REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By WM. WIRT VIRGIN,
REPORTER TO THE STATE.

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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.

NOTE.

The cases in this volume were prepared by the present Reporter, from the papers received by him from his predecessor.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

JABEZ C. WOODMAN, JR. *versus* JOHN W. DANA, *Adm'r.*

An expert in handwriting, having testified that, several years since, he carefully examined, and now has a recollection of three signatures purporting to be the signatures of S., and acknowledged by him to be genuine; that he never saw S. write, and should not feel able to testify to S.'s signature without a comparison with other writings; may, after examining another signature presented purporting to be the signature of S., give his opinion whether or not the signature in question is in the same handwriting as the three acknowledged to be genuine.

No witness, except an expert, is competent to give an opinion simply by comparison of hands by juxtaposition, and this is done by the production of the standard in open Court.

Non-experts can only give opinions in cases where they have previous acquaintance or knowledge of the handwriting by which the genuineness of the controverted specimen is to be tested. And, in this case, the standard need not be present.

An expert need have no previous acquaintance or knowledge of his standard to authorize him to express an opinion by comparison.

A non-expert cannot express an opinion without such previous acquaintance or knowledge.

Where, in the trial of an action on a promissory note, the signature of the maker is denied, and the presiding Judge refuses to permit an expert, in answer to a question put by the plaintiff, to give his opinion whether or not the signature in question is in the same handwriting as three others acknowledged to be genuine, and which the witness had carefully examined, a new trial will be granted, although the witness, afterwards, in reply to a question by the plaintiff, testified that the signature in controversy was the

handwriting of a person other than him whose signature it purports to be; for the plaintiff may have been aggrieved by such refusal.

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

The facts sufficiently appear in the opinion of the Court.

Jabez C. Woodman, pro se.

Shepley & Dana, for defendant.

The opinion of the Court was drawn by

RICE, J.—This is an action to recover of the defendant, as administrator, the contents of several notes of hand, amounting in all to about four thousand dollars, on the ground that said notes were indorsed by the defendant's intestate, Greely Sturdivant. The defence is, that said notes were not indorsed by said intestate nor by his authority.

The plaintiff claims to charge the defendant, *first*, on the ground that said notes were indorsed by his intestate, in his own handwriting; or, *second*, if not so indorsed, that said notes were indorsed in the name of said intestate by some person thereto duly authorized; or, failing in these positions to hold the defendant, on the ground that his intestate had so conducted himself in relation to the matter as to be estopped to deny that he had indorsed the notes in suit.

In the first instance, testimony was introduced by the plaintiff, tending to show that the indorsements on the notes in suit were in the handwriting of the intestate, Greely Sturdivant; and testimony was also introduced by the defendant, tending to disprove that fact.

The case comes before us on exceptions, by the plaintiff, to the exclusion of certain testimony offered by him, tending to prove, as he affirms, that said notes were indorsed by said Greely Sturdivant, the intestate.

It appeared in evidence that the Bank of Cumberland held three promissory notes, in the early part of the year 1850, purporting to have been signed by G. M. Sturdivant and indorsed by Greely Sturdivant. Samuel Small, jr., who was the cashier of the Bank of Cumberland, and also an

expert in matters of handwriting, testified that he, in company with another person, presented the notes held by the bank to Greely Sturdivant and asked him if he acknowledged the indorsements thereon to be his signature, and said Greely answered that he did; and the witness further testified, that he carefully examined the signatures on said notes and had a recollection of them, and that said notes were afterwards paid by G. M. Sturdivant.

On cross-examination, this witness testified that he had never seen Greely Sturdivant write, and he should not feel able to testify to his signature without a comparison with other writings.

The plaintiff then exhibited the notes in suit to the witness and asked him to examine them. After the witness had examined them, he asked the witness to state whether, in his opinion, the name of Greely Sturdivant, on the notes in suit, was or was not the same handwriting as those which the witness had exhibited to Greely Sturdivant, belonging to the bank? The question, on objection being made by defendant, was excluded by the Court.

The plaintiff then asked the witness whether, taking those indorsements which Greely Sturdivant acknowledged to be his, to be genuine, in the opinion of the witness, if Greely wrote those which he acknowledged, he did or not write the indorsements on the notes in suit also. This question was also excluded on the objection of the defendant's counsel. The grounds of the objections do not appear in the exceptions.

By this ruling the plaintiff claims to have been aggrieved.

To prove the handwriting of a person, any witness may be called who has, by sufficient means, acquired a knowledge of the general character of the handwriting of the parties whose signature is in question. This may have been acquired from having seen him write, from having carried on a correspondence with him, or, as was decided in *Hammond's case*, 2 Greenl., 32, from an acquaintance gained from having seen handwriting acknowledged or proved to

be his. These are the sources of that previous knowledge which may qualify a witness to state his belief whether the handwriting in controversy is or is not genuine. *Page* v. *Homans*, 14 Maine, 478.

The same rule is established in Massachusetts and Connecticut. *Homer* v. *Willis*, 11 Mass., 309; *Moody* v. *Rowell*, 17 Pick., 490; *Lyon* v. *Lyman*, 9 Conn., 55.

Mr. Phillips, in his work on evidence, vol. 1, p. 222, says,—"for the purpose of proving handwriting, it will not be necessary, in the first instance, to call the supposed writer himself; the evidence of a person *well acquainted with the general character of his writing*, who, on inspecting the paper, can say that they believe it to be his handwriting, will be of itself sufficient." And, on the 224th page, the writer says,—"it has been held, in a prosecution for forgery of a bank note, that the signature in the same of the cashier of the bank may be disproved by any person *acquainted with his handwriting*, though the cashier would not be an incompetent witness." Again, "the writing may be disproved by others *acquainted with the character of his handwriting*." Ib., 225.

"It is usual," says KENT, J., in *Titford* v. *Knott*, 2 Johns., 211, "for witnesses to prove handwriting from previous knowledge, of the hand, derived from having seen the person write, or from authentic papers received in the course of business. If the witness has no previous knowledge, he cannot then be permitted to decide it from comparison of hands."

The rule in England is, that handwriting cannot be proved by comparing the paper in dispute with other papers acknowledged to be genuine. 1 Phil. Ev., 490. The reason usually assigned for this rule is, says the author, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance. This reason does not seem to be entirely satisfactory to the writer. In this State, where ability to read and write is universal, the reason assigned for the rule has little or no force.

In New York, the same rule, as to comparison of handwriting by juxtaposition, prevails as in England, but the reasons assigned for the rule by SAVAGE, C. J., in *Parker* v. *Phillips*, 9 Cow., 94, are more satisfactory, viz., that the specimens produced might be selected for the purpose; and that these specimens might be contested, and examined by others, and thus collateral issues might be introduced to an inconvenient length, and in the end might not be conducive to justice.

But whatever may be the rule in England or in other States as to proof by comparison of hands by juxtaposition, or whatever may be the reasons for the exclusion of this kind of evidence, the law in this State, admitting such testimony, is well settled. *Page* v. *Homans*, 14 Maine, 478; *Sweetser* v. *Lowell*, 33 Maine, 446. For this purpose, specimens of handwriting, not otherwise pertinent to the issue, but admitted or proved to be genuine, may be introduced before the Court and jury, as a standard for examination and comparison, by which to test the genuineness of the writing in controversy; and for this purpose such standard specimens may be compared by *experts*, in the presence of the jury, and such experts are permitted to express an opinion as to the fact whether the controverted paper be genuine or not, founded upon such comparison. Further than this, evidence, founded solely upon *comparison* of handwriting, has not gone. Witnesses who are not experts can express no opinion, based simply on comparison of specimens by juxtaposition. Whether a witness is or is not an expert is a question to be settled, in the first instance, by the Court, on a preliminary examination for that purpose. The value or weight of his testimony may be tested, after he is admitted, by an examination into the grounds or reasons for any opinion which he may express.

But it is contended that all opinions based upon previous knowledge of, or acquaintance with, handwriting, is in reality only the result of comparison; and of comparison made under much more unfavorable circumstances than when the

admitted or proved specimens are brought in juxtaposition with that which is controverted. That in one case the image of the standard specimen, as it exists in the mind, is compared with the controverted specimen, in the hand of the witness; while in the other the standard is before the eye of the witness and placed side by side with that which is contested. That in the former the characteristics of the standard are necessarily indistinct, shadowy, and uncertain, while in the latter they show out in all the distinctness of visible characters. That in one case you compare existing tangible realities; in the other you compare a visible reality with an invisible, intangible impression in the mind. It is contended that the law in this State makes no distinction between the two cases. To sustain this position, *Hammond's case*, already cited, is relied upon. That case is not fully reported. But, when the few facts reported and the opinion of the Court are examined, it will be found in harmony with the general rule of law for the admission of this kind of evidence, as already stated, or, at least, it will not appear that the Court intended to disregard the distinction between opinions of witnesses based upon previous acquaintance or knowledge of handwriting, and opinions based solely upon the comparison of specimens placed in juxtaposition before the Court and jury.

In a certain sense the position of the counsel for plaintiff is undoubtedly correct. "All evidence of handwriting," says Mr. Greenleaf, in his work on Evidence, vol. 1, § 576, "except where the witness saw the document written, is in the nature of comparison. It is the belief which the witness entertains, upon comparing the writing in question with its exemplar in the mind, derived from some previous knowledge." And to the same point is the opinion in *Hopkins* v. *Megquire*, 35 Maine, 78.

By comparison is now meant an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person; though formerly even comparing the standard formed in the witness' mind with

the writing in dispute was called evidence by comparison, and hence was deemed inadmissible, at least in criminal cases. 2 Starkie's Ev., 373.

From these authorities, and many others following in the same line, it will be seen that there is not an entire agreement among jurists and legal writers, as to the meaning that is to be attached to the words "comparison of hands," some confining it strictly to an examination of papers brought into juxtaposition, while others extend it to all cases, whether the standard of comparison is before the eye of the witness, or exists only in his mind. Misconception may therefore arise from not understanding alike the terms used. However that may be elsewhere, in this State the practical application of the rule is clearly defined and well settled. As we have clearly seen, no witness, except an expert, is competent to give an opinion simply by comparison of hands by juxtaposition, and this is done by the production of the standard in open court. Non-experts can only give opinions in cases where they have previous acquaintance and knowledge of the handwriting by which the genuineness of the controverted specimen is to be tested. And, in this case, the standard would not be present. The required previous knowledge may have been acquired by having seen the person write, — by having become acquainted with his handwriting by corresponding with him in the usual course of business, or by having examined specimens of writing proved or admitted to have been written by him. The expert need have no previous acquaintance or knowledge of his standard to authorize him to express an opinion from comparison. The non-expert cannot express an opinion without such previous acquaintance or knowledge.

The reason for this distinction is quite obvious.

The practiced eye of the expert will enable him to perceive the distinguishing characteristics or features in different specimens of handwriting, and at once to indicate the points of similarity or dissimilarity, though entirely unacquainted with the specimens presented. By long practice

and observation, he has become skilled in such matters. Not so with the non-expert. It is only when he has become familiar with the peculiarities of handwriting, as one becomes familiar with the countenance of his friend, or the characteristics of objects of common observation, that he is able to distinguish between it and other specimens that may bear only a slight resemblance to it.

In view of these principles and of the rule of law in this State, the question arises, was Small a competent witness to express an opinion as to the fact whether the indorsement on the notes in suit were made by the same person who made the indorsements on the notes of the bank, which Small presented to Greely Sturdivant, and which Sturdivant acknowledged to be his. It is contended he was not, because he testified, on the cross-examination, that he should not feel able to testify to Greely Sturdivant's signature without a comparison with other writings. It is apparently upon this ground, and for this reason, that his answer was excluded by the Court. And here lies the error. He had never seen Greely Sturdivant write, and therefore could not *know* his handwriting. But he had carefully examined signatures on these notes, which signatures Greely Sturdivant admitted to be his, and had a recollection of them. This brought the witness within the rule in *Hammond's case*, and within the rule of that class of cases where the witness obtains his knowledge by correspondence, or admitted or proved specimens. In none of these cases does the witness *know* that the specimen is in verity the autograph of the person it purports to be. But the circumstances of the case were so strong a presumption that such is the fact, that courts act upon it as true. Yet, in that whole class of cases, all that the witness can testify from knowledge is that the contested specimen does or does not resemble the admitted or proved standard. That it is or is not, in his opinion, in the same handwriting of such standard. This is necessarily the spirit and extent of the rule. A admits to B that certain signatures are his. B makes himself acquaint-

ed with the general character of those signatures. After thus becoming acquainted with the admitted specimens, B is called upon to give an opinion, as a witness, whether a specimen produced is, or not, the signature of A. If he has never seen A write, all he can say is, if the signatures which A admitted to him were his were so in fact, then, in my opinion, the specimens here presented is, or is not, (as the case may be,) the signature of A.

Greely Sturdivant had admitted to Small that those notes held by the Bank of Cumberland bore his, Sturdivant's, signature. Small had carefully examined those signatures and recollected them. He was afterwards called upon to state, as a witness, whether, in his opinion, the name of the indorser of the notes in suit was in the same handwriting as were the signatures which Sturdivant had admitted were his. The plaintiff was entitled to an answer.

It is contended, however, that, if this be so, it affords no cause for a new trial, because this witness was afterwards re-called by the plaintiff, and was permitted to testify that the indorsements on the notes presented by him to Greely Sturdivant and the indorsements on the notes in suit were in the handwriting of G. M. Sturdivant, and therefore that the plaintiff was not injured nor aggrieved by the exclusion of the rejected testimony. It is undoubtedly true that, where there has been an erroneous ruling, if it appear that no injury has been sustained thereby, a new trial will not be granted in consequence of such error. To determine whether injury has in fact resulted to the plaintiff, the situation of the parties and the condition of the case, as they then stood, must be considered.

The first position assumed and relied upon by the plaintiff was, that the indorsements on his notes were in the handwriting of defendant's intestate. To establish this proposition required only proof of the signature of the intestate. At the time the interrogatories now under consideration were put to the witness, the plaintiff had proved that the intestate had admitted that the name of Greely Sturdivant,

as indorser on the notes held by the Cumberland Bank, were his signatures. Had the witness been permitted to answer the questions proposed, and these answers had been in the affirmative, as it is presumed they would have been, the chain of evidence to establish his claim would have been complete. This would have thrown the burden of disproving the truth of his intestate's admissions upon the defendant.

By excluding this testimony, the plaintiff, to sustain his action, was compelled to abandon his first proposition, which was that the notes in suit were indorsed by Greely Sturdivant, and to disprove the truth of the intestate's admissions, on which he had relied, and to prove that the indorsements on the bank notes and the notes in suit were not in the handwriting of Greely Sturdivant, but in the handwriting of G. M. Sturdivant, and then further to prove that G. M. Sturdivant had authority to make the indorsements on the notes in suit in the name of defendant's intestate, or, if not so authorized, that the intestate had so conducted in relation thereto as to be estopped from denying that authority. This, it will be perceived, was imposing upon the plaintiff a more onerous duty than he would have been required to perform if he could have produced his testimony under his proposition to show that the indorsements were really in the handwriting of the defendant's intestate. By this ruling he was excluded from the more simple and direct mode of establishing his claim and compelled to resort to one more indirect, complex and difficult. Of this he has a right to complain, and it is not sufficient to say that he would have failed to establish his proposition that the name of Greely Sturdivant, on his notes, was in the handwriting of the defendant's intestate. It is sufficient to say the plaintiff would not have been compelled to prove the negative of that proposition, and the defendant might not have been able to do it.

On the principles already illustrated, the interrogatories propounded to the witness Baxter were properly excluded.

Baxter was not an expert. The note which he had examined was not in Court. He was not asked for an opinion based upon previous acquaintance with the admitted or proved signature of Greely Sturdivant, but was asked for his opinion founded solely upon *comparison* of hands. But it is contended that the fact that Baxter made a comparison by juxtaposition of specimens did not render him less competent to give an opinion, based on former acquaintance with the general character of Greely Sturdivant's signature, than he would have been had he made no such comparison. That is true, and had the interrogatory been founded upon prior acquaintance with such signature, instead of knowledge obtained by comparison, the objection might not have prevailed.

The proof offered by Illsley is also within the rule in *Hammond's case*. The true question, as we have already shown, was not whether the witness, as matter of fact, was acquainted with the handwriting of Greely Sturdivant, but whether he was acquainted with the signature which said Sturdivant had admitted was his. If so, he had in his mind a legal standard by which to test the genuineness of the contested signatures. He could properly answer whether the name of the indorser on the notes in suit were or not in the same handwriting as that which had been admitted by the intestate to be his. His opinion, in such case, would be competent evidence, tending to charge the defendant. The fact, however, that Greely Sturdivant had acknowledged any signature or signatures to be his, would not conclusively establish the fact that they were so; such admission might be shown to be erroneous; but it would be competent and sufficient evidence to authorize a jury, in the absence of testimony to the contrary, so to find.

The question of estoppel, referred to in the argument of counsel, does not arise on the exceptions as presented.

The exceptions are sustained and a new trial granted.

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

APPLETON and DAVIS, JJ., concurred in the result, and expressed their views in the following opinion drawn by

DAVIS, J.—The principal point in controversy at the trial of this case was not the genuineness of the signatures upon the notes in suit. There was very little evidence that the signatures of the intestate, Greely Sturdivant, were genuine; while there was much testimony tending to prove that they were in the handwriting of Gardiner M. Sturdivant. Without conceding this, it was insisted by the counsel for the plaintiff that the intestate had acknowledged *similar signatures* to be genuine, and that he was therefore estopped from denying the genuineness of these. In support of this position, the case of *Bridgham* v. *Peters*, 1 Gray, 143, was cited. But the presiding Judge dissented from some of the doctrines laid down in that case, and held that, if the intestate did admit similar signatures, upon other notes, to be genuine, he was not estopped from contesting even those signatures, except as against parties taking the notes upon the strength of such admission; and that, *a fortiori*, he would not be estopped from contesting other similar signatures upon other notes, taken by other parties. He held that, if the signatures of the intestate upon the notes in suit were in the handwriting of Gardiner M. Sturdivant, the plaintiff was not entitled to recover, unless it was proved that the intestate had actually authorized Gardiner M. Sturdivant so to use his name, or had so conducted himself, by holding said Gardiner out to the public as having such authority, that persons might reasonably presume that such was the fact.

The plaintiff offered to prove that the signatures upon certain notes other than those in suit, admitted by the intestate to be genuine, were in the same handwriting as those upon the notes in suit, and the evidence was excluded. That branch of the case relating to the question of estoppel is not reported in the exceptions. But I am now satisfied that upon that point, as well as upon the question of the genuineness of the signatures, the testimony should have been admitted.

SUSAN R. WAKEFIELD *versus* THOMAS LITTLEFIELD.*

When a defendant demurs to a replication to a special plea in bar, a question of law is presented to the presiding Judge, and the plaintiff must join the demurrer.

After joinder, it is the legal duty of the presiding Judge to rule upon the demurrer.

After such ruling, the presiding Judge may, if he sustains the demurrer, allow the replication to be amended *on terms*.

If an issue, tendered by the replication to a special plea in bar, be joined, there must be a special verdict upon that issue. And the general verdict upon the general issue will depend upon and be controlled by the special verdict.

General practice upon demurrers.

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

TRESPASS *de bonis*.

The defendant, by leave of the Court, pleaded the general issue and a special plea in bar, alleging the property in question to have been the plaintiff's husband's property and not the plaintiff's; and that the defendant, by virtue of an execution duly issued, seized and sold said property as the property of the plaintiff's husband. The plaintiff joined the general issue, and filed a replication to the special plea in bar, to which the defendant demurred specially.

After the demurrer was filed, but before joinder, the plaintiff moved for, and, against the defendant's objections, obtained leave to amend the replication. After amendment of the replication, the plaintiff joined the demurrer.

The presiding Judge overruled the demurrer and adjudged the replication good, and thereupon ordered that the parties proceed to trial on the general issue.

To these rulings and orders, the defendant excepted.

Record, *Walton & Luce*, for the defendant.

Fessenden & Frye, for the plaintiff.

* The announcement of the opinion in this case was delayed by a loss of the papers after argument. The case came but recently into the hands of the Reporter.

The opinion of the Court was drawn by

DAVIS, J.—The defendant in this case, by leave of Court, pleaded a special plea, in addition to the general issue. The plaintiff joined the general issue, and replied to the special plea. And, to the plaintiff's replication, the defendant demurred specially.

When a question of law is raised upon a demurrer, that, like any other question of law raised during the progress of a case, must be presented to the full Court, if the party aggrieved by the ruling requires it. But that does not necessarily interrupt the proceedings at *Nisi Prius*. If there are questions of *fact* to be determined, the trial proceeds, upon whatever issues may be presented by the parties, upon general, or special pleas.

Upon demurrers, in civil cases, as in criminal, whenever an overruling of the demurrer will make a final disposition of the case, and there can be no amendment if the demurrer is sustained, the case may properly be transferred at once to the full Court. But if, upon overruling the demurrer, there can be a *respondeas ouster;* or if, after sustaining the demurrer, an amendment can be allowed, the better practice is to proceed at *Nisi Prius* until the questions of fact are determined by the jury. The party required to do so can plead over; or the other party can amend, on terms, or without; and the verdict is quite as likely to render the question of law immaterial, as would a decision of the law be to make it unnecessary to try the question of fact. A final determination of the case will generally be obtained earlier by trying the questions of *fact* first, rather than those of *law*.

The defendant having demurred to the plaintiff's replication, a question of law was presented to the presiding Judge. It was the duty of the plaintiff to join the demurrer. R. S., c. 82, § 19. It was the duty of the Court to rule upon it. *Ib. After such ruling*, if the demurrer had been sustained, an amendment might have been allowed, in the discretion of the Court, *on terms*. Rules of Court, 4.

But to allow an amendment before there was any joinder of the demurrer, or ruling upon it, was depriving the defendant of his right, which he clearly had by the statute, of requiring the Court to rule upon a plea which the opposite party had made in the case.

The replication having been amended, after the defendant had demurred to it, the causes of demurrer which he had assigned no longer existed. Not only were no terms imposed in his favor; the questions which he presented, and prayed the Court to determine, were not decided. The replication which was adjudged good was not the replication upon which he prayed the judgment of the Court. The rules of pleading have been relaxed, in modern times, for the purpose of promoting justice. But a practice so irregular as that adopted in this case, is not only in violation of the legal rights of the party; it would, if generally adopted, be favoring the negligent, at the expense of the vigilant.

Upon further proceedings, the replication should be restored, as it was when the demurrer was filed. If the demurrer is sustained, the replication may then be amended, upon such terms as may be imposed by the Court. And if the issue tendered by the replication is joined by the defendant, there must be a special verdict upon that issue. And the general verdict, upon the general issue, will depend upon, and be controlled by the special verdict. The fact that there were no such proceedings, and no issue on the special plea, upon the previous trial, is, of itself, a sufficient reason for a new trial, the defendant having objected to all the proceedings after his demurrer was filed. A verdict upon the special plea is essential to a determination of the case.

There is no doubt about the authority of the Court, *at common law*, to allow the pleadings to be amended at any stage of the proceedings. And, though a party would seldom be allowed to amend a plea, after demurrer, until after a ruling upon it, the question would be for the discretion of the Court.

But the statute cited provides that "in any stage of the pleadings either party may demur and *the demurrer must be joined.*" This is imperative. *Stevens* v. *Webster*, 45 Maine, 615. An amendment of the plea vacates the demurrer. A joinder *after* such amendment is nugatory and useless. The party demurring cannot thus be deprived of his right to have the sufficiency of the plea determined by the Court. *The exceptions must be sustained, and a new trial granted.*

CUTTING, KENT, DICKERSON and DANFORTH, JJ., concurred.

HARRIET E. BIGELOW *versus* LAVINIA LITTLEFIELD *& al.*

When partition of real estate held in common is to be enforced by legal process, the whole tract so held must be partitioned at the same time.

One tenant in common cannot enforce partition of part only of the common estate.

Nor does a conveyance by one tenant in common of his interest in a part only of the land thus held, authorize a co-tenant to enforce partition of such part against the grantor, leaving the residue unpartitioned.

PETITION FOR PARTITION.

The tract of land, sought to be partitioned, is bounded on the west, by a river, on the east, by the "Coburn line," so called, and through it, parallel with the river, runs the "river road."

Jan. 28, 1858, B. F. Bigelow, and Hiram Bigelow—husband of the petitioner,—each owned an undivided half of said tract of land, when B. F. Bigelow, by his quitclaim deed, conveyed his interest to the petitioner.

March, 1859, Hiram Bigelow—petitioner's husband—by his quitclaim deed conveyed all his "right, title and interest in and to" that portion of said tract lying between the "*Coburn line*" *and the* "*river road*," to Luke Hilton, one of

the respondents—who, on the same day, conveyed, by his quitclaim deed and metes and bounds, a *part* of the portion conveyed to him by Hiram Bigelow, to Lavinia Littlefield, the other respondent.

James Bell, for petitioner.

Coburn & Wyman, for respondents.

The opinion of the Court was drawn by

WALTON, J.—This is a petition for partition, and the petitioner claims that, for some time prior to the 21st of March, 1859, she and her husband had been seized as tenants in common of a certain tract of land in Skowhegan; that he, on that day, by a deed of quitclaim, conveyed all his right, title and interest in a portion of the land (describing it by metes and bounds,) to Luke Hilton; that Hilton afterwards, on the same day, conveyed by metes and bounds a part of the land conveyed to him, to Lavinia Littlefield; that, by means of these conveyances, she (the petitioner) became a tenant in common with Luke Hilton and Lavinia Littlefield, (the respondents,) of that portion of the land which her husband had thus conveyed to Hilton, and entitled, as matter of right, to have it partitioned, and her portion of it set out to her in severalty. She does not ask to have the whole tract partitioned, but only that portion of it which her husband conveyed to Hilton.

The evidence in the case shows that the respondents paid a full consideration, not for an undivided half merely, but for the whole of the land which the petitioner claims to have partitioned, and believed they were getting a good title to it; and if the petitioner asked to have the whole tract partitioned their title could be protected by setting out to the husband as his portion that part of the land held by these respondents, and the remainder to the wife; or, if the land held by the respondents is more than the husband's portion, the title of the respondents could be protected to the full extent of the husband's interest in the whole tract.

But this she has not thought proper to do. She does not ask that partition may be made of the whole tract in which she claims to be a tenant in common, but only of that portion held by the respondents; and, if she could succeed, she would take from them one half of the land for which her husband has been paid the full value. But she cannot succeed.

When partition of real estate held in common is to be enforced by legal process, the whole tract so held must be partitioned at the same time. One tenant in common cannot enforce partition of part only of the common estate. Nor does a conveyance by one tenant in common, of his interest in a part only of the land thus held, authorize a cotenant to enforce partition of such part against the grantee, leaving the residue of the estate unpartitioned. Such a course would lead to fraud and oppression, as this case fully illustrates.

These familiar and well settled rules of law are decisive of the case against the petitioner; and it is unnecessary to decide upon the validity of her title; for, taking the most favorable view of it for her, she is not entitled to have the prayer of her petition granted. *Duncan* v. *Sylvester*, 16 Maine, 388, and other cases cited by the respondents' counsel.

Petition dismissed with Costs for respondents.

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

Samuel G. Bradbury *versus* Inhabitants of Cumberland County.

To support an action of debt to recover land damages on an award of a committee under the statute concerning ways, it must appear that the report and award of the committee, in favor of the plaintiff, were seasonably accepted by the commissioners, and duly recorded, and that the proceedings on the original petition were closed and the record completed.

On Report from *Nisi Prius*, Goodenow, J., presiding.

The facts sufficiently appear in the opinion.

Record & Luce, for the plaintiff.

M. M. Butler, for the defendants.

The opinion of the Court was drawn by

Tenney, C. J.—This action is debt, upon a judgment alleged to have been rendered by the court of county commissioners of the county of Cumberland, at its session, in June, 1853, for the amount of damages sustained by the plaintiff, by reason of a certain highway therein described, having been located and made over a portion of his land.

In the year 1851, Alvin Leavitt and others filed a petition in the court of county commissioners for the county of Cumberland, praying for the location of a highway over a route described, parts of which were in the several counties of Cumberland, Kennebec, Oxford and Franklin. After proceedings, which are not in controversy, a majority of all the commissioners of the counties, just named, each of them being represented by a majority of its own commissioners, at a meeting held by them, adjudged and determined that common convenience and necessity required that the prayer of the petition be granted in part. And afterward the portion of said highway which lay in the county of Cumberland, was legally laid out, and damages awarded to the several owners of the land over which the highway was laid out. The damages so awarded being unsatisfactory to the

plaintiff and others, they seasonably petitioned for an increase thereof. A committee, being agreed upon, according to the provisions of the statute, were duly appointed to ascertain and determine the damages, by the respective petitioners sustained. The warrant to this committee, by the county commissioners of the county of Cumberland, was dated on May 17, 1853, return thereof to be made as soon as the service required should be completed. On June 6, 1853, the committee made return to the court of the county commissioners, of their warrant, with their doings thereon, according to the direction in the warrant. By this return, it appears that the committee adjudged that damages sustained by the plaintiff was the sum of $180, instead of the sum of $120, as awarded by the commissioners; and that the amount of increase of damages of all those who petitioned for an increase was the sum of $248. Thereupon measures were taken by the court of county commissioners, for the county of Cumberland, to have a judgment and determination, by the joint board of the commissioners of the four counties in which the highway was adjudged to be of common convenience and necessity, as aforesaid, upon the question, whether the highway should be discontinued, on account of the damages, which were awarded by the committee, being excessive. At a meeting of this joint board, it was decided that a part of the road which they had adjudged to be of common convenience and necessity should be discontinued.

In the case of *Jones* v. *Oxford County*, 45 Maine, 419, a matter, in the county of Androscoggin, arising under the same petition of Alvin Leavitt and others, it was held by this Court, that the supposed discontinuance by the joint board of county commissioners of the four counties, on the ground that the damages awarded by the committee was excessive, was unauthorized and void.

This decision, being upon action of the joint board, under the petition of Alvin Leavitt and others, is conclusive in this case.

It is apparent, from the records of the court of county commissioners of the county of Cumberland, that all legal proceedings in that court were suspended, immediately upon the return of the warrant to the committee appointed by that court, to determine the matter of the complaint of the plaintiff and others touching damages. We have seen no record of any acceptance of the report of the committee, or judgment that the damages awarded by them should be paid. Indeed, it is difficult to perceive how this could have been done consistently with the subsequent proceedings of that court, the object of which was that the whole or a part of the road laid out should be discontinued, because the damages awarded by the committee were apprehended to be excessive, and discontinuance might be of the portion of the road laid out upon the plaintiff's land.

It may be proper to notice, that the case referred to was an action of debt, upon a judgment alleged to have been rendered by the court of county commissioners for the county of Oxford. It is averred in the first count in the writ, in that action, that the committee agreed upon and duly appointed, to act upon the petition for an increase of damages, made and duly returned to said commissioners, reports of their doings, &c., at the regular term of the court of county commissioners for the county of Oxford, held in Sept., 1853, and that said report, and award of damages, in favor of the plaintiff, was accepted by said commissioners and duly recorded; and the proceedings on said original petition of Alvin Leavitt and others were closed and the record of the proceedings on said original petition completed. And it was agreed, by the parties to that action, that all the facts stated in the first count of the plaintiff's declaration were true, with a qualification, not material to the present inquiry.

In the case at bar, no agreement of that character was made by the parties; and the allegation in the writ, that, at the regular term of the court of county commissioners for the county of Cumberland, held in June, 1853, "said report

and award of damages in favor of the plaintiff was accepted by said commissioners and duly recorded, and the proceedings on the original petition, Leavitt and others, were closed, and the record of the proceedings on said original petition completed, as by the record thereof, now remaining in said court of county commissioners for said county of Cumberland, will fully appear," are not in the least supported by any record of that court which has been introduced.

The proceedings, under the petition of Alvin Leavitt and others, appear by the records not to have been completed, on April 20, 1854, when it was ordered, by the court of county commissioners for the county of Cumberland, that all processes pending before that court, which would have lfalen within the jurisdiction of the county of Androscoggin, if it had been established, where said processes originated, be, and the same are hereby transferred to said county of Androscoggin, &c.

Whether the proceedings in the case, on the petition of Alvin Leavitt and others, can now be completed or not; and if they can be completed, whether by the court of county commissioners in the county of Cumberland, or of Androscoggin; and by what process such court may be required to complete the proceedings, if at all, are questions which are not now before this Court.

According to the agreement of the parties, the plaintiff must become *Nonsuit.*

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

NATHANIEL MOULTON *& als. versus* BENJAMIN EDGCOMB.

Where one, by will duly proved, devised land to his daughter and her husband during their natural life, then to his daughter's heirs after her, the heirs' right of possession will remain twenty years next after the death of the survivor of the joint tenants.

Where one has title and enters into the possession of land, he is presumed to claim by his title, and not by wrong.

Hence, where land was, by will duly proved in 1810, devised to the testate's daughter S., and her husband W., during their natural life, then to her heirs after her; and, in Nov. 1818, W. and S. executed a deed of warranty, duly recorded, of the premises to C., who immediately thereupon went into possession; and possession by himself and assigns, down to the present defendant, has been continued down to April, 1860, when this action was commenced: — *Held*, that the defendant and those under whom he claims cannot be regarded as having been in actual possession, &c., under c. 105, § 15, of the R. S.

ON REPORT.

The facts sufficiently appear in the opinion of the Court.

J. M. Meserve, for plaintiffs.

Record & Luce, for defendant.

The opinion of the Court was drawn by

GOODENOW, J. — This is a writ of entry, dated April 3, 1860, to recover a lot of land in Livermore. The demanded premises were formerly owned by Othniel Pratt, who, by his will, duly proved on the 27th of February, 1810, devised the same to his daughter, Sarah Moulton, and her husband, William Moulton, during their natural life, then to her heirs after her. The plaintiffs are all the children and heirs at law of said Sarah Moulton. She died in the year 1819, and William Moulton, her husband, in January, 1851.

On the 24th of November, 1818, William Moulton and his wife Sarah made and executed a deed of warranty of the premises to Ebenezer Cummings, which was duly recorded, August 18, 1821. The said Cummings went into possession of said premises, under his deed, immediately after its execution, and possession by himself and his grantees,

or their assigns, has been continued to the present time. The defendant claims under said Cummings, by virtue of several mesne conveyances. The plaintiffs claim under said will of Othniel Pratt.

William Moulton and his wife had a life estate only in the premises, under the will of Pratt. *Pratt* v. *Leadbetter*, 38 Maine, 8. They could convey to Cummings no greater estate than they held; and this they could convey, and did *legally* convey, by our statute, although the attempt to convey an estate in fee, when they had only an estate for life, would have operated as a forfeiture at common law. The life estate terminated at the death of the survivor of the joint tenants in 1851, when the right of possession vested in the plaintiffs as heirs of Sarah Moulton.

The fifteenth section of R. S., c. 105, is no bar to this action.

The defendant, and those under whom he claims, cannot be regarded as having been in actual possession of the premises for more than forty years, claiming to hold them by *adverse*, open, peaceable, notorious and exclusive possession, in their own right. Cummings went in under his deed. When a man has title and enters into the possession of land, he is presumed to claim by his title, and not by wrong. The subsequent grantees and their assigns claimed by their deeds. These possessions were not *adverse*. The plaintiffs could bring no action till their right of possession accrued. They could claim no forfeiture, upon the ground that Moulton and his wife, in 1819, had undertaken to convey a greater estate than they had; a fee, when they owned only an estate for life.

Their right of possession would remain twenty years from January, 1851, when William Moulton died.

Upon the facts submitted, there must be judgment for the plaintiffs for *possession of the demanded premises and for costs.*

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

JOSHUA PEABODY *& als. versus* JOSEPH HEWETT.

If, within twenty years after one is disseized of his land, the heirs of the disseizee, or their agent thereunto duly authorized, *legally enter* upon the premises, it will put an end to the ouster and vest the actual seizin in those who have the right.

The mere going upon the land will not always constitute a *legal* entry.

If the disseizee, or his duly authorized agent, go upon the *locus in quo*, with the intent of making an entry, and, then and there, declare to the disseizor such purpose, it will be a legal entry.

If such entry be made by one of the heirs of the disseizee, or by more than one but less than all; or by the authorized agent of one or more but less than all, it will be presumed, in absence of all proof to the contrary, to be in maintenance of the right of all.

The "*actual possession*" in § 1, c. 34, of the Public Laws of 1853, does not differ from that mentioned in § 23, c. 145, of R. S. of 1841, excepting as to the time of its continuance.

The declarations of a former tenant in possession, limiting or qualifying his right arising from possession, are admissible, when he, with the knowledge of the disseizor, acts as agent of the disseizee, notwithstanding he may have executed a contract for the conveyance of the premises to a subsequent tenant under whom the defendant in the present action claims to hold.

And such declarations cannot be considered contradictory to the contract itself.

The party holding such a contract as valid, possesses the premises described therein in subjection to the one having the title.

When the land disseized contained a quarry of granite undisclosed until the operations of the tenant, the tenant has no legal right to require the presiding Judge to instruct the jury, that, in estimating what would have been the value of the premises if no buildings had been erected, or improvements made, or waste committed, they should find what the value would have been without that knowledge of the quality and value of the granite which the tenant's improvements alone have disclosed, by opening the quarries and working the granite; for the intrinsic value of the premises might have been as fully manifested otherwise.

A verdict will not be set aside because it differs from the opinion of the witnesses as to the value of the land in question, when no improper influences appear to have biased the jury.

When one, jointly with others, signs, seals, and delivers an instrument supposed to be a perfect deed, but *his* name appears in no other part thereof, his interest in the premises described in such instrument is not thereby conveyed.

When such defect in a deed is not discovered at the trial, and the jury, in consequence thereof, find for the demandants for the *entire* premises described in the writ, when, in fact, they owned only an aliquot part, this Court will cause the verdict to be amended when it furnishes all the necessary facts.

On Exceptions and Report from *Nisi Prius*, Tenney, C. J., presiding.

Writ of entry.

The plaintiffs claim as the heirs of Solomon Peabody. The defendant claims under one Israel Gregory.

Stephen Peabody, called by the plaintiffs, testified:— "Solomon Peabody was my father. He died twenty-three years ago. Twenty years ago, mother and I went upon Peabody's island to get Gregory off from what we thought was our own island. I saw Gregory; mother and I went to his house on the island. Mother told him father was dead. She presumed the island was in her custody. She presumed she was empowered to look it up for her and her children. She asked Gregory how he came by the possession of the island. He said he had his title by Mr. Ulmer. Gregory told mother he had built a house on the island. She asked him by what authority. Gregory proposed to buy it of mother if she would sell. She refused; said she was old and did not want it for herself, but for the benefit of her children.

"I had brothers and sisters at Jonesport, and knew that they authorized mother verbally to come and look it up. I knew that minister Boynton was sent by the heirs for the same purpose fifteen years ago. I helped pay him."

Rice Rowell, called by the plaintiffs, testified:—"I have known Israel Gregory forty years. Gregory once showed me the Ulmer agreement. I think the one produced is the one; bond for a deed of the island. Gregory told me he was acting for Peabody. Have heard him speak of the Peabody's owning it a great many times. He never, in these conversations, claimed title. He asked me if I thought that bond was sufficient for him.

"I remember a minister came to my house about fourteen or fifteen years ago, with a paper. I met Gregory and asked him if he had seen the minister; he said he had gone away. It was the same day that he asked me if I was going to buy the island. I told him I did not know but I should. He said if he knew who the right owner was he would buy it."

Alden Ulmer, called by the plantiffs, testified:—"I am the son of Philip Ulmer. Am fifty-two years old. Remember when father cut hay on Peabody's Island, I was then eighteen or nineteen years old. Think father had care of the island two or three years. [Heard father say he never had the island in charge for himself. This he said while in possession. The conversation was, that Peabody owed him a small sum, and that he had the island in charge to make his pay out of, and whatever he made over that, he was to turn to Peabody."] The testimony included within brackets was objected to by the tenant's counsel, but admitted.

The tenant's counsel requested the Court to give the following instructions, among others, to the jury:—

2. That the facts as testified by Stephen Peabody respecting his going with his mother to the island and having there a conversation with Gregory, and all that was said or transpired at the time, cannot by law have the effect to interrupt the actual and exclusive possession of the tenant, so as to prevent him from having title after the period of twenty years' possession commencing before that time.

3. That the facts mentioned in the last request cannot by law operate to deprive the tenant of the benefit of the provisions of the 34th chap. of the statutes of 1853, relating to betterments, to wit, "An Act additional to c. 145 of the R. S."

4. That if the tenant or Gregory, under whom he claims, had open, actual, adverse and exclusive possession of the premises, using them as his own, the going on to the island by Stephen Peabody and his mother, and all that was then

and there said and done, as testified by said Peabody, or the declarations of Gregory respecting the ownership of the island, as testified by Rowell, would not in law have the effect to interrupt the continuity of such possession, so as to deprive the tenant of the benefit of such possession, if continued to twenty years and over.

5. If the Judge declines to give the last requested instruction, in such case, he is requested to instruct the jury that such a possession would not be interrupted by the facts therein referred to, so far as to deprive the tenant of the benefit of the Act of 1853, c. 34, above mentioned.

The pleadings, facts in relation to the title, the other material requested instructions, and the actual instructions given to the jury, all sufficiently appear in the opinion of the Court.

The jury returned a verdict for the demandants; that the tenant holds the premises by virtue of a possession and improvements, and has had the same in actual possession for six years or more, before commencement of this action; and that the increased value of the demanded premises by reason of the buildings and improvements made by the tenant and those under whom he claims, to be the sum of $8,137. They also found that the value of said premises, had no buildings been erected, or improvements made, or waste committed by the tenant or those under whom he claims, would be the sum of $3,336.

The jury returned no other special findings, and were not directed so to do; but, upon inquiry by the Court, the foreman stated that they also found that the tenant, and those under whom he claims, had not had the actual possession of the demanded premises more than twenty years prior to the commencement of this suit.

To the refusals to instruct the jury as requested, and to the instructions, the tenant excepted; and filed a motion to set aside the verdict as against law, against evidence, and the weight of evidence.

Peter Thacher & Brother, for the tenant, submitted an elaborate argument upon all the points raised, the material points of which are as follows: —

I. The declarations of Philip Ulmer, as testified to by Alden Ulmer, were inadmissible.

1. Because they were contradictory to the written agreement of said Philip with Gregory, introduced by demandants.

2. Because the demandants having, by said agreement, shown said Philip in possession, at its date, — Jan. 10, 1829, — claiming it and using it as his own, was estopped from putting in Philip's declarations, that he had, in fact, no claim, and made none in his behalf.

3. Because his declarations were in themselves inadmissible, the tenant not claiming under, or setting up any title under him.

II. The 2d and 4th requested instructions ought to have been given. The instructions given relative to the points therein named and touching a legal entry and the effect thereof, were erroneous.

III. The 3d and 5th requested instructions concerning the true intent of the Act of 1853, c. 34, were erroneous. The "*actual possession*" in that Act is not a possession, which, if continued twenty years, gives title. It means actual *occupation*. If the tenant has had exclusive, uninterrupted, adverse possession twenty years, he becomes the legal owner. By Act of 1853, it is intended, that, if he has had "actual possession" twenty years, his possession not being such as to give him title, rights shall belong to him additional to those he enjoyed or would have enjoyed under former statutes, and the owner shall not disturb him but upon terms more favorable to the tenant and less so to the demandant.

The "possession" under Act of 1853 is not the same as that under § 23, c. 145, R. S., from the fact that twenty years' adverse, uninterrupted possession gives title to such possessor, and, therefore, there would be no occasion to

provide a more favorable rule, or any rule, for giving him *betterments*. It is absurd to give one *betterments* in his *own land*, or to compel the demandant to pay betterments and take the land when he makes out no title.

There is no provision for the tenant's abandoning land to demandant, when he proves title in himself, nor are terms or conditions named on which it can be done. But it is expressly provided that the demandant may abandon to the tenant, showing clearly, that, though the tenant has proved that "he and those under whom he claims have had the actual possession for more than twenty years * * and the jury have found in conformity thereto," the tenant has failed to establish his title, and the demandant prevails, *because* the tenant's possession was not of a character, however long continued, to give title.

IV. The verdict is against the evidence, because the jury have returned a verdict for the *whole* of the demanded premises, while demandants have proved title to but an aliquot part. William Peabody, one of the heirs, is not joined as a party, and has never conveyed his interest to the demandants. R. S., 1840, c. 145, § 13.

William Peabody's name nowhere appears in the deed except as a signer. His interest is not thereby conveyed. *Catlin* v. *Ware*, 9 Mass., 218; *Ag. Bank of Miss.* v. *Rice & al.* 4 Howard's (U. S.,) 241, and cases there cited.

Verdict cannot be amended in this particular.

Verdict is against evidence as to title and as to the question of *value*.

The jury found the value of improvements far below any witness, and the value of the premises without improvements far above any witness.

A. P. Gould and J. O. Robinson, for demandants, submitted an extended and learned argument, on the following propositions: —

I. Gregory, under whom tenant claims, went into possession as tenant of Solomon Peabody. He then held under

agreement with Ulmer, Peabody's agent, for a conveyance of the premises, upon certain named conditions.

Gregory, having thus entered by consent of owner, a *clear*, *positive*, and *continued* disclaimer and disavowal of the title, and an assertion of an adverse right brought home to the owner, are indispensable before any foundation can be laid for the operation of the statute of limitations. *Zellirs' Lessee* v. *Eckert & als.*, 4 Howard's S. C., 289; *Ripley* v. *Yale*, 18 Vt., 220; *Jackson* v. *Bard*, 4 Johns., 230; *Berkans* v. *Vanzandt*, 7 Barb. S. C., 92; 2 Smith's Leading Cases, 496.

II. The disseizin by Gregory had become *purged*. *Means & al.* v. *Wells & al.*, 12 Met., 356; *Vaughan* v. *Bacon*, 15 Maine, 455; *Shumway* v. *Holbrook*, 1 Pick., 114; *Barnard* v. *Pope*, 14 Mass., 438; *Marcy* v. *Marcy*, 6 Met., 371; Stearns on Real Actions, 4; Co. Litt., 238; *Robinson* v. *Swett*, 3 Maine, 316; Skinner's Rep., 412; *Jackson* v. *Haveland*, 13 Johns., 229.

III. The declarations of Philip Ulmer were made while in possession as the agent of Peabody, and *known* to be thus by Gregory. *Uncle* v. *Watson*, 4 Taunt., 16; *Little* v. *Libby*, 2 Maine, 242; *Ken. Purchase* v. *Laboree*, 2 Maine, 275; *Bartlett* v. *Belfast*, 4 Mass., 707; *Holt* v. *Walker*, 26 Maine, 107; *School Dis. in Winthrop* v. *Benson*, 31 Maine, 384; 2 Term Rep., 53; 1 Esp. Ca., 458.

IV. "Actual possession," in Act of 1853, must be adverse. Language is identical with that of c. 145, R. S., § 23, which has received judicial construction. *Treat* v. *Strickland*, 23 Maine, 237; *Knox* v. *Hook & al.*, 12 Mass., 329; *Propr's Ken. Pur.* v. *Kavanagh*, 1 Maine, 348; *Butler* v. *Arnold*, 31 Maine, 583; *Mason* v. *Richards*, 1 Pick., 142.

V. Verdict should not be set aside because of the omission of William Peabody's name in the body of the deed, because,

1. Objection should have been taken at the trial.

2. If William Peabody is still owner, there is no contro-

versy between *these parties* about his interest, and it does not concern the tenant, he not claiming under him.

3. It does not appear that William Peabody is still living.

4. William signed, sealed and delivered the deed as a tenant in common with others. *Bird* v. *Bird*, 40 Maine, 398; *Elliott* v. *Sleeper*, 2 N. H., 525; *Carr* v. *Williams*, 10 Ohio, 305; *Mead* v. *Billings*, 10 Johns., 99.

If no person's name had been mentioned in the body of the deed, it would have been the conveyance of all the persons signing, as a deed poll.

Verdict may be diminished and thus save a new trial, when, as in this case, the Court have the means of determining the excess. *Plummer* v. *Walker*, 24 Maine, 14; *Lambert* v. *Craig*, 12 Pick., 199; *Hobart* v. *Hagget*, 12 Maine, 67; *Porter* v. *Rumney*, 10 Mass., 64; *Clark* v. *Lamb*, 8 Pick., 415, and authorities there cited.

The opinion of the Court was drawn by

TENNEY, C. J.—The demandants in this action seek to recover a judgment for possession of a tract of land in Muscle Ridge plantation, in the county of Knox, formerly known as Peabody's island, and more recently as Hewett's island.

The tenant pleads the general issue, which is joined. He also files a brief statement, claiming what are usually denominated betterments, on two grounds. 1. That, the premises having been in the actual possession of the tenant, and those under whom he claims, for more than six successive years before the commencement of this action, he claims compensation for the buildings and improvements on the premises, made by him and those under whom he claims; and he requests that an estimation be made by the jury of the increased value of the premises, by reason thereof. 2. That he alleges and offers to prove that he, and those under whom he claims, have had the premises in actual possession for more than twenty years prior to the commencement of this action, and he requests that the jury shall find

the value of the premises, at the time the tenant and those under whom he claims first entered thereon, and that, in estimating the increased value of the premises by reason of the buildings and improvements, they shall find the value of the premises at the time of the trial, over and above the value thereof at the time the tenant and those under whom they claim first entered thereon.

The demandants, in proper written form, request that the jury estimate what would have been the value of the premises at the time of the trial, provided no buildings had been erected, or improvements made, or waste committed by the tenant or those under whom he claims, if they shall find the tenant is entitled to betterments, and shall estimate the value of the buildings and improvements, or the increased value of the premises, by reason thereof, as requested by the tenant.

Stephen Peabody conveyed to Solomon Peabody, the father of the demandants, by warranty deed dated Nov. 9, 1803, duly acknowledged and recorded, the island in question. Stephen Peabody received conveyance by a like deed from George Ulmer, dated July 27, 1803, of the premises.

Solomon Peabody was in possession, under the deed to him, from its date till about the year 1827, of the same, when he moved away and was soon after succeeded in occupation of the island by Israel Gregory, who continued to occupy the same till July 24, 1843, when he conveyed the same by a warranty deed, to the tenant, duly acknowledged and recorded.

Under the general issue, the tenant claims to hold a title in fee by a disseizin made by Gregory, his grantor, continued without interruption for more than twenty years by his grantor and himself.

That more than twenty years have elapsed since the tenant's grantor commenced the occupation of the premises, before the date of the writ, is not denied, but it is insisted for the demandants, that during the most of the time between the commencement of the occupation of Gregory and

the institution of this suit, this occupation has been in submission to the title of Solomon Peabody, during his life, and of his heirs or their grantees, since his death; and if any disseizin has been made by the tenant or those under whom he claims, it has been purged.

The demandant introduced in evidence a writing, coming from Gregory's possession, in the following words and figures:—"Thomaston, Jan. 10, 1829. This is to certify, that I, Philip Ulmer, of Thomaston, do agree to convey a certain island, known by the name of Peabody's island, and one by the name of Crow island, and another by the name of Two Bush, for the consideration of three hundred and fifty dollars, to be paid in two years, in annual payments, which Israel Gregory has given his notes for this day, and if said Gregory pays said notes, then the said Ulmer is to give the said Gregory a deed of the above mentioned islands, and if said Gregory fails of paying said notes, then the above obligation is to be void, otherwise it shall remain in full force and virtue. "Philip Ulmer.

"Attest, Harriet Ulmer. Alden Ulmer."

Alden Ulmer, called as a witness for the demandants, testified that he was the administrator of his father, Philip Ulmer's estate, that he was fifty-two years old; remembered when his father cut the hay on Peabody's island, was eighteen or nineteen years old at the time his father cut the hay, and that his father had the care of the island, some two or three years before Gregory went on; did not recollect the time of going on, or the fact. The witness further testified that he "heard his father say he never had the island in charge for himself; this was while he was in possession. The conversation was, that Peabody owed him a small sum, and that he had the island in charge to make that out of, and whatever he made over, that he was to return to Peabody."

The testimony contained in the preceding paragraph was objected to by the tenant. The witness further stated, that he never set up any claim to the island, and his father never claimed title thereto to his knowledge.

The demandants introduced in evidence the two notes dated January 10, 1829, signed by Gregory, payable to Philip Ulmer, in one and two years respectively, with interest, and described in the contract of the same date; also a receipt dated May 28, 1828, Philip Ulmer to Israel Gregory, for rent of the island.

The case discloses much evidence, introduced by the demandants, tending to show that Gregory well understood that Peabody was the owner of the island, and that Philip Ulmer had the charge thereof as the agent of Peabody; and that, in addition to the contract given by the said Ulmer, and the notes of Gregory, he repeatedly recognized the right of Peabody as the owner of the island, and, as late as the year 1840, drove to Thomaston a yoke of oxen for the purpose of delivering the same to Ulmer, as part payment of the notes given as the consideration of the contract. Evidence was also introduced by the tenant, for the purpose of showing that Gregory repudiated the right of Peabody and of Ulmer to the island, and in explanation of the evidence adduced by the demandants.

Evidence was also introduced by the demandants to show that, at several times, some of the heirs of Solomon Peabody, and his widow, and the agent of the widow and the heirs, made entries upon the premises, by the authority of the heirs, with the intention of vesting the seizin in the heirs.

The tenant's counsel requested certain instructions to the jury, which were given; other requests for instructions were not given, or were qualified, which his counsel do not rely upon in argument. These it is unnecessary now to consider.

The second and fourth requests, as they were presented, were, that the testimony of certain witnesses for the demandants, on which reliance was placed to show entries to interrupt the disseizin of the heirs of Solomon Peabody, after his decease, could not have such effect in law, so as to prevent the tenant from obtaining a title in fee to the pre-

mises, by the continued adverse possession of twenty years before the institution of this suit.

The Court did not undertake to give a construction to the language of the witnesses, as upon a written contract, and to determine the legal effect thereof, but instructed the jury that, if the heirs of Solomon Peabody, or by their authorized agent, lawfully entered upon the premises within twenty years after the disseizin of Peabody by Gregory, the seizin was thereby vested in the heirs, and the effect of such entry was to put an end to the ouster; and if Gregory, as a wrongdoer, still retained the possession after the entry, it was a new disseizin of the heirs. That, if the entry was made by one of the heirs, or by more than one less than all, or by the agent of one or more less than all, it is presumed to be in maintenance of the rights of all, in absence of all proof to the contrary. That, to constitute a legal entry, the party must go upon the premises with that intent. The mere going upon the land will not always constitute a legal entry sufficient to vest the actual seizin in those who have the right. If, within twenty years after Gregory first disseized Solomon Peabody, the heirs of the latter, or their agent, duly authorized, went upon the premises with the intent of making the entry, and they then and there disclosed to Gregory that they came for such purpose, it would be a legal entry, and, if a legal entry was made within twenty years before the commencement of the present action, the defence under the general issue was not maintained.

The third request was, that the same facts mentioned in the second request, cannot by law operate to deprive the tenant of the benefit of the provisions of the 34th chapter of the statutes of 1853, relating to betterments, to wit, an Act additional to c. 145 of the R. S. And the fifth instruction requested was, if the Court declined to give the last requested instruction, in such case, he is requested to instruct the jury that such a possession would not be interrupted by the facts therein referred to, so far as to deprive the tenant of the benefit of the Act of 1853.

Under the third and fifth requests, the Judge remarked, that the actual possession mentioned in the statutes of 1853, c. 34, § 1, was a possession, which was open, notorious and adverse in its character, did not differ from that mentioned in the R. S. of 1840, c. 45, § 23, excepting as to the time of its continuance.

The sixth instruction requested was, that in estimating what would have been the value of the premises if no buildings had been erected, or improvements made, or waste committed, the jury should find what the value would have been, without that knowledge of the quality and value of the granite which the tenant's improvements alone had disclosed, by opening the quarries and working the granite. The instruction requested was not given, but the jury were instructed that "they would estimate what would have been the value of the premises at the time of the trial, provided no buildings had been erected, or improvements made, or waste committed," from all the evidence in the case, and they were instructed, that the foregoing was the rule of law which they would be governed by, and what effect they would give to the evidence was submitted to them to determine as matter of fact.

In addition to the foregoing instructions under the requests, the Court instructed the jury that, if the writing of January 10, 1829, was executed by Philip Ulmer and delivered by him to Gregory, as the agent of Solomon Peabody, and Gregory knew at the time that therein Ulmer was acting as the agent of said Peabody, it is evidence that Gregory was holding in submission to said Peabody.

There is evidence from deeds introduced that Solomon Peabody had title to the premises. There is none that Philip Ulmer had acquired any title. His contract to convey to Peabody is not evidence of a title in him. He was in possession of the premises, and, like the declaration of any other tenant in possession, his statements, going to limit or qualify his right arising from possession, was admissible to show the character of the possession. In connection

with other evidence that Ulmer acted as an agent of Peabody, and that Gregory knew it, made the part objected to admissible with the other portion of the testimony upon that point. If the jury believed the evidence, Gregory held the relation to Peabody of having taken a contract to convey land to him on the fulfilment of the condition. And so long as such a relation continues, the authorities cited for the demandants, well establish the principle that the party holding such contract as valid, possesses the premises described therein, in submission to the one having the title. The evidence cannot be regarded as contradictory to the contract itself.

Much evidence was in the case, according to the report on the subject, whether an entry had been made on the part of the heirs of Solomon Peabody. The Court gave instructions touching the facts necessary to be proved to constitute an entry sufficient to vest the seizin. In *Robinson* v. *Swett & al.*, 3 Greenl., 316, it is said by WESTON, J., in delivering the opinion of the Court, "an entry into land to purge a disseizin should be made with that intention; and such intention should be sufficiently indicated, either by the act itself or by words accompanying the act." "The intent may sometimes appear from the act; at other times from the declarations of the party, but when both are taken together, it will be still more manifest." Stearns on Real Actions, 43. "And when the entry is to be made upon land, the person who makes the entry may go upon any part of the land, declaring the purpose for which he enters." Ibid, 43.

"In several cases the entry for one person may enure to the use of another. The case of joint tenants and tenants in common have been alluded to." Stearns on Real Actions, 42; *Means* v. *Wells*, 12 Met., 356. These authorities sustain the instructions on this point.

The instruction giving the meaning of the statute of 1853, c. 34, § 1, cannot be held erroneous. This chapter is entitled "An Act additional to chapter 145 of the Revised

Statutes." "When the demanded premises have been in the actual possession of the tenant or those under whom he claims for six successive years or more, before commencement of the action, he shall be allowed a compensation for the value of any improvements," &c. R. S., 1840, c. 145, § 23.

By the statute of 1853, c. 34, § 1, it is provided, "and if the tenant claiming compensation for buildings and improvements, and making a request for an estimation by the jury of the increased value of the premises by reason thereof, shall also allege and prove that he and those under whom he claims have had the premises in actual possession for more than twenty years prior to the commencement of the action, the jury may find that fact, and, in estimating the value of the premises, provided no buildings or improvements have been made thereon, by the tenant or those under whom he claims, shall find and in their verdict state what was the value of the premises at the time when the tenant or those under whom he claims, first entered thereon. And the sum, so found and stated, shall, for the purposes of the aforesaid chapter, be deemed and taken for the estimated value of the premises. And, in estimating the increased value of the premises by reason of the buildings and improvements, the jury shall find and in their verdict state the value of the premises, at the time of the trial, over and above the value thereof at the time when the tenant or those under whom he claims, first entered thereon. And the sum, so found and stated, shall, for the purposes of said chapter, be deemed and taken to be assessed for the buildings and improvements."

A construction has long since been put upon the Act, which was substantially the same as that of R. S. of 1840, c. 145, § 23. And the "actual possession" as used therein was that which was adverse to the legal title. *Knox* v. *Hook*, 12 Mass., 329; *Treat* v. *Strickland*, 23 Maine, 237. And in the revisions of the statutes, when the same lan-

guage had been substantially retained, the construction is to be treated as adopted by the Legislature.

It is contended that, in the additional statute to that which has long been so familiar to the profession, the words "actual possession" does not mean a possession which is adverse, but one which has all along been the possession under a party having a title in fee. It is not easy to adopt a construction which may operate to produce the most flagrant injustice, and which shows such a poverty of language, that the Legislature could not find terms to make known their intention, without giving to words in the same chapter, which are identical, a meaning wholly inconsistent with each other, and producing a result in one part diametrically opposite to that in another.

If a party owning lands has been disseized thereof, and that disseizin has continued for twenty years, compensation to the disseizee for his buildings and improvements is a simple absurdity. He obtains a title in fee. But there may be cases when a party has been in the adverse possession of real estate for a term much longer than twenty years, and he is still liable to be dispossessed, but not by the one whom he or those under whom he claims has disseized. When a person has title to an estate in lands for life, remainder to another, the former may have been disseized for more than twenty years; his right of entry is forever barred; but during his life the remainderman can have no right of action or right of entry. These rights do not commence till the determination of the particular estate. When that is determined, the remainderman is by law admitted to his right of action, which cannot be resisted, unless it be upon other ground. For such and similar cases, it is apprehended, the statute of 1853, c. 34, was enacted. Whether it can be effectual or not in a case to which it may be applicable we give no opinion.

The sixth requested instruction, if given, would have restricted the value of the premises to the condition in which they were, when the "actual possession" as used in R. S. of

1840, c. 145, § 23, of the tenant commenced. If it had not been for such "actual possession" of the tenant, the intrinsic value of the island might have been as fully manifested as by the operations of the tenant. The whole matter was properly submitted to the jury under all the evidence in the case.

The motion that the verdict be set aside and a new trial granted, because the verdict is against law, against evidence and the weight of evidence, we will briefly consider.

On the questions touching the value of the buildings and improvements, and of the value of the premises, if no buildings or improvements had been made, or waste committed thereon, the finding of the jury differs from the opinions of most of the witnesses introduced. But the facts on which these opinions were based were disclosed by witnesses, who had good opportunity of knowing such facts, and may be considered as an important element for the consideration of the jury in finding the value which they were to pronounce in their verdict; and we are not satisfied that the jury were under such influences as to make it the duty of the Court to disturb the verdict on this account.

It appears, from the evidence, that there are nine children of Solomon Peabody, who are the only heirs; that the demandants have the title of eight of them without dispute. It was supposed by both parties, at the time of the trial, that the interests of all the heirs were united in the demandants, and the verdict was rendered accordingly. Among the heirs was the son of the ancestor, William Peabody, who appears to have signed and sealed an instrument, supposed to be a perfect deed, to Sarah N. Patten, one of the demandants, dated Sept. 10, 1844, but his name appears in no other part thereof, and it is denied that any portion of the premises passed by it.

No evidence was introduced to show the death of William Peabody, and he must be treated as living.

According to 2 Black. Com., 297, the matter of a deed must be legally and orderly set forth; that is, there must

be words sufficient to specify the agreement and bind the parties. It is not absolutely necessary, in law, to have all the formal parts that are usually drawn out in the deeds, so as there be sufficient words to declare clearly and legally the party's meaning. In *Catlin* v. *Ware*, 9 Mass., 218, it is said by the Court, "a deed cannot bind a party making it, unless it contain words expressive of an intention to be bound." We think the instrument is not operative as a deed to convey the interest of William Peabody.

Can the verdict be amended so that judgment may be rendered for that undivided portion of the premises which is the property of the demandants? This defect was unknown to the parties and their counsel at the time of the trial, as we understand from the arguments. It was supposed by both that if the demandants should prevail, it would be for the premises described in the writ, entire. But they must recover upon the strength of their own title. If the fact now disclosed was made known at the trial, they could have recovered a verdict for that undivided portion of the estate to which they had proved a title, under R. S. of 1840, c. 145, § 13.

The verdict furnishes all the facts which are necessary to make the correction in every respect. According to the authorities cited for the demandant, the verdict may be amended in conformity to the truth of the case as disclosed by the deed in which the defect appears. *Clark* v. *Lamb*, 8 Pick., 415. On the amendment being made, the exceptions and motion should be overruled.

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

President, Directors & Co. of Lime Rock Bank *versus* Joseph Hewett.

Where a bank has established an usage of notifying, through the postoffice, indorsers of dishonored paper resident in the town where the bank is established, a notice, properly addressed and deposited in the postoffice on the day the note matures, will be sufficient to indorsers conusant of such usage and on notes made payable at such bank.

Aliter, to indorsers conusant of the usage, on notes not made payable at such bank.

On Exceptions from *Nisi Prius*, Rice, J., presiding.

Assumpsit on two promissory notes, of which the following are copies:— "Rockland, Oct. 24, 1853.

"$790. Thirty days after date, value received, we promise to pay Joseph Hewett, or order, seven hundred ninety dollars, at the Lime Rock Bank.

(Signed) "D. C. Dinsmore.

Indorsed.—"Joseph Hewett. Jesse Ames."

"Rockland, Nov. 12, 1853.

"$300. Sixty days after date, value received, I promise to pay Joseph Hewett, or order, three hundred dollars.

(Signed) "D. C. Dinsmore.

Indorsed.—"Joseph Hewett. A. Howes."

A. D. Nichols, cashier of the Lime Rock Bank, testified, that, at maturity, the notes in suit were unpaid; and that, on the day they became due, he deposited notices of dishonor addressed to the defendant, in the postoffice at Rockland where the defendant resided.

It was also proved to be the custom of the bank to deposite notices, to indorsers residing in Rockland, in the postoffice of that place.

It was also proved that defendant was one of the directors of said bank from 1837 to 1852, and that he did a great deal of business with said bank.

The presiding Judge instructed the jury, that it was necessary that the defendant should have reasonable notice

of the dishonor of the notes, and that the bank looked to him for payment of them. As he lived in the town where the notes were payable, notice deposited in the Rockland postoffice directed to him would not be sufficient, unless there was a custom or usage of the bank to notify, in this way, indorsers who lived in town, of which custom and usage the defendant must be conusant. That, if the jury were satisfied from the evidence that there was a custom prevailing in this bank to notify through the postoffice indorsers who lived in town, and that the defendant was conusant of that custom, he would be bound by it whether he received the notices or not. And, in such case, the general rule of law as to notice through the postoffice, where the indorser lived in the town where the note became payable, would not obtain.

The jury were further instructed that they were to determine whether there was such a custom; if there was, whether the defendant was conusant of it, and, if he was, whether the notice was given in conformity with such custom.

The verdict was for the plaintiff including the amount due on *both* notes; and the defendant excepted.

Thacher & Brother, in support of the exceptions.

A. P. Gould, for plaintiff.

The opinion of the Court was drawn by

Appleton, C. J. — Where the parties to a note or bill of exchange live in the same town, a demand upon the maker and notice through the postoffice are not sufficient to charge an indorser. Such is the general rule.

The indorser may agree with the holder of a note, that notice of dishonor may be left at a particular place, and notice so left will be binding upon him. *Mill* v. *Bank of U. S.*, 11 Wheat., 431; *Eastern Bank* v. *Brown*, 17 Maine, 356; *Chicopee Bank* v. *Eager*, 9 Met., 583.

So a bank may establish usages variant from the general usage and not adverse to positive law, and those doing busi-

ness with such bank and conusant of its usages, will be regarded as assenting thereto and as agreeing to be bound thereby.

The jury have found that it was an usage of the Lime Rock Bank, when parties to a note payable at its counter were residents of the city where the bank is established, to give notice of demand and non-payment through the post-office; that the defendant for a series of years had been accustomed to do business with the bank, and was conusant of its usages, having been for a long time one of its directors.

The larger note in suit was payable at and transferred by the defendant to the bank. By indorsing a note thus payable, he may well be presumed, knowing the usages of the bank, to have assented to and to have agreed to be bound by them. In delivering the opinion of the Court, in *Gindrat* v. *Mechanic's Bank of Augusta*, 7 Ala., 325, GOLDTHWAITE, J., after referring to numerous authorities on this point, sums up the result as follows:—"We may therefore conclude, that it was competent for the bank to establish a rule that notice might be given to parties through the postoffice, although resident in the same place, and that such rule was obligatory upon the parties to *all bills expressing upon their face to be payable at that bank.*"

The instructions of the presiding Judge, so far as they relate to the note made payable by its terms at the plaintiffs' bank, are correct.

But the note for three hundred dollars was not made payable at any bank. There is no proof that the defendant knew that it would or assented that it should be discounted by the plaintiffs. He is not the last indorser. Nor is he, by the mere fact of a prior indorsement, to be presumed to have waived, as to this note, the usual notice of demand and non-payment. Notice through the postoffice would not be binding upon him.

No question as to the sufficiency of the proof to sustain

the verdict arises, as there is no motion to set aside the verdict as against evidence.

Exceptions sustained, unless the plaintiffs will remit the amount of the note for $300 and interest.

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

GEO. F. MUSTARD *& als., in Eq., versus* ROBERT ROBINSON.

R. S., c. 77, § 8, confers jurisdiction in equity on this Court, "in cases of partnership, and between *part owners of vessels* and other real and personal property, for adjustment of their interests in the property and *accounts respecting it;*" and a bill will be maintained, although it alleges and the evidence shows that a portion of the funds were received by the defendant as part owner and a portion in the capacity of agent and master.

BILL IN EQUITY.

The case was heard on bill, answer and proof.

The allegations in the bill and answer sufficiently appear in the opinion of the Court.

Shepley & Dana, for the plaintiffs.

Evans & Putnam, for the defendant.

This Court has no equity jurisdiction beyond that given by statute. It has jurisdiction between part owners of vessels, and may entertain a bill to account in proper cases, but this is not such a case.

The accounts are *not* accounts between part owners, though the parties stand in that relation, but they are strictly and entirely accounts between owners and *masters*, which are cognizable in an action at law. An action of account is not regarded here as obsolete, but especially preserved by statute. *Means* v. *Closson*, 40 Maine, 337; *Maguire* v. *Pingree*, 30 Maine, 508; *Hardy* v. *Sproule*, 33 Maine, 508.

Account at common law lies only against bailiffs, receivers and guardians, &c. Not between part owners of property.

Equity jurisdiction is given as between part owners by our statute, because there was no adequate remedy at law—suits could not be entertained till accounts were settled and balanced.

No jurisdiction was given as between owners and master, for the reason that the remedy *was* adequate.

The bill is framed with *double aspect*. It sets the ground of claim in the *alternative*—either as master or agent—or, as part owner. This is not allowable. It should state a case plainly and distinctly and within the jurisdiction of the Court. Story's Eq. Pl., § 241. "An elementary rule of the most extensive influence, that the bill should state the right, title or claim of the plaintiff with accuracy and clearness."

It is *uncertain* what case is intended to be made by this bill against the defendant,—whether as part owner or master. *Ib.* § 242.

A statement of claim in the alternative is fatal. Story's Eq. Pl., §§ 244, 245, 247, 248 and *seq.*

Yet, in some cases, where distinct grounds of claim are set up, one *within* and one *without* the jurisdiction of the Court, the bill has been treated as single, and proceeded with as if it were solely for the case *within* the jurisdiction. Story's Eq. Pl., § 283 and note.

The allegations in the bill are not sufficient to present a case between part owners.

No allegation of unsettled accounts between them as *part owners*. Accounts between owners and master are different from those of part owners *inter sese*.

The former respect the expenses of sailing the vessel, her disbursements and earnings and proceeds of sale when a sale has been made by the master, he having authority as master, when necessary, to make sale.

Part owners have no such power, under any circumstances.

The right, title and claim are not stated with clearness. Story's Eq. Pl., § 241.

The allegations in the bill in relation to the sums received by the defendant, of which an account is sought, are for *earnings* and *proceeds* of *sale*, which, from the nature of the transactions, are receipts by the master, and in that capacity, and which he would have received if he had not been part owner. 1 Story's Eq. Juris., § 466, speaks of them as distinct.

The papers and proofs show that the matters of which accounts are sought are wholly pertaining to his relation as *master*, and not within the jurisdiction of the Court.

It is not a bill for discovery—it prays none—and does not allege what facts are sought to be discovered, nor that they are material to the plaintiff's case—nor that they are exclusively within the defendant's knowledge. 1 Story's Eq. Juris., § 74; *Woodman* v. *Freeman*, 25 Maine, 545–6.

The distinguished counsel for the defendant argued elaborately and *in extenso* upon the admissibility of various parts of the testimony, and upon the merits.

The opinion of the Court was drawn by

APPLETON, J.—The bill alleges that the plaintiffs and the defendant were part owners of the ship Daniel Elliot, from Jan. 1, 1855, to Jan. 1, 1861, in certain proportions as therein set forth; that, during a part of this time, the defendant was agent for the owners and master of the vessel; that he continued as such master till the ship was condemned and sold; that he received her earnings and the proceeds of her sale and should account for the same. It then alleges that the defendant, though requested, has never accounted with the plaintiffs for the funds, belonging to and arising from the vessel, now remaining in his hands.

The answer admits the existence of the relation of joint owners of the ship in question—the receipt of its earnings by the defendant, as agent of the owners, and of the proceeds of the vessel, as master, and alleges an entire adjustment of all its accounts.

The preponderance of proof satisfactorily shows that the plaintiffs called on the defendant to produce his vouchers and to make a final adjustment of the accounts of the ship; that a time and place were agreed upon for that purpose; and that the defendant neglected to appear and make the requested settlement.

It is urged that, as part of the funds were received by the defendant as master of the vessel, and a part as agent for the owners, that therefore the bill is not maintainable.

By R. S., 1857, c. 77, § 8, jurisdiction in equity is conferred on this Court "in cases of partnership and *between part owners of vessels* and other real and personal property, for adjustment of their interests in the property and *accounts respecting it.*"

The plaintiffs and defendant are part owners of a vessel. The evidence shows that a part of the funds were received in that capacity, and a part by him as agent and as master. But, though master and agent, he was none the less part owner. Being part owner, and the funds arising from the vessel being in his hands, the other part owners have, by the clear and unequivocal language of the statute, a right to the adjustment of their interests in the vessel and of the accounts respecting it.

The bill is therefore maintained, and a master must be appointed before whom the accounts of the parties must be presented for adjustment.

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

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

If the first indorsee of a promissory note acquire a right of action as against the maker, by being a *bona fide* purchaser without notice and before maturity, he can transfer a good title as well after as before the note becomes due.

In the trial of an action on a negotiable promissory note indorsed in blank and before maturity, brought by a holder other than the first indorsee, which note is invalid between the original parties on the ground of fraud or want of consideration, it is erroneous for the presiding Judge to instruct the jury, that the burden of proof is on the plaintiff to show that he is a *bona fide* holder for value, and that he can show this by proving, by a preponderance of testimony, that he gave value, either by allowing it on a debt or otherwise, and that he took it in due course of business, and without any knowledge of fraud or defect, and unattended by any circumstances justly calculated to awaken suspicion.

Such ruling may be correct as applied to the first indorsee, but not to a subsequent holder, even though the latter knew of the original invalidity of the note, and took it after its maturity.

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

The facts sufficiently appear in the opinion of the Court.

Jabez C. Woodman, for the plaintiff.

Vinton, for the defendant.

The opinion of the Court was drawn by

APPLETON, J. — On Jan. 8, 1856, the defendant gave his note to George Knight or order, for the sum of two hundred and forty-six dollars, payable in two years from date, with annual interest. George Knight, long before the maturity of the note, indorsed the same to Isaac Knight, who, after it became due, transferred it to the plaintiff "without recourse."

The defence relied upon was that, as between the original parties, there was an entire failure of consideration, that Isaac Knight took the note with full notice of such failure, and that this defence was available against the plaintiff, as he purchased it when overdue.

It was to be determined, (1,) whether, as between the original parties to the note, there was or was not a failure of consideration; and, (2,) whether or not Isaac Knight was to be deemed a *bona fide* indorsee without notice.

In regard to both these inquiries, the instructions given are to be regarded as unobjectionable.

After giving instructions on these points, the Judge proceeded as follows, — "that there was also another principle, that the burden of proof was on the plaintiff to show that he is a *bona fide* holder for value, if the note is invalid on the above grounds between the original parties, and he can show that he is such *bona fide* holder, by proving, by a preponderance of testimony, that he gave value, either by allowing it on a debt or otherwise, and that he took it in due course of business, and without any knowledge of fraud or defect, and unattended by any circumstances justly calculated to awaken suspicion."

If the note was originally void for want of consideration, and Isaac Knight purchased it with notice of such fact, then the plaintiff, deriving his title from a *mala fide* indorsee after the maturity of the note, would not be entitled to recover.

But if Isaac Knight were a *bona fide* indorsee, then, notwithstanding there was a failure of consideration as between the original parties to the note, the rights of the plaintiff would be entirely different. In such case the note would be valid in his hands and he could recover. The title of Knight being perfect, he could transfer it. His indorsee would succeed to his rights, and, whether such indorsee knew of the original invalidity of the note from fraud in its inception, or from want of consideration, or whether he took it after its maturity or not, would be inquiries entirely immaterial. If the first indorsee acquires a right of action as against the maker, by being a *bona fide* purchaser without notice, before the maturity of the note, he could transfer such perfect title as well after as before the note was due.

The ruling may be correct as applied to the first indorsee. But he is not the plaintiff of record; and, as the exceptions stand, the ruling in terms applies to the plaintiff, who may have derived his title from a *bona fide* indorsee of the note before its maturity.

The instructions being in this respect erroneous, the exceptions must be sustained. *Exceptions sustained.*

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

RALPH DAY *versus* CONWAY INSURANCE COMPANY.

Where one of the conditions of insurance—which is made part of the policy—is, that "a false description or the omitting to make known any fact or feature in the risk which increases the hazard" shall render the policy void; and the application—also made a part of the policy—describes the building insured to be a "wooden four story paper mill, 60 x 70 feet from above basement, ten feet between floors, and ceiled with wood," and not only makes no mention of a brick "bleach house" 20 x 30 feet, which is separated from the paper mill by a wooden shed-roofed building, known as a "salt box," 24 x 18 feet and 14 feet high, one end of which is formed by the paper mill and the other by the "bleach house, but, on the contrary, in answer to a written question, the application declares there is no building within 300 feet of the mill, except the "stock house"—which is other than the "bleach house" or "salt box:"—*Held*, that whether the "bleach house" and "salt box" are a part of the paper mill or not, the warranty on the part of the insured is broken.

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

The facts sufficiently appear in the opinion of the Court.

E. H. Daveis, for the defendants.

John Rand, for the plaintiff.

The opinion of the Court was drawn by

APPLETON, C. J.—The plaintiff effected an insurance on "his wooden four story paper mill." The insurance was

predicated upon the answer of the applicant to certain inquiries — which, by the terms of the policy, are made a part thereof, and a "warranty on the part of the assured."

The main building is described in the answer to the fifth question as made of wood — sixty or seventy feet from above basement — ten feet between floors and ceiled with wood.

It appeared in evidence that there was a bleach house, adjoining the mill insured, built of brick, which was not called a part of the mill. The bleach house was built separate and connected with the main building by a shed-roofed building called the salt box. The bleach house made one wall of it, the mill the other end of it. These had been erected before the application for insurance was made. The bleach house and salt box have been insured by another company.

The conditions of insurance are made a part of the policy. By the fourth, "a false description by the insured," or "the omitting to make known any fact or feature in the risk which increases the hazard of the same," renders the policy void.

In answer to inquiries proposed, the applicant stated that no building was within three hundred feet, except the stock house, which was an one story building of wood.

It will be perceived that no mention whatever is made of the bleach house or salt box in the application, nor in any answer to the questions proposed.

Beside other instructions, the correctness of which it is not material to discuss, the jury were instructed "that it was for them to decide whether the bleach house and salt box were a *part* of the mill, and, *if so*, that their vicinity to the main building did not affect the contract, and was not inconsistent with the answers to the fifth, twenty-seventh and under the twenty-eighth inquiries in the application."

The risk assumed depended on the building insured, and the purposes for which it was used, and on the number and nearness of the adjacent buildings, and the uses to which they were applied. As to all these things the defendants

had a right to true answers, and the applicant warranted their truth.

The bleach house and salt box were either part of the mill or they were not.

If part of the mill, as the jury found they were, then the description of the building insured is materially incorrect in omitting to describe them as part thereof, and the policy by the fourth condition is rendered void.

In *Chase* v. *Hamilton Ins. Co.*, 20 N. Y., 32, the application for insurance described the subject of the risk as a stone dwellinghouse, without disclosing the fact that a wooden kitchen was attached thereto; it was held, that the word "dwellinghouse" is to be construed as including the kitchen, and the application cannot be deemed one for the insurance only of so much of the building as was of stone. "Although it may be hard upon the plaintiff," observes GROVER, J., "thus to lose the benefit of the contract, it would be harder still to hold the defendant bound to insure a dwellinghouse composed in part of wood and stone, because it had been proposed to insure a stone dwellinghouse." So here, if the bleach house and salt box are part of the mill, then there is a material variance in the description of the property insured.

If not a part of the mill, then the application is false in stating that there were *no* buildings within three hundred feet, when the bleach house and salt box were within that distance. That they were not a part of the mill would seem fairly inferrible from the fact that they were both insured elsewhere, for parties would be little likely to insure different parts of the same building in different offices.

In either alternative, there was a breach of warranty on the part of the assured. *Exceptions sustained.*

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

JOSEPH EATON *versus* CHARLES MUNROE.

The plaintiff delivered $40 worth of duck to H., who agreed to have it manufactured into a sail, and that it should remain the property of the plaintiff until it was paid for. H. caused it to be manufactured, as by agreement, at a cost of $18, and, without ever paying the plaintiff, sold the sail to C., who sold it to the defendant. The plaintiff, after demand, replevied the sail: — *Held*, that replevin could be maintained on two grounds; —

1. Because the plaintiff never parted with his property; and —
2. On the principle of accession.

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

The facts sufficiently appear in the opinion.

J. S. Baker, for the plaintiff.

Gilbert & Sewall, for the defendant.

The opinion of the Court was drawn by

WALTON, J. — This is an action of replevin. It appears from the evidence that the plaintiff let one Hall have canvass for the foresail of a gondola; that Hall procured the sail to be made at an expense of about ten dollars for labor, and from five to eight dollars for materials; that the canvass cost $40,63; that it was agreed the plaintiff should own the sail, and that it should remain his property till paid for; that Hall never paid for the sail, but afterwards sold it to one Chase, and that Chase sold it to the defendant.

The defendant contends that the plaintiff acquired no property in the materials furnished by Hall; that, inasmuch as the plaintiff consented that his canvass should be inseparably connected with Hall's property, and the plaintiff cannot now hold what was his own, without also holding what was the property of Hall, the action cannot be maintained.

But we are of opinion that the action can be maintained. It was expressly agreed that the *sail*, (including, of course, not only the canvass, but the other materials used in making it,) should be and remain the property of the plaintiff till it was paid for. If this was not sufficient for the pur-

pose, we think the plaintiff became the owner of the materials furnished by Hall upon the principle of accession. Title by accession applies not only to what is produced by one's own property, as the increase of animals, but also to that which is united to it, either naturally or artificially. 2 Kent's Com., 360. "It was a principle settled as early as the time of the Year Books, that, whatever alteration of form any property had undergone, the owner might seize it in its new shape, and be entitled to the ownership of it in its state of improvement, if he could prove the identity of the original materials; as, if leather be made into shoes, or cloth into a coat." 2 Kent's Com., 363. This principle, applied to the case at bar, would give to the plaintiff, as owner of the canvass, the materials used in making it into a sail, by accession; the same as the materials used in the manufacture of the shoes and the coat, would become the property of the owners of the leather and the cloth.

In *Pulsifer* v. *Page*, 32 Maine, 404, this Court held that a right of property, by accession, may occur when materials belonging to several persons are united by labor into a single article; and that the ownership of an article, so formed, is in the party, if such there be, to whom the principal part of the materials belonged. In respect to the sail, it is clear the canvass formed the principal part of it, and the plaintiff being the owner of the canvass, he would, within the authority of this case, be the owner of the sail when it was completed.

Default to stand.

Judgment for plaintiff.

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

AMBROSE MERRILL *versus* DANIEL C. STANWOOD *& al.*

When one agrees to sell, and another to buy articles, at a specified price, and no credit is stipulated for, the delivery of the goods and the payment of the price are to be simultaneous and concurrent acts.

As between the immediate parties to a promissory note given for the right of selling patent sewing machines, it is no defence that the payee agreed, in part consideration of the note, to furnish the maker machines as fast as wanted, and that the maker, having numerous and urgent calls for machines, repeatedly sent orders to the payee for them but received none, and the maker was thereby damaged, unless it be also proved that either the pay accompanied the orders, or that the payee was to furnish the machines on credit.

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

ASSUMPSIT on a promissory note given by the defendants to Shaw & Clark for $100, and indorsed to the plaintiff.

Plea, general issue, and a brief statement setting out the same grounds of defence. Plaintiff, to make out his case, read the note declared on and the indorsement thereon.

Defendants called Daniel Pike, cashier of the Freeman's Bank of Augusta, who testified that the note in suit was sent to him by Shaw & Clark, before it became due, for collection; that he kept it in his possession till it became due when he demanded payment of the defendants, which was refused, and he soon after sent the note to Shaw & Clark at Biddeford, by mail.

Defendants then offered to prove that the note was given in part payment for the patent of Reymond's Sewing Machine for the State of Maine, purchased by deed; that the price paid for said patent was $700; that, at the same time they purchased the patent, and, as a part of the same transaction, Shaw & Clark verbally agreed with defendants to furnish the machines to them from time to time as fast as they were wanted, and as defendants might order them, at the price of $5 a piece; that defendants sold the patent for certain portions of the State with the same agreement on their part, that they would furnish the machines to the pur-

chasers as fast as wanted; that defendants, having numerous and urgent calls for machines, repeatedly sent orders to Shaw & Clark for them, which were never filled—by reason of which the defendants could not supply those who had purchased of them—consequently the sales were stopped and the business spoilt—and that they were damaged thereby more than the amount of the note.

Plaintiff objected to the evidence as inadmissible. No account was filed in set-off.

The case was taken from the jury and reported for the decision of the Law Court—the parties agreeing that, if the testimony offered be admissible, the action shall stand for trial, otherwise the defendants shall be defaulted.

Libbey, for plaintiff.

Lancaster, for defendants.

The agreement to furnish machines was part of the consideration of the note; and, so far as Shaw & Clark failed to perform such agreement and thereby damaged the defendants, so far has the consideration failed.

Defendants have a right to retain, as against this note, whatever damages they have suffered in consequence of nonfulfilment of agreement by Shaw & Clark. *Herbert* v. *Ford*, 29 Maine, 546; *Herrin* v. *Libbey*, 36 Maine, 350; *Hammatt* v. *Emerson*, 27 Maine, 324; *Hall* v. *Tribou*, 42 Maine, 192; *Harrington* v. *Stratton*, 22 Pick., 510; *Perley* v. *Balch*, 23 Pick., 283. So on principle. American Law Register, April No., 1861, title Recoupment.

The opinion of the Court was drawn by

WALTON, J.—The defendants' offering to prove certain facts, as set forth in the report, leaves it doubtful whether it was intended to embrace the proposition that the agreement to furnish the machines formed any part of the consideration of the note in suit or not. The note is said to have been given in part payment for the patent of Reymond's Sewing Machine, which would seem to exclude the

idea of any other consideration for it; but it is afterwards said that, at the same time the defendants purchased the patent, and *as a part of the same transaction*, Shaw & Clark agreed with them to furnish the machines to them from time to time, as fast as they were wanted, and as defendants might order them, at the price of $5 a piece; which seems to convey the idea that the note was not given exclusively in consideration of the conveyance of the patent, but partly in consideration of that, and partly in consideration of the agreement to furnish the machines at the price named, the whole forming but one contract.

It is unimportant, however, to determine which of these views is correct, for, in either case, the proof offered would constitute no defence to the note. Where one agrees to sell, and another to buy articles at a price specified, and no credit is stipulated for, the legal construction of the agreement is, that payment of the price and delivery of the articles are to take place at the same time; and neither can support a claim for damages against the other, for non-performance of the agreement, unless he has performed, or offered to perform, his own part of the agreement. The buyer is under no obligation to advance the pay unless he at the same time receive the goods; nor is the seller under any obligation to part with his goods unless he at the same time receives his pay. In such cases, delivery of the goods and payment of the price are to be simultaneous and concurrent acts.

In this case, the defendants offered to prove that they repeatedly sent orders for machines which were never filled, but they did not offer to prove that they sent the pay for them, or that they were ready and offered to pay for them on delivery; and the Court is not to understand, therefore, that such are the facts. The facts offered to be proved would show no such breach of the contract on the part of Shaw & Clark as would entitle the defendants to damages. No credit was stipulated for, and, to have perfected their claim for damages, the defendants should not only have sent

orders, but they should also have sent pay for the machines. Payment, or an offer to pay, is in such cases a condition precedent to a valid claim for damages. The evidence offered, without more, was insufficient to establish any defence to the note, in whole or in part, and was therefore irrelevant and inadmissible, and, by agreement of the parties, the defendants are to be defaulted.

Defendants defaulted.

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

NATHANIEL CLARK, *Complainant, versus* ROCKLAND WATER POWER COMPANY.

Chapter 381, of the Special Laws of 1860, provides that the defendants may convey, "by pipes sunk below the bottom of its outlet," Mill river, "the water of Tolman's pond, to the city of Rockland, and take and hold any land," &c., necessary for the purpose; but that nothing in the Act shall be construed to prevent the owners of mills, on Mill river, from using the water thereof in the same manner as they have heretofore done; and gives said mill owners a remedy by complaint to the S. J. Court, final judgment thereon to be the measure of yearly damages, until a new complaint is made.

In the trial of such complaint against said Company, for diverting the water by said pipes, and withholding it by the rebuilding and raising of an ancient mill-dam at the outlet of said pond, which the defendants had purchased since they were incorporated; it is not competent for the defendants to prove, by a witness, "that fourteen years ago, he owned a clothing mill and other machinery below the complainant's, between which and the witness' mill another stream united with Mill river; that the water of said river ran to waste at his dam, in the spring freshets, for the want of sufficient means to retain it at Tolman's pond for summer and fall use; that there was not enough left for milling purposes during summer and fall months; and therefore he could not run his mill much of the time during those seasons."

Nor is it competent for the defendants to prove that, in Mill river, below where said other stream unites with it, less water, that could be made useful to mills on the river, ran prior to the time when the defendants commenced their operations, than during the subsequent period, to the present time.

Clark *v.* Rockland Water Power Company.

It is not competent for a witness to give his opinion of the value of a mill, after having testified, that he had resided many years, and owned real estate in the vicinity of the mill; had been assessor of the town; that he was something of a judge of real estate in that vicinity; that he had no special knowledge of the value of mills on that stream; and that he had never bought, sold, owned or operated a mill.

The rights of the proprietors of the defendants' mill cannot be measured by the amount of grain they might have to grind within a given time, nor by the peculiar structure of their water wheels; but by the natural flow of the stream as modified by grant or prescription.

The defendants have no authority, under their Act of incorporation, to operate a gristmill as an independent business.

By said Act, the right to recover damages by complaint is given to the mill owners on the stream, only in case the corporation, in *the exercise of the powers therein granted*, shall damage the mill privileges on the river.

If the corporation damaged the mill owners in any other manner than in the exercise of the powers conferred in the Act, by unreasonably or unlawfully diverting or detaining the water of the river, the remedy of the mill owners would be by some other form of action.

The common law and statute rights of riparian proprietors stated.

A request for instructions not applicable to the case may be refused.

Damages in the trial of such complaint.

On Exceptions to the rulings of Rice, J., at *Nisi Prius*.

Complaint.

The complaint set out the title to the complainant's mill, &c., and alleged that the defendants had, in the exercise of the powers granted to them by their Act of incorporation, done great damage to the complainant's said mill and privilege, by diverting the water therefrom, and by stopping the water of Tolman's pond and preventing it from running through the outlet thereof and by its accustomed and natural channel to the complainant's mill and privilege, &c.

The defendants pleaded "not guilty," with a brief statement denying that they had, in the exercise of the powers granted them by the Act of incorporation, damaged, in any manner, the complainant's mill privilege, &c.

Complainant proved title and possession to the mill mentioned in the complaint, prior to October, 1854; that it was situated on Mill river issuing from Tolman's pond, two and one-half miles below the outlet; that said mill was first built on or about 1830.

It appeared that, prior to the passage of said Act, Tolman's pond was and had been dammed at the outlet for a great number of years beyond the memory of the witness, and that it had been always used as a reservoir by the successive owners of a mill one-third of a mile below its outlet, modernly called the McLain mill, and that the successive owners of that mill had a flume gate in said dam, which was raised when that mill had need of water to operate it, and the gate closed to save the water when the mill stopped, thus controlling the water at the outlet for the benefit of the McLain mill. There was evidence tending to show that the pond had been flowed much higher, and the water detained much longer since the defendants had owned the McLain mill than formerly.

It appeared that the pipe for conveying the water to the city of Rockland, was inserted into the pond at a depth two feet on a level lower than the mudsill of said flume, and that the defendant company made a new flume, placing it fifteen inches lower than the mudsill of the old flume and excavated above and below so as to secure that much greater capacity for said reservoir pond.

It also appeared that, on Jan. 21, 1854, Lewis McLain, who owned the said McLain mill, conveyed said mill and privilege to the defendants, "together with a passage way, or path, forever, from said mill-dam to the foot of said Tolman's pond, with the right of entry and keeping up a dam at said Tolman's pond, for the purpose of saving the water for the use of the said grantees, and also the right to raise the water and flow the land at the head of said pond and around the same, and also all the rights, appurtenances and privileges appertaining to said mill, with the right of raising said mill pond and flowing the land as far as it shall be necessary, they paying therefor $5000; that a large sum was expended in its improvement and that it has since been run as a grist-mill, grinding a large quantity of corn annually, under the direction of W. A. Farnsworth."

Theodore P. Howard testified that he has been the miller

since January, 1855, that he has ground large quantities of grain annually, and always saved the water of Tolman's pond for the use of the mill by shutting the gate at the outlet whenever he did not need it for the mill, except that, in 1857, in July and August, when they had less grinding to do than usual, and the pond being nearly full, he let down water enough daily to grind 125 bushels of corn, for several days, when he had no use for it at that mill, and that he always drew water to grind whenever he had grinding to do, and that he acted under the directions of said Farnsworth; that he had and exercised full control over the gate at the flume at said outlet and opened it and shut it with sole reference to and for the benefit of said mill in grinding.

There was evidence tending to show that W. A. Farnsworth was the agent of the defendants, that the mill was operated under his direction, and that the profits thereof were paid into the treasury of the company, and that it was necessary for the successful operation of the defendants' water works that the head of water in the pond should be kept up as high as practicable for that purpose.

There was evidence tending to show that the quantity of water diverted from the pond annually, by the defendants, to supply the village with water, did not exceed 7½ inches in depth of the superficies of said pond, in a year, and that the said pipe, by which the water is conducted from the pond to the village, as laid, is incapable of conveying from said pond to the village over about ten inches in depth of the superficies of the pond in a year.

There was evidence tending to show that the said 7½ inches in depth, afforded 198,000 gallons daily during the year, being 1980 hogsheads of 100 gallons each per day. It appeared that there were 600 families supplied with the water, and that not over half of the quantity drawn was employed for family uses, the other half being allowed for the various other uses. That would give to each family 165 gallons per day, and, averaging five persons to a family, it would afford

33 gallons to each person daily, through the year, leaving the remaining 990 hogsheads for other uses daily.

It further appeared that, in 1854, after purchasing said mill, the defendants raised the dam at the outlet of the pond 15 inches, and thus, with the additional depth given to the outlet, increased the reservoir pond in depth and capacity two feet and nine inches; and there was evidence tending to show that, in the spring freshets, the said pond, with its improved capacity, could not hold all the water which accumulated therein, but much would nevertheless run to waste, and that the same at sometimes, if not usually, would be the case in the fall and other freshets.

The testimony also tended to show that the waste way has been filled up so that no water can pass except when defendants hoist their gate at the outlet, and that they have retained all fall flood in the pond, and most of the spring floods.

There was evidence tending to show that, since October, 1854, the McLain mill and the plantiff's mill have had a better supply of water, take the year through; and that it flowed down Mill river, on which these mills stand, more uniformly and more beneficially for the mill privileges than for many years before 1850, and plaintiff introduced evidence tending to show the contrary, and that for many years anterior to 1852 the plaintiff's mill, then owned by Jacob Ulmer, had an enduring supply of water through the year with slight deficiency in the pinch of the drought.

The defendants' counsel requested the following instructions to the jury:—

That, if the defendants opened and shut the gate at the outlet of Tolman's pond as they had use for the water in driving their mill, letting the water flow when they had work to do, and closing the gate when they had no use for it, and stopping their mill to save the water for further use when grists came in, and thus preventing the water from running to waste, and saving it for a dry time in prospect,

such alternate use and detention of the water would not render defendants liable in this process.

That defendants cannot be held accountable under this process for retaining or withholding the water of Tolman's pond for the purpose and uses of their mill, if it appear that they used the water in running said mill as much as the work they had to do in said mill required, and did let it flow from said pond and through their mill whenever they had grinding to do in said mill.

That the change of wheels in the defendants' said mill, by which less water is used in a given time in driving the same, than was used by the former mill, was no violation of the rights of the plaintiff, provided the water saved thereby was ultimately used to drive said mill and to flow on in its natural channel.

But the Judge declined so to instruct the jury.

The Court instructed the jury that the charter of the defendants did not authorize them to purchase and operate a gristmill, or an independent business disconnected with their works for supplying the city of Rockland with pure water, and in case they had so done, and the complainant had suffered damage thereby he could not recover for such damage in this process.

But, if the mill and privilege, with the right to flow Tolman's pond pertaining thereto, was necessary to the successful operation of the defendants' works for supplying the city of Rockland with pure water, and was used by the defendants as a means of carrying into effect the purposes and objects of their charter, they would be entitled to the right to flow and control the water in the Tolman pond, in the same manner and to the same extent as such rights had been acquired, and were possessed by the grantors of the defendants at the time said mill and privilege and right to flow were conveyed to defendants, and would be liable in this process for damages occasioned to the complainant's privilege, so far, and only so far, as such damages were occa-

sioned by exceeding the rights thus connected with and pertaining to said mill and privilege.

Other appropriate instructions were given.

The Court ruled that under this process damages, if any occured, might be recovered up to the time of finding the verdict, and instructed the jury to assess the damages for each year, commencing with October, 1854, up to October, 1859, and to find the damages from that time up to the time of finding the verdict; and the jury found and rendered the following verdict in accordance with such instructions:—

The jury find the defendants are guilty in manner and form as the complainant has alleged, and assess yearly damages for the complainant as follows, to wit:—for the year ending on the 1st day of October, 1855, $88; for the year ending October 1st, 1856, $96,12; for the year ending October 1st, 1857, $117; for the year ending October 1st, 1858, $150; for the year ending October 1st, 1859, $150. And at the rate of $150 a year from the 1st day of October, 1859, to the day of finding this verdict, being $16,66. Amounting in all to the sum of six hundred and seventeen dollars and seventy-eight cents. Defendants excepted.

Thacher & Ruggles, for the defendants.

Gould, for the complainant.

The opinion of the Court was drawn by

RICE, J.—This complaint is based upon the provisions of c. 381 of the Special Laws of 1850, being an Act to incorporate the Rockland Water Power Company, for the purpose of conveying to the village of Rockland a supply of pure water for domestic purposes, &c.

The 2d section of the Act provides that the corporation may hold real and personal estate necessary and convenient for the purposes aforesaid, not exceeding in amount seventy-five thousand dollars.

In the 3d section it is provided that "nothing in this Act be taken or construed to prevent the owners of mills, or of

mill privileges, on the stream flowing through the outlet of said pond, from using the water thereof in the same manner that they now do or have heretofore done."

Section six provides for the manner of obtaining redress on the part of mill owners in case they shall be injured by the operations of the corporation.

On the trial of the cause, the defendants offered to prove by Horatio Alden, that being possessed, fourteen years ago, and for many years prior to that time, of a clothing mill and other machinery on said Mill river stream, a mile below the plaintiff's mill, that the water of that river ran to waste at his dam, in the spring freshets, for the want of sufficient means to retain it at Tolman's pond, for summer and fall use; that there was not enough left for milling purposes, during the summer and fall months; and, for want thereof, he could not run said mill much of the time during that season of the year; and that for that reason he removed his works to Camden.

The Court, being informed that there was another stream that united with the Mill river between the plaintiff's mill and said Alden's mill, rejected the evidence. Whether other considerations concurred in inducing the Court to exclude the offered evidence does not appear.

The only legitimate purpose perceived for which this testimony could be introduced, was to institute a comparison, by which to determine the flow of the water at the plaintiff's mill, on different years and at different periods of the year before and since the construction of the defendant's works. Did the proposed testimony afford any reliable elements from which such a comparison could be made? We think not. It does not appear what portion of the water that ran to waste during the spring freshets, flowed from the west, or from the east branch of the river; nor how much water was required to run *Alden's* mill and *other machinery;* nor how the requirements of his mill would compare with the requirements of the mill, on the plaintiff's dam; nor whether the requirements of water, at his mill,

were greater or less in the spring or summer and fall; nor whether there is sufficient water now flowing in said stream in the spring or summer to run his mill. In fact there were no elements of comparison offered which could afford any safe or reliable data for the judgment of a jury. *Aldrich* v. *Pelham*, 1 Gray, 510.

The evidence offered presented several purely collateral issues, which were both remote and uncertain, affording no reliable ground for comparison if established, and were calculated rather to confuse and mislead the jury than to aid them in coming to a correct conclusion on the matter submitted for their determination. *Moulton* v. *Scruton*, 39 Maine, 287.

The defendants also offered to prove, by other witnesses, that in the Mill river stream below said western branch, less water, that could be made useful to mills on the stream, run prior to 1850, than during the subsequent period, to the present time. This testimony was not less objectionable in its character than that just considered, and for similar reasons. The situation, condition and requirements of the mills below the west branch do not, so far as appears, present such points of similarity to the plaintiff's mill and privilege, as to afford any reliable data for comparison. *Collins* v. *Dorchester*, 6 Conn., 396.

Defendants further offered to prove that the plaintiff's mill privilege had been increased in value by the improvements they had made at the outlet of Tolman's pond, and by the manner they had used the water thereof, and called Timothy Williams, who testified that, in 1850, he carefully examined the plaintiff's mill privilege and mill to ascertain the value thereof, and that he had resided many years in the vicinity of this mill privilege; that he was the owner of real estate in the vicinity; had been an assessor in said town; and was something of a judge of the value of real estate in that vicinity; but had no special knowledge of the value of mills and mill privileges on that stream; that he had never bought, sold, owned or operated a mill. The

defendants' counsel inquired of him the value of said mill in 1850. Being objected to on the ground that he was not an expert, the evidence was rejected by the Court.

Witnesses are ordinarily confined to the statement of facts within their own knowledge. There is, however, a class of persons, known in legal proceedings as *experts*, who are not only permitted to testify to facts within their own knowledge, but who may also give opinions based upon these facts, or facts otherwise proved, or upon hypothetical cases.

An expert is a skilful or experienced person; a person having skill or experience, or peculiar knowledge on certain subjects, or in certain professions; a scientific witness. *Heald* v. *Thing*, 45 Maine, 392.

The foundation on which expert testimony rests, is the supposed superior knowledge or experience of the expert in relation to the subject matter upon which he is permitted to give an opinion as evidence. This knowledge must be such as is peculiar to persons of skill and experience in some particular branch of business, or department of science, which is the subject of investigation, and not of such a character as to be open and common to all persons.

As a person, having such peculiar knowledge, the witness Williams was produced, and his opinion offered in evidence in the case. Was that opinion, tested by the rules applicable to the class of evidence, admissible? The point to be determined was the value of the plaintiff's mill and privilege in 1850, when it was examined by the witness. In relation to his knowledge upon this point, he says he "was something of a judge of the value of real estate in that vicinity, but had no special knowledge of the value of mills or mill privileges on that stream; that he never bought, sold, owned or operated a mill." He thus distinctly negatives the idea that he was possessed of peculiar knowledge or skill in relation to the matter upon which his opinion was desired. It cannot be necessary to cite authorities to show that the opinions of a witness, thus situated, are not admissible in

evidence as an expert, which is the only ground on which this witness was excluded.

In relation to the requested instructions, which were refused, and to those which were given, no error is perceived.

At common law, the riparian proprietors on a stream are entitled to the natural flow of the water of the stream, without diminution or obstruction, except so far as other parties thereon may have obtained paramount rights to control such flow by grant or prescription. If any such paramount rights have been acquired, they are to be exercised according to their terms and limitations.

Under our mill Act, riparian proprietors, who are owners of mill sites, may raise a head of water, by the construction of dams, on their own lands, across streams not navigable, for the purpose of working their mills, subject only to the prior and paramount rights of other proprietors. And the head of water thus raised, may be detained a reasonable time for the beneficial use of such mills. But the flow of the stream cannot be permanently obstructed, nor the water diverted by such dams, to the injury of the proprietors below, nor can the water be used capriciously to their injury. Each proprietor is entitled to the reasonable use of the water in its natural flow over his land.

The rights of the proprietors of defendants' mill cannot be measured by the amount of grain they might have to grind within a given time, nor by the peculiar structure of their water wheels, but by the natural flow of the stream as modified by grant or prescription. The defendants could not deal out the water of the stream in homeopathic or allopathic doses, to be determined simply by the number and size of the grists that might come to their mills, or to the character of their water wheels, irrespective of their own acquired rights or the rights of the proprietors below. By the rule contended for by the defendants, they would be enabled to withhold the entire flow of the water for an indefinite period of time, in case no grists came to their mill, or, permit the flow in minute quantities, if their business was

small and their water wheels required but little water to propel them; or, on the other hand, if they were pressed with business, and had wasteful wheels, they would be authorized to let the water down upon the lower proprietors in floods. Such is not the rule of law; and, therefore, the requested instructions could not have been properly given, irrespective of the chartered rights of the defendants.

But, further, the requests were inapplicable to the case.

The defendants had no authority, under their Act of incorporation, to operate a gristmill as an independent business. By that Act, the corporation was authorized to hold real and personal estate necessary and convenient for the purpose of conveying to the village of Rockland, a supply of pure water, for domestic purposes, &c.; and the right to recover damages by complaint is given to the mill owners on the stream only in case the corporation, in the *exercise of the powers herein granted*, shall damage the mill privileges on the stream. If the corporation damaged the mill owners in any other manner than in the exercise of the powers conferred in the Act, by unreasonably or unlawfully diverting or detaining the water of the stream, the remedy of the mill owners would be by some other form of action.

It was manifestly in view of this state of things that the instructions of the Court were given; and, under the circumstances of the case, as presented, they appear to have been full, distinct and apposite.

The only remaining question is, whether the verdict is sufficient in form and substance to determine the rights of the parties and form the basis of a judgment.

The Act of incorporation is very general in its provisions, and the precise manner in which the judgment for damages is to be entered up is not very distinctly indicated. It provides, in case the parties cannot agree, that the mill owner may cause his damages to be ascertained by complaint, in which all parties interested in any particular mill privilege, claiming to have been damaged, shall be joined, to the Supreme Judicial Court at any term held in the county of

Lincoln, and that said corporation shall be held to answer and plead thereto; and all questions of fact arising upon said pleadings shall be presented to and settled by a jury, unless the parties shall agree to a committee or referees; and that all questions of law shall be settled by the Court as in other civil suits.

The remedy is analogous to that provided under the mill Act for parties whose lands are flowed by the erection of mill-dams; and it is manifestly the intent of the Act under consideration, that damages arising under it shall be determined, as far as practicable, in accordance with the rules which prevail in cases arising under the mill Act.

Under the mill Act, the jury assess the damages to the time of rendering the verdict; but whether that verdict should find the damages in a gross sum or in yearly damages after the date of the complaint, the cases do not entirely concur *Com.* v. *Ellis*, 11 Mass., 462; *Bryant* v. *Glidden*, 36 Maine, 36. In *Bryant* v. *Glidden*, the Court remarks, that "the damages occasioned for three years before the complaint is filed, may be assessed in one aggregate sum. The subsequent damages are to be 'yearly damages,' for the recovery of which, the owner of the land has a lien from the time of the institution of the original complaint, on the mill and dam. Those damages cannot be found to be different in different years, and be incorporated with those occasioned before the complaint was filed as appears to have been done in this case." The reason given for this rule is that to find the damages *in solido*, to the time of the verdict, would deprive the owner of the land of his lien, and other parties of rights secured to them by the statute.

Whether the true point of time from which "yearly damages" under the mill Act should be assessed is not that period when the commissioners, by their report, or the jury by their verdict, determine how far the flowing may be necessary, and what portion of the year such lands ought not to be flowed, has been matter on which different opinions have been entertained. Inasmuch as the flowing under the mill

Act may be wholly different after it has been regulated by the commissioners from what it had been before, it is apparent that the "yearly damages" may also be different after that period, and therefore there is much force in the suggestion that this would indicate the point of time from which the "yearly damages," for the future, should be estimated and determined.

But whatever may be the difficulties in establishing a satisfactory rule for yearly damages under the peculiar provisions of the mill Act, no such difficulty exists in this case, as the law gives the complainant no lien, nor does it, in any manner, limit and modify the manner in which the defendants shall exercise their rights, as in cases of flowage. So far, therefore, as this case is concerned, no objection is perceived to entering judgment on the general verdict.

A question may, however, be raised as to the rule for future yearly damages. The Act provides that such judgment shall be the measure of yearly damages, until the parties issue a new complaint to the Court to be filed by either party, &c. The question will naturally arise *what final judgment?* It is obvious that the statute is very indefinite on this point. But fortunately the verdict of the jury has furnished the elements for the determination of the question under any conceivable construction. They have found the yearly damages before the date of the complaint, also after the date of the complaint, and until the verdict was rendered. Also the aggregate, for a series of years, to the time the verdict was rendered. From these data, if the parties should not agree, the future yearly damages may readily be established by the Court. But inasmuch as that question is not now distinctly before us, we do not deem it advisable to volunteer an opinion thereon at this time.

Exceptions overruled, and
Judgment on the verdict.

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

JEREMIAH M. MASON *& als., in Equity, versus* THE YORK & CUMBERLAND RAILROAD COMPANY *& als.*
JOHN B. CARROLL, *in Equity, versus* Same *& als.*

A railroad corporation made a contract with M. for the construction of their road, and gave him a conveyance of their property containing the following conditions and provisions:—"*Provided, nevertheless*, that if said corporation or their agents or assigns, pay to the said M. or his assigns, who shall become the holder or holders thereof, the amounts specified in the several bonds and coupons for interest pertaining thereto, that shall be issued concurrently with these presents, and such also as shall hereafter be issued by the directors of said corporation, according to and to satisfy the terms of the contract existing between said corporation and said M., bearing date, &c., for the construction and equipment of said railroad, as by reference to said contract and the records of said company will fully appear; each of said bonds being numbered consecutively, from one to the sum total thereof, requisite for the completion of said road, according to said contract, and each being issued only by the previous specific vote thereof of the said directors, at their meeting duly notified; and if said payments shall be made, as the same shall respectively become due, according to the terms of said bonds and coupons; and if said contract shall also be fully performed by said corporation, in all other respects, then this deed shall be null and void thereafter, otherwise the same shall remain good and in full force. And it is further provided and a condition of this deed, that the possession and uses of said premises shall at all times remain in the said grantors, so long as payment shall be made promptly and in good faith by said grantors, of said several bonds and of the coupons pertaining thereto as the same shall become due or payable, but upon failure thereof for the term of sixty days, the holder of said bonds or of any one or more thereof, shall be and hereby is authorized and empowered to take full and complete possession of said premises and mortgaged property, personal and real, rights of way and corporate franchise, without hindrance or process of law, for the common and joint benefit and the use of the holders of all the bonds so previously issued, and whether payment then be due or not, and in satisfaction thereof, and such holders shall share and share alike in the disposition and sale of the same for that purpose by public vendue, on reasonable public notice given thereof, to the grantors aforesaid, first deducting from such proceeds all costs and expenses incident to such possession and sale."—*Held*:—

1. That the conveyance was not a deed in trust, but a mortgage;
2. That after a transfer by M. of any bonds of the corporation, he held the legal title as mortgagee for his remaining interest, and in trust for the other bondholders;
3. That the contract was secured by the mortgage;

4. That the bonds have priority in payment from the avails of the mortgaged property, over the contract;

5. That the conveyance contains no valid power of sale of the mortgaged property;

6. That a sale by the mortgagee of all his "right, title and interest" in the mortgage, and a judgment recovered by him against the corporation, for non-fulfilment of the contract, is an assignment of the mortgage; and the assignees hold the estate in the same manner as he held it;

7. That subsequent conveyances by the railroad corporation cannot affect the rights acquired by virtue of the mortgage;

8. That the Court will not determine what particular bonds are secured by the mortgage, until the coming in of the report of the master, to whom the case will be sent for that purpose;

9. That bonds, not "issued by the previous specific vote of the directors," but afterwards ratified and approved by the corporation, and received by M. and applied in accordance with the terms of the contract, are secured by the mortgage;

10. That the claim of an indorser of company notes, the avails of which were applied in part payment of the contract, is not secured by the mortgage;

11. That one bondholder may maintain a bill in equity to enforce payment of the bonds, in his own name, but for the benefit of himself and all other bondholders;

12. But that, in such a case, the Court cannot properly examine and determine the rights of one claiming an interest in the judgment on the contract, as *equitable* assignee, or as having an *equitable* lien upon it.

The plaintiffs in a bill in equity may discontinue on payment of costs; or without costs, if they are not claimed by the respondents.

When a plaintiff in equity parts with all his interest in the subject matter of the suit, the case can be no longer prosecuted in his name; but the assignee must make himself a party by an original bill in the nature of a supplemental bill.

It seems, that the report of a master in chancery is conclusive, as to all the facts passed upon by him.

BILL IN EQUITY, heard on bill, answer and proof.

The original bill makes Jeremiah M. Mason and others plaintiffs, and the York & Cumberland Railroad Company, John G. Myers, and William Willis, James C. Churchill and Nathan L. Woodbury, defendants.

The bill then alleges that, on the sixth day of February, 1851, said corporation made a mortgage of its property to said Myers, and sets forth said deed in words and figures, the material parts of which are stated in the opinion.

The bill then alleges that said mortgage was duly recorded, and, that at different dates, between the first day of February and the first day of July, 1851, there were issued by said corporation, according to and to satisfy the terms of the contract existing between said corporation and said Myers, bearing date the fifth day of February, 1850, and as modified in writing on the sixth day of February, 1851, sundry bonds for the payment of the sums of money specified in said bonds, and for the interest on the same semi-annually, as specified in said bonds and coupons accompanying the same, and that said bonds and coupons were duly issued by said corporation, and that they were and continued to be secured by said mortgage and a part of the bonds therein specified.

The bill then sets forth a description of the bonds held by each one of the plaintiffs.

The bill then alleges that said amounts due for interest have been duly demanded at the office of said company, as said interests respectively became due, and payment refused by the company and by the treasurer of the same; that said corporation is wholly insolvent and irresponsible and destitute of means to pay the said interest and bonds as they mature, and that the only mode in which payment can be obtained of said bonds and interest is by a resort to the property, conveyed in said mortgage, to secure the same; and that said property is becoming daily deteriorated and destroyed and wasted by the acts and omissions of said defendants.

The bill then alleges that the aforementioned bonds constitute the principal part of the debt outstanding, and secured by said mortgage, and that the complainants are owners of all the bonds and debts known with certainty by them to be existing and outstanding under said mortgage, and that they believe and allege that if any other bonds secured by said mortgage are in existence and outstanding and not paid or cancelled, they are of small amount and not in the hands of persons within this State, or subject to the

process of this Court, and prays, if it should appear that any such other bonds are in existence, and in the possession of persons subject to the jurisdiction of this Court, they may have leave to join such other persons as parties plaintiff, or parties defendant to the bill, whenever the existence of such persons shall be made known, and whenever at any stage of the proceedings, it may appear to the Court necessary.

The bill then alleges that said Myers, who is named as trustee and mortgagee in said mortgage, has neglected and refused, and still neglects and refuses to take any steps to protect the rights of the bondholders aforesaid, under said mortgage, and has refused and neglected and still refuses and neglects to call a meeting of the holders of said bonds, for the purpose of organization, as provided by the 51st chapter of the R. S. of the State, although requested so to do by said bondholders.

The bill then alleges that, on the first day of January, 1857, said Myers made and executed a deed to James Hayward, William Willis, and James C. Churchill, whereby said Myers conveyed to said Hayward, Willis and Churchill, their survivors and successors, all the right, title and interest of him, the said Myers, in and to the aforesaid mortgage by said corporation to him, the said Myers, they, the said Hayward, Willis and Churchill, assuming the responsibilities of him, the said Myers, by virtue of said deed, to other persons, and refers to *said deed* for proof of the same, which said complainants pray may be produced by the defendants, and that said deed, when produced, may be taken as a part of said bill.

The bill then alleges that said Hayward declined said trust, and refused to accept the same or to take delivery of said deed, and that, by operation of said deed and of law, the said Willis and Churchill became and claimed to be the successors of the said Myers in the said trust under said mortgage, and subject to the responsibilities and liabilities created by virtue thereof; or that if said trusts, powers and

responsibilities under said mortgage did not pass to, and vest in said Willis and Churchill, by virtue of said deed and of their acceptance and action under the same, then the same, or such part of the same as did not pass to and vest in said Willis and Churchill, remains in said Myers.

The bill then alleges that said Willis and Churchill associated with themselves said Woodbury, as a co-trustee, and that said Woodbury has claimed and still claims to act as a co-trustee with said Willis and Churchill, and that he has, jointly with said Willis and Churchill, entered into certain contracts and arrangements with reference to said road, and the construction of the same, and the extension of the same, and the issue of certain bonds, assumed and claimed to be secured by a subsequent mortgage on said railroad and its appurtenances.

And alleges that said corporation and said trustees, or persons claiming to be trustees, and the said Myers, have entered into certain contracts and arrangements, the precise terms and conditions of which are not known to the complainants, but which said complainants pray may be fully described and set forth by said defendants, in their answer, by virtue of which said Myers, under the authority and with the consent of said Willis, Churchill and Woodbury, and of said corporation, has been and still is in possession and control and use of said railroad and the property described in said mortgage, and claims to hold the same and receive the earnings and profits of the same, either directly under the authority of certain contracts made with said Myers by the other defendants or some of them, or under such contracts made by the other defendants, with said Myers and with one John Hosey, and with sundry other persons, whose names are unknown to the said complainants, but all whose rights and interests and claims, as they are informed and believe, have been assigned to and are vested in said Myers.

The bill then alleges that the defendants, in violation of the rights of the complainants as holders of said bonds, and

in violation and in fraud of the trusts, responsibilities, and liabilities of the said Myers under said mortgage, and of the said Willis, Churchill and Woodbury, who, if they have succeeded to any right or title under and by virtue of said conveyance from said Myers, have taken the same with full knowledge of and subject to all the trusts, responsibilities, and liabilities of said trusts and mortgage, and charged with said trust, have not applied the earnings and profits of the said road and of said mortgaged property to the payment of the interest due and unpaid upon said bonds and under said mortgage, but have suffered and are now suffering the same to be used and expended by said Myers, for his private purposes, and to be used to pay the coupons issued in connection with certain bonds of said corporation, purporting to be issued by a mortgage of said property, subject and subsequent to the mortgage given to secure the aforesaid bonds of said complainants.

And then the bill alleges that the said Myers, and Willis, and Churchill and Woodbury, have continued to act and still do act in total disregard of the rights and interests of the holders of the bonds secured by said first mortgage, and of the responsibilities and liabilities imposed upon the trustees under the same, and do not and will not take any steps to enforce said mortgage or to foreclose the same, and that, notwithstanding the interest due upon the aforesaid bonds held by the complainants has remained unpaid for so long a time, they have been and are applying the earnings of said road to the discharge of other liabilities of said corporation not secured by said mortgage, in violation of the rights of said complainants, and have been and are suffering said railroad and its furniture and equipments to fall into decay and become greatly depreciated and deteriorated in value, so that, by reason of the acts, refusals, omissions and neglects of the said defendants, the complainants are losing their security in part, and are in danger of losing the whole, notwithstanding the said defendants have received and are receiving large sums from the receipts of said road, which earnings

and expenditures the complainants pray that the said defendants may severally set forth, so far as to render a full, exact, and true account of all the same since the time of the execution of the deed from said Myers to said Willis, Hayward and Churchill.

The bill then alleges, in the usual form, that said actings, doings and pretences are contrary to equity and good conscience, that they are injurious and oppressive, and that the complainants are remediless according to the strict rules of the common law, and can only have relief in a court of equity.

The bill then prays that the defendants, upon their several and corporal oaths, may make answer to said bill, in the usual form of said bills, and that said defendants may come to a fair and just account of all the earnings and receipts from said property thus held in mortgage and trust, since the date of said conveyance to said Willis and others, and that a receiver may be appointed by the Court to receive and take charge of the said mortgaged property, and of the earnings and income of the same, and to apply the net earnings and income of the same to the payment of so much of said mortgage debt, and of said bonds and interest, as is now due or may hereafter be due and unpaid, and that a trustee may be appointed by the Court in place of the trustee named in said mortgage, and in place of the other defendants, who claim to have succeeded to the rights of said trustee, and that the other defendants may be decreed to convey their interests in said mortgaged property to said trustee, or to the receiver so appointed by said Court, so far as may be necessary for the effectual carrying out of the trusts, and realization of the securities of said mortgage, and that the said trustee may be authorized by the Court with a power to sell and dispose of the said mortgaged property and with all the powers of sale and disposition, if any, embraced in said mortgage; and that the said defendants, their servants and agents, and all other persons, may be enjoined from paying over or disposing of any of said

mortgaged property, or the earnings or income or receipts of the same, except under the order of the Court, or to the trustee or receiver appointed by the Court; and for such other and further relief as the nature of the case may require.

Then follows a prayer for a writ of injunction from the Court accordingly; and for the ordinary process by subpœna.

To the bill was appended the *jurat* of John W. Lane, one of the complainants, in the usual form.

The original bill was entered at the January term, 1860, when the defendant Myers was defaulted. The bill was ordered to be taken *pro-confesso* as to said Myers on the 36th day of the term. The answer of the York & Cumberland Railroad Company and of said Willis, Churchill and Woodbury, was filed on the 35th day of said term.

Joseph C. Noyes was appointed receiver, January term, 1860.

At the October term, 1860, Jabez C. Woodman appeared for said Mason and MacDonald. On the same day, Smith, one of the complainants, claimed to discontinue, and his counsel withdrew their appearance.

At the January term, 1861, on the 21st day, the general replication was filed.

On the 27th day of May, Shepley & Dana, in behalf of all the complainants except said Mason and MacDonald, filed their motion in which they alleged that said Mason and MacDonald had disposed of their bonds and were not interested in the suit, and praying that said bill might be dismissed without prejudice.

On the 5th day of June, 1861, John B. Carroll filed his petition for leave to file a supplemental bill, and subsequently had leave to file his supplemental bill, upon giving bond to the other plaintiffs, to be approved by some Justice of the Court, to prosecute the suit at his own expense, and indemnify and save them harmless from any and all liabilities for costs or expenses accruing afterwards.

On the 13th day of June, 1861, said Carroll filed his bond, and with the permission of the Court his supplemental bill. On the same day, Edward H. Daveis, Charles Q. Clapp, and Levi Morrell, appeared and took notice of said bill and acknowledged service, by Edward H. Daveis and George Evans, their solicitors. The original defendants also appeared and acknowledged service, by George Evans, their solicitor, on the same day.

The supplementary bill and bill of revivor by John B. Carroll recites the original bill, its allegations, charges and prayers. It then alleges that the writ of subpœna was issued on the 22d day of December, 1859; that it was duly served and returned into the Clerk's office, January 4th, 1860; that, at the January term, 1860, the joint and several answer of said corporation and of James C. Churchill, Nathan L. Woodbury and William Willis to said bill was made and filed on the 35th day of the term, and that, on the next day, the default of said Myers was recorded and the bill ordered to be taken *pro-confesso*, as to said Myers; that Joseph C. Noyes was appointed a receiver in said case, according to the prayer of said bill; that the decree appointing said Noyes was filed on the sixth of March; that a commission was issued to the receiver on the 13th of March, 1860; that all the property described in said mortgage now in existence, and the receipts and income of the same, save the necessary disbursements incident to the same, have been in the hands of said receiver since his commission issued, subject to the order of this Court.

It then alleges that, since the filing of the original bill, the said Mason and MacDonald, for a valuable consideration, have sold and transferred the six bonds, numbered two, three, four, five, six and seven, with the coupons pertaining thereto, and that, since the filing of said bill, the said Carroll, for a valuable consideration, has become the purchaser of said six bonds with the coupons pertaining thereto, and that he is now the holder, owner, and assignee of said six bonds and coupons.

The complainant then claims that, by the purchase of said bonds and coupons, he is entitled to have said bill of complaint continued, and to prosecute the same against the defendants in his own name, and to have all the benefits of said bill in the same manner and to the same extent as the said Mason and MacDonald might have had, if they had not sold and transferred said six bonds and the coupons pertaining thereto.

The complainant then alleges that he is informed and believes the bonds that were issued according to and to satisfy the terms of the contract, existing between said corporation and said Myers, bearing date the fifth day of August, 1850, and as modified in writing on the sixth day of February, 1851, were exceedingly numerous, being to the number of one hundred and sixty-six, and all of them secured by said mortgage to said Myers.

The bill then alleges that all of said bonds were payable to the bearer thereof, negotiable in form, and passing from hand to hand by delivery; that he has no knowledge who are the owners and holders of any of said bonds, except the six aforesaid, which belong to him; that he does not know how many of said bonds are outstanding, believes they are exceedingly numerous, and that he has no means of knowledge who were the owners and holders of said bonds or any of them, at the time the original bill was commenced, except as he sees the matter stated in said bill.

The complainant then alleges, it would be impracticable for him to make all the holders and owners of said bonds and coupons, parties to this bill by name, because said holders and owners are unknown, because of their numerousness, and because the bonds are negotiable in form.

He then prays that the original bill may be so far amended that he may be allowed, either in company with the other complainants, or so many of them as may continue to prosecute the bill, or otherwise in his own name, to maintain this bill, in behalf of himself or themselves, and also in behalf of all other persons that may be holders and own-

ers of said bonds and coupons, or any of them, who shall come in and prove their claims, become parties and contribute to the expense of this suit, at any time before the final decree.

The complainant then avers that he has been informed, and verily believes, that said corporation, by their deed of mortgage and trust, on the first day of November, 1851, conveyed to one Toppan Robie, one John Anderson and one Nathan Clifford, all the property of said corporation, including the franchise thereof, that was embraced in the aforesaid deed of said corporation to said Myers, and offers to produce said deed; and further represents that, agreeably to the provisions of said deed, Charles Q. Clapp, Edward H. Daveis and Levi Morrell, have been duly and legally appointed successors to said Robie, Anderson and Clifford in said trust, and claim to hold said franchise and other property in accordance with the provisions of said deed, and claim to have the right to redeem the same from the mortgage made by said company to said Myers, and to have other and important interests in said property, liable to be affected by any decree which this Court may make in this case, and that they have commenced a bill in equity, now pending in this Court, against said corporation and others, to which the complainant refers, as setting forth more fully the ground of their claim.

The complainant then prays the process of the Court against said Clapp, Daveis and Morrell, and that they may be required to appear and answer thereto as they may be advised.

He then prays that the original defendants may be required to answer to the matter alleged by way of supplement and amendment, and that the complainant may have the same benefits of said bill and proceedings against the defendants as the said Mason and MacDonald were entitled to have under the original bill and before they assigned their bonds, with the addition of the supplementary matter and amendments aforesaid.

The answer admits the contract with Myers, the mortgage to him, and the issuing of bonds (known as the "Emery bonds") to the amount of $95,500, and no more; it denies that some of the bonds (known as the "Herrick bonds") held by some of the plaintiffs, were ever authorized by the corporation, or legally issued; it alleges that the plaintiffs became the owners of their bonds long after they were dishonored and subject to certain defences; that Myers had recovered a judgment for breach of the contract amounting to some $165,000; that Myers had taken possession of the mortgaged property for breach of the condition and had sold it, by virtue of a power of sale contained in the mortgage, to one Amos Finch; [that other proceedings took place which do not become material in the view taken of the case by the Court;] that the judgment in favor of Myers had been assigned to said Willis, Churchill and Woodbury, as well as the interest of Myers in the mortgage; that, on the first day of January, 1857, the company conveyed to them in mortgage and in trust all its property; it denies that the defendants are in possession or are liable to account to the plaintiffs; it admits the non-payment of interest as alleged in the bill, and substantially all the new allegations in the supplemental bill; and it alleges other matters not material in the view of the case taken by the Court.

So much of the documentary evidence as is material is given in the opinion.

It was admitted, among other things:—

1. That the documents and papers of which printed copies are filed by the respondents, as proofs and exhibits, were duly signed and executed by the parties thereto, respectively.

2. That the deeds and contracts so filed, purporting to be the deeds and contracts of said railroad company, were executed by the proper officers of said company, duly authorized thereto by votes of the directors of said company, at meetings duly held for that purpose.

3. That said Myers recovered judgment against said com-

pany in a suit commenced by him as set forth in the answer of said respondents.

4. That said Myers advertised and sold at public auction, as set forth in his deed to Finch, all his right, interest and property in the premises, described in the deed of mortgage to him.

J. C. Woodman, for Carroll, submitted an elaborate argument in support of the following propositions:—

I. The deed to Myers is a deed of mortgage and of trust. He held the estate for himself and in trust for the other bondholders.

II. All the necessary parties are before the Court. As the bondholders are numerous, and continually changing, and many of them are unknown, Carroll may maintain the suit in his own name for the benefit of them all.

III. Myers had no authority by virtue of the mortgage to sell the mortgaged property.

IV. By the conveyance of Myers to Finch, and of Finch to the defendants, and of Myers to the defendants, they succeeded to Myers' rights and duties, and became the holders of the estate in trust.

V. The contract with Myers was not secured by the mortgage.

VI. If it was secured by the mortgage, Myers lost his lien by the sale to Finch.

VII. The Court will send the case to a master in chancery to ascertain what bonds were legally issued and are secured by the mortgage.

Evans, for respondents.

The case comes before the Court, upon the original bill of Mason and others—the supplemental bill of Carroll—and the answers thereto—and upon exhibits, documentary proofs, agreements and admissions of Mason and MacDonald, original plaintiffs, and of Carroll.

All parties in interest, it is believed, are before the Court.

The plaintiffs claim to be holders of certain bonds issued

by the Y. & C. R. R. Co., secured by a deed of mortgage to Myers which is set out at length.

The answers admit the validity of the deed, and admit the issuing of certain bonds secured by it, which bonds so admitted are accurately described. They deny that any other bonds than those so described—those signed by Emery as treasurer—are the bonds of the company or covered by the mortgage. They do not admit that the plaintiffs are holders of any of the bonds so admitted to be secured—and call for proof. The answer is responsive to the bill, in these respects, and renders proof of the allegations incumbent on plaintiffs.

Mason and MacDonald, and their successor Carroll, have filed the bonds held by them as exhibits, and they are among those admitted to be the bonds of the company and secured by the mortgage. The bill alleges, and the answers admit that the interest due upon these bonds has not been paid since February 10, 1856, and it is also admitted that the holders of these particular bonds have been in no way privy or assenting to any proceedings heretofore had, and set forth in the answer, affecting in any way the rights of the holders.

So far, therefore, as the bonds now held by Carroll are concerned, it is not perceived that the denials of the answers in this respect are not overcome—and that Carroll is not entitled to such equitable interposition as the case made authorizes, and as is within the power of the Court to grant.

The bill alleges and the answers admit a conveyance from Myers of the mortgaged property, dated January 1, 1857, to Hayward and others, trustees, and subsequent conveyance of the same to Woodbury and Willis, and certain agreements of the trustees with Wood and Myers and one Hosie, all of which it prays may be produced and made part of the bill. They have been produced and are among the exhibits, and are to be taken as a part of plaintiffs' bill.

The answer sets forth other proceedings and conveyances from Myers to Finch, and from Finch to Churchill and others, copies of which are filed among the proofs, and are ad-

mitted to have been duly executed and authorized by votes of the company or the directors.

The bill alleges and the answers admit that the company is insolvent and unable to pay its debts, for which purpose resort must be had to the mortgaged property.

The answers allege a conveyance in trust by the railroad company to Hayward and others, January 1, 1857, and, by subsequent conveyances, the transmission of this trust-estate to Churchill, Woodbury and Willis, of which due proof is made by the production of the deeds and admissions in the case.

No proof has been offered that any other bonds, admitted to be the bonds of the company, are held by any of the plaintiffs, nor has any proof been offered that any bonds alleged in the bill to be held by the plaintiffs, other than those admitted, are bonds of the company or obligatory upon them, or covered by the mortgage.

In all these respects, therefore, the answer being responsive, must stand.

The decree must be against the validity of such other bonds for want of proof, and against the asserted lien or trust in their behalf.

The questions arising on this state of the case, are:—

1. The construction of the deed to Myers.

Does it give priority to the bonds which were issued in pursuance of it, over the contract with Myers also secured by it—or, if the mortgaged property be insufficient to pay the whole of both descriptions of indebtedness, is it to be appropriated *pro rata* to the payment of bonds and contract?

We maintain the latter proposition. It results from the language of the deed. Both are secured and no priority given.

Churchill and others, trustees, are assignees of the judgment obtained by Myers against the company, for violation of his contract, and are therefore entitled to stand on the same footing of equality as those bondholders who may sustain their lien.

2. The effect of the sale at public auction by Myers to Finch, July 29, 1856, upon the bonds then held by persons privy to and assenting to such sale.

By examination and comparison of the documents, it will appear that the then holders of all the bonds described in the original bill of Mason and others were so privy and assenting, except those now held by Carroll, and possibly that held by Goddard, one of the plaintiffs, being $500 only.

The effect of this assent and agreement to extend credit was, it is contended, to discharge the lien created by the deed, if any ever was created in their favor. The consent and agreement was good and valid; the proviso, that it should not impair the lien, was repugnant and void. The doing of that which they consented should be done, to wit, the sale of the property, necessarily effected what they desired should not be done, viz., the displacement of their lien. If not so, it might operate a great fraud on purchasers.

The bill is framed to enforce "an *equitable lien* growing out of a constructive trust" *under the deed to Myers*. It is not brought to enforce any rights secured to the plaintiffs under the *deed to Finch*, or under Finch's mortgage to Myers.

The holders of the bonds, near $400,000 in amount, issued under the deed to Robie and others, a large portion of which are held by Churchill and others, trustees, claim priority of right to those who claim under the Finch deeds—and hence the necessity of determining the effect of the sale by Myers, upon the bonds assenting thereto. If their assent to that sale did displace their lien, the Robie bonds would have priority to those issued to Myers, and admitted to be valid and covered by the mortgage,—and would displace the bonds alleged to be held by Foster, amounting to $5,000, and the bond alleged to be held by Dyer, $1,000, leaving only the bonds now held by Carroll, ($6,000,) and that alleged to be held by Goddard, if found valid upon due presentment of it, to be first provided for. If this should be the result reached, viz.: that the privity of the holders

of the bonds represented in the bill as belonging to Foster and Dyer, plaintiffs, to the sale by Myers, displaced *their* lien, then the Robie bonds would have priority to all except to those now held by Carroll and to that held by Goddard, if of the class, and to the Myers judgment, if that be held to have priority, as we contend it has.

The bonds have not yet expired; and to meet the arrears of interest on the bonds having priority, and to be first provided for, a sale of the road would probably not be necessary.

All the other bonds alleged in the bill to be held by other plaintiffs, which are not admitted by respondents to be obligatory on the company, would also be excluded from priority, even if they were proved to be valid, as they were all held by persons assenting to the proceedings of Myers in the sale.

Having determined these questions of priorities, and the rights of the several classes having liens, it can then be ascertained in what mode their several claims can be best protected or satisfied. It is believed that no decree of sale will be necessary or proper, until these questions are determined, and then only, upon condition that, within a reasonable time fixed by the Court, the liens of the plaintiffs are not extinguished.

The opinion of the Court was drawn by

APPLETON, J.—The rights and duties of the parties to this litigation can be best understood and most satisfactorily determined, by recurring to and examining, in the order of their execution, the several deeds and contracts in and by virtue of which they have their origin.

On the 5th August, 1850, John G. Myers & Co., entered into a contract with the York and Cumberland Railroad Company for the construction and equipment of their road, which was further modified, in writing, on 6th Feb., 1851, when said Myers became the sole contracting party with the corporation.

On the same 6th Feb., 1851, the defendants made and executed to Myers a deed, upon the construction and effect of which the rights in controversy mainly depend.

(1.) In the *matter of the bondholders of the York and Cumberland Railroad Co.*, 50 Maine, 552, it was determined that the conveyance to Myers was not a deed in trust, within the meaning of R. S., 1857, c. 51, § 53, but that it was a mortgage, and that Myers thereby acquired only the rights and was subject only to the liabilities of a mortgagee.

It was further held that, upon and after a transfer by Myers of the bonds of the corporation or any portion of the same, that he held the legal title as mortgagee for his remaining interest, and in trust for those to whom he had transferred the bonds.

(2.) The consideration of the mortgage from the railroad company to Myers, is expressed to be "the sum of one dollar, paid by the said John G. Myers of Portland, in said county, * * * in consideration of the stipulations contained in the contract of said Myers," &c. The condition is "that, if said corporation, or their agents or assigns, pay to the said Myers or his assigns, who shall become the holder or holders thereof, the amounts specified in the several bonds and coupons for interest pertaining thereto, that shall be issued concurrently with these presents, and also as shall hereafter be issued by the directors of said corporation, according to, and to satisfy the terms of a contract existing between said corporation and said Myers, bearing date the fifth day of August, A. D. 1850, and as modified, in writing, on the sixth day of February, A. D. 1851, for the construction and equipment of said railroad, as by reference to said contract and the records of said company will fully appear; each of said bonds being numbered consecutively, from one to the sum total thereof, requisite for the completion of said road *according to said contract*, and each being issued only by the previous specific vote thereof of the said directors, at their meeting duly notified; and, if said payments shall be made as the same shall respectively become

due according to the terms of said bonds and coupons; *and, if said contract shall also be fully performed by said corporation, in all respects, then this deed shall be null and void thereafter, otherwise the same shall remain good and in force.*"

Myers had contracted to build the road. It was a matter of justice that he should be secured for the labor he might perform and the advances he might make. The bonds were to be issued to him in part payment of his contract. If issued, the contract would be discharged to the extent of the bonds received, and the indebtedness of the corporation would be upon their bonds and the contract, so far as it remained unpaid. If not issued, it would be upon the contract. In either event, the corporation would be debtors and should secure their liabilities. The language of the deed is clear and precise. It expressly secures in terms the construction contract. To hold that it was not thereby secured would be at war with the plain language of the deed and the just and obvious intentions of the parties. It would be to strike out an essential condition, which the parties have deliberately inserted in their deed.

(3.) While it is thus clear that the payment of the construction contract is secured by the mortgage of the corporation to Myers, the question arises, whether the bondholders have priority over the construction contract, in the payment of their bonds, or whether all the debts secured by the mortgage are to be paid *pari passu*. Were the corporation solvent, the inquiry would be of little moment. It is only because of its insolvency that it becomes material.

As the contract was made with, and the mortgage given to Myers, and, as the bonds were issued to him in reduction of his claims, he must be deemed as conusant of the terms and conditions of each and as assenting thereto. As long as the contract and bonds remain in his hands, the priority of right and the appropriation of payments are alike immaterial to both of the contracting parties. It is only when the bonds are transferred, that the question at once springs into importance.

The bonds, by the terms of the construction contract, are to be issued in part payment thereof. They are to be issued to Myers. Until so issued, the contract is secured by the mortgage. After they have been issued, the security of the mortgage attaches to them.

It was desirable, both to the corporation and to Myers, that the bonds issued should be saleable in the market. This was especially important to Myers, because he would thus be enabled, from their sale, the more readily to raise the funds necessary for the completion of his contract. The value of the bonds in the market would depend upon the probability of their payment, and this would be materially affected by the security pledged for such payment.

The contract was so made, the mortgage so written, the bonds so prepared, that they (the bonds) should be available in the market and readily command purchasers. By § 11, of the construction contract of February 6, 1851, the bonds issued by the railroad company are to be secured "by mortgage of all the real and personal property of said company," with certain exceptions, &c., and "freed of all other and all prior incumbrance or lien whatever, excepting existing bonds to indemnify the present liabilities of the directors, &c. And no other indebtedness shall be created by said company *to affect the credit of said bonds or prejudice their priority of payment, or acquire any concurrent lien* upon the property so mortgaged. The bond certificates recite that, "for the security of said promise, (in the bond,) the property of the road, real and personal, is pledged, *exclusively* and unincumbered by any previous indebtedness, in the manner set forth in the statement annexed hereto." By the annexed statement it appears that the issuing of bonds is restricted as therein stated, and that "the bonds so issued have a lien by mortgage, preceded by no other lien, upon the entire property, real and personal, of the company." "The bonds," according to the statement, are "secured by a mortgage of the entire property of the company out of Portland," and represent no credit separated from the tan-

gible and otherwise unincumbered property of the road." In the mortgage to Myers, in the last clause, provision is made for the distribution of the proceeds of the sale of the property mortgaged, among the bondholders only, "share and share alike."

It is apparent, by the acts and recitals of the railroad company, that it was their intention that the bonds should be secured by mortgage, and that they should have the precedence over all other claims; that there should neither be prior nor concurrent lien upon their estates, so as to diminish in any degree the acknowledged priority of the bondholders. That Myers must have so understood it cannot be doubted. Indeed, in his letter of August 7, 1856, as well as in the arrangements made when his mortgage was transferred to James Hayward, William Willis and James C. Churchill, this precedence of the bondholders and their right to the priority of payment is recognized.

The bonds are delivered to Myers. He sells them in the market. He sells them as they appear on inspection. He adopts what they say. He says they are secured as they are described to be. The representations on the face of the bond certificates are material and affect their price. It would be a fraud on those to whom Myers has transferred them, to permit him to claim as *against* the bondholders *a concurrent lien* for his construction contract.

The result is, that the contract and the bonds are secured by the mortgage to Myers, but, in marshalling the assets of the corporation arising from the mortgaged property, the bondholders are *first* to be paid, "share and share alike." The contract is next to be paid. This construction gives effect to all the words of the mortgage. It protects the just rights of all. It secures the bondholders to the full extent of all their claims. It secures Myers. The corporation have no cause of complaint. Justice is done to all.

(4.) It is insisted that the mortgage to Myers confers a

power to sell by reason of the following clause therein contained:—

"And it is further provided, and a condition of this deed, that the possession and uses of said premises shall at all times remain in the said grantors, so long as payment shall be made promptly and in good faith by said grantors, of said several bonds and of the coupons pertaining thereto as the same shall become due and payable, but upon failure thereof for the term of sixty days, *the holder of said bonds or of any one or more thereof, shall* and hereby is authorized and empowered to take full and complete possession of said premises and mortgaged property, real and personal, rights of way, and corporate franchise, without hindrance or process of law, for the common and joint benefit and the use of the holders of all the bonds so previously issued, and whether payment be then due or not, and in satisfaction thereof, and *such holders shall share and share alike in the disposition and sale of the same* for that purpose by public vendue, on reasonable notice given thereof, to the grantors aforesaid, first deducting from such proceeds all costs and expenses incident to such possession and sale."

It is in proof that Myers, on July 29, 1856, proceeded to sell whatever he might lawfully sell under and by virtue of his mortgage to one Finch, who, January 1, 1857, transferred whatever he acquired by Myers' deed to Hayward and others as trustees.

It is not pretended that the mortgage to Myers has been foreclosed. The legal estate was conveyed to him as mortgagee and not otherwise. As such he had no right to sell. The power to sell, if given, is given by the clause under consideration.

The power of sale in a mortgage, when carried into effect, defeats the right of redemption. Its existence is not to be inferred unless the inference is unavoidable. The language giving it should be clear. Its meaning should be obvious. The power should be such that it can be carried into effect. The persons, by whom it is to be done, should be named.

In the case before us, the alleged power, if conferred upon any one, is conferred upon *any* bondholder as such. The power is given to no one specifically. The bondholders are perpetually changing. Such a power is void from its very indefiniteness. There is no appointee. If one may sell, so may another. If one wishes to sell and the others do not, the exercise of the power of sale cannot be prevented. The sale may be made, though against the interests and notwithstanding the protestations of all but the bondholder selling. The power to sell, if incident to the ownership of a bond, will pass by its transmission. No provision is made for, no restriction is imposed upon the exercise of this power. Each may sell. The number of persons thus having the right to dispose of the estates mortgaged is coextensive with that of the bondholders. The bondholders may severally proceed to sell, but, if at the same time and at different places and upon different terms and conditions, who, of the bondholders thus selling, will confer a valid title upon the purchaser?

The power of sale is not given in terms. It is not necessarily to be implied from the terms of the mortgage. A power, such as must be assumed to exist, to give validity to the sale, would be void from the indefiniteness of the persons upon whom it is conferred and from the impossibility of its execution.

No estate whatsoever is conveyed to the bondholders as such. The fee is conveyed to Myers in mortgage. The bondholders, as such, have no estate in the possession of which they can enter or which they can sell. It is in Myers as mortgagee.

(5.) The sale of the corporate franchise and of the mortgaged estate of the corporation being invalid, it becomes necessary to determine where the legal title of the mortgage may be, and whether the estate, in those in whom the title is now vested, is to be charged with the trust arising from the transferrence of the bonds, as we have seen it would be while it remained in Myers.

On the 1st Jan., 1857, Myers assigned and transferred, by deed, to James Hayward, William Willis, and James C. Churchill, all his "right, title and interest in and to the following described deeds, bonds, judgments, debts and claims, viz.:—To a mortgage made by said corporation to me, bearing date Jan. 6, 1851, *they assuming my responsibilities and liabilities by virtue thereof to others.* Also a judgment recovered by me against said corporation," &c., &c. The judgment assigned was for damages for the non-fulfilment of the contract referred to in the mortgage.

By this conveyance the mortgage and the contract thereby secured passed from Myers to the assignees therein named.

The bondholders, it has been seen, were protected by the mortgage. The mortgagee, after the assignment of his bonds to the holders thereof, held the legal estate in trust for their benefit. The mortgage has not been discharged. Its terms are clear. The assignees are affected with notice thereof. They took the legal title with full notice of all subsisting equities, and they cannot be permitted to hold it discharged from existing trusts. In accordance with these views was the decision of this Court in *Moore* v. *Ware*, 38 Maine, 496, where it was held that, where one or more notes are given, secured by a mortgage of the maker, the mortgagee holds the estate, when one of the notes is transferred, in trust for its security; and that the mortgage is in itself notice to the assignee of the trusts chargeable upon it, notwithstanding he may not know to whom the note may have been assigned.

It results, therefore, that, as between the bondholders and these assignees of the mortgage, they hold the estate as it was held by Myers, their assignor, and subject to the same trusts as when in his hands.

(6.) As the mortgage to Myers is subsisting in the hands of the assignees, with the trust in favor of the bondholders undischarged, all who are thereby secured, are equally entitled to the security which the mortgage gives. The lien of all is to be protected. The assent of Woodman and others no way injuriously affected or diminished their rights.

A distinction, too, between the Herrick bonds and the Emery bonds has been suggested. All bonds issued under the construction contract are secured by the mortgage. They, if received under it, were received in payment and reduced the amount due upon it. So, too, the rights of *bona fide* holders are always to be regarded and enforced.

But the rights of the different bondholders are not now to be determined, for the facts which create a supposed distinction are not before us, and a settlement of these conflicting rights, if conflict there be, would be premature.

The facts can be ascertained by a master after due notice to all interested, and, if there be any dispute as to the law, a further hearing can be had on exceptions to the master's report.

(7.) On Nov. 1, 1851, the York & Cumberland Railroad Company deeded in trust and mortgage to Toppan Robie, John Anderson and Nathan Clifford, from whom the title has passed to Levi Morrill, Charles Q. Clapp and Edward H. Daveis, who are parties defendant.

As this is subsequent to the mortgage to Myers, the trustees acquired only the right of redeeming therefrom. Nothing has occurred by which the priority of the Myers mortgage has been impaired or the superior rights of the bondholders have been diminished.

(8.) On Jan. 1, 1857, the York & Cumberland Railroad Company deeded, in trust and mortgage, all its existing rights of franchise and property to James Hayward, William Willis and James C. Churchill. James Hayward declined the trust, and it became vested in Nathan L. Woodbury, who, with the other trustees, are parties defendant.

This conveyance is subsequent in time and is subject to the prior rights of the preceding mortgagees. It conveyed whatever the company then owned and no more, and gave the trustees the right of removing prior existing incumbrances.

The title thus acquired is distinct from and not in conflict with, but in subservience to that *of* the mortgage of Feb. 6, 1851, which they acquired by assignment from Myers.

It will be perceived that the two mortgages in trust, of the

railroad company, are of no material importance in the view we have taken of the cause, but the result of this litigation, so far as we are now called upon to decide, must depend upon the mortgage to Myers.

(9.) The bill in its original inception was by Smith, Mason and others, representing the holders of the Herrick and Emery bonds. A part of the complainants claim to discontinue the bill on their part. The respondents might have insisted upon costs, before the discontinuance was permitted, but as they have not so done, no reason is perceived against allowing the discontinuance as prayed for.

(10.) It seems, that some of the complainants transferred the bonds, by virtue of the ownership of which they are entitled to prosecute, to John B. Carroll, by whom the supplemental bill is filed. A supplemental bill, when properly before the Court, is an addition to the original bill and becomes a part of it, so that the whole may be taken as an amended bill. *Gillet* v. *Hall*, 13 Conn., 456. In *Fellowes* v. *Deere*, 3 Beavan, 353, liberty was given to amend by striking out the names of several co-plaintiffs and suing by one in behalf of others similarly situated, security being given for costs. "When the complainant sells his whole right in the suit, or it becomes vested in another by operation of law," says WALWORTH, Ch., in *Mills* v. *Hoag*, 7 Paige, 18, "whether before or after a decision, if there be any further litigation in the case, it cannot be carried on in the name of the original complainant, by the party who has acquired the right. And, if the complainant's interest is determined by a voluntary assignment, the assignee must make himself a party to the suit, by an original bill in the nature of a supplemental bill, before he can be permitted to proceed. Mitford's Pl., 65; *Binks* v. *Binks*, 2 Bligh, 593." The same principle was affirmed in *Van Hoak* v. *Throckmorton*, 8 Paige, 33.

(11.) The bill is prosecuted by Carroll, as one of the bondholders, secured by the Myers mortgage for himself, and all others entitled to the protection of that mortgage.

That, in certain cases, a suit may be instituted by one for himself and others in like condition, seems well determined by all the authorities. "It is well settled," remarks SARGENT, J., in *March* v. *Eastern R. R. Co.*, 40 N. H., 566, "that where the parties interested are numerous and the suit is for an object common to them all, some of the body may maintain a bill in behalf of themselves and others having a like interest, but, in all cases where one or a few individuals of a large number institute a suit in behalf of themselves and others, they must so describe themselves in the bill." In *Taylor* v. *Salmon*, 4 M. & K., 142, Lord COTTENHAM says, the rule "that, where parties are numerous, and the suit is for an object common to them all, some of the body may maintain a bill in behalf of themselves and others, is established." In *Wallworth* v. *Hall*, 4 M. & C., 649, the same learned Chancellor observes, that "where it becomes impossible to work out justice if the rule requiring all persons interested to be parties were not departed from, it must be relaxed rather than be allowed to stand as an obstruction to justice." The bondholders, secured by the mortgage to Myers, are numerous. They constitute a fluctuating body. They are unknown to each other. The bondholders of to-day may cease to be such to-morrow. No one can compel another to act. Yet their interest is homogeneous. The right of one bondholder secured is the right of all. If the bill cannot be maintained by one or more for all, the plaintiff is remediless. If maintained, the rights of all can be preserved, protected and enforced. Where, as in this case, one sues for many, the Court will carefully guard the rights of the absent. The general rule is, that all parties interested in the subject of the suit, shall be parties to the record. "Then," observes the Vice Chancellor, Sir JOHN LEACH, in *Long* v. *Yonge*, 2 Sim., 369, "there are certain exceptions. One exception is, where several persons having distinct rights against a common fund, or against one individual are allowed, a few of them, on behalf of themselves and the rest, to file a bill for the purpose of

prosecuting their mutual rights against the common fund, or the individual liable to their demand." Story on Eq. Plead., § 111, and the following sections.

"The rule is well established," remarks NELSON, J., in *Smith* v. *Swomestedt*, 16 How. U. S., 288, "that, where the parties are numerous and the suit for an object common to them all, some of the parties may maintain a bill in behalf of themselves and of the others."

But all parties are desirous of an early decision as to the various matters in controversy, and have waived all questions as to the sufficiency of parties or the structure of the bill as first drawn, or as subsequently amended.

The bill prays that the trustees now holding the Myers mortgage may be compelled to account, and that the mortgaged estate may be sold and the proceeds distributed among the various creditors of the company in the order of their priority.

The bondholders, the *cestui que trusts*, have a right to demand an account of the funds received by the trustees and to require their distribution.

The bondholders are entitled to the payment of their dues. They have a right to the proceeds of the estate pledged for their security. The trustees are bound to see that funds therefrom are realized as soon as it can be done with a due regard to the interests of all. To that end, the Myers mortgage should be foreclosed, and when this is done, the foreclosed estate should be sold and the proceeds distributed according to the legal rights of the different classes of creditors of the corporation.

This bill relates only to the bondholders secured by the mortgage to Myers, and is to enforce their claims. It would be premature to discuss the effect of the other conveyances to which our attention has been called, except so far as they have a bearing upon the matters now presented for adjudication.

A master must be appointed, whose duty it will be to state the accounts of the respondents—trustees of the Myers

mortgage,—to determine how many bonds have been issued by the corporation which are secured thereby, &c., &c., &c.

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

The case was accordingly sent to a master to determine, (*inter alia*,)

1. The number and amount of bonds issued by the railroad company under the construction contract and mortgage, and those outstanding; to whom the same were due; the amount thereof including interest or coupons for interest; and to receive and return the same into Court with his report.

2. How much was due upon the construction contract for which no bonds had been issued, and which was still secured by the mortgage; and to whom the same was due.

The case came again before the Law Court (July term, 1864,) on exceptions to the master's report.

No copy of the exceptions came into the hands of the reporter; but it seems that the respondents excepted to the allowance by the master of the "Herrick bonds;" and that Mr. F. O. J. Smith excepted to the refusal of the master to pass upon the validity of the second and third mortgages of the corporation, referred to in the supplemental bill, and the answer; and to his refusal to allow certain amounts paid by said Smith as indorser of company notes, the avails of which were applied in payment of the construction contract; and the claim of said Smith to be the equitable assignee of one-fifth of the judgment recovered by Myers against the company, for non-fulfilment of the construction contract.

The facts upon which the exceptions are founded are sufficiently stated in the opinion.

F. O. J. Smith, pro se.

[His argument upon his first and third exceptions is omitted, as the Court held that these points were not open to him in this case.]

In support of his second exception, he says:—

The notes and judgment already paid by Smith, each being parts of the construction cost of the road, went to the reduction of the amount payable to Myers in bonds. By the terms of the contract and mortgage, payments were to be made in cash and bonds, and all the construction contract unpaid was to be secured by mortgage. The notes in question were given by the company in lieu of cash payments, and were never paid by the company. Hence, these amounts of the construction contract were never paid, and the equity of the mortgage security follows these notes for payment, on the same basis as it follows the Herrick bonds, whether specifically named or not in the mortgage, and constitutes a part of the construction debt of the contract, for which the mortgage was made expressly security. The ruling of the Court on the Herrick bonds in principle manifestly covers these unpaid notes, indorsed by the directors.

Evans, for the respondents.

The opinion of the Court was drawn by

APPLETON, C. J.—On the 5th of August, 1850, John G. Myers entered into a contract with the York & Cumberland Railroad Company for the construction of their railroad. This contract was modified by the parties on the 6th Feb., 1851, on which day the railroad company gave said Myers a mortgage of all their real and personal estate, to secure the performance of this contract, and the payment of bonds issued in pursuance of its provisions.

When this case was under consideration at the hearing on bill, answer and proof, it was held that the bonds issued under the terms of the construction contract had priority of security over the contract—but that both were secured by the mortgage.

This bill is brought by the bondholders to enforce the payment of their debts by a foreclosure of the mortgage to Myers, and a sale of the mortgaged property.

(1.) Exception is taken to that part of the master's report by which the Herrick bonds, so called, were allowed.

The facts in relation thereto, and the conclusion of the master upon those facts, are thus stated by him in his report.

"The whole number of this class of bonds known by the designation of the Herrick bonds, which have been presented and filed or claimed before me, is twenty-four, amounting in all to the sum of nineteen thousand and five hundred dollars and interest, so far as interest may now be due thereon.

"From the records and other evidence, which have been presented to me, I am fully satisfied that the same were issued without any authority existing in the officers who issued them by virtue of a specific vote previously passed or existing at the time of their issue, and I am equally well satisfied that they were issued in payment of and were allowed towards liabilities of the company, which accrued under the construction contract with John G. Myers; and that said company, by their subsequent votes and action, have fully ratified and adopted the acts of the officers, who issued the said bonds, and have thus made the company liable for the same and the interest due thereon. They are in fact the bonds of the company, issued in payment of their indebtedness to Myers under the construction contract, and were allowed thereon. * * * I do further determine the said bonds, called the Herrick bonds, are secured by the mortgage from said company to said John G. Myers."

That part of the condition of the mortgage which is descriptive of the bonds to be secured, is in these words, "each of these said bonds numbered consecutively from one to the sum total thereof, requisite for the completion of said road according to said contract, and each being issued only by the previous specific vote of the said directors, at their meeting duly notified."

The mortgage referred to secures to Myers the construction contract and the bonds issued and delivered him in part payment of the same.

The Herrick bonds answer all the requirements of this

condition, save that they were issued without "the previous specific vote of the directors." Instead of which, their validity depends on their subsequent adoption and ratification.

These bonds, though improvidently issued, were received by Myers in reduction of the amount due upon the construction contract. The York and Cumberland Railroad Co. have received the same benefit from them as if they had been issued in pursuance of a previous vote of the directors. By its subsequent action, the company has approved and ratified the unauthorized acts of its officers. And well it might, for it has received all the benefit it could have ever hoped to receive from these bonds. They have liquidated the indebtedness arising under the construction contract and they could have done no more, howsoever regularly issued. The company cannot, therefore, except to any irregularity on the part of its officers in issuing these bonds.

Nor can Myers take exception thereto. He has credited their amount on the construction contract. He has transferred them to the holders as valid, and has received an adequate consideration therefor. It is not for him to allege that he has been guilty of fraud in their transfer.

The trustees of the York and Cumberland Railroad Co. are the assignees of Myers. They succeed to his rights, and are in the same condition as their assignor.

The holders of the bonds previously issued, and to which there are no objection, have no right to except. The Herrick bonds, if regularly issued, would have stood on an equality with the previous bonds of the company. They equally reduced the sum due on the construction contract, and are equally entitled to the protection of the mortgage given to Myers. The irregularity in their issue was one the company might waive, and, having waived it, they cannot now take advantage of it. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* The mortgage was given to secure the construction contract and bonds issued in payment thereof. These bonds were so issued. They answer the description in the mortgage in all respects save one,

and, so far as relates to that, the company are estopped from relying upon it, if it was ever available. They are within the equity of the mortgage. Neither the other bondholders nor the mortgagers can interpose any valid objection to their allowance.

(2.) The master disallowed certain judgments against Mr. Smith, which he paid as indorser of certain notes for the York & Cumberland Railroad Company, the proceeds of which he claimed had been applied to the reduction of the construction contract, though, that they were so applied does not seem to have been in proof.

But if Mr. Smith indorsed for the company, he must look to them for the remuneration to which he is equitably entitled. The mortgage secures only the construction contract and the bonds issued in payment thereof. It is no security to every laborer, whom Myers may have employed, nor to every capitalist, who may have advanced him money towards the completion of the contract. Nor is it a security to those who may have loaned their credit or their capital to the company, though they may have been applied to the construction of the road. If the proceeds of the notes indorsed were paid to Myers, they, to that extent, reduced the amount on his contract, and can only confer rights in favor of Smith against the railroad corporation.

(3.) It is admitted by the parties that "the deeds and contracts so filed, purporting to be the deeds and contracts of said railroad company, were executed by the proper officers of said company, duly authorized thereto by votes of the directors of said company, at meetings duly held for that purpose." This agreement renders it unnecessary to consider the validity of the second and third mortgages and the bonds secured thereby.

(4.) The legal title to the judgment, *Myers* v. *York & Cumberland Railroad Company*, is in the defendant trustees. If Mr. Smith is the owner in part of that judgment, it is as equitable assignee or as having an equitable lien. Whether his title is one which a court of equity would sus-

tain, is not a question now properly before us. The bill is by the holders of the first mortgage bonds and to enforce their payment. It sets forth no such claim on his part as to this, and, if it had, a demurrer might have been properly filed on the ground of multifariousness. Neither by bill nor answer is the title of Mr. Smith to a portion of this judgment presented for our consideration. The bill contains no prayer for any decree in relation thereto, nor could one properly be made.

If it were necessary for the decision of the cause, it would seem that the report of the master is conclusive as to facts. "When the Court refers it to a master to examine and report as to the existence or non-existence of a fact or as to any other matter," remarks WALWORTH, Ch., in the matter of *Hemiup*, 3 Paige, 307, "it is his duty to draw the conclusions from the evidence produced before him, and to report that conclusion *only*. And it is irregular and improper for him to set forth the evidence in his report, without the *special* direction of the Court. * * He must himself draw all the conclusions of fact as in a special verdict, leaving the question of law alone for the decision of the Court."

Exceptions to the report of the master overruled.

Report of master accepted.

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

JOSEPH C. NOYES, *Receiver*, *versus* JOHN P. RICH.

In a suit in equity in its nature *in rem*, when a receiver is appointed, the right to the custody of the property *in controversy* vests in him immediately upon the filing of his bond.

Mortgagees are not entitled to the rents and profits of the estate received by the mortgager, while in possession.

The receiver, appointed in a suit in equity to foreclose a mortgage of a railroad, cannot maintain a suit to recover earnings of the road accruing before his appointment.

UPON FACTS AGREED. ASSUMPSIT to recover certain moneys received by the defendant, as earnings of the York & Cumberland Railroad, while he was superintendent thereof.

The facts are sufficiently stated in the opinion.

Barnes, for plaintiff.

Fox, for defendant.

The opinion of the Court was drawn by

DAVIS, J.—In the suit in equity of *Mason & als.* v. *Y. & C. Railroad Co. & als.*, *ante p.* 80, the plaintiff was appointed a receiver, and was ordered to take certain property of the corporation into his possession. The defendant had possession at the time, as superintendent of the railroad; and he also had money in his hands amounting to about seven hundred dollars, which had accrued by operating the road. This he refused to deliver to the receiver; and this suit is brought to recover it.

In a suit in equity, in its nature *in rem*, when a receiver is appointed, the right to the *custody* of the *property in controversy* vests in him immediately upon the filing of his bond. *Albany Bank* v. *Schermerhorn*, 1 Clark's Ch., 297. And he may, by order of Court, bring a suit for it in his own name. *Green* v. *Bostwick*, 1 Sandf. Ch., 185.

But this right of custody extends only to the property which is the subject matter of the litigation. Under a general creditor's bill, to recover the entire property of a debtor, the receiver is entitled to the whole of such property. *Chipman* v. *Sabbaton*, 7 Paige, 47. So assignees in bankruptcy, or insolvency, take the whole estate. So would receivers of banks, under our statute, have the right to the custody of the entire corporate property, of whatever kind.

The suit of Mason and others is not a general creditor's bill, though analogous to one. They bring it, not in behalf of *all the creditors* of the corporation, but in behalf of *certain specified creditors*. Nor does it seek to reach *all the*

property of the corporation, but *certain specified property*, mortgaged in trust for their benefit, by a deed to Myers, dated Feb. 6, 1851. The right of the plaintiffs cannot extend beyond the property mortgaged; and the right of the receiver must necessarily have the same limitation.

There are certain *defendants* in the equity suit, trustees under a subsequent mortgage, who have *other conveyances* from the railroad company. Whether *they* can hold the money in the hands of the defendant, in any adjustment or controversy with him, it is immaterial now to inquire.

The mortgage, of which Mason and others claim the benefit, was afterwards assigned by Myers, by his deed to the trustees referred to, and to other parties who also deeded to said trustees. But the assignees did not take possession of the railroad, under the mortgage, for condition broken. Smith and Myers undertook to take possession; but it was after the mortgage had been assigned, and so no rights were affected by it.

It will hardly be contended that, while mortgagers remain in possession, they can be compelled to pay the rents and profits of the property to the mortgagees. *Boston Bank* v. *Reed*, 8 Pick., 459; *Mayo* v. *Fletcher*, 14 Pick., 525. And yet, that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage, until it was done by the receiver, in March, 1860. The money in the defendant's hands accrued from the earnings of the road prior to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject matter of the suit in equity; and the receiver was not entitled to it. *Plaintiff nonsuit.*

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

WILLIAM MITCHELL *versus* THE CITY OF ROCKLAND.*

The cases *Mitchell* v. *Rockland*, 41 Maine, 363, and 45 Maine, 504, reaffirmed.

The consent of the owners of a vessel to the appropriation of it for a hospital, by the health officers of a town, does not render the town liable for any injuries caused by the negligence of such officers, while they are in possession of it.

Neither the relation of master and servant, nor of principal and agent exists between a town and its health or police officers; nor is the town liable for their unlawful or negligent acts.

As a general rule, municipal corporations are not liable to a suit, except when the right of action is given by statute.

It seems that a city government cannot legally *ratify* the negligent, careless, or tortious acts of their officers, knowing them to be such, so as to make the city liable therefor.

The payment of a bill by a city government to one employed by the health officers is no evidence that the city government had knowledge that the services, for which the payment is made, were so negligently performed as to injure others; or that the negligent acts of such *employee* were approved or sanctioned.

ON EXCEPTIONS, to the ruling of RICE, J., and on MOTION TO SET ASIDE THE VERDICT, as being against evidence.

The evidence tended to show that the defendants' health officers took the plaintiff's vessel, by consent of his agent, for a hospital for a man sick with small pox; that the sick man died; that, after his death, the health officers sent one *Sweetland* to fumigate the vessel; that he so negligently performed his duties, that the vessel was set on fire and injured; and that the city government of the defendants paid a bill to *Sweetland* which contained a charge of two dollars for cleansing the vessel.

The verdict was for the plaintiff, and the jury found specially that the defendants had ratified and adopted the acts of the health officers and their servants in taking care

* This case (argued in 1862,) and the following cases of earlier date than the preceding cases, came into the hands of the present Reporter since the latter were printed.

of the sick man on board the plaintiff's vessel and in smoking and purifying her.

The defendants excepted to certain instructions of the presiding Judge, which are stated in the opinion.

Peter Thacher, for the defendants.

A. P. Gould, for the plaintiff.

The opinion of the Court was drawn by

APPLETON, C. J.—When this case first came before the Court, in 41 Maine, 363, it was then held that health officers are not authorized to take vessels, in quarantine, into their own possession and control, to the exclusion of the owner or of those whom he has put in charge—and that when such unauthorized possession and control are taken by the health officers or their servants, the town is not responsible for their acts. In 45 Maine, 505, it was held that the statute (R. S., 1841, c. 21,) "gave no authority to the selectmen or the health committee, who, by § 26, are clothed with the same authority, to take possession of, to control or appropriate a vessel, or any portion of the same, as a hospital;" and the principles of law established in the first decision between these parties were fully affirmed.

When this cause was last tried, the jury were instructed that, "the law does not authorize a health officer to assume the possession of a vessel, her cabin, or any part thereof to use as a hospital to cure a malignant or infectious disease, and, if he do assume such possession for such purpose, and any accident which occasions injury to a vessel or cargo happen *through the want of ordinary care* of such health officer or his servant, the city is not liable for such loss, *unless it* (the possession) *be by the consent of those having the legal control of the vessel.*"

The amount of this instruction is, that if consent be given by the owner, the town is liable, when it would not be liable, had no consent been given. That is, the consent being given, the liability of the town follows as a consequence of such consent.

The consent of the owners undoubtedly relieves the health officer from any liability arising from an interference with the vessel, which otherwise would have been unlawful. The town is not made liable because the owner gave such assent. This imposes no new liabilities upon the town nor creates any new obligations on its part. The owner allows a health officer to do what otherwise he could not legally do. It is a matter between them. If the statute gives the health officer no right to assume the control of a vessel and convert it into a hospital, but the owner does give such consent, then the so doing is authorized by the owner and not by the statute. The action of the health officer is by the permission of the owner, and not under the law, nor by any authority of the town. In case of negligence, on the part of such officer, and a loss arising therefrom, if the possession is by consent of the owners, the negligence of the officer must be at their risk. His possession and control are by virtue of their consent, and not by virtue of official right. The consequences of such possession, and of negligence while in such possession, must fall upon the person permitting it, and not upon a corporation, which neither directed, authorized, nor consented to such possession. The remedies, the party suffering may have, are against the person whose negligence caused the injury, not against the corporation by whose vote such person was elected.

In fine, if the health officer, who has no right to convert a ship in quarantine, into a hospital, without consent of the owners, does it by their consent, such consent of the owners to his so doing cannot give any new right or claim against the town, as a result and consequence of such consent. The person thus occupying by consent may be liable to the person consenting, for the consequences of his negligence during such occupation. The town is not a guarantor against the carelessness or negligence of such occupant nor liable to indemnify against losses arising therefrom.

The Court further instructed the jury, "that if the health committee, with the consent of those having the legal con-

trol of the vessel as contemplated, (i. e., if the health officer did assume possession and control through Sweetland, of so much of the cabin as was necessary to take care of the sick man and to prevent the spreading of small pox,) did take control of the cabin, *then* the city would be liable for their acts and the acts of Sweetland, if he acted under their directions and as their servant and agent in what he did in relation to the vessel."

And "that, before the city could be held responsible, they must be satisfied that the acts complained of were done by the authority of a health committee, who had been duly elected and sworn into office, *or*, that the acts complained of had been ratified by the city, with a full knowledge of all the facts in relation thereto."

The acts complained of were the negligent and careless acts of Sweetland, who was in the employ of the board of health of the defendant city. That he was authorized to be careless or negligent is not pretended, and, if pretended, is not proved. Nor is there any proof that he was an unsuitable person to perform the services he was employed to render.

By the first instruction, just referred to, and by the first branch of the alternative instruction, a town or city may be made liable for acts it never authorized, — for the illegal and tortious acts of its officers and their servants, — as well as for the results of their carelessness and negligence.

The town or city chooses its health and police officers in pursuance of the requirements of a statute which prescribes their duties to the public. Neither the relation of master and servant, nor that of principal and agent exists between them and the municipal corporation to which they owe their election. They are appointed for public purposes. An officer may be liable for negligent or illegal acts to the person injured thereby. But is the town or city a warrantor or guarantor against all the torts or neglects of its police or its health officers? If so, then is the town a surety to the public for every person it may elect, that he will per-

form the duties incumbent upon him, and is responsible in all cases of neglect for his non-performance or his careless performance of such duties. Nor is this all, for, according to the instructions referred to, a town or city is made equally responsible for the good conduct of all persons employed by its officers, and liable for their misfeasances or non-feasances.

It was decided in *Walcott* v. *Swamscott*, 1 Allen, 101, "that a town is not liable for an injury sustained by reason of the negligence of a laborer employed by one of its highway surveyors, to aid him in the performance of the duties of his office." "It was held, in *Hafford* v. *New Bedford*, 16 Gray," remarks BIGELOW, C. J., in the case just rereferred to, "that, where a municipal corporation elects or appoints an officer, in obedience to an Act of the Legislature, to perform a public service, in which the town has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law, for the general welfare of its inhabitants or of the community, such officer cannot be regarded as the servant or agent of the town, for whose negligence or want of skill in the performance of his duties a town or city can be held liable. To the acts and conduct of an officer so appointed or elected, the maxim *respondeat superior* is not applicable." So in *Buttrick* v. *Lowell*, 1 Allen, 172, it was held that a city is not liable for an assault and battery committed by its police officers, even though it was done in an attempt to enforce an ordinance of the city. "Police officers," remarks BIGELOW, C. J., "can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the Legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts." The same reasoning is equally applicable to the case of health officers and their doings. "It is not conceivable," remarks the Court, in *Fox* v. *Northern Liberties*, 3 W. & S., 103, "how

blame can be fastened upon a municipal corporation because its officer, who is appointed or elected for the purpose of causing to be observed and carried into effect the ordinances duly passed by the corporation for its police, either mistakenly or wilfully, under a color of his office, commits a trespass."

As a general rule, municipal corporations are not liable to a suit, except when the right of action is given by statute. They are usually termed "*quasi* corporations"—and are distinguished in many respects from proper aggregate corporations. *Riddle* v. *Proprietors of Locks and Canals*, 7 Mass., 169. "*Quasi* corporations," observe the Court, in *Mower* v. *Leicester*, 9 Mass., 247, "created by the Legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute." So in *Adams* v. *Wiscasset Bank*, 1 Greenl., 361, MELLEN, C. J., says, "no private action, unless given by statute, lies against *quasi* corporations for a breach of duty." As an illustration of this, it is well settled that towns are liable for defects in their highways by statute only, and not by the common law. Hence, unless a case is brought within the scope of the statutory provisions, it cannot be maintained. *Farnum* v. *Concord*, 2 N. H., 392; *Baxter* v. *Winooski Turnpike*, 27 Vt., 123.

The principle seems fully established, that a town is not liable to an individual for its neglect or omission to perform, or its negligent performance of those duties, which are imposed upon all towns, without their corporate assent and for public purposes, unless the right of action be conferred by statute. Thus, in *Bigelow* v. *Randolph*, 14 Gray, 541, it is held, that a town, which has assumed the duties of school districts, is not liable for an injury sustained by a scholar, attending the public school, from a dangerous excavation in the school yard, owing to the negligence of the town officers, on the ground, as stated by METCALF, J., "that a private action cannot be maintained against a town, or other *quasi*

corporation, for a neglect of corporate duty, unless such action be given by statute." So in *Eastman* v. *Meredith*, 36 N. H., 284, when a building, erected by a town, for a town house, was so imperfectly constructed that the flooring gave way at the annual town meeting, and a legal voter, in attendance on the meeting, received thereby bodily injury, it was held that he could not maintain an action against the town, to recover damages for the injury. In this case, the distinction between aggregate corporations and *quasi* corporations, as towns, cities, counties, &c., was taken, and the law, in reference to their respective obligations and liabilities, was thoroughly examined and very learnedly discussed by Mr. Ch. Jus. PERLEY. The general views on this subject, already stated, have been recently considered and deliberately affirmed in this State, in *Brown* v. *South Kennebec Agricultural Society*, 47 Maine, 275.

If there has been a neglect of a public corporate duty, for which no right of action has been provided by statute for the party aggrieved, this suit cannot be maintained. If there has been no neglect of duty, the plaintiff has no ground of complaint.

But it is argued, that whether the instructions, already considered, are correct or not, the verdict may be sustained, on the ground of a subsequent ratification of the careless acts of the health officers of the defendant city or of their servants, by the action of the city government, in the payment of Sweetland's bill.

The instruction, on this point, requires a ratification, with a full knowledge of all the negligent or tortious acts to be ratified, — in other words, an assumption by the city of the liability of the health officers and their servants arising from their wrong doings, or their negligent doings. This is materially different from a ratification of an act of controverted legality, in which the pecuniary interests of the city are involved, and where its rights are in question. In the present case, the city, before its alleged ratification, had nothing at issue, — no interests at stake.

It may well be doubted, whether the city government could legally ratify the negligent, careless, or tortious acts of their officers, knowing them to be such, so as to make the city liable therefor. In *Vincent* v. *Nantucket*, 12 Cush., 103, it was decided that a town was not bound, even by its corporate vote, to pay the expenses of a field driver, in defending a suit brought for taking up and impounding cattle, running at large contrary to law; such agreement not being within the scope of a town's corporate powers. "In relation to field drivers," observes MERRICK, J., "the whole corporate power of a town is exercised and exhausted in their election. It has afterwards no guardianship, control, or authority over them, in respect to their observance or neglect of the single specific duty, which the law imposes upon them. It is not responsible for their fidelity; and it cannot gain by their diligence, or lose by their official inattention, or carelessness." There is no authority given to the town, to ratify the official negligence of its officers. A distinction may be taken between the ratification of an unauthorized act by an individual, who is personally responsible for the consequences of his action, and a ratification by the officers of a municipal corporation, the effect of which would be to impose burdens more or less onerous upon their constituents.

But, assuming that the negligent acts of the health officers or their servants were susceptible of ratification, there is no proof from which a ratification, with *a knowledge of the acts to be ratified*, can be reasonably inferred. The act relied upon, as showing a ratification, is the payment of Sweetland's bill, in which is found a charge, "to cleansing the vessel $2,00," from which it is insisted, that the inference may be legitimately drawn, that all the acts of Sweetland, however negligent or tortious, in the process of "cleansing," were thereby sanctioned and approved.

This charge shows nothing from which negligence or wrongdoing can be inferred. It affords no information of the manner in which the work was done, still less that it

was done negligently or carelessly. A bill of two dollars for cleansing a vessel can hardly be deemed notice that the work charged was so negligently and recklessly performed as to render the individual performing the same liable for a thousand times that sum. Nor can any one believe it would have been paid if it had been supposed that the effect of payment would have been to impose, upon the corporation making such payment, this enormous liability.

There is nothing but the fact of payment, indicating that the defendants had knowledge of this misfeasance of Sweetland. The evidence is entirely the reverse. They knew nothing of his neglect or carelessness. He denied that he had been guilty of any on the trial. There is no proof tending to show it, which was disclosed to the defendants.

The inference, then, of a ratification of all acts done, whether illy, negligently or tortiously done, from the fact of payment, was unauthorized. The premises are too narrow to support so broad a conclusion.

Nor are there wanting numerous authorities in support of this position. In *Perley* v. *Georgetown*, 7 Gray, 464, it was held, that a town was not liable for an arrest and imprisonment by its collector, for non-payment of taxes illegally included in his warrant and since abated, although it afterwards paid the collector's fees for serving the warrant. "In this case," remarks METCALF, J., "the town did not authorize its treasurer and collector to commit the plaintiff to prison for not paying a tax that had been abated, nor did it ratify the act of imprisonment by paying the collector's fees for commitment and the jailer's charges. If these payments had been made by an individual, it could not be pretended that he thereby made himself liable to the plaintiff in an action for false imprisonment. Nor can the payment thereof, by the town, render the town so liable. The payments may have been made and doubtless were made for a very different purpose than that of ratifying or justifying the acts of their collector." So in *Buttrick* v. *Lowell*, 1 Allen, 172, the action of a city, in authorizing and employing its

solicitor to appear and defend an action brought against its police officers for an assault committed by them, does not make the city liable to pay damages for the assault and battery. The Court, in *Boone* v. *Utica*, 2 Barb., 111, having come to the conclusion that the committee of the common council in undertaking to execute their duties had committed a trespass, continue thus:—"It is insisted, however, upon the authority of what is said in *Thayer* v. *Boston*, 19 Pick., 511, the common council affirmed and ratified the acts of the committee by defraying the expenses of repairs and of medical attendance, and provisions furnished the family. To this argument there are two answers. (1) There is no evidence that the common council, by any resolution or legal action, ever authorized the payment of their particular expenses, much less, that they did so with a full knowledge of the unlawful trespass which had been committed upon the rights of the plaintiff; and, if they did, it would not necessarily follow that they intended to adopt the trespass as their own. (2.) We would say, as the Court said in reply to a similar argument, in *Hodges* v. *Buffalo*, 2 Denio, 113, 'it cannot be maintained that a corporation can, by a subsequent ratification, make good an act of its agent, which it could not have empowered him to do.' This very case, from Pickering, is a direct authority for holding that the city is not liable, unless the common council had the power to authorize the doing of the act complained of."

Exceptions and motion sustained.

New trial granted.

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

WILLIAM HASKELL *versus* MONMOUTH FIRE INS. CO.*

Where a mortgagee assigns the mortgage and notes secured thereby, with a covenant that he "is lawfully seized in fee of said notes and has good right to sell the same," he is estopped from denying that they were not all due according to their tenor.

In such a case, a claim of the mortgagee upon an insurance company by an order from the mortgager, for money due in consequence of the destruction of the building upon the mortgaged property, and to be indorsed upon the mortgage notes, passes with the assignment of the mortgage.

If the mortgager obtains an assignment of the claim upon the insurance company, from such assignee, he is entitled to collect the same of the company, and payment by them to the mortgagee is no defence to an action therefor by the mortgager.

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

DEBT on a judgment; defence, payment.

The case is fully stated in the opinion.

A. P. Gould, for plaintiff.

Wales Hubbard, for defendants.

The opinion of the Court was drawn by

CUTTING, J.—This suit is brought upon a judgment recovered by the plaintiff against the defendants in this Court in 1854, which has been satisfied, whether in whole or in part is the question now presented.

It appears *that*, on December 30, 1847, one *Green Longfellow, jr.*, conveyed to the plaintiff one hundred acres of land with the buildings thereon standing, for which he received four notes for one hundred dollars each, payable in one, two, three and four years with interest, signed by the plaintiff and secured by his mortgage of the same premises, the first of which notes was subsequently paid by the plaintiff.

That, on September 21, 1849, the defendants insured the plaintiff's building for a period of four years in the sum of

* Argued at Law Term for 1863.

three hundred and fifty dollars, and *that* the property so insured was consumed by fire on November 23d, of the same year.

That, on December 4, 1849, *Longfellow* filed, with the defendants' secretary, a notice in writing of his holding the mortgage, stating the amount, which he claimed as equitably due thereon, and his intention to secure to himself the benefit of the provisions of the Act approved March 19, 1844.

That, on December 10, 1849, the plaintiff transmitted a paper to the defendants of the tenor following, viz.: "Gents., You are hereby requested to pay to Mr. Green Longfellow, jr., of Augusta, the sum of one hundred and fifty dollars, according to the rules and usages of your company, (the said amount being for a valuable consideration received by me of said *Longfellow*,) in part payment of my claim against said company on account of the buildings insured in policy numbered 1891, issued by said company Sept. 21, 1849, and destroyed by fire Nov. 23, 1849." This paper was sent to and received by the defendants from *Longfellow*, and detained by them until it was subsequently delivered to the plaintiff, without the consent of *Longfellow*. It was never paid by the company, or the amount specified therein indorsed on the notes secured by the mortgage.

It further appears *that Longfellow*, on Nov. 23, 1850, in consideration of three hundred dollars, paid by *Sarah H. Sylvester*, transferred to her all his right, title and interest in the mortgage and the three last described notes, and covenanted that "*he was lawfully seized in fee of said notes, and had good right to sell the same.*"

That, on March 31, 1852, *Sarah H. Sylvester*, in consideration of two hundred and ten dollars, paid by *Stephen Chadwick*, assigned to him the mortgage and the three notes last described therein, and covenanted that "*she was fully seized in fee of said notes, and had good right to sell and convey the same.*" The foregoing assignments were duly recorded.

In 1853, *Chadwick* notified the company that he was the

holder of the mortgage and the three notes, on which he says "*nothing has been paid*," and that he claims a lien on the sum insured, by virtue of the statute.

It moreover appears, *that* the company refused to pay the sum insured or any part thereof, but contested their legal liability. Whereupon the plaintiff commenced an action against them in 1851, on the policy, which resulted in a judgment against them in 1854, as already stated, for the sum of four hundred and nineteen dollars, damages, and costs of suit taxed at one hundred thirty-seven dollars and two cents. *That*, on March 14, 1854, just prior to the rendition of the judgment, *Stephen Chadwick*, the last assignee of the mortgage which had previously been foreclosed, "remised, released, and forever quitclaimed to *William Haskell*, (the plaintiff,) all his right, title, claim and interest in and unto all or any part of the insurance due, or which may be due to him from the *Monmouth Mutual Fire Insurance Company*, by virtue of said mortgage deed; provided, that nothing herein shall be so construed as to interfere or do away with any bargain made between said *Haskell* and said *Green Longfellow, jr.*, prior to this date, in relation to said insurance."

Without proceeding further, at present, in the summary of the documentary evidence, we may here pause to consider what interest *Chadwick* conveyed to the plaintiff. After the loss by fire, *Longfellow*, the mortgagee, assigned his mortgage and the three notes to *Sarah H. Sylvester*, with not only no indorsement of part payment, but with a covenant in substance that the whole amount of the notes were then due and payable according to their tenor. After this assignment *Longfellow* ceased to be mortgagee, and the lien on the amount due from the insurance company depended wholly on the mortgage, and could not be separated therefrom without the loss of its vitality. The claim of the mortgagee on the company and the notice thereof given, and other acts done in pursuance thereof, accompanied the mortgage and were transferred and accrued to the assignee.

It embraces the order or assent that the company might pay to the mortgagee the sum of one hundred and fifty dollars; and, inasmuch as that sum was not indorsed on the notes before their transfer, the assignor is estopped by his covenant, before cited, to deny that they were not all due according to their tenor.

Subsequently, the mortgage and notes were assigned by *Sylvester* to *Chadwick* with the like covenant, who released, as we have seen, to the plaintiff his lien claim on the company with the proviso before stated. The parol testimony introduced by the plaintiff as to his knowledge and consent of the introduction of the proviso we exclude. We can only judge as to its effect when considered in connection with the other documentary evidence. The proviso had relation to *any bargain* which had previously been made between the plaintiff and *Longfellow*. It is difficult to perceive any bargain made between those parties. It, at most, was only an assent that the company might pay to the then mortgagee a portion of the sum insured which was not paid and not indorsed upon the notes either before or after they were transferred. If it had been indorsed before the foreclosure had expired, and the title to property of more value than the sum secured had become absolute, it might have raised a consideration, and induced the plaintiff to have redeemed. It seems from the parol testimony that he manifested such a desire, but was met by *Chadwick* with a refusal unless he would pay to him the full amount of the notes.

But, were the company legally justified in paying to *Longfellow* the sum now claimed of them in this suit? If they were, this action cannot be maintained.

It has already appeared that, on March 14, 1854, *Chadwick*, then having the ostensible lien on the company, released the same to the plaintiff, so far as his interest was concerned. What was his interest at that time? That depends upon the effect to be given to the order introduced in defence, dated Feb. 17, 1854, of the following tenor:—

"Mr. President of the Monmouth Fire Insurance Com-

pany. Please pay Green Longfellow, jr., one hundred and fifty dollars and interest, it being the order William Haskell gave to Green Longfellow, jr., and the same which I reserved for him. "Stephen Chadwick."

This order is presented under peculiar circumstances. It purports to have been given some four weeks before *Chadwick's* release, yet therein no mention is made of it, and *Chadwick* himself, the defendant's witness, swears that it is not in his handwriting, and that he never saw it until produced at the trial in this case in 1858. The order was either ante-dated or a forgery, and is to be laid out of the case. The indorsement in pencil on one of the notes and also in writing on the mortgage under *Sarah H. Sylvester's* assignment, and not recorded with the assignment, when considered by the evidence produced, show turpitude and a gross attempt to defraud. The suspicions of the company, manifested by their requiring Longfellow's indemnifying bond before paying the money, it seems, were justly entertained. But such payment affords them no legal or equitable defence. Consequently they must be defaulted and judgment rendered against them for the amount wrongfully paid to *Longfellow* and interest on that sum since that time.

Defendants defaulted.

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

ELIAS BAILEY, *in Equity*, *versus* LOT MYRICK *& als.*

The taking possession of the mortgaged premises in the presence of two witnesses, for the purpose of foreclosure, under our statutes, does not necessarily impose upon the mortgagee the obligation to account for rents and profits.

If the mortgagee take such possession, and he, and those claiming under the mortgager, allow the latter to remain in possession and take the rents and profits, the mortgagee should not be held to account for them.

Bailey *v.* Myrick.

A master in chancery is not bound to report the evidence, but only the facts proved. He may examine the parties as to the receipt of rents and profits, or the possession of the estate, although one of them may be an administrator.

On Exceptions to the report of the master, by the defendants.

The case is fully stated in the opinion.

P. Thacher, for the defendants.

Ruggles, for the plaintiff.

The opinion of the Court was drawn by

Tenney, C. J.—It having been decided in this case, 50 Maine, 171, that the plaintiff is entitled to redeem the premises mortgaged by Nathan W. Sheldon to Lot Myrick and others, on Oct. 21, 1837, a master was appointed to ascertain certain facts and state an account, according to the principles declared in the opinion of the Court, and report the same.

The report of the master has been made and returned; and the case is now before us on exceptions thereto.

The master was required to ascertain the present value of all the premises, covered by the mortgage to Lot Myrick and others, not including permanent improvements made on any part since the mortgage. And also to find the value of the several portions of the mortgaged premises, as held by different individuals under the mortgager, and therefrom fix the amount for each to contribute respectively in the redemption. This service, the master did not perform, the plaintiff having waived all claim to contribution from other parties, and no proof was offered on this branch of the case, as stated in the opinion of the Court, and no computation was made thereon. This omission is one ground of the exceptions taken by the defendants. It would seem, that those persons who held portions of the premises mortgaged, under the mortgager, were interested to know what they

should equitably contribute towards the redemption, of the amount of the notes secured by the mortgage that were not paid by the rents and profits, for which the mortgagees were bound to account, in order that each might hold his portion free from the incumbrance, by payment thereof. And, if there was an excess of rents and profits above the amount of the notes, each would be interested to be legally informed how that excess should be apportioned and, that therefrom the equities might be adjusted and they severally be able to hold an indefeasible title to their respective portions, independent of one another, who held under the same mortgager.

We infer from the report of the master that no party appeared before him for the purpose of presenting proofs and having these questions settled. It certainly would have been desirable, that each should understand his rights and obligations, and, by the introduction of evidence, have a final disposition of this long, litigated controversy. But how far the master was required to take measures to have proofs introduced, on this part of the matter submitted, it is not now the business of the Court to inquire.

Upon the principal question, which is the amount due upon the notes secured by the mortgage of Oct. 21, 1837, the master has made an alternative report, by stating the sum due upon the notes, on May 6, 1861, and that the net rents and profits, allowed by him as accruing from the mortgaged premises, excluding the lots sold to Hubbard and Stetson each year, exceeded the amount due on the mortgage, by a sum stated.

The facts are stated in the report, touching the occupation of the premises mortgaged, on Oct. 21, 1837, subsequent to the possession taken in behalf of the mortgagees, for condition broken, and to foreclose the mortgage on July 29, 1850, as follows:—

"From the testimony before me, it appeared that about the time possession was taken by the defendants, as appears by the papers in the case, one David Lawrence hired the

premises of E. Wilder Farley by a written agreement, said Farley acting as agent for the defendants; said written agreement was not produced, nor its contents proved. Lawrence immediately moved into the house on the premises, and occupied the same jointly with Bartlett Sheldon, until early in the winter following, when he left and never paid any rent to any one. Bartlett Sheldon, who was in the occupation of the premises, when possession was taken, continued in the sole occupation thereof, excepting while Lawrence was there, until his decease in the summer of 1853, and his widow has remained in the occupation of the premises, up to the present time, managing and controlling the property."

"There was no proof showing the actual receipts of rents and profits by the defendants, or any interference on their part with the occupation of the premises, otherwise than the possession taken by them on July 29, 1850, and the occupation of Lawrence aforesaid."

The plaintiff claims that the rents and profits should be allowed in extinguishment of the mortgage, and the balance be paid by the defendants, who hold under the original mortgage and who caused possession to be taken for condition broken. The defendants, who took possession, on the other hand, insist that, inasmuch as they never were in the occupation of the premises and received no rents and profits, they are not bound to account therefor, and are entitled to receive the full amount remaining unpaid upon the notes.

The taking possession of the mortgaged premises, after condition broken, for the purpose of foreclosure, in the presence of two witnesses, according to the provisions of R. S. of 1841, c. 125, § 3, clause 3, does not necessarily impose upon the mortgagee the obligation to account for rents, if he should not receive them. Such is the fair construction of the statute cited in section 23 and that of the revision of 1857, c. 90, § 13. It has been decided in Massachusetts, under a statute in this respect similar to those referred to in this State, that possession taken in this mode, by the consent of the mortgager, who may remain in pos-

session for three years, the mortgage will be foreclosed, the latter being regarded as a tenant at will of the mortgagee. *Swift* v. *Mendall & al.*, 8 Cush., 357. The Court, in the case just cited, in referring to the cases of *Thayer* v. *Smith*, 17 Mass., 429, and *Hadley* v. *Houghton*, 7 Pick., 29, treat a good open and peaceable entry made, and actual possession taken, sufficient to operate as a foreclosure in three years, notwithstanding the mortgager had remained in possession.

Whether the entry made in behalf of the original mortgagees in this case has been followed by a continued possession, so that a foreclosure would have taken place, if the suit had not interrupted the running of the three years from the time the entry was made, we are not now called upon to decide; but it will not be said that, if those holding under the mortgager had been in the receipt of the rents and profits, that they had been so received by the mortgagees that they are bound to account therefor. Between the mortgager and mortgagee, the latter, when in possession, must account for the actual rents and profits received by him. *Gordon* v. *Lewis & al.*, 2 Sumner, 143, 155, which was a case where the mortgagee had taken possession for condition broken, to foreclose the mortgage. If he had not received rents and profits, the implication is, that he was not bound to account, unless they were lost or reduced by his wilful default or gross negligence. 4 Kent's Com., 166, 5th ed.

The case of *Charles* v. *Dunbar*, 4 Met., 498, is relied upon by the defendants, and we think it is in point. The statute under which this case was decided was in the revision of the statutes of Massachusetts in 1836, c. 107, § 15, which is similar to the one of this State under which the entry was made to foreclose the mortgage, so far as it provides that the mortgagee shall account for rents and profits. In that case it was held that the mortgagee was not bound to account for rents and profits to a second mortgagee.

The right of Elias Bailey, the plaintiff, is derived by deed

from Bartlett Sheldon, through several mesne conveyances, and from the levy of an execution against him in favor of one Jackson and others, upon certain rights of redemption, under the mortgages from Bartlett Sheldon of portions of the land covered by the mortgage from N. W. Sheldon to Lot Myrick and others, of Oct. 21, 1837; all these rights of the plaintiff were derived prior to the taking possession in behalf of the original mortgagees, on July 29, 1850. Whether his right under the levy had become absolute or not is not deemed material. He suffered Bartlett Sheldon to remain in possession after the levy, under an agreement, or as a trespasser. He was entitled to his action of trespass against Bartlett Sheldon, if he held that relation, by which he could have recovered the rents and profits as damages; if the former, the possession of the tenant was that of the plaintiff. *Fox* v. *Harding*, 21 Maine, 104.

The occupation of Lawrence was so short and so uncertain in its character and extent, (the agreement, which it seems was made between him and the agent of the mortgagees, not having been in evidence, and, being joint with Bartlett Sheldon, at most,) that it cannot create any liability on the mortgagees to account for rents, which the master's report states they never received. We think that the defendants were not bound to account to the plaintiff for any rents and profits.

The third exception has no foundation. The master was not bound by his authority from the Court to report the evidence; but, on the other hand, he was required to ascertain facts and state them in his report.

It is somewhat doubtful whether the statute of 1859, c. 79, will authorize an executor or administrator to testify, who holds the relation to the case which E. Wilder Farley held in the present one.

The witness Farley was the administrator of a deceased party, who would have been necessarily a party to this suit if living and within the jurisdiction of the Court, and the

suit could not, with propriety, proceed without the administrator, as a party, to the litigation.

It does not appear, from the report, what facts the defendants wished to establish by the testimony of two of their number. If it related to no matter connected with the transactions in controversy, in which they had knowledge superior to others, but it was matter of opinion touching the value of the several portions of real estate, which the master was directed to find, they would seem inadmissible. But, if the object was to show that the defendants had received no rents and profits, or had not a certain and actual possession after the entry to foreclose the mortgage, it was in analogy to equity practice in such cases, that the master should exercise the authority to examine the parties in the cause, upon oath, touching such matters, notwithstanding one was a party administrator.

We think the exceptions should be sustained so far as to allow the parties to introduce evidence before the master upon the last four matters submitted to him, which the plaintiff waived, and to receive the testimony of parties so far as the same may be admissible according to the foregoing.

Report recommitted.

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

JOHN HANLY *versus* SOLOMON SIDELINGER.

In the appraisers' certificate of a levy upon real estate, the words "we proceeded with the officer to view and examine the debtor's real estate, and having viewed and examined the same," &c., sufficiently show that they entered with the officer upon the estate levied on.

And the words "*the fee simple therein*" show that the *land* was set off.

As between debtor and creditor, a levy is valid without being recorded.

If an officer obtains leave to amend a return and files an amended copy with the clerk, but does not amend the original, and afterwards obtains leave to withdraw his amended copy, the original return stands without amendment.

On Exceptions to rulings of Walton, J.

Writ of Entry. The case was submitted to the presiding Judge, with the right to except.

The plaintiff introduced copy of judgment, plaintiff against defendant, October term, 1857, Waldo county, and offered the original execution, return of levy, and certificates thereon. Defendant objected to their introduction, and showed that the execution and levy were never correctly recorded, as required by law, by introducing copy of execution and levy from the registry of deeds, showing an error.

The material facts are stated in the opinion of the Judge.

The defendant made the following objections to the validity of the levy:—

1. Neither the appraisers' certificate or officers' return show that the appraisers entered upon the premises "with the officer;" or that they viewed the same "so far as was necessary for a just estimate of its value."

2. Neither the return or appraisers' certificate show that the *land* was set off or appraised. It is the "fee *simple*" that is appraised.

3. The execution and levy do not appear to have been either returned into the clerk's office, or recorded in the registry of deeds, and were therefore inadmissible as evidence; and, if admitted, form no ground for this action.

The record of the number of cents in the judgment not being correct, the execution was not recorded.

A levy like a deed cannot be introduced in evidence to support title, without having been first recorded.

4. The levy was void because not made by three disinterested men.

The amendment of the officer was legally made.

The subsequent proceedings were irregular, being upon the motion of a party, and therefore left the levy as amended.

The Judge gave the following decision:—

1. The language of the appraisers' certificate is as follows:—"*We proceeded with the officer to view and examine the debtor's real estate*," * * * * "*so far as was necessary*

to a just estimate of its value," and "*having viewed and examined the same; we appraised,*" &c.

The appraisers' certificate, referred to by the officer and thus made part of his return, shows a substantial compliance with the statute in this respect.

2. I think it does sufficiently appear that it was the fee simple in the debtor's land that was set off. The language of the return is "fee simple *therein*," that is, the fee simple in the real estate. I therefore overrule this objection.

3. The original execution, with the appraisers' certificate and officer's return thereon, are offered in evidence by the demandant, and admitted by the Court, although it does not appear, otherwise than by the officer's return thereon, that the execution has ever in fact been returned into the clerk's office. The tenant's objection to their admissibility is overruled.

The tenant further objects that the execution, certificate and officer's return thereon, if admitted, "form no ground for this action," because the number of cents in the judgment being recorded *four* instead of *forty*, it cannot be said that the execution was correctly recorded, and therefore, in contemplation of law, not recorded at all.

But the R. S., c. 7, § 18, provide that every instrument shall be considered as recorded, at the time the register minutes upon it the time when it was received and filed. The minute, however, upon the back of this execution, is somewhat defective in not stating the time of day when it was received, which the statute requires. I do not, however, make any ruling upon this point, because, it not appearing that there are any parties having any interest in the real estate levied upon, except the debtor and the creditor, as between them the levy is valid without being recorded.

5. The officer's return states that the appraisers were disinterested. This is conclusive so far as the validity of the levy is concerned. It is true that the officer once obtained leave to amend his return by striking these words out, and did in fact erase them from a copy, and file the copy with

the clerk of this Court, but he never erased them from his original return, but, on the contrary, by leave of Court withdrew his motion to amend, and had an entry made upon the docket that the return was to stand as made originally without amendment. I therefore regard the officer's return as not amended in this particular, and overrule the tenant's objection to the validity of the levy in this particular; and, upon the whole case as presented, decide that the demandant is entitled to judgment for the premises demanded in his writ.

To which ruling the defendant excepted.

A. P. Gould, for defendant, in support of exceptions.

Ruggles, for plaintiff, *contra*.

BY THE COURT — (APPLETON, C. J., CUTTING, KENT, WALTON and BARROWS, JJ.)

Exceptions overruled.

JAMES DROWN, JR., *versus* JACOB SMITH.

A quitclaim deed containing the following clause, written after the description and before the *habendum*, viz.: — "but the said" grantee "is not to have or take possession till after my decease; and I do reserve full power and control over said farm during my natural life," is valid, notwithstanding it purports to convey a freehold estate to commence *in futuro*.

Where one of the stipulations in the bond in suit was, that the obligor "shall manage the farm in a prudent and husband-like manner;" and the plaintiff contended that it was waste in law for the defendant obligor to cut and sell growing trees for his own use;" — *Held*, it was correct for the presiding Judge to instruct the jury, that the cutting and selling trees is not necessarily waste in this country, in every case where, by the common law of England, it would be so held; that regard is to be had to the condition of the land, and whether good husbandry, as understood and practiced here, requires that the land should be cleared, or the trees felled and marketed; that, to what extent wood and timber may be cut without waste, is a question of fact for the jury; that, by the terms of the agreement recited in the condition of the bond, the defendant was to manage in a prudent and husband-like manner; and, if the cutting and selling of the timber were a violation of this stipulation, it would be a breach of the bond; otherwise, not.

Drown *v.* Smith.

Where a verdict is not *clearly* against the weight of evidence, it will not be set aside as being against the weight of evidence.

On Exceptions and Motion from *Nisi Prius*, Walton, J., presiding.

The facts appear in the opinion of the Court.

Bourne, *Sen'r*, for the plaintiff.

Tapley, for the defendant.

The opinion of the Court was drawn by

Walton, J.—The plaintiff is step-father to the defendant, and this suit originated in one of those family settlements intended to secure property to a child and support to the parents,—a kind of arrangement very common, and yet almost certain to end in disappointment, and very often in litigation.

The plaintiff conveyed to the defendant certain real estate by a deed containing this clause:—"But the said Smith is not to have or take possession till after my decease; and I do reserve full power and control over said farm during my natural life." We have decided that such a deed is valid, notwithstanding it purports to convey a freehold estate to commence *in futuro*. *Wyman* v. *Brown*, 50 Maine, 139.

On the same day of the above conveyance, and as part of the same transaction, the defendant executed to the plaintiff a bond with a condition, in which was recited an agreement to support the plaintiff and his wife, and to occupy and manage the farm in a prudent and husband-like manner, and it is upon this bond, and an allegation that the defendant has not performed the agreement therein recited, that this action is founded. The defendant pleaded performance, and, upon this issue, the parties went to trial, and the verdict was in favor of the defendant.

The case is before us on motion to set aside the verdict as against evidence, and on exceptions to certain rulings of the presiding Judge.

A careful examination of the evidence has failed to satis-

fy us that the verdict is so clearly against the weight of evidence that we ought to set it aside. The motion, therefore, must be overruled.

As the jury did not reach the question of damages, all rulings bearing upon that question only become unimportant, and need not be considered.

The only rulings excepted to which could, by any possibility, have influenced the jury in determining that there had not been a breach of the bond, and the only ones, therefore, necessary to be considered, are those which related to waste, or bad husbandry.

The exceptions show that the learned counsel, then employed by the plaintiff, contended, as the able counsel, now employed, contends, "that it was waste in law for the defendant to cut and sell growth for his own use," in the manner shown by the evidence; and cited authorities showing that in England the law was very strict in this respect.

The presiding Judge instructed the jury that "the cutting and selling of growing trees is not necessarily waste in this country, in every case where, by the common law of England, it would be so held; that regard is to be had to the condition of the land, and whether good husbandry, as understood and practiced here, requires that the land should be cleared, or the trees felled and marketed; that, to what extent wood and timber may be cut without waste is a question of fact for the jury to decide; that, by the terms of the agreement recited in the condition of the bond, the defendant was to manage in a prudent and husband-like manner. Was the cutting and selling of the timber a violation of this stipulation? If so, it would be a breach of the bond; otherwise not."

We think these instructions were correct. Mr. *Washburn* says, "that many acts which would be waste in England will not be such here, in consequence of the difference in the condition of the two countries." 1 Wash. on Real Prop., 108–9. Chancellor KENT says, the American doctrine is more enlarged, and better accommodated to the cir-

cumstances of a new and growing country, than the English law. 4 Kent, 76. Mr. *Greenleaf* says, "to cut down trees is not always held to be waste here, in every case where, by the common law of England, it would be so held." 2 Greenl. Ev., § 656. "The American doctrine on the subject of waste is somewhat varied from the English law." *Chase* v. *Hazelton*, 7 N. H., 177. To cut decaying trees, in order to give the younger trees a chance to grow, is held not to be waste in Vermont. *Keeler* v. *Eastman*, 11 Vt., 293. To clear wild land, so as to fit it for cultivation, is not necessarily waste. *Jackson* v. *Brownson*, 7 Johns., 227. In *Pynchon* v. *Stearns*, 11 Met., 304, the Court laid it down as a general rule, that, "in this country, no act of a tenant amounts to waste, unless it is or may be prejudicial to the inheritance, or to those who may be entitled to the reversion or remainder," and the Court say that the reasons for the doctrine of waste, as held in England, are inapplicable to this country.

Motion and exceptions overruled.
Judgment on the verdict.

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

JAPHET STORER *versus* THOMAS HOBBS.

By R. S., c. 11, § 28, when a location for the erection of a school-house has been legally designated, and the owner thereof refuses to sell, the municipal officers may lay out a school-house lot and appraise the damages; and, on payment or *tender of such damages*, the district may take such lot, &c.

A district has no right to take land for a school-house lot when the owner thereof refuses to sell, except on *payment or tender* of the damages appraised.

A tender, made *after* an action of trespass is brought against the building committee, will be no justification for the defendant.

Where the plaintiffs, in the trial of an action of trespass *quare clausum*, introduce testimony tending to show joint possession in themselves, and the

defendant to the contrary, the presiding Judge cannot legally instruct the jury that the action is maintained, and direct them to find nominal damages. If he does give such instruction, a new trial will be granted.

On Report, from *Nisi Prius*, Appleton, C. J., presiding.

Trespass *quare clausum.*

Writ dated Dec 19, 1859.

To prove the plaintiff's title, a deed of warranty from George Hobbs to Japhet Storer, (one of the plaintiffs,) dated April 3, 1850, duly recorded, and a similar deed from Japhet Storer to John W. Storer, (the other plaintiff,) dated Nov. 6, 1858, and recorded after this action was commenced, viz.: Sept. 28, 1860. The last mentioned deed contains the following clause:—"reserving to myself the use, occupancy, income and control of one half of the above described premises during my natural life."

During the latter part of the year 1859, the school-house was erected.

The remaining facts sufficiently appear in the opinion of the Court.

After the ruling of the presiding Judge, the defendant was defaulted, and the case continued on report, with the entry, that, if the rulings of the presiding Judge were right, the default was to stand, otherwise a new trial to be granted.

Tapley, for the defendant.

Hains, for the plaintiffs.

The opinion of the Court was drawn by

Appleton, C. J.—This is an action of trespass *quare clausum fregit.* The title is shown to be in the plaintiffs. The defendant, in his specifications of defence and brief statement, justifies his entry as having been "done by him in the faithful discharge of his duty as one of the inhabitants of School District No. 15, in Wells, and as one of the building committee chosen by said District."

The inhabitants of School District No. 15, in Wells, un-

dertook to erect a school-house upon the plaintiffs' land without their consent, under the provisions of R. S., 1857, c. 11, § 28. Assuming the owners of the land to have refused to sell or to have asked an unreasonable price for the lot in controversy, still the district had no right to enter upon, or take the lot, except "on payment or tender of such damages" as the municipal officers of the town should appraise, in accordance with § 28. But the district, without such payment, proceeded to erect a school-house on the plaintiffs' land, in which the defendant, by his own admission, participated and in so doing became a trespasser.

The tender of the damages appraised by the selectmen, acting under the section before referred to, having been made *after* the school-house was erected and this suit commenced, can afford no justification. It should have been made *before* the lot was taken. No valid reason is disclosed why it was not done. The title of one of the plaintiffs was on record and, so far as thereby appeared, he was the owner of the whole estate. *Prima facie,* a tender to him would have sufficed. But none was seasonably made to any one.

The action of trespass is a possessory action. The case shows the title to have been in the plaintiffs. The law presumes the possession to have followed the title and to be in accordance therewith. But, from the report, it seems there was contradictory evidence as to the joint possession of the plaintiffs. The action is not maintained unless such possession is established. And, however improbable it may be that Japhet Storer would have disseised his grantee in a conveyance but a year before the trespass, and ousted him of his possession, yet, as the instructions given, or proposed to be given, were peremptory and excluded from the consideration of the jury the question of joint possession, a new trial must be granted. *New trial granted.*

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

DAVIS, J., concurred in the result and submitted his views as follows:—

I concur in the result. But I do not understand that the evidence shows the title to have been in *both* the plaintiffs. The counsel says the father had a *life lease* of an undivided half. But the report does not so state. If he had not, he does not appear to have had any interest; and whatever possession he had was merely the possession of the son. A *joint* action cannot be maintained unless there was a common or joint *title*, or *interest*, so that the *injury was joint*. If the father lived with the son merely by permission, or license, having no right, whatever either might have done *separately*, for an injury to *himself*, they cannot maintain an action *jointly*.

LUTHER M. SIMMONS *& als., in Equity, versus* JOSEPH W. JACOBS *& als.*

The decretal order is the rule for the guidance of a master in chancery in this State.

Unless the order otherwise requires, it is not the duty of a master to report the evidence upon which his determination is founded.

When the order does not require him to report the evidence, no testimony outside of the report touching the points determined in the report is admissible to prove any facts set forth in motions to set aside, or in exceptions to the acceptance of the report.

By c. 150, § 1, of the Public Laws of 1862, no judgment of any Court shall be entered against any party unless such party has been legally served with process, or has appeared and answered thereto personally or by *attorney duly authorized.*

Prior to the time when this law took effect, March 19, 1862, the general appearance of an attorney for parties defendant, rendered an order of notice and service on parties residing out of the State unnecessary.

Where an attorney entered his general appearance, May term, 1858, for several defendants, some of whom were not residents in this State, and, at the October term following, on written motion, he was permitted to enter upon the docket that he limited his appearance so as not to embrace the

non-residents, alleging that he was never authorized to appear for them, but such entry not to be construed as an admission of the fact that his general appearance was unauthorized; and, at the May term, 1862, he had leave to withdraw and *did* withdraw; — *Held*, that testimony offered at the time of withdrawal for the purpose of showing his unauthorized appearance was inadmissible.

By c. 155, § 3, of the Public Laws of 1862, no proceedings shall hereafter be had before any master in chancery, unless appointed under the provisions of this Act, and the case thereafter committed to him.

By R. S., c. 1, § 3, the Act of 1862, c. 155, became effective in thirty days after the recess of the Legislature passing it. — In computing the time, the day on which the Legislature adjourned is to be excluded.

Where the acceptance of the report of a master, duly appointed *prior* to said Act's becoming effective, is objected to *after*, for the reason that the master was not appointed in accordance with the Act; and the report itself shows that the hearing before the master was concluded *before* the Act took effect; *Held*, that the Act did not affect the report.

This Court does not ordinarily take notice of the Resolves of the Legislature, unless produced in evidence.

Where the complainants, having constructed the hull and spars of a vessel, sold eleven-sixteenths to the respondents, embracing therein one-fourth to H. R.; and, on Nov. 15, 1854, having completed all of her requisite fittings, caused her to be enrolled; and, on the day after the enrollment, H. R. gave to the complainants a mortgage bill of sale, with a covenant of warranty, of his one-fourth, together with one-fourth of the masts, bowsprit, sails, anchors, and all the other necessaries thereunto belonging, to secure the payment of two notes of $650 each, payable in three and six months respectively; and, shortly afterwards, while the vessel was on her first voyage, under H. R. as master, he died, insolvent; and the vessel made several voyages, when she was sold by an agent; and, on May 20, 1856, the complainants took possession of the one-fourth covered by their mortgage, and perfected their title on July 20, following; — *Held*, —

1. That H. R.'s one-fourth of the hull and spars should contribute in that proportion to the payment of the "top bills," and that his insolvency conferred no responsibility on the other part owners to make up and pay over to the venders such defalcation; and,

2. That if the master's report charge the respondents with H. R.'s debt for the top bills, and, at the same time, allow the complainants for one-fourth of the proceeds derived from the sale of the vessel including the same articles purchased and charged as top bills, it will be recommitted for inequity.

On Exceptions from *Nisi Prius*, Appleton, C. J., presiding.

Bill in Equity.

The bill alleged substantially: —

That the complainants, in 1854, constructed the hull and

spars of the brig Crimea; that they sold eleven-sixteenths, in the proportion enumerated—embracing therein one-fourth, to Hiram Robinson—to the respondents; that, in the fall of 1854, they fitted out said vessel with the necessary sails, rigging, &c., and caused her to be enrolled on the 15th of November of the same year; that, on the next day, the said Robinson, being indebted to the complainants in the sum of $1300, conveyed to the respondents, by a mortgage bill of sale, containing a covenant of warranty, his one-fourth part of said vessel together with one-fourth of the masts, bowsprit, sails, &c., to secure the payment of two promissory notes of $650 each, payable in three and six months respectively; that, prior to said enrollment, said J. W. Jacobs was constituted agent of said owners in all matters relating to the hire and employment of said vessel; that said Robinson became master of said vessel, sailing her on shares; that, on Nov. 17, 1854, he sailed for New Orleans, with a cargo of lime, shipped on owners' account; that, on the second or third day out, said Robinson was lost overboard, when Alexander Robinson—the mate—took command; that subsequently, she made several voyages, particularly set forth, earning a large amount, of which the complainants crave account.

The bill further alleges, that, on March 3, 1856, Roland Jacobs, jr., (one of the respondents,) was duly appointed administrator of the estate of said Hiram Robinson, and that he, on August 7, following, represented said estate insolvent, and that commissioners of insolvency were appointed, who made their first report March 3, 1857.

The bill further alleges that the complainants, on May 20, 1856, took possession of the one-fourth of said brig, so mortgaged, and obtained insurance on the same. That, after the sundry voyages aforesaid, all the aforesaid owners united in authorizing Robert R. Snow, one of the respondents, to sell said brig for $10,000, and that he did sell her for that sum.

The bill further alleges that the respondents received

and retain in their hands a greater proportion of the earnings and proceeds of sale of said vessel than their shares therein would entitle them to, on a just and lawful adjustment of all the bills, accounts of earnings and disbursements, and of the proceeds of sale aforesaid, &c.

The bill prayed that the respondents might be required to make true and full answers, &c.; render just and accurate accounts of earnings, &c.; and for relief.

The case was, once before this, in Court on demurrer, when the "demurrer was dismissed, and exceptions overruled."

Peter Thacher was appointed master in chancery at the May term, 1862. The defendants filed the following motion to set aside the report of the master offered that term, offering to prove the facts therein set forth.

And now, on the tenth day of the above term, the master's report having been presented to the Court, the following defendants, viz.:—Joseph W. Jacobs, William Medcalf, William H. Medcalf, Cyrus Patterson, Edmund B. Hinckley, Mary T. O'Brien, Stephen B. Starrett, John Lermond and John A. Lermond, come and move this honorable Court that said report may be set aside, and that further proceeding against said defendants may be stayed until the further order of the Court, for the following reasons, viz.:—

1st. Because Ambrose Snow, Joseph S. Burgess and Augustus H. Badger, who are necessary parties to the case, and against whom the award of the master has been made, have never been made parties to this suit, and because they have never been served in any legal manner with process, or in any way brought before the Court, nor have they appeared in this case, either in person or by attorney duly authorized, or in any way submitted themselves to the jurisdiction or authority of this Court, and because this Court cannot, according to the statutes of the State, pass any decree or enter any judgment against the said Snow, Burgess and Badger in this case.

2d. Because no decree or judgment can be recovered

against the defendants, or any of them, without making the said Snow, Burgess and Badger parties to the suit, which has never been done.

3d. Because Peter Thacher Esq., the master, who made said report, has refused to report the testimony offered before him, by which it appeared that the plaintiffs were owners of one-fourth part of brig Crimea, which they afterwards sold to Hiram Robinson, at the time the "top bills" of said vessel were purchased and put upon her, amounting in all to about the sum of $5150. But has found and reported that the said Robinson was owner of said one-fourth part of said brig, at the time of the purchase of said bills, and has therefore charged these respondents with a portion of the loss arising from the non-payment of said Robinson's share of said bills, on account of the insolvency of his estate. Whereas it appeared by the testimony of Luther M. Simmons, one of the plaintiffs, that the said Robinson did not become an owner of the said one-fourth part until after said top bills were purchased and put upon said vessel, which testimony was unopposed and uncontradicted by any testimony or proofs in the case; and the respondents aver that said master has, either by inattention to the evidence, or misapprehension of its character, thus charged the other owners of said vessel with said one-fourth part of the top bills, which should have been charged wholly to the plaintiffs.

4th. Because the said master has neglected and refused to report the evidence which was produced before him, to show, and which, without contradiction, did show that the plaintiffs were mortgagees in possession of one-fourth part of said brig from Nov. 15th, 1855, to July 20th, 1856, and were also the absolute owners of five-sixteenths during the said time,—although these facts did appear without dispute or contradiction before said master; and because said master has neglected to charge the plaintiffs with nine-sixteenths of the losses, expenses and disbursements of said brig during said period, which amounted to about $6000; but does

charge them in said report with five-sixteenths of the same only, and requires the other four-sixteenths of the plaintiffs' share to be paid by the respondents, which findings are unsupported by any evidence which was introduced before him.

5th. Because in his report the said master has charged the respondents with their proportionate part of Hiram Robinson's one-fourth part of all the bills of said brig, including both the top bills of about $5150, and the losses, expenses for repairs, and disbursements of the same prior to July 20th, 1856, amounting to about $6000, which sums so charged to these respondents, as belonging to said Robinson's one-fourth of said brig is $1653,66, and is charged to these respondents in the following proportions, viz.: J. W. Jacobs one-twelfth, S. B. Starrett one-twelfth, John A. Lermond one-twenty-fourth, John Lermond one-twenty-fourth, Mary T. O'Brien one-twenty-fourth, William Medcalf and William H. Medcalf one-twenth-fourth, E. B. Hinckley one-twenty-fourth, Cyrus Patterson one-twenty-fourth, and the said master has also charged one-twelfth of the same to Snow & Burgess, one-twelfth to A. H. Badger and five-twelfths only to the plaintiffs, whereas the whole of said $1653,64 should have been charged to the plaintiffs.

6th. Because the said master proceeded to hear evidence and to consider the case, upon said 18th day of April, at which time his authority had been revoked and annulled, and, between that day and the day of the return of the report, to hear and to consider the case, and act thereupon, as master, without any warrant or authority of law.

The presiding Judge excluded the testimony and overruled the motion.

The defendants offered to prove by depositions, taken by agreement before a commissioner, that Burgess, Snow and Badger, defendants, resident in New York, gave A. P. Gould no authority to appear for them in the case, but the presiding Judge excluded the testimony and accepted the report.

To all which rulings the resident defendants excepted.

A. P. Gould, for the respondents.

Ruggles, for the complainants.

The opinion of the Court was drawn by

CUTTING, J. — This case is presented on exceptions to the rulings of the Judge at *Nisi Prius*, accepting the master's report, acting under certain decretal orders of this Court, "by which it was ordered, adjudged and decreed that the master be required to inquire and report the amount due to the complainants, with just and equitable interest thereon; and that, for the better taking the account, the master require the production of books, papers and writings in the custody or power of the parties relating thereto, under oath, and examine the parties thereto under oath, on interrogatories, or otherwise, as he shall direct."

It appears that the master, in pursuance of the power thus conferred on him, has attempted to discharge his duty. He has inquired and reported the amount due to the complainants with just and equitable interest thereon, after the production of the books of the parties and their examination under oath, or so many of them as saw fit to obey his summons.

But it is contended by the respondents' counsel, that the master has erred in not reporting all the testimony produced upon the disputed points before him, to this Court, for their supervision, and, for that cause, exceptions are taken to the acceptance of his report, which we will first proceed to consider.

In this State we have no "*Regula Generalis*" in relation to the duties of masters in chancery; but, in each case, where a master is appointed, the rule for his guidance is the decretal order. He is not usually appointed to act merely as a commissioner to take testimony, which any ordinary magistrate might do, but as an officer of the Court to receive and adjudicate upon the force and effect of evidence produced before him, and thus to ascertain facts and form

an opinion as to the law arising thereon, both of which constitute his findings, and are the only subject matter to be inserted in his report to the Court. So that, if his legal conclusions are not sustained by the facts found, the Court may interpose and correct the error. Thus, it has been decided, in *Howe* v. *Russell*, 36 Maine, 115, "a master in chancery is not bound to report the evidence upon which his determination was founded." Again, "where it is referred to a master to examine and report as to particular facts, or as to any other matter, it is his duty to draw the conclusions from the evidence before him, and to report such conclusions only; and it is irregular and improper to set forth the evidence, in his report, without the special direction of the Court." 1 Barb. Ch. Practice, 548, and authorities there cited.

This summarily disposes of much of the testimony taken since the acceptance of the master's report, and overrules all motions and exceptions thereupon presented.

Again, it is contended that certain individuals named as respondents in the bill; viz.: *Burgess*, *Snow* and *Badger*, residing in the city of New York, were never legally notified of its pendency, and that they never appeared or answered either by themselves or counsel duly authorized; and consequently the bill cannot be sustained as against them, or the other respondents, for the want of proper parties. To sustain this proposition the counsel invokes the statute of 1862, c. 150, § 1, which is that—"No judgment of any Court shall be entered against any party unless such party has been legally served with process, or has appeared and answered thereto personally or by attorney duly authorized."

This should have embraced a *proviso*, that, if any attorney shall appear without authority, he shall be liable in damages to the party injured by delay, in consequence of such unauthorized appearance. If such appearance was through inadvertence, the careless and not the innocent party should suffer. But it is to be inferred, from the fore-

going section, that it was intended to relieve both counsel and client from responsibility and leave the injured party without the means of redress. The statute would have been more perfect had it been more comprehensive. But we are to take the law as it is, and not as we might imagine it should have been.

It appears that the bill was duly served on all the respondents who resided within this State, and seasonably entered upon the docket of this Court, and at the same term counsel entered his general appearance, which, as the law then was, rendered an order of notice and service on the residents out of the State unnecessary. *Maine Bank* v. *Hervey*, 21 Maine, 38. And in *Denton* v. *Noyes*, 6 Johns. R., 296, KENT, C. J., remarks,—"By licensing attorneys, the courts recommend them to the public confidence; and, if the opposite party, who has concerns with an attorney, in the business of a suit, must always, at his peril, look beyond the attorney, to his authority, it would be productive of great public inconvenience. It is not usual for an attorney to require a written warrant from his client. He is generally employed by some secret confidential communication. The mere fact of his appearance, is always deemed enough for the opposite party, and for the Court. If his client's denial of authority is to vacate all the proceedings, the consequences would be mischievous. *The imposition might be intolerable.*" Yet, our Legislature of 1862, against the decisions of their own courts, and that of others, composed of some of the most eminent jurists, endowed with great practical common sense and experience, have, for some cause, seen fit to tolerate by a general law this "intolerable imposition." Well did the American jurist pronounce such a course of proceeding intolerable; if, after a delay of years in Court, various issues raised and decided, and great expenses accumulated, the defeated party, as a last resort, could arrest the progress of justice and a final judgment, by the filing of a motion and offering evidence that he had

been represented in Court by "an attorney not duly authorized."

It may be urged, (but we do not find *any* foundation for such a proposition in the present case,) that the attorney may be either dishonest or irresponsible, and that it would be extremely unjust for a party to be so represented without his special authority. Dishonesty can hardly be imputed to attorneys, who for years heretofore have been admitted, under modern legislation, to practice in all our Courts, upon the presentation of a certificate from the selectmen of *good moral character*, and proof of the payment of twenty dollars each to the county treasurer. Under such legislation *ignorance* has been no bar to admission, but *dishonesty* always has. And, in the case last cited, the learned Judge further proceeds:—"If the attorney has acted without authority, the defendant has his remedy against him; but the judgment is still regular, and the appearance entered by the attorney, without warrant, is a good appearance, as to the Court. It was, therefore, wisely laid down by the K. B. in the time of Lord HOLT, (1 Salk., 88,) that, if the attorney for the defendant be not responsible, or perfectly competent to answer to his assumed client, the Court would relieve the party against the judgment, for otherwise a defendant might be undone."

We do not impeach the omnipotence of the Legislature for creating attorneys, as the world was created, out of nothing; or the power to control such eccentric orbs within their appropriate spheres. Our province is rather to ascertain their orbits, and to harmonize their motions, if possible, with the movements of other bodies.

This brings us to the consideration of the docket entries referred to as a part of this case, and made before and after the recent enactment, viz.:—

"May term, 1858, action entered, and *A. P. Gould* enters his general appearance. August 4, 1858, notice of motion for leave to amend filed. September 21, 1858, notice of motion for want of answer filed. Answers of defendants to

be filed by middle of vacation or bill to be taken *pro-confesso.*"

"October term, 1858, *A. P. Gould*, on motion, is permitted by leave of Court to enter upon the docket that he limits his appearance so as not to embrace *Ambrose Snow*, *Joseph S. Burgess* and *Augustus H. Badger*, alleging that he was never authorized to appear for them. This motion granted, subject however to complainants' rights, and as no admission of the want of such authority. Demurrer filed by leave of Court. Bill taken *pro-confesso*. *P. Thacher* appointed master."

"January term, 1859, exceptions filed and allowed. July 17, 1860, order received from the Law Court. 'Demurrer dismissed as immaterial and exceptions overruled.'"

"May term, 1862, master's report filed. On his own motion, *A. P. Gould* has leave to withdraw his appearance as to *Snow*, *Burgess* and *Badger* and *does* withdraw. Exceptions by plaintiffs filed and allowed. Report of master offered for acceptance. Exceptions to report filed. Motion to set aside report filed. Exceptions to motion overruled. Report accepted. Exceptions filed and allowed."

The Act which has been under consideration took effect on its approval by the Governor, which was on March 19, 1862; and the attorney for the New York respondents did not *finally* withdraw his appearance until the following May, after a hearing before the master, whose report had been presented for acceptance; although, at a previous term, he had that liberty, subject to certain responsibilities, which he did not see fit to assume. Under these and other circumstances, known to the Court and the parties, which will appear in an opinion of the Court, before referred to, on the demurrer, but not as yet reported, we have no hesitation in saying that the evidence offered for the purpose of showing an unauthorized appearance was too late and inadmissible, and that the Judge committed no error in rejecting it.

Again, the complainants are opposed by another Act of the same year, entitled—"An Act relating to equity pro-

ceedings," approved March 19, 1862, which directs this Court to appoint masters in chancery in each county, not exceeding five in number. Section 3 provides that—"No proceedings shall hereafter be had before any master in chancery, unless appointed under the provisions of this Act, and the case thereafter committed to him," &c. This "statute became effective in thirty days after the recess of the Legislature passing it." R. S. of 1857, c. 1, § 3. The case finds that the respondents' counsel objected to the acceptance of the report, because the master had no authority to act, his original authority having been taken away by force of this statute. Upon this point we refer to the report of the master, who says, "that after due notice to all the parties, they all appeared before me in person, or by counsel, except *Snow*, *Burgess* and *Badger*, upon several previous days therefor appointed in the years 1861 and 1862, and especially upon the 15th, 16th, 17th and 18th days of April, 1862, upon which last mentioned day the hearing before me was concluded." Have we legal evidence before us, or was any such produced to the Judge, who ruled upon this question, as to the time when the Act took effect, or, in other words, when the Legislature took their recess? The burden of proof was upon the excepting party, and no such particular favor is to be extended to him, which would be in violation of all rules of evidence, and operate to suspend all chancery proceedings before duly appointed masters, and render abortive, as in this case, all their prior investigations. It may be a *historical* fact that the pay-roll of the Legislature of 1862 was made up and embraced in a resolve of that year, in which it was declared that the session "commenced on the first day of January and ended on the nineteenth day of March." Ordinarily courts do not notice resolves unless produced in evidence. But, assuming that we recognize the resolve, the excepting party is not thereby benefited; for, even then, excluding the day on which the Legislature took their recess in the computation of the thirty days after such recess, the Act would not

take effect until the nineteenth day of April, the day after the master closed his proceedings. Upon this point, therefore, the evidence offered, and, as subsequently produced, was inadmissible. *Windsor* v. *China*, 4 Maine, 298; *Buttrick* v. *Holden*, 8 Met., 233.

We next come to the consideration of that portion of the case, which embraces the real and only merits involved in the controversy, which is contained in the motion to set aside the report for error in conclusions of law upon the facts found. In order to present that question, it becomes necessary to recite so much of the bill and the findings reported as refers to that subject matter.

The complainants allege that, in 1854, they constructed the hull and spars of the brig Crimea, eleven-sixteenths of which they sold to the respondents, in proportions therein enumerated, embracing one-fourth to *Hiram Robinson*; that, in the fall of 1854, they fitted out said brig with the necessary sails and rigging and all the requisite fittings, and caused her to be duly enrolled, on Nov. 15th of that year; *that*, on the same Nov. 16th, said *Hiram Robinson*, being indebted to them in the sum of $1300, gave to them two notes, payable in equal amounts, one in three and the other in six months, with interest; and, to secure the payment thereof, conveyed to them, by a mortgage bill of sale, his one-fourth part of said brig, together with one-fourth of the masts, bowsprit, sails, boat, anchors, cables and all other necessaries thereunto belonging, with a warranty to defend the said one-fourth part of said brig and all the other before mentioned appurtenances against the claims of all persons; *that*, prior to the enrolment, *Joseph W. Jacobs* was appointed agent of the owners to manage the hire of the vessel and employment; *that* Hiram Robinson took charge as master, sailing on equal shares, and, on Nov. 17, 1854, he sailed for the port of New Orleans with a cargo of 1200 casks of lime purchased and shipped on owners' account; *that*, on the 2d or 3d day after leaving Thomaston, *Robinson* was lost, and *Alexander Robinson*, the mate, took command, who arrived

at New Orleans in the latter part of December, sold the cargo and accounted for the proceeds to *Jacobs*, the agent; *that*, while the brig was at New Orleans, *Robert R. Snow* was appointed master, who sailed on wages and performed several voyages, and paid over to the agent the net earnings; *that*, subsequently, and while the brig was at New Orleans, by authority from the owners, *Snow* sold the brig for the sum of $10,000, who accounted to *Jacobs*, the agent for that sum,—that, on March 3, 1856, *Rowland Jacobs, jr.*, was appointed administrator on the estate of *Hiram Robinson*, which was subsequently rendered insolvent; *that* the complainants, on May 10th of that year, took possession of the one-fourth, under their mortgage, and their title thereto became perfected and absolute on the 20th day of the July following. And, in conclusion, the complainants allege that *Jacobs*, the agent, still retains a portion of the funds belonging to them, or has inequitably paid it over to the respondents, and pray for each to account.

We have seen that the bill was entered in Court, as also a general appearance for the respondents; that, at a subsequent term, for the want of due diligence in the performance of all acts required of them, under our rules for practice in chancery, the bill was taken *pro-confesso*, and the master appointed, whose report is now legitimately before us for the correction of errors as before stated.

That report exhibits a commendable degree of labor, patience and impartiality, and, upon the principal point raised, a sufficient finding as to facts to enable us to correct his conclusions if erroneous, which we proceed to consider.

It is contended by the complainants that, before the sale of the hull and spars, they furnished for the vessel a portion of her top fixtures, and had an account denominated "top bills," for which they have charged in their exhibit a certain amount, one-fourth of which sum they claim should be accounted to them by the owners in proportion to their ownership, in consequence of the insolvency of *Hiram Robinson* and as a *pro rata* contribution for his quarter part of

the top bills. And that proportion we understand to have been allowed to the complainants in the master's report, upon the evidence reported by him as follows, viz.:—"It also appeared in evidence that, by universal custom and usage, when a party purchases a part or the whole of the hull and spars of a vessel then building, he, the purchaser, is liable for the proportion of the top bills belonging to said part or the whole, whether the top bills have been previously purchased or not."

It is unnecessary to consider the number of witnesses by which such custom was attempted to be proved, for it militates in no degree against the proposition of the respondents, but corroborates it; which is, that *Robinson's* quarter should contribute in such proportion, and that his insolvency conferred no responsibility on the other part owners to make up and pay over to the vendors such defalcation.

In order to test the principle, let it be assumed that the builders had completed the vessel in every particular for sea, and then sold the hull and spars in certain proportions; could they subsequently recover by force of the custom the value of the rigging from such purchasers, who might be solvent when the bills for such rigging might be presented? If so, every person, who might purchase a part of the hull, would thereby become a partner with those who might subsequently purchase the remainder, thus constituting them co-partners instead of tenants in common.

Besides; inequity appears from the master's report in another view. The respondents have been charged with *Robinson's* defalcation in the non-payment of his one-fourth of the top bills, notwithstanding which, the complainants have been credited with the same one-fourth of the proceeds of the sale of the vessel including all, both below and above deck; the effect of which would be to receive payment *first* by a contribution by the part owners, and *secondly* by their reception of the same share, embracing hull, sails and rigging. This is attempted to be justified by reason of the sale and mortgage. The sale was the hull and spars and

the mortgage, the same including the rigging, &c. The latter, so far as it regards the respondents, could not alter or change the relations between the vendors and their co-tenants.

The master's report, therefore, is incorrect in charging the respondents with *Robinson's* debt for the top bills, and at the same time allowing the complainants for one-fourth of the proceeds derived from the sale of the vessel, including the same articles purchased and charged as "top bills," thus indirectly receiving payment twice for the same thing.

Consequently the exceptions *in this particular* are sustained. Report recommitted to the same master to be revised and reformed, so as to comply with the principles herein enunciated. Upon his report, thus amended and accepted, costs are allowed to the prevailing parties, and a decree is to be entered in conformity with such amended report.

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

JONATHAN MOORE *& als. versus* HENRY PENNELL.

The share of one of several co-partners in the goods of the firm, may be attached and sold on execution for his individual debt; and, as incidental to this right, the officer may deliver the whole of the goods seized to the purchaser.

But, if the officer *sells* the *entire property* in the goods, he will become a trespasser *ab initio*.

Where an officer attached the goods of a firm composed of three persons, on a writ against two of them only, and sold under the statute, the *entire property* in the goods attached; — *Held*, that the firm might maintain trespass against him and recover the full value of the goods sold.

ON FACTS AGREED.

George D. Hillman and A. H. Phinney, two of the plaintiffs, were formerly partners, doing business in the stove

business in the name of George D. Phinney & Co. They were also partners in the millinery business, using the firm name of Asa H. Phinney & Co. On Oct. 19, 1860, Asa H. Phinney & Co., dissolved their co-partnership, and formed a new one with Jonathan Moore, one of the plaintiffs, under the name of Moore, Phinney & Co., the said Moore having purchased on that day one-half part, in common, of the stock of Asa H. Phinney & Co.

On Oct. 29, 1860, one J. W. Orvis sued out a writ on a note given by George D. Phinney & Co., by virtue of which William Huse, a deputy of the defendant, attached and took possession of the property mentioned in the plaintiff's writ in this action, and, after due proceedings under the statute, sold the whole and entire property in the articles thus attached.

The plaintiffs, thereupon, brought this action of trespass against the defendant, sheriff of the county of Cumberland, for the acts of his deputy.

Fessenden & Butler, for the plaintiffs.

Henry P. Deane, for the defendant.

The opinion of the Court was drawn by

WALTON, J.—The share of one of several co-partners in the goods of the firm may be attached and sold on execution for his individual debt; and, as incidental to this right, the officer may take possession of the goods seized, and deliver the whole to the purchaser. But, if he sells the *entire property* in the goods, it is such an abuse of his legal authority as will make him liable as a trespasser *ab initio;* and an action may be maintained against him in the name of all the members of the firm.

With respect to such members of the firm as are not parties to the execution, he is a trespasser, because he has sold their share of the property to pay the debt of others, without any precept or authority in law authorizing him so to do; and with respect to the debtors themselves, because he

has sold their shares jointly with the shares of others, and thereby rendered it impossible to determine what proportion of the purchase money belongs to them, and how much of it ought to be indorsed on the execution, and because it is their right to have their shares sold separately, to the end that they may not only know the precise amount for which they are sold, but because the sale of a larger amount of property in bulk may injuriously affect the price by limiting the number of bidders. Many persons might have the ability and be willing to purchase the debtor's share, when they could not purchase a larger amount. Ordinarily we should not expect the price of the debtor's share to be injuriously affected by selling the entire property, but it is sufficient to protect him against such a sale, to know that such might be the result; that cases might occur in which such a sale would cause his share to sell for less than if it were sold separately. Many other reasons suggest themselves why the law ought not to sanction such a proceeding, but those already named are deemed sufficient to condemn it.

Such a sale being illegal, and rendering the officer a trespasser *ab initio*, the action may properly be brought in the name of all the partners, and they will be entitled to recover the full value of the goods sold, leaving the judgment, to satisfy which the property was sold, in no part satisfied.

These principles are decisive of the case now before us, and judgment must be rendered for the plaintiffs, the amount of damages to be estimated by a jury, according to the rules of law, and the principles here laid down. *Melville* v. *Brown*, 15 Mass., 82; *Walker* v. *Fitts*, 24 Pick., 191; *Waddell* v. *Cook*, 2 Hill, 47.

Tenney, C. J., Rice, Appleton, Goodenow and Davis, JJ., concurred.

GEORGE F. GILMAN, *Appellant from decree of the Judge of Probate, versus* ANNA K. GILMAN.

If the domicil of a testator, at the time of his death, be in any other of the United States, his will, when its validity is not questioned, may be allowed and recorded in this State as a foreign will; and the moveable property in this State, belonging to the testator's estate, will be disposed of under the will, according to the laws of the State in which the domicil was established.

If the domicil be in this State, the Probate Court here will have original jurisdiction, and our laws must govern the construction of the will, and the disposal of the property.

In regard to questions of citizenship, and the disposition of property after death, every person must have a domicil.

It is an established principle of jurisprudence, *in regard to the succession of property*, that a domicil once acquired continues *until a new one is established.*

In regard to the succession of property, a person can have but one domicil.

If any general rule can be applied to a person having two dwellinghouses, — one in the city and the other in the country, — or in two different cities, and residing in each a part of each year, thereby leaving in doubt, so far as his domestic establishments alone are concerned, which of them is intended as the real domicil, it is, that *the domicil of origin*, or the *previous domicil*, shall prevail.

The *intention*, which combined with residence, establishes the domicil, must relate to the *future*, and not to the *past.*

An intention to dispose of his property according to the laws of any place does not tend to fix the testator's domicil there.

Nor, on the other hand, does the fact that he described himself, in his will, and in his codicil, as "of the city and State of New York," make any material difference.

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

APPEAL from a decree of the Judge of Probate for the county of Kennebec, admitting to probate a paper claimed to be a copy of the last will and testament of Nathaniel Gilman.

On March 25, 1861, the appellee entered a petition in the Probate Court for the county of Kennebec, alleging, substantially, that she was heir at law of Nathaniel Gilman, late of Waterville, in said county, deceased; that he died at

Waterville, Dec. 19, 1859, leaving a large estate, real and personal, in said county; that said deceased was a citizen of, and had his domicil in said Waterville, at the time of his death; that the petitioner believed he left a will duly executed according to the laws of this State; that said will was in existence and unrevoked, at the time of the decease of the testator; that the petitioner was the daughter of the deceased, and is named in said will as one of the executors thereof; that said will was taken away and carried out of this State; that, after using reasonable diligence to obtain it, she has been unable to obtain said will to offer the same in probate; and that she has filed a true copy thereof, and was prepared to prove the execution thereof by a copy and the legal testimony of the subscribing witnesses thereto. The petition concluded with a prayer that said will may be proved and allowed, &c., the same as if the original will had been produced and proved.

After due notice ordered and published, the will was duly approved and allowed by the Judge of Probate, June 11, 1861.

From this decree, the appellants appealed within the time allowed by the statute.

On Jan. 3, 1860, George F. Gilman, named executor in said will, entered a petition in the Surrogate's Court, for the city of New York, praying that the instrument filed in said Court be proved.

At a term of said Court, holden Nov. 23, 1860, the appellee in the present case appeared and offered to show that the deceased was a non-resident, and a non-inhabitant of the State of New York, and was a resident and inhabitant of Waterville, in the State of Maine, at the time of his decease, and also that letters of administration had been granted on the estate before the proceedings were taken in the Surrogate's Court; *but the offer was overruled.*

On Feb. 24, 1863, a final judgment was rendered approving the will in New York.

The printed testimony in the case is contained in 243

octavo pages; but the material portions sufficiently appear in the succeeding pages.

Bradbury, *Morrill* and *Meserve*, for the appellants.

This case arises under provisions of c. 22 of laws of 1861.

1. The appellees allege and must prove that the domicil of Mr. Gilman, the testator, was in Waterville, at his decease.

2. Domicil in international law depends on residence and intention.

It has not the same restricted meaning as the words residence, dwellinghouse and home.

It is not necessary, to the establishment of one's domicil in a place, that he should have a particular house to which he could resort as matter of right, nor that he should live all the time in the town. 2 Kent's Com., 431 and note; *Wayne* v. *Greene*, 21 Maine, 357; *Drew* v. *Drew*, 37 Maine, 389; *Warren* v. *Thomaston*, 43 Maine, 406; *Jefferson* v. *Washington*, 19 Maine, 293; Story's Confl. of Laws, 39, 47; 20 Johnson, 208; 4 Wendell, 603.

3. If a person lives a portion of each year in two different places, his intention will determine which in law is his domicil.

He may elect. Story's Confl. of Laws, 3, 47; 2 Kent's Com., 3, 431 and note.

4. His declarations are evidence of his intention. If they are conflicting, his intention is to be ascertained from his character, condition and acts, as interpreters of his declarations. 1 American Leading Cases, 725.

II. Applying these principles to the evidence in the case, the appellants maintain that the testimony not only fails to establish Mr. Gilman's domicil in Waterville at the time of his decease, but clearly establishes it in New York.

1. His character was strongly marked. With great business capacity, he had an inordinate passion for money making. Outgrowing the field at Waterville, he removed to New York in 1836, to find a theatre suited to his powers.

He found it there and successfully filled it.

From the moment of his success he never contemplated abandoning it.

His letters and conduct up to the month of his death shew him as much devoted to business, as eager for money making, and as confident of his capacity, as in the prime of life.

2. The testimony shows that Mr. Gilman commenced business in New York in 1831; and that, after his marriage, in December, 1836, he removed there with his family, and continued in extensive business there, and to reside in that city and vicinity with his family, up to the time of his death, making Waterville a summer retreat during the warm and sickly season in the city.

3. It is the custom of many of the wealthy citizens of New York to resort to their summer residences during that season of the year.

4. Mr. Gilman usually left New York in mid-summer and returned in the autumn, spending about two-thirds of the year in New York and Brooklyn.

5. Several years he did not return to his house in Waterville, at all.

From 1841 to 1844 he kept house in Tenth street, New York.

From 1847 to 1853 he hired and furnished a house in Brooklyn, where he resided with his family. Subsequent to that time he boarded with his family, and made it his home, at the Astor House and other hotels in New York.

For more than twenty years all his business of consequence was in New York.

He had gathered all his children about him and established his sons and sons-in-law in business in that city.

6. Ten years before his death, he permanently closed his tomb in Waterville, and purchased a lot in Greenwood, on which he built a magnificent tomb "for the burial place for his family," and ornamented the grounds "so as to make it pleasant for his family to visit after he was laid there."

He then declared that he should never make his residence in Waterville again; that all his family were in New York, where it was much easier to get a living.

7. In the spring of 1859, after a search for many years, he purchased a dwellinghouse in Brooklyn, near his business in New York, "for a home for himself and family."

He fitted it up for occupancy, superintending personally.

He furnished it, to have it ready to move into upon his return in the autumn.

He purchased, prepared and ornamented a garden contiguous.

We call attention to a few of the many declarations of Mr. Gilman on the object of this purchase, as convincing evidence of his intention:—

He said to Mr. Walsh that he had purchased the house "expressly for himself and family to live in;"—he said "he wanted it repaired so he could move into it when he returned from the country."

Mr. Miles testifies that, after his purchase of a house in Brooklyn, Mr. Gilman said to him, that "he was fixing it up to reside in when he came back in the winter."

Charles F. Gilman says, I saw Mr. Gilman in July, before he went to Maine the last time. He was talking of having a bill of furniture from me. "He said he wanted to get every thing completed before he went away so as to move into his house in Brooklyn on his return; said he was fixing up his house to occupy on his return."

Henry McClellan says:—He succeeded in purchasing a house in Brooklyn. He laid out a good deal of money in fitting it up, and in laying out a garden on a vacant lot, &c. "He said he wished the house to be a home for his family after his death." He had his own furniture fixed up and removed there, waiting for his family to occupy it when he returned from the country. I saw him the day or the day before he started for Maine; he spoke of returning as soon as the hot weather was over."

W. W. Gilman says, "He said he bought the house to

live in himself," &c. Calling attention to some furniture, he said, "There is the furniture you wanted me to make firewood of." He said it would answer just as well as to buy new. He was painting the house and fixing it up, and spent most of his time there.

George F. Gilman says, "He said it was a very substantial, wellmade house, with plenty of land, a small garden and a fair neighborhood. He said he wanted it for a permanent home for his family. He said he did not think he would get into the house that spring season; but he meant to have it all ready when he came back in the fall to move right into."

Edward McClellan says, that Mr. Gilman conversed with him about the purchase before the title passed. I visited the house and went over it repeatedly while repairs were going on. "He said he had bought it for a home for himself and family after he was gone." "For six years before, his furniture had been in Gold street; he had it fixed up and removed to his house in Brooklyn."

Prior to going into the country for the last time, he said to me, before leaving, that "he wanted to go at once into his house in Brooklyn when he returned, but he would have to go to the Astor House for a few days to make some final arrangements, and that he had left some packages there."

8. If it is said that Mr. Gilman's declarations and voting in Waterville, in 1856, tend to show his domicil there at that time; the evidence shows clearly that it was not there afterwards.

In the summer of 1857 he did not stop in Waterville declaring that, "if there was any question about his residence then, there should be none hereafter."

His declarations at the election in Waterville, had reference to voting, he supposing that any citizen of the United States could vote where he and his family had lived for three months. Hence he urged his son to vote.

9. It is a significant fact that Mr. Gilman was not taxed

in Waterville, nor was his name kept on the list of voters there.

Upon his death, his family understood his body was to go to New York.

10. The value of declarations depends on the fidelity with which they are related and the circumstances under which they are made. Mere recital of residence in deeds and depositions, being immaterial to the questions depending on the instrument, are of comparatively little weight to those in instruments, like wills, where important rights depend upon the residence of the testator.

11. The appellees refer to Mr. Gilman's letters written just prior to his decease, and to his solemn declarations as to his residence contained in his will and codicil, as conclusive upon the question of intention.

In April, 1858, he commences the former: "I, Nathaniel Gilman, of the city and State of New York," &c.

And in the latter we have his dying declaration on the day of his decease, in the words: "I, Nathaniel Gilman, of the city and State of New York, now temporarily residing in Waterville," &c.

12. But there is further reason why the will of Mr. Gilman should not be allowed and established here. It is in evidence that the original will and codicil have been filed and proved in the appropriate court in New York, and that, under the authority of the court, the executors are administering upon the estate. 16 Con., 128.

It is a grave matter to attempt to oust a court of its jurisdiction in a sister State.

There can be no pretence that the codicil is legally proved, only two witnesses having been produced, and there being no legal excuse for the non-production of the third. 17 Mass., 68; 27 Maine, 17.

13. The disastrous consequences of a waste of the estate, that would probably result from a conflict of jurisdiction, invite a careful consideration of the case in all its bearings,

especially as the will makes the most wise and equitable provision for all parties.

W. B. S. Moor and *J. Baker*, for the appellee.

The opinion of the Court was drawn by

DAVIS, J.—This case comes before us upon an appeal from a decree of the Probate Court, admitting to probate and allowing the last will and testament of Nathaniel Gilman. It was proved by a copy, the original being beyond the jurisdiction of the Court.

The validity of the will is not questioned. But the testator left a large amount of property in the city of New York as well as in this State; and the will has been proved and allowed there, on proof of its execution merely, without any inquiry in regard to domicil. The Surrogate seems to have assumed that jurisdiction of the *property* conferred original jurisdiction of the *will*, whether the testator's domicil was there or elsewhere. Even if his decree were conclusive, which cannot be admitted, no decree was made by him upon that point, or that was intended to settle it, as a judgment binding upon the Courts of any other State.

If the domicil of the testator, at the time of his death, was in New York, then his will should be allowed and recorded in this State as a foreign will. R. S., c. 64, § 8. And, in that case, the moveable property in this State would be disposed of, under the will, according to the laws of the State of New York. Jarman on Wills, 2. But, if his domicil was in this State, then the Probate Court here has original jurisdiction, and our laws must govern the construction of the will, and the disposal of the property. *Harrison* v. *Nickerson*, 9 Peters, 483; Story's Conflict of Laws, § 481; *Bempde* v. *Johnstone*, 3 Ves. 199.

It would be well, if possible, to have a distinct and clear idea of what we mean by the term "domicil," before applying it to this case. It is no easy matter, however, to find a definition that has not been questioned. Vattel de-

fines it as "the habitation fixed in any place, *with an intention of always staying there.*" This is quoted with approbation by SAVAGE, C. J., in *Thompson's case*, 1 Wend., 43; and in the case of *Roberts' Will*, 8 Paige, 519. Chancellor WALWORTH adopts it in substance. "Domicil is the actual residence of an individual at a particular place, with the *animus manendi*, or a fixed and settled determination *to remain there the remainder of his life.*" This was slightly varied in Massachusetts, by WILDE, J., in *Jennison* v. *Hapgood*, 10 Pick., 77, where it is said to be a residence at a place "accompanied with the intention *to remain there permanently, or at least for an indefinite time.*" Vattel's definition was questioned by PARKER, J., in *Putnam* v. *Johnson*, 10 Mass., 488, in which "domicil" is said to be "the habitation fixed in any place, *without any present intention of removing therefrom.*" This form has been recognized in this State, as more nearly correct than any of the others. *Warren* v. *Thomaston*, 43 Maine, 406.

All definitions of this kind were criticised, with much force, by Lord CAMPBELL, C. J., in the case of *Regina* v. *Stapleton*, 18 Eng. Law and Eq., 301, in which he suggests that, if one should go to Australia, with the intention of remaining there ten years, and then returning, his domicil could hardly be said to continue in England. If he should leave his family in England, as stated in the supposed case, his domicil might properly be considered there. But, if a citizen of Maine, with his family, or having no family, should go to California, to engage in business there, with the intention of returning at some future time, definite or indefinite, and should establish himself there, in trade, or agriculture, it is difficult to see upon what principle his domicil could be said still to be here. His residence there, *with the intention of remaining there a term of years*, might so connect him with all the interests and institutions, social, and public, of the community around him, as to render it not only proper, but important, for him to assume the responsibilities of citizenship, with all its privileges, and its

burdens. Such residences are not strictly within the terms of any definition that has been given; and yet it can hardly be doubted that they would be held to establish the domicil.

Other definitions have been given, which, though more general, are better adapted to determine the case at bar. Thus STORY, in his Conflict of Laws, says that one's domicil is "his true, fixed, *permanent home, and principal establishment,* to which, whenever he is absent, he means to return." And, in *Munroe* v. *Munroe*, 7 Cl. & Fin., 877, Lord COTTENHAM says that, to effect the abandonment of one's domicil, and to substitute another in its place, "is required the choice of a place, actual residence in the place chosen, *and that it should be the principal and permanent residence.*"

That the testator's original residence was in Waterville, is admitted. There he established himself in business, accumulated property, was married, and owned a house, in which, either continuously, or at intervals, he resided, with his family, until he died there in 1859.

It has been laid down as a maxim on this subject, that every person must have a domicil somewhere. *Abington* v. *North Bridgewater*, 23 Pick., 170. This may be doubtful, in its application to some questions. A life may be so vagrant that a person will have no home in any city or town, where he can claim any of the rights or privileges appertaining to that relation. But, in regard to questions of citizenship, and the disposition of property after death, every person must have a domicil. 1 Amer. Lead. Cas., 725, note. For every one is presumed to be a subject of some government while living; and the law of some country must control the disposition of his property upon his decease. It is therefore an established principle of jurisprudence, *in regard to the succession of property*, that a domicil once acquired continues *until a new one is established.* Therefore the testator's domicil must be considered in Waterville, for the purpose of settling his estate, unless he had

not only abandoned it, but had actually acquired a new domicil in New York.

It appears in evidence that he commenced business in New York about 1831, at first being there transiently; that in 1836 or 1837, having been married a second time, he was in the habit of spending considerable time there with his family, at the Astor House, and other hotels; that he hired a house there, in which he lived portions of the year from 1841 to 1844; that he bought a house in Brooklyn, which he occupied at intervals from 1847 to 1852; that he bought a lot in Greenwood Cemetery, on which he built an expensive tomb; that, after 1836, his principal business was in New York, and that several of his children were married and settled there in business. But he never disposed of his house in Waterville; he always kept it furnished, in repair, and supplied with fuel; he kept a horse and carriage there; he generally spoke of Waterville as his home; and, with the exception of one or two years, (and during those years he did not keep house anywhere else,) he lived in his house there, a portion of the year, with his family.

A person may have two places of residence, for purposes of business or pleasure. *Thorndike* v. *Boston*, 1 Met., 242; *Sears* v. *Boston*, 1 Met., 250. But, in regard to the succession of his property, as he must have a domicil somewhere, so he can have only one. *Green* v. *Green*, 11 Pick., 410. It is not very uncommon for wealthy merchants to have two dwellinghouses, one in the city and another in the country, or in two different cities, residing in each a part of the year. In such cases, looking at the domestic establishment merely, it might be difficult to determine whether the domicil was in one place, or the other. *Bernal* v. *Bernal*, 3 Mylne & Craig, 555, note. In the case of *Somerville* v. *Somerville*, 5 Ves., 750, 788, it is stated as a general rule, "that a merchant, whose business is in the metropolis, shall be considered as having his domicil there, and not at his country residence." But no such rule can be admitted. The cases differ, and are distinguished by other

facts so important, that the domicil cannot always be held to be in the city. It is frequently the case that the only real home is in the country; so that, while some such merchants talk of going into the country to spend the summer, others, with equal propriety, speak of going into the city to spend the winter.

If any general rule can be applied to such cases, we think it is this; *that the domicil of origin, or the previous domicil, shall prevail.* This is in accordance with the general doctrine, that the *forum origines* remains until a new one is acquired. 3 Kent, 431; *Kilburn* v. *Bennett*, 3 Met., 199; *Moore* v. *Wilkins*, 10 N. H., 455; *Hood's case*, 21 Penn., 106. And this would generally be in harmony with the other circumstances of each case. If the merchant was originally from the country, and he keeps up his household establishment there, his residence in the city will be likely to have the characteristics of a temporary abode. While, if his original domicil was in the city, and he purchases or builds a country house for a place of summer resort, he will not be likely to establish any permanent relations with the people or the institutions of the town in which it is located.

If we apply this rule to the case at bar, it will bring us to the conclusion that the testator's domicil in Waterville remained unchanged. Are there any facts that should make this case an exception to the rule?

The testator continued to vote in Waterville about one half of the time. There is no evidence that he ever voted in New York. His manner of life there, boarding generally at hotels, where he always registered his name as from "Maine," renders it probable that he never claimed or was admitted to be a voter in that city.

He paid a tax upon personal as well as real estate in Waterville, a few of the years after he went into business in New York. He does not appear ever to have paid any tax in the latter place but one year. He evidently belonged to that class of men, fortunately small in number, who have

no stronger desire than to avoid the payment of taxes anywhere.

These facts have little tendency to establish anything but the *intention* of the testator. *Residence*, being a visible fact, is not usually in doubt. The *intention to remain* is not so easily proved. Both must concur in order to establish a domicil. *Harvard College* v. *Gore*, 5 Pick., 370. And, as both are known to be requisite in order to subject one to taxation, or to give him the right of suffrage, any resident who submits to the one, or claims the other, may be presumed to have such intention. Both parties claim that the will itself furnishes evidence of the testator's domicil. At most, it can be of little weight, except on the question of his *intention*. Such intention must relate to the *future*, and not to the *past*. A will made at or near the close of life will not be likely to throw much light on that question. It must be an *intention to reside*. An intention to dispose of his property according to the laws of any place, does not tend to fix the testator's domicil there. So that, if the will is made in conformity with our laws, and even if, as is contended, some of its provisions would be void by the laws of New York, that cannot affect the question of domicil. *Hoskins* v. *Matthews*, 35 Eng. Law and Eq., 532; *Anstruther* v. *Chalmer*, 2 Simons, 1. Nor, on the other hand, does the fact that he described himself, in the will, and in the codicil, as "of the city and State of New York," make any material difference. *Whicker* v. *Hume*, 5 Eng. Law and Eq., 52.

During the last twenty years of the testator's life, his ruling purpose seems to have been, to accumulate property abroad, and escape taxation there and at home. This led him to sacrifice, to a large extent, the enjoyments of domestic life, and to sever or neglect all those social ties which might have given him position and influence in the community. He pursued this process of isolation, because, while it did not interfere with his gains, it diminished his expenses. This was what rendered his domicil a question of doubt.

This is what gives to the testimony, as it gave to his life, an aspect of inconsistency and contradiction. But through it all there is apparent an intention to retain his home in Waterville, as a place of retreat for himself during life, and a place of residence for his family after his decease. He never had any such home elsewhere. And, upon the whole evidence, we are satisfied that his domicil was never changed. The decree of the Probate Court is affirmed, with costs for the appellees.

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

JAMES SMITH, JR., *versus* JOHN MONTGOMERY.

By R. S., c. 30, § 1, when any dog does any damage to a person or his property, his owner or keeper shall forfeit to the injured person double the amount of the damage done; to be recovered by action of trespass.

If, in an action under this section, the plaintiff allege that, on a day and at a place specified, "the defendant was the *keeper* of a dog," and had been, for some time prior thereto; and that said plaintiff, at said time and place, owned and had in possession a large number of sheep; and said "*defendant's dog*," on, &c., at, &c., without the fault or consent of the plaintiff, "killed and destroyed two of said plaintiff's sheep," &c.: — *Held*, that the plaintiff need not prove that the defendant owned the dog; if he satisfied the jury that the defendant was the keeper of the dog it would be sufficient.

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

TRESPASS.

The action was brought under R. S., c. 30, § 1.

And the declaration was as follows: —

"In a plea of trespass; for that, on the 28th of November last past, at said Bangor, said defendant was the keeper of a dog and dogs, and had been for some time before said date, and said plaintiff, at said date, owned and had in his possession at said Bangor, and had owned and possessed for some time before that date, a large number of sheep; and

said defendant's dog or dogs, on said 28th of November, without any fault of said plaintiff, or any consent thereto, killed and destroyed, at said Bangor, two of said plaintiff's sheep, and mutilated, injured and spoiled three other of said plaintiff's sheep, and rendered them worthless, each sheep of the value of four dollars; and also, prior to said 28th of November, during last summer and fall season, at said Bangor, pursued, worried and destroyed sheep of said plaintiff, of the value of twenty-five dollars, whereby plaintiff is entitled to recover of said defendant, in this action of trespass, double the value of said property destroyed, to wit, — one hundred dollars, all of which is," &c.

The plaintiff introduced testimony to prove his allegation and rested his case.

Defendant then moved the Court to nonsuit plaintiff, for the reason that plaintiff did not conclude his declaration with the words, "contrary to or against the form of the statute," &c.

The Court declined to order a nonsuit, and defendant, reserving his right to except thereto, introduced testimony to the defence.

The defendant contended that the declaration of plaintiff, among other things, alleged, substantially, that defendant was the owner as well as keeper of the dog or dogs, and that, therefore, plaintiff was bound to prove that defendant was the owner of the dog or dogs in order to warrant the jury to find a verdict for plaintiff.

But the Court instructed the jury that it was not necessary for plaintiff to prove that defendant was the owner of the dog or dogs, but it was sufficient to prove that he was the keeper of the dog or dogs, to their satisfaction, if they found that the dog killed or injured plaintiff's sheep, to entitle him to their verdict for twice the amount of the actual damages done thereto.

The verdict was for plaintiff.

To these several rulings of the Court, defendant excepted.

A. Sanborn, for the defendant.

J. A. Peters, for the plaintiff.

The opinion of the Court was drawn by

BARROWS, J. — The first exception is waived by the defendant's counsel, as plainly not tenable. *Mitchell* v. *Clapp*, 12 Cush., 378; *Frohock* v. *Pattee*, 38 Maine, 108.

With regard to the second, the allegation in this writ is *not*, as in *Buddington* v. *Shearer*, that the defendant was the "owner and keeper," but simply, that he was the keeper of the dog, and this is sufficient under the statute.

The subsequent phrase, "said defendant's dog," must be deemed to relate to the previous allegation, and plainly means the dog of which the defendant is alleged to have been the keeper. We often speak of property temporarily in the possession of another, as his, without intending to assert that he is the owner thereof, but merely to allude to it as being in his possession or charge.

Exceptions overruled.

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

STEPHEN NEWHALL *versus* UNION MUTUAL FIRE INS. CO.

A bond for the conveyance of land, upon the payment of a sum of money at a specified time, is not an incumbrance upon premises insured, if the time has expired and the money has not been paid, even if the obligor has verbally waived the time.

Where the application represented that one stove was used in the building insured, and another stove was subsequently put in and used without notice; and the by-laws of the defendant company provided that "if the risk shall be increased by the insured or others by any change of the circumstances disclosed by the application," &c., "the policy shall be void;" — *Held*, that it is incumbent on the defendant company to show that the addition of the second stove increased the risk, if they would avoid the insurance.

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

ASSUMPSIT on a policy of insurance against fire.

Gould & Robinson, for the plaintiff.

Thacher & Brother, for the defendants.

The facts sufficiently appear in the opinion of the Court.

The opinion of the Court was drawn by

RICE, J.—Two objections only are relied upon by the defendants to defeat the plaintiff's recovery. The first has reference to his title to the premises insured. In his application, the plaintiff avers that the property insured was his, and that it was not incumbered.

The evidence shows that the legal title was in the plaintiff at the date of the application, and at the time of the fire. Some years before the application, the plaintiff had executed a bond, in which he had obligated himself to convey the premises on certain conditions therein specified. This bond had expired before the application, by its terms, its conditions not having been performed, but the evidence shows satisfactorily that the conditions thereof, so far as time was concerned, have been waived by the plaintiff, and that the obligee, both at the time of the application and of the fire, had a subsisting right under the bond.

Did the existence of this bond divest the plaintiff of his title, or create an incumbrance upon the estate?

An incumbrance is an embarrassment of an estate or property, so that it cannot be disposed of without being subject to it. Bouv. Law Dict. *Incumber*, to load with debts; as an estate is incumbered with mortgages, or with a widow's dower. Web. Dict. *Incumbrancer*, one who has an incumbrance or legal claim on an estate. Ib.

In mutual insurance companies, a lien is created upon the estate insured, for security of the premium note. That only can be deemed an incumbrance on such estate which interferes with and puts in jeopardy this lien. It must be something that attaches to the estate and affects the title.

In the case at bar the plaintiff had the absolute title to the estate. He had given a bond, it is true, to convey the estate upon certain conditions which have not been performed. That bond does not purport to convey the estate, and is at most a personal contract that, in certain contingencies, the plaintiff will convey. This may have created an equitable interest in favor of the obligee in the bond, but did not constitute an incumbrance upon the estate, within the meaning of the contract of insurance, by which the lien of the company could be defeated. *Smith* v. *Bowditch M. F. Ins. Co.*, 6 Cush., 44; *Lowell* v. *Essex M. F. Ins. Co.*, 8 Cush., 127; *Brown* v. *Williams & Tr.*, 28 Maine, 252.

The case of *Chase* v. *Hamilton M. F. Ins. Co.*, 22 Barb. S. C., 527, is supposed, by defendants' counsel, to be in conflict with the cases cited above. In that case, the insured in his application represented the property insured as his. The evidence showed that at the time of the application he held a bond for the conveyance of the land, on which the buildings insured had been erected by himself, the conditions of which bond had been fully performed. The Court in their opinion remark:—"He was not a purchaser in possession bound to pay the purchase money before he could demand a conveyance. He had paid the entire consideration for the purchase, and was in possession, and could maintain that possession (under the code) even against those in whom the technical legal title was vested." That presents an entirely different case than the one at bar.

Then there is no such misrepresentation of title, even though those representations be deemed warranties, as will defeat the plaintiff's right to recover.

The next objection is that there was a misrepresentation in the application as to the number of stoves in the house.

The fifth interrogatory is as follows:—The number of stoves, and fire-places, and how stoves and funnels are secured? Ans. One stove.

The original application was made by the obligee in the bond in the name and on behalf of the plaintiff. At the

trial the plaintiff testified that he did not know whether or not there was more than one stove in the house at the date of the application. Almond, the tenant and obligee in the bond, did at one time put in a new stove. The fire did not take in the chimney to which this stove was attached. The new stove was a cook stove. That was attached to a separate chimney. The other had iron feet, and the feet sat upon blocks. The pipe went up through an iron plate into the chimney. This was a short chimney built only from the upper floor.

In a letter from the plaintiff, to the defendants, dated in August, 1857, he says, "The exact cause of the fire I could not exactly tell. There had been fire in one of the stoves to cook dinner. His, (tenant's) wife, was, at the time the fire was discovered, at one of the neighbors. He was in the field with two of his children. They first discovered the fire. There was no one but an infant in the house at the time. There has been air tight stoves used in the house. They may have caused some fissure in the chimney, the only apparent cause of the fire."

This is all the evidence the case presents tending to show that there was or had been more than one stove in the house at any one time. It does not establish the fact affirmatively, though such an inference may legitimately rise therefrom. We think it may fairly be inferred that the new stove, the cook stove, had been ordered since the insurance. Assuming that fact to be proved, how does the case stand?

Art. 17 of the by-laws of the company provides that the applicant for insurance shall make a true representation of the situation of the property on which he requests insurance, so far as concerns the risk and value thereof, and of his title and interest therein.

There is no complaint that he did not truly represent the situation of the property, so far as the risk was concerned.

Art. 19 provides, if the risk on any property insured by said company shall be increased by the insured, or others, by any change of the circumstances disclosed by the appli-

cation, or by the erection or alteration of any building, the carrying on of any hazardous trade, operations or process, or the deposit of any hazardous goods in or near the same, the policy thereon shall be void, unless an additional premium and deposit shall be settled with, and paid to the company.

Sec. 14 of the charter refers to alterations and enlargements of the buildings insured, and is not applicable to this case.

The material question then is, did the introduction of the new cook stove increase the risk of the property insured?

This presents simply a question of fact to be determined by the evidence. *Smith* v. *Ins. Co.*, 12 Harris, (Penn.,) 320; *Herrick* v. *Union M. F. Ins. Co.*, 48 Maine, 558.

It cannot be assumed as matter of fact, or as an implication of law that, by the substitution of a cook stove in place of an open fire, the risk of fire is thereby increased. The burden of showing such increased risk is on the party holding the affirmative, which, in this case, is the defendant. There is nothing in the testimony which shows or tends to show any such increase of risk in this case.

No other points are presented on which a defence can be established.

The default must stand, and judgment be rendered for three hundred dollars, with interest after three months from notice of the loss, which was August 1st, 1857.

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

JEREMIAH CONNER *versus* JESSE WHITMORE.

The possession of a mortgager must be presumed to be in subordination to the title of the mortgagee until the contrary is shown.

A quitclaim deed of the premises mortgaged, given by a mortgagee in possession, passes all his interest therein.

The assignee of a mortgage cannot discharge it after having given a quitclaim deed of the same premises.

A mortgager cannot maintain ejectment against a mortgagee in possession.

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

WRIT OF ENTRY.

The facts sufficiently appear in the opinion of the Court.

N. Abbott, for the plaintiff.

W. G. Crosby, for the defendant.

The opinion of the Court was drawn by

APPLETON, C. J.—The plaintiff, on Dec. 17, 1816, mortgaged the demanded premises to William B. Johnson. It is neither alleged nor pretended that the mortgage has been paid or discharged, with the funds of the mortgager. The demandant was a witness, and did not assert such to be the fact. Indeed, it appears by his admission, long after the mortgage was given, that the debt thereby secured was due and unpaid. Since those admissions were made, a sufficient time had not elapsed to raise the presumption of payment, before the assignee of the mortgage entered into possession under a judgment of Court.

The possession of the mortgager must be presumed to be in subordination to the title of the mortgagee until the contrary is shown. There is no proof that it was ever adverse thereto.

The title to the mortgage passed by various intermediate assignments to Nathan Haywood, who, in 1842, commenced an action of ejectment against the tenant, in which he re-

covered judgment, and, having obtained his writ of possession, entered under the same into the premises in controversy. After so entering, on May 5, 1843, he, with one Edward Fuller, joined in a deed of release to the tenant, who has remained in possession since that time.

The effect of this release was to pass the title of the mortgagee to the tenant. The mortgagee in possession, by a quitclaim deed, passes all his interest in the mortgaged premises. *Hill* v. *Moor*, 40 Maine, 524; *Collamer* v. *Langdon*, 29 Vermont, 32.

There appears on the back of the mortgage a discharge by the assignee, dated August 8, 1843. But this was after Haywood, the assignee, had transferred his interest to the tenant. He had then no remaining interest in the mortgage, and could not legally discharge it.

But this discharge was erased. It does not appear that it was ever delivered as a valid discharge. The evidence tends to show that it was signed under a misapprehension as to the legal rights of the parties, and was erased before any delivery. After the erasure, it was assigned, in pursuance of a previous agreement, to the tenant.

The tenant is in possession as the assignee of an undischarged mortgage,—having a valid assignment before there was any pretence of a discharge. He has been in possession for nearly twenty years. It has been repeatedly settled that the mortgager cannot maintain ejectment against a mortgagee in possession. The remedy of this plaintiff, if any he have, is in equity. *Wilson* v. *Ring*, 40 Maine, 116.

Plaintiff nonsuit.

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

DICKERSON, J., did not sit, having been of counsel in the case.

James A. Russ *versus* Waldo Mutual Insurance Co.

If the declaration on a policy of insurance contain sufficient allegations, which, if proved, would warrant a judgment for the plaintiff; and the defendants simply file the following specification of defence; — "the defendants expect to prove the act of barratry on the part of the master, which act was not covered by the policy;" the plaintiff may safely rest his case after reading the writ to the jury; and he will be entitled to a verdict, unless the defendants, taking upon themselves the burden of proof, maintain their specified defence.

If the master sailed the vessel at the halves, the usual terms, manning and victualling her, and paying half of her port charges, and so continued to sail her till she was lost; this fact, though undisclosed to the insurers, would not be material, except so far as it would allow the defendants to prove barratry on the part of the master; otherwise the fact would be immaterial, unless the master, under such circumstances, with no insurance, should be induced by selfish and corrupt motives to disregard his duty to all parties interested in the safety of the vessel, himself among the rest, which the Court will not assume.

When the plaintiff, before the loss, being bound on a voyage at sea, went with O. A. to the defendant's office, and there their secretary wrote on the back of the policy, in suit, the following order: — "In case of loss, pay to O. A.," and the plaintiff signed it and left it with O. A. for collection in case of loss in the plaintiff's absence, the plaintiff being then indebted to him on a balance of account, and, as security for said balance, which was soon thereafter settled and paid: — *Held*, that the transaction did not constitute a pledge that would render the policy void, but that it is inferable the policy was to be restored to the plaintiff, on his return, in case no loss had occurred or collection made.

On Report, from *Nisi Prius*, Fox, J. presiding.

Assumpsit on a policy of insurance.

The facts appear in the opinion of the Court.

Jewett and *Chase*, for the plaintiff.

W. G. Crosby, for the defendants, submitted an elaborate brief, arguing the following propositions among others.

The defendants may avail themselves of any defence in law or fact, which the plaintiff's testimony discloses, whether embraced in the specifications or not.

The master, up to the time of the loss, sailed the vessel on shares, and thus became owner *pro hac vice*. Being

owner *pro hac vice*, he could not commit barratry. 1 Phil. on Ins., p. 630, sub sect. 1082; *Taggard & al.* v. *Loring*, 16 Mass., 336.

Defendants did not *contract* to insure against barratry of the master, yet, by operation of law, they are *made* responsible for his very acts, which would have been barratry, could he have committed that offence.

The policy was void on account of the wilful concealment by the plaintiff that the master was owner *pro hac vice*. This fact was material; because, when a vessel is sailed by a master on shares, and he is thereby owner *pro hac vice*, the risk is greater than when he sails in capacity of master only. In that capacity, he has the strongest inducements possible to save the ship, and thereby save his employment and wages. Otherwise, he is interested in one-half of the freight and in the stores. He may insure his share in both, and then lacks stimulus to exertion for her preservation.

Insurers might insure when master sails as master, when they would not if he sailed as owner *pro hac vice*.

Every fact is material which there is a just reason to believe might determine the underwriters to insure, or influence their estimate of the premium. 1 Phil. on Ins., 315, *et seq*. Ib., 288, 380.

As to what assured is "bound to communicate." 1 Phil. on Ins., sub sect. 571; 1 Arnold on Ins., original p. 487.

What constitutes concealment in insurance. 1 Phil. on Ins., p. 287, sub sect. 531.

By the terms of the policy, it was "to become void in case of its being assigned, transferred or *pledged* without the previous consent in writing of the owners."

The delivery to Angier was a *pledge* of the policy, without the written consent of the insurers.

Payment of the debt, subsequently, to secure which the policy was pledged, did not restore vitality to it; the simple act of pledging *extinguished* the vital spark.

The *written order* did not constitute a pledge. It was the delivery as security of the debt.

To sustain a pledge of bills, notes, obligations, &c., the only proof required, is to establish the fact of *delivery* to the pledgee, *possession* by him, and a *consideration* therefor; no writing is necessary. To remove all embarrassment in the way of collecting payment in case of loss, plaintiff accompanied the pledge with an order on the company to pay to the person who is proved to be the pledgee.

It is no less a pledge because the plaintiff might have an interest in the policy for the surplus remaining after paying the debt to Angier.

Counsel assigned numerous reasons why such a stipulation *should be* embraced in a policy.

The opinion of the Court was drawn by

CUTTING, J.—The plaintiff, in his declaration, alleges, that, "on the 13th day of September, 1856, he was the owner of one-eighth part of the schooner Fred. Wording, and that the defendants, in consideration of a premium therefor, paid to them by him, on the 15th day of said September, made a policy of insurance upon said schooner for the term of one year, commencing on the 13th day of September aforesaid, at noon, and thereby promised to insure for him five hundred dollars upon said schooner for the term aforesaid, against the perils of the sea, and other perils in said policy mentioned; and avers that afterwards, and within the year aforesaid, to wit, on the 24th day of December of that year, the said schooner was by the perils of the sea wrecked and totally lost; of which the said defendants thereafterwards, to wit, on the same day, had notice and were bound to pay the same in sixty days. Yet, although requested," &c.

To this declaration the defendants file the following specification in brief of the nature and grounds of their defence, to wit:—"They expect to prove the act of barratry on the part of the master of the vessel insured by them, which act was not covered by the policy declared on in the plaintiff's writ."

Upon these pleadings, the only point at issue, at *Nisi Prius*, was the alleged barratry of the master. No one of

the allegations in the writ was denied, but were admitted, and the plaintiff, after having read his writ to the jury, could with safety have rested his case and was legally entitled to a verdict, unless the defendants, taking upon themselves the burden of proof, had maintained their specified defence, which they wholly failed to do.

But the plaintiff appears not to have rested his case upon the pleading, but unnecessarily introduced evidence tending to show, as the defendants contend, an intentional concealment of a material fact as to the ownership of the property insured, at the time of its insurance, and a subsequent transfer of the policy, either absolutely or in pledge, without their consent, whereby the contract of insurance was, or became ineffectual.

The defence, as now presented, rests principally upon the testimony of *Oakes Angier*, (a witness called by the plaintiff,) who states, "that the master (Geo. O. Russ) took the vessel in the spring of 1856, and sailed her at the halves, the usual terms, manning and victualling her, and paying half her port charges, and so continued to sail her till she was lost, Dec. 9, 1856." Hence it is contended by the defendants that the master was the owner *pro hac vice*, which fact was not disclosed to them. But, if not disclosed, was such fact material to the risk? It became material to the defendants in one respect but wholly for their benefit, for it allowed them to introduce evidence to prove the barratry of the master; otherwise that fact is immaterial, unless it should be, as the defendants have argued, that the master, under such circumstances with no insurance, would be induced, by selfish and corrupt motives, to disregard his duty to all parties interested in the safety of the vessel, himself among the rest. Courts do not assume that men so conduct in the management of their affairs, but rather that all are honest and faithful until the contrary appears.

Mr. Angier further testified, "that, sometime before the loss, the plaintiff, being bound on a voyage at sea, went with him to the office of the defendants, and there Mr. Brad-

bury, their secretary, wrote the order on the back of the policy, and the plaintiff signed it and left it with him for collection in case of loss in his absence, being then indebted to him on a balance of account, and, as security for said balance, which was soon thereafter settled and paid."

The indorsement, referred to on the policy, was in these words,—"In case of loss pay loss to O. Angier. J. A. Russ."

It is not now contended, as it was at the trial, that the indorsement constituted an assignment, but it is conceded, in the defendants' argument, that it only created Angier the plaintiff's agent. In the order of time, then, the case finds that the policy was indorsed (not transferred) and *left* with Angier for collection *in case of loss* in his, the plaintiff's absence, and as security for said balance. It is the latter part of the foregoing testimony which the defendants rely upon as establishing a pledge.

One of the essential elements in the contract of pledge, is the delivery of the thing pledged to the pledgee, and the possession retained by him until the debt secured thereby shall have been paid, or the pledge forfeited. Was there here such a delivery of the policy? We think not. The evidence, as a whole, amounts to this,—I leave this policy with you (Angier) for collection in case of loss in my absence, and, from the proceeds, you may deduct my indebtedness to you. It is inferable that the policy was to be restored to the plaintiff on his return, in case no loss had occurred or collection made. Or, in other words, the security depended upon the loss and collection during the plaintiff's absence. Any other construction would defeat the very object of the parties, and render the policy void as to both. We cannot infer any such intention.

Judgment for the plaintiff for the sum insured, with interest from the time it became payable.

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

COLUMBIA GROSS *& al., by Guardian, Appellants from decree of the Judge of Probate, versus* ALBERT E. HOWARD, *Administrator.*

To justify a decree licensing an administrator to make sale of any real estate belonging to his intestate's estate, (except such as is held in mortgage or taken in execution by the administrator for a debt due the estate,) it must be made to appear that such sale is necessary to pay debts, legacies or expenses of sale and administration, or that a sale of *some portion* thereof is necessary for these purposes, and that, by a partial sale, the residue would be greatly depreciated.

The decree of the Judge of Probate, appealed from, cannot be used as evidence of the facts therein contained, in support of the decree in the Supreme Court of Probate.

If land has been sold under a license which was illegally obtained, and an appeal has been taken from the decree granting such license, the fact of sale will not affect the decision of the Supreme Court of Probate.

APPEAL from a decree of the Judge of Probate of Lincoln county, granting a license to the appellee as administrator of the estate of George H. Gross, deceased, to sell enough of the real estate of said deceased to raise the sum of $500.

The appeal not having been seasonably taken, was granted on petition to the Supreme Court of Probate.

The facts agreed upon by the parties are substantially as follows: —

George H. Gross, now deceased, Jan. 9, 1845, gave a bond to Cornelius Gross and Catherine Gross—his father and mother—for their maintenance, secured by a mortgage of his homestead. In October, 1849, said George H. Gross died, intestate, seized and possessed of a homestead (subject to said mortgage) and one other lot of land. Cornelius Gross (the father) died several years previously, but Catherine Gross (the mother) was living at the time of the proceedings appealed from.

The appellee never had any dealings with the intestate, his claim as creditor of the estate being for supplies furnished by him to said Catherine long after the death of the intes-

tate. There were no claims against the estate, at or since the death of the intestate, other than said bond.

On March 6, 1860, Howard, the appellee, entered a petition in the Probate Court, alleging himself to be a creditor of the estate, and praying to be appointed administrator of the estate of George H. Gross. On the same day, without notice, and without the request or assent of any of the relatives of the intestate, he was appointed. At the same time, the appellants, children and heirs at law of the intestate; the widow of the intestate, then unmarried; and a brother of the intestate, were residing in said county of Lincoln.

There was no proof presented to the Judge of Probate that said Howard was a creditor of the estate, other than the allegation in the petition. Upon receiving the appointment, he filed a sufficient bond as administrator. May 29, 1860, an inventory was returned, in which the real estate was appraised at $300, and no personal property was returned.

March 5, 1861, the appellee, as administrator, petitioned for license to sell real estate, on which notice was ordered and published, and license granted in May following. Under this license, the appellee sold all of the real estate of the deceased, June 8, 1861; one portion, subject to the mortgage before described, to the said Catherine, for $5, and the other to one John Gentleman, for $103, for which deeds were duly executed and delivered.

The appellee took the oath, gave the bond and notice required by law, and sold according to his license.

The purchasers took possession under their respective deeds, and were *bona fide purchasers*.

At the time the license was granted, the appellee had not filed or settled any account of his administration, or presented any claim against the estate, excepting the bond heretofore referred to; nor had his claim as creditor been in any manner considered by the Judge of Probate. Commissioners of insolvency had never been appointed, nor was any

proof offered to the Judge of Probate of the nature or amount of the appellee's claim.

The appellants filed the following reasons for the appeal:

2d. Because said petition for license to sell said real estate for the payment of debts, &c., (the amount of said debts not having been ascertained by the settlement of an account or the report of commissioners of insolvency,) was not accompanied with a list, under oath, of the debts due from said estate, and of the amount of the expenses of administration up to the time of said application, as by the rules of said Probate Court is required, nor by any evidence of the nature and amount of said supposed debts and charges.

3d. Because the administration granted to said Albert E. Howard, as a creditor of said deceased, was void, it having been granted without notice to the widow or others next of kin to said deceased; without proof that they were unsuitable; and without their being cited before the Judge of Probate for the purpose of taking out letters of administration on the estate of said deceased. And said administration was further void in this, that it did not appear by the said Howard's petition for administration, nor by the evidence presented thereon, nor by the decree granting said administration, that there was personal estate of said deceased, amounting to twenty dollars, nor that the debts due from him amounted to that sum, and that he left that amount in value of real estate. For which reasons and because there was no property or estate of said deceased, whereon said administration could operate, the said administration and all acts done in pursuance thereof were irregular, illegal and void.

4th. Because said Albert E. Howard was not a creditor of said deceased, and because there were no just debts due and owing from said deceased at the time of his death, nor from his estate since that time.

5th. Because the said appellants claimed that the real estate of said deceased descends and belongs to them of right as his legal heirs, and that they ought not, by the sale of

their said estate, to bear any part of the expenses of said Howard's unnecessary, illegal and void administration.

The opinion of the Court was drawn by

BARROWS, J. — The irregularities occurring throughout these proceedings are numerous and extraordinary, and indicate a looseness of practice in the matter of issuing notices to parties, whose rights are to be affected by the proceedings contemplated, and a general inattention to the requirements of law in the Probate Court, that are greatly to be deprecated.

To commence with the objection that lies nearest to the proceeding appealed from: — To justify a decree licensing an executor or administrator to make sale of any real estate, belonging to the estate which he represents, (except such as is held in mortgage, or taken in execution, by the executor or administrator, for a debt due the estate,) it must be made to appear that such sale is necessary to pay debts, legacies or expenses of sale and administration, or that a sale of *some portion* of the real estate is necessary for these purposes, and that, by a partial sale, the residue would be greatly depreciated. R. S., c. 71, § 1, items, 1st, 4th, 7th.

Now, here, the decree granting the license and finding these facts is appealed from, and to authorize the appellate Court to affirm the decree, enough of these facts must be proved or admitted, in the Supreme Court of Probate, to make out a case for the original petitioner. They are not only not proved nor admitted, but, by the agreed statement of facts presented to us, the contrary appears.

The administrator never had any dealings with the deceased. His claim for supplies furnished to Catherine Gross, after the decease of the intestate, was against said Catherine only. She only could assert a claim against the estate of the deceased, upon the outstanding bond. She does not seem ever to have done so. She held a mortgage to secure it, and there is no evidence before us that there was anything due from the estate of the deceased upon that bond.

The counsel for the appellee seem to rely upon the decree appealed from, as evidence of the facts to be made out, but, in a hearing upon an appeal from that decree, it can hardly be necessary to say that it cannot be thus received.

And it is time that parties should more fully understand that it is an exceedingly precarious advantage that can be obtained, by misleading a Judge of Probate in the exercise of his functions.

It is urged that the sale is necessary, and the license should be granted, to raise money to pay the expenses of administration.

If we conceded the propriety of this position, under the circumstances of the case, still there is nothing before us to show the amount of those expenses, and the license must be limited to that, as it is not alleged nor proved that a partial sale would depreciate the residue.

But looking into the agreed statement of facts, upon which we are to pass, we find that this administration was improvidently granted upon the *ex parte* representation of this petitioner, that he was a creditor of the intestate, when he was not so, and when, so far as appears, the case was within the provisions of section 5, chapter 63 of the Revised Statutes, declaring that administration shall not be granted unless it appears that there is personal estate of the deceased amounting to at least twenty dollars, or that the debts due from him amount to at least that sum, and that he left that amount in value of real estate. It was held in *Bean* v. *Bumpus*, 22 Maine, 553, that the Probate Judge "has no jurisdiction, so that he can grant administration, if it does not appear to his satisfaction" that there is personal estate, or debts due from the intestate and real estate, sufficient to meet the requirements of the statute above referred to.

Now, even if we substitute the recital in the decree granting administration for the agreed statement of facts before us, and hold that the decree granting administration, not being appealed from, is conclusive as to the rightfulness of the appointment, it would by no means follow that a license

to sell real estate ought to be granted to pay the expenses of administration.

The petition for administration alleges that there was personal estate, rights and credits, which ought to be administered according to law; and there is no allegation that the debts due from the estate amounted to twenty dollars, (which would be necessary to give the Court jurisdiction to appoint for that reason,) although it is asserted that the applicant for administration is a creditor. The decree finds the facts set forth in the petition and those only. So that unless we resort to the agreed statement, it would seem that there was personal estate which should have paid the administration expenses. If we take the agreed statement, (which is really the case presented by the parties for adjudication,) the impropriety of the appointment is at once manifest. The appellee may have done all under an innocent misapprehension of his legal rights, but to suffer a stranger, thus intermeddling, to deprive the heirs of a person deceased, of their rights of inheritance in their progenitor's real estate, for the purpose of paying expenses incurred by his own wrong, would be an abuse of the power to grant licenses for the sale of real estate.

That the land has been sold, under the license granted by the Judge of Probate, can make no difference in our decision of this case. *Nowell* v. *Nowell*, 8 Greenl., 220. Enough has been said to show the conclusion to which a reasonable attention to the requirements of law in other matters must bring us. *Decree reversed, with costs for the appellants.*

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

BETSEY KERSEY, *Appellant from decree of the Judge of Probate, versus* ISAAC H. BAILEY, *Executor.*

By R. S., c. 65, § 13, in the settlement of any intestate estate, or of any testate estate which is insolvent or in which no provision is made for the widow in the will of her husband, or she duly waives the same, the widow shall be entitled to so much of the personal estate, besides her ornaments and wearing apparel, as the Judge deems necessary, according to the degree and estate of her husband, and the state of the family under her care.

A widow's claim for an allowance rests merely in the discretion of the Court.

The circumstances under which this Court will not reverse a decree of the Judge of Probate refusing an allowance to a widow.

APPEAL from a decree of the Judge of Probate of Lincoln county, refusing an allowance to the appellant out of the personal estate of Abisha Kersey, late of Alna, in said county, deceased.

The facts appear in the opinion of the Court.

Ingalls & Smith, for the appellant, contended that:—

To entitle a widow to an allowance from the personal estate of her deceased husband, it is only necessary to show that she is his widow; that there is personal property from which the allowance can be made, and that no provision has been made for her in the will of her husband, or that she has duly waived the provisions of such will. The statute, c. 65, § 13, is *peremptory*, and without *qualification* or *condition*.

No rule of common law can apply, for the right to an allowance is given by statute only, and the widow can be barred only in the modes prescribed by statute. Unless deprived of an allowance by statute, the right of the widow is *absolute* and *unconditional*.

The respondent relies upon adultery to defeat the right of the widow to an allowance. Adultery is not admitted, but, if it was, the statute makes it no bar to an allowance.

Analagous to the right to an allowance, is the right to dower. The statutes of Massachusetts in reference to dow-

er are similar to those of this State, and it has, in a recent case there, been held "that a woman is not barred of her right to dower by leaving her husband and living with an adulterer." *Lakin* v. *Lakin*, Law Reporter, August, 1861, No. 4, Vol. 24.

That was a stronger case for the defence than this, for in the case at bar the husband deserted the wife, and she was not married again till she believed she had a lawful right to do so.

Wales Hubbard, for the appellee.

The opinion of the Court was drawn by

BARROWS, J.—It is claimed on the part of the appellant, in substance, that a widow, no matter what may have been the position which she has occupied towards her deceased husband, nor whether she has sustained the relation of a wife in fact as well as in law, or not, is entitled to a portion of his personal estate, to be set out by the Judge of Probate, upon her petition for allowance, as matter of legal right, by virtue of § 13, c. 65 of R. S.

But it has been decided by this Court, under statute provisions substantially the same, that a widow's claim for an allowance is not such a *right;* that it rests merely in the *discretion* of the Court. *Gowen, Appellant*, 32 Maine, 516.

The Judge is empowered by the statute to make her an allowance, in the case of an intestate estate, or of any testate estate which is insolvent, or in which no provision is made for the widow in the will of the husband, or where she duly waives the same, of so much of the personal estate as *he deems necessary*, according to the degree and estate of her husband and the state of the family under her care, and she shall be entitled to so much as he determines in the exercise of his judicial discretion she shall have. But any petition of this sort is addressed to the discretion of the Judge of Probate, and is to be considered in the light of all the circumstances of the particular case, and the Judge may make

an allowance larger or smaller as the case may seem to require, or dismiss the petition altogether, if it appears that, all things considered, no allowance ought to be made.

It was decided, in *Cooper, petitioner*, 19 Maine, 260, that, though the amount of the allowance was discretionary, an appeal lies to the Supreme Court of Probate. The appealing party has usually been some heir or creditor of the deceased, who has considered himself aggrieved at the amount of the allowance ordered — for, long usage, many precedents, and the sympathy which is naturally felt for one who has been deprived of her legal partner, stay and support, infallibly compel a Judge of Probate to deal liberally in these matters towards the petitioners — quite as liberally as is consistent with a due regard for the rights of heirs, creditors and legatees. But the right of the petitioner to appeal is equally clear, and we therefore proceed to determine, from the agreed statement of facts, whether in this case the discretion of the Judge of Probate was rightly exercised in refusing an allowance and dismissing the petition.

From the tenor of the statute directing the attention of the Judge to the estate and condition of the husband and the state of the family under the widow's charge, it is apparent that the Legislature, in making the provision, were contemplating the ordinary case where the parties to the marriage relation have lived together till death severed the tie, and where the widow remains in charge of the family of the deceased. Yet the *power* undoubtedly extends to cases where a separation has taken place between the husband and wife before the death of the husband, so long as the marriage relation has not been legally dissolved. But it is apparent that such cases call for more careful discrimination, and that even where the separation has been a brief one, the circumstances may be such as would make it proper to refuse an allowance. Indeed, where no separation has taken place, and the husband and wife have lived together in the most amiable exercise of the nuptial relation till the close of his life, there may be somewhat in the position of the

wife as to separate property of her own—as to the amount of the distributive share of his estate to which she is entitled—or the amount which she may realize from her right of dower in his real estate, and in the condition of the estate as to indebtedness—or in the more pressing necessities of the heirs or legatees, which would make it entirely just and proper for the Judge of Probate either to decline to exercise his discretionary power in her behalf, or to make a small allowance out of a considerable estate.

The original intention of the statutes giving this power to the Probate Court would seem to have been the furnishing of a temporary supply for the wants of the widow and family, while the estate was in the process of settlement, and until the debts should be paid, and the distributive shares of the widow and heirs ascertained, and in cases of insolvency the furnishing of support for the helpless until such time as new arrangements could be made to enable them to gain a livelihood. This seems to have been the construction adopted in *Washburn* v. *Washburn*, 10 Pick., 375. But in our State the practical construction has been more liberal, and the power is not to be understood as being confined in all cases to mere temporary relief.

Questions of this description call for the most careful discrimination on the part of the Court before which they come, in order to do equal justice, forgetting none who have claims and interests to be protected.

What are the facts in the case at bar?

The appellant, though the legal wife of the deceased, had not lived or cohabited with him as such for more than forty years. True, he deserted her, but subsequently she, supposing him to be dead, married another man with whom she lived and cohabited as his wife for thirty years or more, and until his decease. The intestate, on his return to this State many years ago, finding that she had formed new ties, allied himself to another woman by whom he had a family, and in connection with whom the little property left by him at his decease would seem to have been accumulated.

The appellant, entangled with her new connection, does not appear to have made any claim upon him for support during the long time that elapsed after his return to this State before his decease. She lost nothing by his death, which she had before possessed. In fact there seems to have been a tacit relinquishment by each of all claims upon the other for more than a quarter of a century. It is plain that she contributed nothing by her industry and prudence to the accumulation of the three or four hundred dollars out of which she now claims an allowance.

Upon her right to dower in his real estate we do not pass. But while we impute no blame to her for the sundering of this old connection, we do not see that the Judge of Probate erred in refusing an allowance under all the circumstances of the case. *Decree affirmed with costs.*

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

JAMES THURSTON *versus* LEVI SPRATT.

The vendor in possession of personal property impliedly warrants the title to the thing sold.

If the purchaser, or any subsequent vendee, be sued in any action involving the question of title, the judgment will be conclusive against said vendor, if he received notice of the pendency and nature of the action.

And it can make no difference that the property has been repeatedly sold, and that the suit is against the last vendee, if the question of title is the only question in controversy.

Where the defendant exchanged horses with the plaintiff, and the plaintiff sold the horse received of the defendant to another person, and the last named to still another; and the last vendee was sued in replevin for the horse; and he notified his vendor of the pendency and nature of the suit, and a similar notice was given by each vendee to his respective vendor, back to the defendant, who neglected to defend the suit: — *Held*, that the plaintiff could recover the amount of the judgment in said replevin suit, together with witness and counsel fees expended in the same; and that the judgment was conclusive upon the defendant.

Thurston *v.* Spratt.

THE plaintiff introduced testimony to prove the following facts, to wit: — In Jan., 1859, said Levi Spratt exchanged horses with said John Thurston. Said Thurston, about the first of March, 1859, sold the horse which he had received from said Levi Spratt to one Paul Ham. Said Ham, about the first of June following, sold the same horse to Abel Gould; said Thurston, Ham and Gould believing that the title to said horse was in them respectively, as per said sales.

Thereafterwards, on the 20th day of June, 1859, one James Spratt, of Corinth, Maine, replevied said horse from said Gould, claiming title to the same, and that the property was in him at the time of the transfer by said Levi Spratt to said Thurston, in January, 1859.

Thereafterwards, before the return day of said replevin writ, said Gould notified said Ham in writing of the pendency of said suit, of the purport of said suit, and calling upon him to appear and defend the title to said horse at the time of the transfer of the same from said Ham to said Gould. And there and then said Ham also served a similar notice upon said Thurston, and said Thurston served a similar notice upon said Levi Spratt. Said Gould and Ham and Thurston appeared and defended said suit; but said Levi Spratt made no appearance and no defence.

Said suit came on for trial and was tried at the October term of said Court, 1860, and the jury returned a verdict "that the defendant, (Gould,) did take in manner and form as the plaintiff, (James Spratt,) has declared against him, and assess damages for the plaintiff in the sum of five dollars." They further found that, "the property was the property of the plaintiff," (said James Spratt.)

And thereafterwards, on the first of November, 1860, judgment was rendered in said suit, and execution issued Nov. 27, 1860, for said five dollars damage and $29,50 taxable costs.

Said Gould's expenses in answering to said suit, attorney's and witnesses' fees, amounted to $32,96.

The value of said horse, taken and retained by said James Spratt from said Gould, was $50,00.

Said execution was paid by said Gould, and said Ham paid said Gould his expenses and costs in said suit, and for said horse, all amounting to $117,51, and said Thurston also paid said sum to said Ham, and brought this action to recover the same of said Levi Spratt who had sold and delivered to him said horse as abovesaid.

The defendant offered testimony to prove the following facts, to wit:—that defendant and said James Spratt jointly owned the horse which the plaintiff had of defendant in exchange for a horse of plaintiff's in January, 1859; that defendant, who is the son of said James Spratt, and the latter lived in different houses on the same farm which they managed and cultivated together; that they had jointly owned oxen, cows, horses and other personal property for many years, and each had permitted and allowed the other to sell or exchange horses and other personal property so owned by them, as each saw fit, without objection on the part of the other, that said James Spratt was immediately informed by defendant of the exchange of said horse by defendant with plaintiff, and made no objection thereto till long afterwards, when some disagreement happened between them; that the horse which defendant let plaintiff have was not worth more than $25, and the horse which defendant had of plaintiff in exchange as abovesaid, was not worth more than $5. This evidence being excluded, the defendant submitted to a default; damages to be assessed by the Court; if testimony improperly excluded, the case to stand for trial.

The Court ruled that this testimony was inadmissible and excluded it.

To this ruling defendant excepted.

B. H. Mace, for the plaintiff.

A. Sanborn, for the defendant.

The opinion of the Court was drawn by

KENT, J.—The vendor in possession of personal proper-

ty impliedly warrants the title to the thing sold. He is therefore bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser, or any subsequent vendee is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. If no notice is given, it is not conclusive on him, but he may show that the plaintiff, in a suit against him on his warranty, ought not to recover the amount he has paid, because the case was not properly defended, and judgment was suffered unnecessarily. *French* v. *Parish*, 14 N. H., 496; *Duffield* v. *Scott*, 3 D. & E., 210; 1 Johns., 517; *Weld* v. *Nichols*, 17 Pick., 538; *Kipp* v. *Bingham*, 6 Johns., 157.

It can make no difference that there are intermediate purchasers, and that the suit is against the last one, *if the question of title is the sole matter in controversy*. All the individuals who have sold the property are alike warrantors, and can as well defend the title in the suit against the last purchaser, as in a suit against themselves, if they have notice. The law will not tolerate a succession of long lawsuits to determine, as in this case, the title to a single horse, in all of which precisely the same issue is to be tried, when all the parties have had due notice and an opportunity to defend. It requires that every warrantor, who is notified, shall act at once in defending himself, or in aiding the party sued to defend the action. This is the rule in real actions. *Perkins* v. *Pitts*, 11 Mass., 125; 4 Mass., 353.

Where there is a succession of transfers, and judgment against the last holder, and notices to all the vendors, it may be competent for the first, or any seller, to show that the defect in the title arose after he sold the property, and that therefore he had no interest in the determination of the question tried. However this may be, the defect in the case before us was in the title of the defendant. That was the only question in issue. He was notified and did nothing to

aid in the defence. This case illustrates the wisdom of the rule. After being notified, he stands by and keeps to himself the facts which he now says would show a right in him to sell the property. If he had disclosed them or testified to them at the trial, the result might have been different. He allows a final judgment to pass by which the other innocent purchasers lose the property and damages and costs, and now asks to be allowed to prove them, when it is too late for his vendee to use them in his defence.

Exceptions overruled. Default to stand.
Damages to be assessed by Judge at Nisi Prius.

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

JONATHAN DURHAM *versus* CHARLES GILES *& als.*

The plaintiff, as indorser, paid a note, after a suit had been brought thereon by the indorsee, in which the makers obtained a verdict and judgment in their favor, on the ground that, before the negotiation of the note, the time of payment had been extended without the consent of the sureties; — *Held*, that the plaintiff acquires no right of action against the maker and sureties for the money so paid; that the sureties were discharged by the verdict in their favor as against the plaintiff.

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

ASSUMPSIT for money paid, &c. From the case, it appears that the plaintiff was the payee of a negotiable promissory note against Giles, as principal, and the other defendants as sureties. After the maturity of the note, the plaintiff sold and indorsed it to one *Havener*, who afterwards commenced an action thereon. *Giles* made default; but the sureties defended on the ground that Durham, while owner of the note, and before the sale to *Havener*, made an agreement with *Giles* to extend the time of payment of the note, for a valuable consideration, and, without their knowledge or

consent. The verdict was in their favor, and judgment was rendered thereon.

The plaintiff, as indorser, paid to Havener the amount of the note, and thereupon brought this action.

N. Abbott, for the plaintiff.

W. G. Crosby, for the defendants.

The opinion of the Court was drawn by

APPLETON, C. J.—It is difficult to perceive what pretence there is for maintaining this action. The only claim, the plaintiff had against these defendants, arose from their note of hand to him. This he indorsed, to one Havener, after which he ceased to have any right of action against the defendants.

The indorsee, having the title to the note of the defendants, commenced a suit thereon. The principal was defaulted. The sureties defended the suit and recovered judgment against Havener.

Havener, failing to collect his debt, called on the plaintiff as indorser, who thereupon paid him the amount due on the note indorsed. The plaintiff made this payment on his own account, and not on account of these defendants. He made it in consequence of his liability as indorser, and to relieve himself therefrom. He was under no obligations to these defendants to make the payment.

Besides, that payment did not transfer the title to the note to the plaintiff. It still remained in Havener, to whom he had previously transferred it. The only claim the plaintiff had against the defendants was as the payee of their note. Their liability to him was as the holder thereof, and while he continued such holder and no longer. But the plaintiff is not the holder of the note. The payment to Havener did not revest the title in him so as to enable him to maintain an action thereon. A judgment had been rendered upon the note in a suit between the indorsee and the makers. The plaintiff has acquired no right of action against the

sureties. Their rights and liabilities have been once judicially determined in a suit by the indorsee of the note against them, and cannot again be called in controversy. If it were not so, they might be harrassed by as many suits as there should happen to be indorsers. *Nemo debet bis vexari pro una et eadem causa.* *Plaintiff nonsuit.*

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

JOHN WHITEHOUSE, *pet'r*, *versus* ANDROSCOGGIN R. R. Co.

A jury appointed to estimate damages for land taken by a railroad company, should not include in their verdict, damages occasioned by the neglect of the company *to remove* the stones thrown upon the petitioner's land, by blasting, while grading their road.

It should include damages caused by blasting.

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

The facts sufficiently appear in the opinion of the Court.

Gilbert & Sewall, for the respondents.

The petitioner's brief does not indicate who made it.

The opinion of the Court was drawn by

DAVIS, J.—The petitioner, being dissatisfied with the amount of damages awarded him by the County Commissioners, for land taken by the Androscoggin Railroad Company, applied for a jury to estimate his damages. A warrant for a jury was issued, the parties were duly heard, and a verdict was returned to this Court, to the confirmation of which the defendants have excepted. Two questions of law are presented by the case.

The jury were instructed by the sheriff that they might consider, in their award of damages, injuries caused by

rocks thrown out upon the petitioner's land by blasting, "*and not removed by said company.*"

In grading their railroad, the company have the right, so far as may be necessary, to remove the loose or solid rock by blasting. This is one of the necessary incidents to the right of construction granted by the Legislature. It may be exercised, therefore, though injury is thereby caused to the adjacent lands. And the jury may properly take such injury, already done, or likely to be done if the railroad has not been graded, into consideration, in their estimate of damages. *Dodge* v. *County Commissioners*, 3 Met., 380.

But it is the duty of the railroad company to remove the stones thus thrown out, within a reasonable time. The jury are to presume that they will execute their work properly. They cannot award damages on the supposition that there will be any breach of duty. They can only embrace in their estimate, injuries caused by the acts of the company which are authorized by their charter. Pierce's Am. Railway Law, 169, and cases cited; *Dearborn* v. *B. C. & M. Railroad Co.*, 4 Foster, 179. And, if the way has already been graded, and the company have been guilty of negligence, in doing anything not authorized, or neglecting to do anything required, damages cannot be awarded for this. The neglect *to remove* the stones thrown upon the petitioner's land by blasting, was an injury for which his remedy was by an action at law. The jury should not have embraced it in their verdict. *Sabin* v. *Vermont Central Railroad Co.*, 25 Vt., 363.

As the exceptions must be sustained, there is no necessity that we should express any opinion upon the other questions presented.

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

INHABITANTS OF DETROIT, *Petitioners*, *versus* COUNTY COMMISSIONERS OF THE COUNTY OF SOMERSET.

By R. S., c. 18, §§ 16 and 17, after a joint board of County Commissioners has decided to locate a way which will extend into their several counties, each board may act separately in locating so much of the way as lies within its own county.

R. S., c. 18, §§ 38 and 39, provide that a highway may be laid out on the line between towns, part of its width being in each, and the Commissioners *may* then divide it crosswise, and assign to each *town* its proportion thereof, by metes and bounds.

If, in locating so much of a highway, extending into two counties, as is in their own county, the County Commissioners assign, in their report, the several portions of the road to be built by the respective *counties*, instead of by the *towns*, in which said road runs; a writ of *certiorari* will not be granted to quash the proceedings.

Nor will such a writ be granted because no damages were awarded to the individuals over whose land the road passed, nor because such land owners were not named, it appearing that no damages were claimed.

Nor because no time is allowed the owners of land over which the road is located to take off wood, timber, and other erections. The statute allows them one year for that purpose.

PETITION for a writ of *certiorari*.

The boards of County Commissioners of the counties of Waldo and Somerset, acting jointly upon a proper petition, adjudged that a highway running into both counties — both *termini* of which were in Somerset county — should be located and established.

The Commissioners of Somerset made a report of their proceedings under that adjudication. So much of their report as is necessary to be transcribed was as follows: — "Commencing on the line between Somerset and Waldo, and on the line between the towns of Burnham and Detroit, and about fifty rods northerly of John B. Pushaw's house in the town of Burnham, and in the centre of the county road on the "horseback," so called, at a stake marked "R," &c.; "thence," [specifying five corners with their respective distances, and referring to a stake and tree, for a monument at the end of each distance,] — "to a stake marked R, standing

in the dividing line between the counties of Somerset and Waldo." At this point, the way crossed wholly into Waldo and continued in said county of Waldo, thirty-four rods and eighteen links, when it crossed back into Somerset. The report continued: — "*Somerset to build to said stake on the north, and Waldo to build to said stake on the south.* Commencing again, also, on the horseback at a point *thirty-four rods and eighteen links north of last named point, and at the north end of that part of the county road located this day by the County Commissioners of Waldo*, at a stake in the centre marked R, *Waldo to build to said stake on north, and Somerset on south*, as per agreement of County Commissioners of Somerset and Waldo; thence" [specifying eight different courses, with their respective distances, referring to a monument at the end of each,] "to a stake marked R, standing in the centre of the county road leading to Pittsfield village," &c.; "said road to be four rods wide, and the line described to be the centre thereof."

"No damages are claimed by or awarded to the owners of land over which the road passes, and two years are allowed to the towns of Pittsfield and Detroit to build and make said roads passable.

"Given under our hands," &c.

This is a petition for a *certiorari*, with a view to quash the proceedings of the Commissioners of Somerset county in establishing the road.

The petitioners assigned five errors, all of which appear in the opinion of the Court.

J. H. Webster, for the petitioners, argued: —

The proceedings of County Commissioners in locating and establishing ways, being entirely regulated by statute, the statute provisions must be strictly pursued.

In regard to ways in two or more counties, R. S., c. 18, § 17, provides that "each county must be represented by a majority of its Commissioners. A majority of those present *may decide upon the whole matter.* The duty of *carrying*

that judgment into effect is to be performed in each county by its own Commissioners."

The "*whole matter*" cannot be "*decided*," so long as anything remains to be determined. To determine that "common convenience and necessity require the location of a road" between two points, is not a *determination* of the *whole matter*. The actual location of the road upon the face of the ground, by courses, &c., must be done, before the *whole matter is decided*. There may be obstructions in the direct course to be avoided. The judgment is to be executed by the separate boards.

Proceedings in the Commissioners' Court do not come to judgment, until they are closed and ordered to be recorded. It cannot be when the Commissioners have decided the road prayed for to be of "common convenience," &c.; for, upon proceeding to locate, they may find too high damages claimed, or greater obstructions than were first supposed; or after they report, juries, upon appeal, may award such damages as to induce the Commissioners to refuse to establish the road.

Sections 16 and 17 are barren of directions as to mode of proceedure on joint petitions. Legislature only intended to point out steps peculiar to joint petitions, leaving all other steps the same as those required before a single board.

Sawyer v. *County Commissioners of Kennebec*, 25 Maine, 231, decides that, under R. S. of 1841, c. 25, § 26—which was an exact transcript of the Act of 1832 and 1836—in case of a joint view, after the adjudication that the road prayed for is of "common convenience," &c., it is the duty of the separate boards to make the location each in its own county. When the laws were revised in 1857, the provisions above cited had been in force twenty-six years, and a judicial construction given them. Instead of re-enacting them as they then were, very essential modifications of language were made. Why that change, if the law was intended to remain the same?

Where, in the revision of a law, a material change is

made, the Legislature cannot be presumed to have unintentionally made it. *Woodman* v. *Valentine*, 24 Maine, 553.

So, when, in the revision, some part of the revised Act is omitted, the part omitted cannot be revised by construction, &c. *Pingree* v. *Snell*, 42 Maine, 55; *Ellis* v. *Page*, 1 Pick., 43.

The counsel then argued the errors assigned.

Under the 4th error assigned, counsel cited R. S., c. 18, § 4; *Cushing* v. *Gay*, 23 Maine, 9.

S. D. Lindsey, for the respondents.

The opinion of the Court was drawn by

WALTON, J.—This is a petition for a writ of *certiorari* to quash the record of the doings of County Commissioners in locating a highway, lying partly in the county of Somerset and partly in the county of Waldo.

The *first* error assigned is as follows:—

"Said Commissioners act jointly in making their location and not each board separately, in its own county, and they have located a road at each end of the road prayed for, and left a portion in the middle unlocated, and provided no means to pass from one end to the other."

Two or more boards of Commissioners, after having decided to locate a way, which will extend into their several counties, are not required by law to act jointly in making the location. Each board may act separately in locating so much of the way as lies within their county. Such was a correct course of proceeding under the R. S. of 1841, c. 25, §§ 25 and 26; and such we hold to be a correct course of proceeding under the R. S. of 1857, c. 18, §§ 16 and 17. The phraseology in the latter is somewhat different from that in the former, but we think the meaning, when applied to the location of ways extending into two or more counties, is the same. An examination of the record fails to satisfy us that the location of any portion of the way prayed for has been omitted, and it is unnecessary, therefore, to determine what would be the effect of such an omission. So

much of the way as lay in their county was located by the Commissioners of Somerset, and, as nothing appears to the contrary, it is to be presumed that the Commissioners of Waldo have done their duty and located the rest of it, which lay in their county. Such a method of locating the way we hold to be legal and proper.

The *second* and *third* alleged errors may be considered together. They are as follows:—

"In two places the Commissioners have assigned a portion of the road to be built by Waldo and a part by Somerset county, whereas the law requires the towns and not the counties to build the roads, and it is not competent for the Commissioners to require counties to build them. In one place Somerset is required to build a portion of road lying in Waldo, and Waldo a corresponding portion in Somerset county."

An examination of the record before us discloses the fact that these errors are correctly assigned. They probably occurred in this way:—At the places referred to the way is laid out on the line between the towns of Detroit and Burnham, part of its width being in each; and it is provided by law, (R. S. c. 18, §§ 38, 39,) that when a highway is thus laid out the commissioners may divide it crosswise, and assign to each town its proportion thereof by metes and bounds; and in this case it happened that the line between the towns was also the line between the counties; and by an oversight, probably, the Commissioners have stated in their record that they divided it between the counties, instead of between the towns. It thus appears, by the record, that the Commissioners omitted to make a division between the towns, for which they had lawful authority, and made one between the counties, for which they had not lawful authority; and, if the law peremptorily required the Commissioners to make such a division between the towns, so that, in omitting to make it, the inhabitants of Detroit were deprived of a clear legal right; or if, in making such a division between the counties, the petitioners were in any

way aggrieved, they would be entitled to a remedy. What the proper remedy would be, we do not now determine. But the Commissioners were not peremptorily required to make such a division between the towns. The law is, that they *may* make such a division, not that they must make it. It was therefore optional with them to make it or not, and the omission to make it deprived the petitioners of no legal right. Nor do we perceive that the petitioners can be in any way aggrieved by the agreement that a portion of the way lying within their limits should be built by the county. If this agreement should be carried into effect, a burden would be thrown upon the county which otherwise the petitioners would be obliged to bear alone. The second and third errors assigned, therefore, furnish no ground of complaint to the petitioners.

The *fourth* alleged error is as follows: —

"No damages are awarded to individuals over whose land the road passes, nor are such named."

As no damages were awarded, it is to be presumed that in the opinion of the Commissioners none were sustained. And as no one appeared to claim any, either at the hearing or afterwards, it is fairly to be presumed that the owners of the land were of the same opinion. The record discloses no error in this respect.

The *fifth* and last error assigned is as follows: —

"No time is allowed owners of land over which the road is located to take off wood, timber and other erections."

The law allows one year for this purpose; and as nothing which the Commissioners could say would either enlarge or restrict the time, it was entirely proper for them to remain silent upon the subject.

The conclusion to which we have arrived is, that the petition must be dismissed.

Petition dismissed, cost for respondents, to be taxed jointly — not separately.

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

THE CITY OF HALLOWELL *versus* THE CITY OF AUGUSTA.

In the trial of an action of assumpsit for supplies furnished a pauper, the admission, by the defendants, that the pauper (who was a female,) fell into distress as alleged; that the supplies were furnished; that notice was seasonably sent and received; and that the pauper had her legal settlement in the plaintiff town at the time of her marriage; makes out a *prima facie* case for the plaintiffs, and the burden is upon the defendants to show that the husband had a settlement in this State; for by R. S., c. 24, § 1, the settlement of a female pauper is not affected by her marriage, unless her husband is shown to have a settlement in this State,

An illegitimate, born in this State in 1817 or 1818, would take, by the statute of Mass., of 1794, c. 34, then in force, the settlement of his mother at that time, if she had any in the State.

If the mother acquired a settlement in this State by residing here March 21, 1821, — the date of the settlement Act — (so called,) it would not affect the settlement of her illegitimate son

THIS is an action for supplies furnished by Hallowell to widow Sally Wright and her five minor children.

The fact that Mrs. Wright and children fell into distress, as alleged in the writ; that supplies were furnished to a certain amount hereafter to be ascertained; that a notice was seasonably sent and received; and that Mrs. Wright had her legal settlement in Augusta at the time of her marriage with John Wright, were admitted by the defendants.

It was not admitted that the articles furnished were suitable and necessary in kind.

The following is a copy of the items claimed by plaintiffs:

1859, Jan. 4, cash paid for wood by Jesse Aiken,		$2	50
" " 25, " " " " " "		4	00
" Feb. 19, paid M. Johnson for supplies, as follows:			
" Jan. 4, ...	2 00		
" " 13, ...	2 00		
" " 18 to Feb. 12, . . .	6 82		
" Feb. 12 to March 1, . . .	6 10		
Cutting wood for Mrs. Wright	60	17	52

Feb. 23, Supplies to Mrs. Wright,	2,00
March 29, Paid F. L. Ball for moving Mrs. Wright,	2,00
	$28,02
Interest on same,	2,02
	$30,04

The plaintiffs then stopped.

The defendants then contended that the plaintiffs should show that John Wright had not a residence in the State, before they could resort to the residence of the wife and mother; but the Court ruled otherwise, holding the burden of proof to be on the defendants, to show the settlement of Wright.

The defendants thereupon proceeded with their defence. In behalf of the defendants, the plaintiffs admitted that the pauper was married some years ago to one John Wright, since deceased, and that denial was seasonably returned to the plaintiffs' notice. Defendants then called

Mrs. Laura Avery, who testified:—I was acquainted with John Wright all his life-time. He was born in Readfield. I lived in the same house where he was born, in January of 1817, or 1818, I cannot say which. His mother was Betsey Cressy. She had made it her home at Readfield for a good many years. She had been there about a year at that time when John was born. She had lived in Augusta a good deal. Her mother lived in Wayne. John Wright was an illegitimate child. Betsey lived there till she was married to John King. This was the winter after he was five years old in January. Then she lived in Augusta a number of years. She was boarding in the same house with me at the birth of John. Miss Cressy and I both resided at Readfield, March 21, 1821.

Cross-examined.—I knew Betsey nearly all her life. She was older than I was. She was between 20 and 30 years old, probably, when John was born. She lived at Dillingham's in Augusta before she first came to Readfield. Betsey

was 17 or 18 years old when she first came to Readfield. Mrs. Crosby was her sister. She had made her home in Readfield some four or five years when John was born. She did not then make her home at her mother's in Wayne. Can't say where she was born. I do not know whether she had any help from the town at, before, or after the birth of her child.

When the child was born, I was about 8 years old, and now am 51. She came to Readfield some three or four years before that. She was not a foreigner. I did not know her father. I do not know where Betsey's legal settlement was at the birth of John.

Direct.—John Wright always lived in this State till the time of his death. Can't say when he died, but some five or six years ago.

Cross-examined.—I have lived in Augusta 28 years. John Wright moved to Augusta the year before the Aroostook war, to make his home. He was a single man. He enlisted in the Aroostook war, went to the war and then came back and lived with my husband two years, in Augusta, and then moved to Vassalborough. He resided about three years in Augusta.

Francis Davis, called by defendants.—I was acquainted with Betsey Cressy and John Wright. She lived in Readfield. I remember her in Readfield when I was a very small boy, and to the time John was born, and several years after, till she married King. I should think she was about 30 years old when the child was born. She married King some seven or eight years after that. Her residence was in Readfield, March 21, 1821.

Cross-examined.—I would not say Betsey was more than 25 years old when John was born. I never knew her father. He did not live in Readfield. Betsey was not born in Readfield.

The case was withdrawn from the jury, to be reported to the full Court, who are to draw such inferences as a jury might, and to render judgment for the plaintiffs or defend-

ants, according to the law and the facts; and either party is to have the right to be heard in damages if judgment is for the plaintiffs.

J. Baker, for the plaintiffs.

No paper that has come into the hands of the Reporter indicates who was counsel for the defendants.

The opinion of the Court was drawn by

BARROWS, J. — All the points essential to the plaintiffs' right to recover in this action are established by the admissions of the defendants, unless we find from the evidence in the case that the settlement of the pauper, Sally Wright, was changed by her marriage. Her own settlement in Augusta was not affected by her marriage, unless her husband is shown to have had a settlement in this State. R. S., c. 24, § 1, rule 1.

To change it, the defendants must show, affirmatively, that he had such a settlement. They cannot require the plaintiffs to prove that her original settlement was *not* changed, for it is presumed to continue till a new one is shown to have been gained.

Does it appear that John Wright, the husband, had a settlement in this State? He was an illegitimate child, born in Readfield, in 1817 or 1818. He followed the settlement which his mother had at the time of his birth. It does not appear where her settlement at that time was, or that she had any in this State. She was not born in Readfield. Her parents did not reside there. She came there four or five years before the birth of John, being then seventeen or eighteen years old. At the time of his birth, she had acquired no settlement in Readfield, so far as the case shows, in any of the modes prescribed by the statute of 1794, c. 34, then in force. The settlement which she subsequently acquired in Readfield, by residing there, March 21, 1821, the date of the settlement Act (so called) would not affect that of her son John, which would continue to be that which she had at his birth until he gained one in his own right.

Biddeford v. *Saco*, 7 Maine, 270; *Houlton* v. *Lubec*, 35 Maine, 411. There is nothing in the case to indicate that he ever did so gain a settlement, and consequently there is a total failure of evidence to show that he had a settlement in this State, or that that of Sally Wright, the pauper, was changed from Augusta by her intermarriage with him.

A hearing in damages is to be had, in pursuance of the agreement of the parties. *Defendants defaulted.*

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

JAMES C. BOYNTON *versus* WILLIAM S. GRANT.

The person who subscribes the return of the appraisers, by the use of his whole name, is sufficiently identified as the same person who is mentioned in the certificate of the oath, and in the officer's return by his surname only, where the officer's return refers to that of the appraisers thus subscribed, (in which the administration of the oath is also set forth,) and it speaks of "*the said appraisers*" as having viewed the premises, &c.

The levy of an execution, against two judgment debtors, upon real estate, is void, unless the officer's return thereof show that the debtor, whose estate is taken, chose one of the appraisers, or neglected to do so upon being duly notified.

The return, which states that, "N. W. being chosen by myself, and W. P. being chosen by the creditor, and —— I., being chosen by myself also, *the debtor neglecting to select one*," is insufficient.

When the appraisers' return states that they viewed a "certain *tract of land*" showed to them as *the estate* of the judgment debtor, and that they appraised *said land*, and set *it* out by metes and bounds, &c.; this language, in the absence of any words of limitation, may be understood as stating the "*nature of the estate*," &c, as required by R. S., c. 76, § 3.*

The record of an officer's return of a levy must show the seizure to have been within thirty days after judgment, in order to be good as against intervening *bona fide* purchasers.

An officer's return of a levy cannot be amended according to the facts, after having been recorded, to the injury of intervening *bona fide* purchasers.

* The "nature of the estate" need not be now stated in the appraiser's return. *Vide* Pub. Laws of 1863, c. 165.

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

WRIT OF ENTRY.

Plea, general issue, and brief statement alleging title in the defendant.

To make out his case, the demandant introduced the original writ, *James C. Boynton* v. *Joseph H. Vigoreux* and *O. P. Quincy*, dated Feb. 11, 1851, returnable to the D. C. M. D. Lincoln county, Feb. term, 1851; the officer's return of attachment thereon, dated Feb. 11, 1851; the judgment in said suit in S. J. Court, Sagadahoc county, April term, 1859; (said judgment was rendered on April 30th, 1859;) the execution issued on said judgment, dated May 12th, 1859; the officer's return of the levy on said execution, dated June 6, 1859, which was recorded on July 6, 1859.

Plaintiff also offered, subject to tenant's objection, the annexed affidavit, marked A, and moved for leave for the officer to amend his return in accordance with the facts stated therein.

The premises described in plaintiff's writ are the same as described in his levy.

Tenant, in defence, introduced the record of a deed of warranty from said Joseph H. Vigoreux to Edwin S. Vigoreux, dated March 8, 1853, acknowledged and recorded same day; and he also introduced the records of several deeds of warranty, showing that the same premises were conveyed from said Edwin S. Vigoreux by mesne conveyances to the tenant on 18th day of November, 1857, acknowledged and recorded on the same day. Said deeds all embrace the same premises described in plaintiff's writ. He also introduced, subject to objection, the officer's return of his attachment on said writ, *Boynton* v. *Vigoreux & al.*, to the registry of deeds, Kennebec county, received and entered of record on the 15th day of February, 1851.

(The tenant offered to prove that the separate return, marked B, of the officer on said execution, certifying that he seized said premises on the 28th day of May, 1859,

which is not recorded, has been made on said execution since the levy was recorded, without authority, and is no part of the original return of said levy, but the evidence was excluded by the presiding Judge.)

Demandant then offered the record of said attachment, marked C, in the registry of deeds of Kennebec county, subject to objection, which may be referred to by either party.

The case was then taken from the jury to be reported for the decision of the Law Court, on so much of the evidence offered or reported as is legally admissible; and, if the action can be maintained, tenant is to be defaulted, otherwise judgment is to be for the tenant.

(A.)

"I, Elbridge Berry, on oath, say, that I seized the land described in my return on the execution, *James C. Boynton* v. *Joseph H. Vigoreux & al.*, on the 28th day of May, 1859, and, at the same time, went on to the land and ascertained the boundaries thereof. The creditor and myself, as officer, at the same time chose the appraisers, William Palmer and Noah Woods. Said Vigoreux was out of town at the time, and I delayed until the 5th of June, 1859, for him to return home and choose an appraiser. He was notified to choose one appraiser, but neglected. The Irish named in my return, is Joseph Irish. "Elbridge Berry.

"December 10, 1862."

"Kennebec, ss., Dec. 10th, 1862.—Then personally appeared Elbridge Berry, above named, and made oath to the truth of the foregoing by him signed. Before me,

"Nath'l M. Whitmore, *Jus. Pacis.*"

(B.)

Copy of return on execution, *not recorded.*

"Kennebec, ss., May 28, 1859.—By virtue of this execution, I have this day seized a piece or parcel of land, lying in the town of Farmingdale, in said County, as the property of the within named Joseph H. Vigoreux, the same having been attached on the original writ, Feb. 11, 1851, and

bounded as follows, to wit." (Here follows a description, by metes and bounds, of the same land described in the appraisers' return.) Signed,

"Elbridge Berry, *Dep. Sheriff.*"

So much of the returns and certificates on the execution recorded, as is material, is as follows:—

"Kennebec, ss., June 6, 1859.—Then personally appeared Noah Woods, William Palmer, ——— Irish, all of said county, who made oath, that, in appraising, &c., they would act faithfully and impartially, &c., before me.

"Elbridge Berry, *Dep. Sheriff.*"

"Kennebec, ss., June 6, 1859.—We, the subscribers, *having this day been duly appointed*, &c., *have this day viewed a tract of land* lying in Farmingdale, in said county, shown to us by Elbridge Berry, Esq., for and in behalf of the creditor, as *the estate* of the said Joseph H. Vigoreux, which said *tract of land* is bounded as follows, to wit: beginning, &c., (here follows description of land by metes and bounds,) which said *tract of land* we have on our oaths, &c., and we have set out the said *tract of land* by metes and bounds to the creditor within mentioned, to satisfy this execution and all fees. In witness whereof," &c.

Signed, "Noah Woods,
"William Palmer,
"Joseph Irish."

"Kennebec, ss., June 6, 1859.—The debtor within named, failing to satisfy this execution, &c., and the creditor within named, &c., thinking proper to levy the same on the real estate of the within named Joseph H. Vigoreux, one of the debtors within named, &c., I have *this day* caused Noah Woods, William Palmer, ——— Irish, all of said county, being three disinterested and discreet men, to be duly sworn, &c., to appraise such real estate of the within named J. H. Vigoreux as should be shown them, &c., *as will appear by the foregoing certificate of myself*, the said Noah Woods being chosen by myself, and William Palmer being chosen by the creditor, and ——— *Irish being chosen by myself*

also, the debtor neglecting to select one, &c., * * * * *and on the same day*, by direction of the creditor, I levied this execution on the same tract of land, &c. I therefore return this execution wholly satisfied." Fees stated.

Signed, "Elbridge Berry, *Dep. Sheriff.*"

"Kennebec, ss., June 6, 1859.—Received of Elbridge Berry, Deputy Sheriff, seizin and possession of the before described real estate, in full satisfaction," &c.

Signed, "J. C. Boynton."

"Kennebec, ss., Received July 6, 1859.—Entered and compared with the original, by

"J. A. Richards, *Register.*"

(C.)

"To the Register of the county of Kennebec:—

"Kennebec, ss., Feb. 11th, 1851.—I have attached all the right, title and interest that the defendant has in and to all real estate in the county of Kennebec.

"E. Marshall, *Dep. Sheriff.*

"Attest, E. Marshall, *Dep. Sheriff.*"

"The foregoing is a copy of my return of an attachment made by me on a writ dated Feb. 6th, 1851, returnable to the District Court, Middle District, next to be holden at Wiscasset, Lincoln county, on the fourth Tuesday of Feb. next, in favor of James C. Boynton of Richmond, and against Oliver Quincy and Joseph H. Vigoreux of Gardiner, and the sum sued for in said writ is seventy-four dollars and seventy-two cents, and the *ad damnum* is ninety dollars. "E. Marshall, *Dep. Sheriff.*"

"Kennebec, ss., Registry of Deeds, May 27, 1863.—A true copy from the original filed in said registry, Feb. 15, 1851." Attest, "J. A. Richards, *Register.*"

N. M. Whitmore, for the plaintiff, argued:—

1st. The plaintiff's title to the land described in his writ is perfect, and he should have judgment in his favor unless the levy is defective, or the lien on the land by virtue of the attachment was lost, by neglect to take it "in execution" before the lapse of thirty days after judgment.

1st. The seizure was made, as appears by the officer's return, within the thirty days, viz., May 28, 1859. This is a "taking of the land in execution." The statute does not require the levy to be made or even commenced within the thirty days. The statute does not require "the seizure" to be recorded. It is no more a part of the levy than the original attachment on the writ. The *levy* only is to be recorded. R. S., c. 81, § 32; R. S., c. 76, § 16.

All of the proceedings in a levy relate back to the time of the seizure. *Pope* v. *Cutler*, 22 Maine, 107 and 108, and cases there cited; *Haywood* v. *Hildreth*, 9 Mass., 393.

2d. The officer's entire return shows beyond any reasonable doubt that Irish, named in the certificate and return, is the same man who signs his name to the appraiser's certificate, "Joseph Irish." If the return shows that the man who was sworn as appraiser is the same "discreet and disinterested man" who made the appraisal, it is sufficient. It matters not how he is identified, whether by a christian name or description of his person. *Rollins* v. *Rich*, 27 Maine, 558.

3d. It does fully appear by the officer's return that Joseph H. Vigoreux was notified to choose an appraiser, and that the same Joseph H. Vigoreux neglected, &c.

Joseph H. Vigoreux's land was the only property levied upon. The word "neglect" applies to the defendant, who had rights and privileges in making the levy. Quincy, the other debtor, had no interest in the land and no right to choose an appraiser. "Neglect" cannot apply to him. It can only apply to Vigoreux, and if he was not notified, the officer's return is false. *Herring & al.* v. *Polleys*, 8 Mass., 120, 121; *Bugnow* v. *Howes*, 13 Maine, 154; *Fitch* v. *Tyler*, 34 Maine, 463; *Howe* v. *Wildes*, 34 Maine, 566.

4th. The "land" without any qualification was set off. This excludes the idea of any interest less than a fee simple. It is the most comprehensive language which can be used, and means a fee simple.

5th. It is not necessary by the language of the statute

that the time or fact of a seizure should appear in the registry of deeds. If the levy is not recorded it shall be void. R. S., c. 76, § 16.

6th. The statute referred to in the defendant's brief fixes *the time* of seizure for certain "*purposes.*" It has nothing to do with this case. R. S., c. 76, § 19.

Libbey, for the defendant.

The opinion of the Court was drawn by

BARROWS, J.—Several objections are made to the validity of the levy under which the demandant claims.

It may well be held that Joseph Irish, who subscribes the certificate of the appraisers, is sufficiently identified as the same Irish who is mentioned in the certificate of the oath, and in the officer's return.

The officer's return refers to that of the appraisers, thus subscribed, (in which the administration of the oath is also set forth,) and it speaks of "*the said* appraisers" as having viewed the premises and set out the land. This objection must fail. *Rollins* v. *Rich*, 27 Maine, 557.

Another objection is, that the return of the appraisers does not state the nature of the estate taken, whether a fee simple or a less estate, according to the requirements of c. 76, § 3. But it does state that they viewed "a certain *tract of land*" showed to them as *the estate* of Joseph H. Vigoreux; that they appraised said *land* and set *it* out by metes and bounds.

In the absence of any words of limitation, this may, perhaps, be fairly understood as being an estate in fee simple, held in severalty by Vigoreux.

And, if these were the only objections, the demandant might be held entitled to recover.

Two objections of a more formidable character remain to be considered. The judgment against *Vigoreux & al.*, in satisfaction of which the levy was made, was rendered April 30, 1859. The only return of the levy which was recorded bears date June 6, 1859, and sets forth that the debtor

failing to satisfy the execution, and the creditor finding no personal property and thinking proper to levy the same on real estate, he *that day* caused certain persons to be sworn as appraisers, &c.

The tenant claims under a deed made, acknowledged and recorded, Nov. 8, 1857, the title coming through several mesne conveyances from Joseph H. Vigoreux, who conveyed by deed, duly acknowledged and recorded, March 8, 1853. The tenant appears to be a *bona fide* purchaser for value, and the deeds of warranty, all regularly made and recorded before the levy, will give him the title, unless the levy is connected with the attachment of the premises, on the original writ against *Vigoreux & al.*, dated Feb. 11, 1851. So far as the record of the levy shows, the land was not taken in execution until more than thirty days had elapsed after the rendition of judgment. The plaintiff relies upon an unrecorded memorandum, made by the officer, of a seizure of the premises on May 28, 1859, and contends that the statute does not require the seizure to be recorded, and that it is no part of the levy. This position cannot be sustained, for it is one of the statute requisites of a levy that the officer shall state, in his return on the execution, the time when the land was taken in execution. R. S., c. 76, § 5.

According to the record, it seems to have been done June 6, when the appraisers were chosen and sworn.

Which shall govern, the record, or the unrecorded memorandum of May 28th?

In *Lumbert* v. *Hill*, 41 Maine, 482, the Court say,—"If the judgment creditor, by mistake, do not make his title to the land seized on the execution perfect by the levy, surely there can be no reason why a subsequent attaching creditor or purchaser should be prejudiced by such mistake, *for the record is the statute evidence* of what was done in extending the execution." And again, in the same case,—"A statute title must always be perfect, that is, everything made necessary by the statute, to pass the property, must appear by the return of the officer, and, when recorded, it must of course

appear *by the record* to have been done. And, when the execution and levy thereof have been returned and recorded, as was done in this case, there can be *no other notice* of the previous proceedings *than the record*, by which subsequent attaching creditors or purchasers can be affected."

In *Stevens* v. *Bachelder*, 28 Maine, 218, it was ruled by SHEPLEY, J., "as matter of law," that a levy was void and without any legal effect in the case, because "the officer's name did not appear of record in the book of records, produced and exhibited by the Register;" and this ruling was sustained, though the original return upon the execution, bearing the name of the officer by whom the levy was made, and which purported to have been placed there at the date of the levy," was in the case. It is true, that the facts upon which that case was decided arose prior to the enactment of the statute provision, that every deed shall be considered as recorded at the time when it is received. But the design of that statute undoubtedly was to make the register's certificate of the time of the reception evidence of the *time* of the record, while the deed remained in the office unrecorded, and not to make such a certificate conclusive evidence of notice to third parties of the contents of the deed, in direct contradiction to the record itself. As to this, the true rule seems to be the one laid down in *Hastings* v. *Blue Hill Turnpike Corporation*, 9 Pick., 80, where the Court held that, by all the rules of evidence, the record must be conclusive; that the certificate of record was only *prima facie* evidence, and that to determine otherwise would be to defeat one of the principal objects of the record, for the certificate would be no notice to subsequent purchasers.

This view gives their full and legitimate effect to §§ 15 and 16, c. 76, R. S., which provide that "the officer is, within three months after completing the levy, to cause the execution, with the return thereon, to be recorded in the registry of deeds where the land lies," and that, "*when not so recorded*, the levy will be void against a person who has purchased for a valuable consideration, or has attached or

taken on execution the same premises without actual notice thereof."

The remaining objection to the levy seems, according to the doctrine of *Harriman* v. *Cummings*, 45 Maine, 351, to be equally fatal. There were two debtors in the execution, and it does not appear with certainty that the debtor whose land was taken was notified to choose an appraiser, and neglected to do so; the return simply reciting parenthetically, in the statement of the manner in which the appraisers were chosen, as follows, "the *debtor* neglecting to select one." It is insisted by the plaintiff's counsel in argument, that the return is false, unless Vigoreux was the party notified, because the other debtor had no right to choose an appraiser, and could not "neglect."

It is not easy to see why the same style of argument would not apply equally well in *Harriman* v. *Cummings*. The other debtor had no right to "choose," and when it is returned that an appraiser was chosen by the debtor, it might, perhaps, be fairly argued or inferred, that the choice was made by the one who could rightfully do it, and that unless so made the officer's return is false. But there should be nothing left to argument or inference in such a case. The creditor should make it certain that the proper course was pursued, and, not having done so, the levy must be held defective for this reason also.

According to the stipulations of the parties in the report, there must be. *Judgment for the tenant.*

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

HENRY COOPER, JR., *versus* JOHN BAILEY *& als. & trustees.*

In an action on a promissory note against the makers composing a firm, service of the writ upon one is sufficient, although the action is not commenced until after a dissolution.

In a trustee process, the action may be brought in the county where a corporation aggregate, summoned as trustee, has its established or usual place of business, provided the name of such corporation be inserted, and service made upon it, at any time prior to service on the principal. (R. S., c. 86, §§ 5 and 6.)

A negotiable promissory note, made payable "to the order of A. J. Lynn and W. Perkins," and indorsed "Lynn & Perkins," written by one of the payees, with the sanction and approval of the other, is a sufficient indorsement, although there was no such firm as "Lynn & Perkins."

The declaration, on a note, making an error in describing the amount for which it was given, and also in one of the initials of the payee's name, may be amended.

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

ASSUMPSIT.

The writ was against the principal defendants, several alleged trustees residing in Lincoln county, and the President, Directors & Co., of American Bank (alleged trustees) of Hallowell, Kennebec county.

The note declared on was as follows:—

"$3504,58. Sept. 10th, 1859.

"On demand, after date, we promise to pay to the order of A. J. Lynn and W. Perkins, thirty-five hundred and four dollars and fifty-eight cents.—Value received.

"Jno. Bailey & Co."

Indorsed.—"Lynn & Perkins."

John Bailey & Co., the principal defendants, consisted of John Bailey, George W. Perkins and William Goette.

By the officer's return, it appeared that he made service on the alleged trustees, residing in Lincoln county, on Sept. 23, and, on the same day, attached all the real estate belonging to principal defendants. Sept. 27, the writ was served on John Bailey. On Oct. 22, the writ was served on the President, Directors & Co. of the American Bank,

"by giving Alexander H. Howard, cashier of said bank, in hand, a true and attested copy of this writ," &c. And, on Nov. 8, service was made on George W. Perkins. No service was ever made on Goettee.

The principal defendant Bailey appeared specially, and seasonably filed a motion to abate the writ, because the action was not brought in Lincoln county.

The American Bank were defaulted as trustees.

An affidavit, denying the indorsement of the note in suit, was duly filed, and notice thereof given to the plaintiff's counsel.

The declaration described the note to be for the amount of $3550,58, instead of $3504,58; and one of the payee's names as A. *G.* Lynn, instead of A. *J.* Lynn; which errors the plaintiff filed a written motion to amend, which was objected to by the defendants.

Plaintiff introduced *George W. Perkins*, as a witness, to prove the consideration of the note; but, as his testimony failed to disclose any defence to the note, it is needless to report it.

Plaintiff then called *A. G. Stinchfield*, who testified:— Note in suit was brought into my office, I can't say when, prior to commencement of the suit, however, and it is the same note upon which the writ is made. I have never had any other note growing out of the transaction in my office. Objected to.

The indorsement was put on by Mr. Lynn, in the name of Lynn & Perkins. When Perkins came home, the note and indorsement was exhibited to him, and he made no objection to the form of the indorsement, but expressed his satisfaction with the transaction.

Cross-examined.—I cannot use his language. It was at my office, or my door, that it was exhibited to him; can't say where. It was after he came home; he was in Hallowell when it was exhibited to him.

The case was thereupon withdrawn from the jury, and, by agreement, reported for the full Court; the Court, upon

so much of the evidence as is legally admissible, to draw such inferences as a jury might, and to render such judgment for the plaintiff or defendants as to law and justice shall appertain.

A. G. Stinchfield, for the plaintiff.

J. M. Meserve, for the defendant Bailey, argued:—

1. The action must be dismissed upon the motion filed by Bailey. The R. S., c. 86, § 5, provides that, if all the trustees live in one county, the action shall be brought *there*.

In this case all the trustees live in Lincoln county.

They are all so named in the writ, except there is the name of the "*American Bank*." The American Bank is not a trustee. No legal service has ever been made upon it. A person is not made a trustee by merely having his name inserted in the writ. Such proceedings must be had as to bind the goods and effects of the principal in his hands, if there be any there, before he can be said to be a trustee.

The name of a person in Kennebec cannot be inserted in a writ, so as to give jurisdiction here, without a service of the writ upon him. The principal defendant has a right to know who are summoned, and what property of his is claimed to be held by the attachment.

No person is a trustee within the meaning of the statute, until the writ or precept of attachment has been served upon him. He is then the trustee, the garnishee of the principal defendant. Bouvier's Law Dictionary, "Garnishee," "Trustee," synonymous terms. See definition of "*Garnishee*."

When the writ was served on this defendant Bailey, no service had been made on the American Bank. No valid service could be afterwards made upon the bank as trustees, unless the service was renewed upon Bailey. R. S., c. 86, § 6.

No further service was made on Bailey. There was no service on Goettee at any time.

A service upon the trustee is an attachment of the goods

and effects of the principal defendant, in his hands. R. S., c. 86, § 4.

No service is effectual or valid that does not so bind such goods, provided there be any in the hands of the trustee.

No attachment of the defendant's goods can be made after the final service of the writ upon him. R. S., c. 81, § 44. Therefore, a party cannot be legally summoned as a trustee after a final service upon the principal defendant; and, although his name may be in the writ, still, if not summoned, he is not the trustee of the principal defendant.

The American Bank not being the trustee of the defendants, it is the same as if its name was not inserted in the writ.

A subsequent service on Perkins is not sufficient. Bailey was within the jurisdiction, as the officer's return shows, and must be served with process. *Parker & al.* v. *Danforth & trustee*, 16 Mass., 302.

Chapter 81, § 24, is the only authority in this State for proceeding by a service on a part of the co-defendants, and that requires an order of notice by the Court. It applies only when defendants are absent from the State when service is made. The writ shows that Bailey was an inhabitant of Thomaston at that time, and the officer's return shows that he was within the State.

The fact that the American Bank made no appearance, but were defaulted, gives no jurisdiction to this Court. The fact that they make no objection to the maintenance of the suit does not help the defect or cure the service. Nor does it prevent the principal defendant from taking advantage of the want of jurisdiction.

The principal defendant, as well as a trustee, may abate a suit, if it is not brought in the right county. *Scudder* v. *Davis*, 33 Maine, 575.

In that case, the trustees appeared and admitted in their disclosures an indebtedness to the principal defendants. They made no objection to the proceedings. The principal defendant, however, filed his plea in abatement, and the

Court abated the writ, saying that, "as the action could not rightfully be *commenced* for this county, it cannot be *maintained* here."

The attempted service upon the American Bank, having been made after the service upon Bailey, the principal defendant, (who is in fact the only defendant, Perkins being the real plaintiff, and Goettee never having been summoned at all,) and no further service having been made upon Bailey, has no force or validity whatever. It does not bind the defendant's goods in the hands of the bank, if there were any, and does not make the bank the trustees of the principal defendant.

All the real trustees, therefore, reside in Lincoln county, and the statute is imperative that the action shall be brought there. Not having been brought there, it will be dismissed on motion. The defect is apparent on the face of the papers. *Jacobs & al.* v. *Mellen & trustee*, 14 Mass., 132.

The writ does not describe the note which is offered in suit. The two correspond neither in amount nor in the names of the payees. The writ sets out an entirely different cause of action from that attempted to be introduced in evidence.

The note has never been legally indorsed and transferred. A. J. Lynn and William Perkins were not partners in Sept., 1859. They are not alleged as partners in the writ. The only proof that they were ever partners is the testimony of George W. Perkins that, in 1858, they were in partnership with himself, and that he retired from the firm in August, 1859, thus causing a dissolution.

There is no suggestion that there was ever any other partnership between Lynn and Perkins than that which embraced A. J. Lynn, William Perkins and George W. Perkins. The firm having been dissolved, no one of the partners could indorse and transfer the note.

The note is not made payable to a partnership, but to several persons not partners. In that case, the transfer can only be by a joint indorsement of all of them. Story on

Promissory Notes, § 125, p. 135; Edwards on Bills and Notes, 254.

The note shows upon its face that it was not payable to Lynn & Perkins, as partners. Neither of them could transfer the note by indorsement, without the indorsement of the other.

The indorsement relied upon does not purport to be the indorsement of either of the payees, nor the indorsement of each, but is in the form of a co-partnership indorsement, made by a member of a firm. It is wholly inoperative to transfer any title to the note to a third party. It is not, in fact, an indorsement, but is what has often been decided in our Courts to be the signature of co-promisors. There was no firm of Lynn & Perkins, composed of the two payees of the note; no allegation of such firm in the writ; no proof of any in the evidence. There is no suggestion, even, that there was ever any co-partnership of any body, under that firm name. If there be any such parties to the note at all, they are promisors and not indorsers.

The opinion of the Court was drawn by

APPLETON, C. J.—The note in suit is payable to the order of A. J. Lynn and W. Perkins, and is indorsed "Lynn & Perkins." At the date of the note, there was no such firm as Lynn & Perkins.

The proof is clear that Lynn had authority from Perkins to transfer the note, and, after its indorsement by Lynn, in the name of Lynn & Perkins, that Perkins sanctioned and approved such indorsement.

The authority to indorse may be by parol, and the agent may transfer the title by signing the name of his principal, to whom the note is payable. It need not appear that the signature was placed there by an agent. *Morse* v. *Green*, 13 N. H., 32; *Shaw* v. *Emery*, 38 Maine, 484.

The payee of a note may transfer it by indorsement in pencil. *Clossen* v. *Stearns*, 4 Vt., 11. The initials of the holder of a bank check indorsed thereon, are enough to

charge him as indorser. The *Merchants' Bank* v. *Spicer*, 6 Wend., 443. "A person," remarks NELSON, C. J., in *Brown* v. *Butchers' Bank*, 6 Hill, 443, "may become bound by any mark or designation, he thinks proper to adopt, provided it is used as a substitute for his name, and he intends to bind himself." When a note, payable to A or order, was indorsed by him, with intent to negotiate it, in the partnership name of A & Co., a firm composed of A & B and then subsisting, it was held that such indorsement transferred the note to the indorsee. *Finch* v *Deforest*, 16 Conn., 445.

As an indorsement with the initials of the indorser is sufficient, so one with the surname of the payee must be deemed valid. If the note had been payable to Lynn, he might have passed the title by indorsing his surname only. As he could thus transfer a note by the indorsement of his own surname, so, by a similar indorsement, he could transfer the interest of Perkins, more especially when the indorsement thus made was adopted and approved by him.

In *Lowell* v. *Reading*, 9 Maine, 85, cited by the counsel for the defendant, the authority to indorse was revoked before the act of indorsement.

It appears that the American Bank, one of the trustees, had its place of business in Kennebec county. It does not appear that the name of this trustee was inserted after service on the principal debtors. The action may therefore be brought in the county of Kennebec, or of Lincoln, where the other parties resided, at the option of the plaintiff. R. S., 1857, c. 86, §§ 5, 6.

The evidence fails to disclose any defence to the suit. It is immaterial, therefore, to the defendants, in whose name it is brought. *Defendants defaulted.*

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

Oliver Moulton *versus* George W. Witherell.

A writ, containing one count in trespass *de bonis*, and another in case, may be amended by adding a more formal count in trover for the same property.

Where the defendant, a boom owner, had, in accordance with a general custom, taken another's logs and appropriated some of them for boom logs, and subsequently the owner of the logs bargained them to the plaintiff by a written agreement, in which the bargainer retained "a full and perfect lien on the logs and lumber manufactured therefrom as collateral security for the payment of the notes given therefor," and the plaintiff thereupon went to defendant's boom, found the logs, and requested the defendant to turn them out of his boom which he agreed to do, but did not do; — *Held*, that the plaintiff might maintain trover for the value of the logs as against the defendant, although, when the action was commenced, said agreement had not been delivered to the plaintiff, and some of the notes were not due, and unpaid.

If, in the trial of such action, the presiding Judge instruct the jury that, if, after a conversion by the defendant, the plaintiff had made an agreement with the owners to purchase all of the logs of the marks stated, including the logs previously converted by the defendant, and the plaintiff had been permitted by the owners to take possession of the logs, as he might find them in the river, from time to time, to manufacture, and the plaintiff had claimed the logs in suit of the defendant, and demanded them of him, and the defendant had refused or neglected to give them up, they would be authorized to find for the plaintiff, *though the title to the logs had not passed to him;* a new trial will not be granted, although the instruction may not be tenable as an abstract legal proposition, if it is not perceived that the defendant could be injured thereby.

On Exceptions from *Nisi Prius*, Appleton, C. J., presiding.

Trover.

Defendant called Abner Coburn, who testified as follows: I had an interest in the Murray and Wyman logs, and had, when they were sold. Our logs were bargained for in July, 1859. Perhaps the title passed in 1860. The memorandum at the bottom of the bill of sale shows the time. This bill of sale was delivered to Moulton at that time. [The bill of sale put in by plaintiff was here shown the witness.] Witherell talked with me several times about taking some of our logs for boom sticks. I know we talked about it once. I

cannot recollect precisely.—My recollection about these logs is not definite—in the spring of 1859.

Cross-examined.—I cannot say I gave Witherell leave to take the logs; I might have acquiesced in his stopping some. Am not definite as to what was said. The custom of stopping logs by boom owners, for boom sticks, is general. They usually select sticks and never pay for them. The custom is acquiesced in by log owners. Moulton collected some of the logs in 1859 and 1860. I don't recollect of giving him any authority. Nothing said about it. I did not object. I supposed he would take some, as he paid, from time to time. I did not part with any title. I had a right to take them anywhere. The bill of sale was not delivered till all was paid up. *I considered them sold to Moulton when the bargain was made.* I did not anticipate that I gave Witherell leave to take any of these logs; I might have acquiesced in his taking some of them.

The presiding Judge instructed the jury that, if, after a conversion by defendant, the plaintiff had made an agreement with Mr. Coburn and Murray & Wyman to purchase all of the logs of the marks stated, including the logs previously converted by defendant, and the plaintiff had been permitted by Coburn and Murray & Wyman to take possession of the logs, as he might find them on the river, from time to time, to manufacture, and the plaintiff had claimed the logs in suit of the defendant, and demanded them of him, and defendant had refused or neglected to give them up, they would be authorized to find for the plaintiff, though the title to the logs had not passed to him.

The verdict was for the plaintiff.

And the defendant excepted.

The other material facts sufficiently appear in the opinion of the Court.

Clay, for the plaintiff.

Libbey, for the defendant, argued:—

1. The amendment allowing the count in trover should not have been allowed. It is not of the same *kind* of action.

The new count must be of the same kind of action, subject to the same plea and for the same cause. *Houghton* v. *Stowell*, 28 Maine, 215; *McVicker* v. *Beedy*, 31 Maine, 314; *Sawyer* v. *Goodwin*, 34 Maine, 419; *Ball* v. *Claflin*, 5 Pick., 303; *Wiley* v. *Gale*, 1 Met., 553.

2. The instructions to the jury are erroneous. The rule, as given to the jury by the Judge, permits the plaintiff to recover without title, and without possession, actual or constructive. Coburn, and Murray & Wyman had the title and the constructive possession which follows the title, but the actual possession was in defendant, who had before converted the logs to his own use. In taking them he was a trespasser. Coburn could undoubtedly maintain trespass, but it will not be contended that the plaintiff could. Can he maintain trover? To maintain trover, plaintiff must have title and possession, or the right to immediate possession. He had neither. *Clapp* v. *Glidden*, 39 Maine, 448; *Ames* v. *Plummer*, 42 Maine, 197; *Muggridge* v. *Eveleth*, 9 Met., 233; *Morgan* v. *Ide*, 8 Cush., 420; *Fairbanks* v. *Phelps*, 22 Pick., 538.

The opinion of the Court was drawn by

BARROWS, J.—The writ in this case, dated Aug. 2, 1860, originally contained two counts, one in trespass and one in case. The Legislature of this State many years ago abolished the distinction between trespass and trespass on the case, and this Court, in *Moulton* v. *Smith*, 32 Maine, 410, recognizes the right of the plaintiff to combine, in the same writ, a count in the usual form of trespass *de bonis asportatis* and another alleging a taking and conversion of goods by defendant's deputy, and held that, when the state of facts shows a party entitled to recover in trespass on the case, his declaration may be framed in either form, or both.

"*Case in trover* is an action founded on property general or special."

"This action of *trover and conversion* is an action of *trespass on the case*, and lies against any man who has in his possession, by any means whatever, the personal goods of

another, and sells them or uses them without the consent of the owner, or refuses to deliver them when demanded. The *term* is mere matter of form." 3 Dane's Abridgement, c. 77, art. 1, §§ 1 and 2, pp. 184, 185.

The defendant's objection to the allowance of the amendment, by adding a more formal count in trover, cannot prevail.

It would seem, from the report, that most, if not all of the logs in controversy had been appropriated by the defendant for his boom at Fairfield, before the plaintiff had bargained for them, confessedly without payment to, or permission from any one, but according to a sort of practice among boom owners to take such sticks as are found suitable for their purpose, without purchase or license, or any regard whatever to the rights of the log owners.

Now, this custom of trespassing, of course, amounts to nothing by way of justification in a legal point of view, and the defendant's relation to the logs is that of a mere wrongdoer. But, being in possession, he can be held answerable only to one having a better right, a right sufficient to entitle him to maintain the action.

The plaintiff's property in a portion of the logs is not controverted. But his claim to the "A wide girdle D," and the "notch O" and "notch C," accrued by virtue of bargains made with Murray & Wyman and with A. & P. Coburn, in the summer of 1859. The written instruments, subscribed by these parties, respectively set forth an agreement for the sale of these logs to the plaintiff, at a price mentioned, payable according to the tenor of certain notes falling due at regular intervals, and contain the following stipulations:— "and it is mutually agreed that the said" (vendors in each case) "are to retain full and perfect lien upon the aforesaid logs *and lumber manufactured therefrom*, as collateral security for the well and true payment of the above sums, and that nothing shall be added to or deducted from the abovementioned price, in consequence of the logs proving better or worse than was anticipated *at the time of sale*." A. & P.

Coburn also agreed to turn the balance of the two lots which they sold "out of Moosehead Lake free of expense to said Moulton," and said Moulton was "to pay all expenses below." The expenses upon the Murray & Wyman logs, plaintiff was to pay. From the tenor of these instruments, even without the oral testimony which was put into the case, it is manifest that the *plaintiff was to have the possession* of the logs thus bargained, and to drive and manufacture them to meet his notes. It would seem that, after the bargain, he proceeded to do this, without denial or interruption by his vendors, at any time, and had thus taken possession of most of the logs purchased. Plaintiff and defendant both concur in testifying that the plaintiff came to the defendant's boom, had these logs, which are in controversy here, scaled, and demanded that the defendant should turn them out, and that the defendant agreed to do so, but did not.

But, at the time that the suit was commenced, two of the five notes given to the Coburns, and one of the notes given to Murray & Wyman, had not become due and were not paid.

Upon the facts, as above detailed, the presiding Judge instructed the jury that if, after a conversion by the defendant, the plaintiff had made an agreement with Mr. Coburn and Murray & Wyman, to purchase all of the logs of the marks stated, including the logs previously converted by the defendant, and the plaintiff had been permitted by Coburn and by Murray & Wyman to take possession of the logs as he might find them on the river, from time to time, to manufacture, and the plaintiff had claimed the logs in suit of the defendant, and demanded them of him, and the defendant had neglected or refused to give them up, they would be authorized to find for the plaintiff, though the title to the logs had not passed to him. And the defendant contends here, that the plaintiff had no such property, possession, or right of possession, as would enable him to maintain trover, and excepts to these instructions.

When goods are sold while in the tortious possession of

a third person, the purchaser, after demand, may maintain trover for them against such third person, though they were never delivered. *Cartland* v. *Morrison*, 32 Maine, 190.

The conversion, *quoad* this plaintiff, took place upon the defendant's neglect to turn out the logs as requested. The right of possession had been ceded to the plaintiff by his vendors, and he had taken possession under his contract of sale, and by their permission, of the identical logs in controversy, had had them scaled, and would have retained that possession but for the tortious acts of the defendant.

Espinasse answers the question, "by whom may trover be maintained," thus, — "Possession alone gives a sufficient title to maintain this action against all persons except against the owner." "But possession is not necessary to maintain this action, for *a right of possession* is sufficient." "But, to support this action, property in the plaintiff is eventually necessary." "But an absolute property is not necessary, as a person having a special property may maintain the action."

In *Sutton* v. *Buck*, 2 Taunt., 301, a party who was the purchaser of a ship and had taken possession, but whose *title was not completed* by any proper registry, or *by any regular conveyance*, sued in trover for the recovery of certain portions of the ship against a wrongdoer, by whom he had been dispossessed, and was held entitled to recover; the ground of the opinion being, that his possession alone, under such circumstances, was a good title against a mere wrongdoer.

Judge Story, in discussing the nature of special property, says, — "When we speak of a person's having property in a thing, we mean that he has some fixed interest in it, (*jus in re*,) or some fixed right attached to it, either equitable or legal, and when we speak of a special property in a thing, we mean some special fixed interest or right therein, distinct from, and subordinate to, the absolute property or interest in the general owner." "Special property," says

Mr. Justice LAWRENCE, "is where he who has the possession holds it subject to the claims of other persons."

If we should assume, then, that it is true, as the defendant contends, that the plaintiff had not, when his action was commenced, the general property in, and an absolute title to, the logs, but that the Coburns and Murray & Wyman were still the general owners, under the stipulation before recited, is the position of the defendant any better?

His counsel argues, that Coburn and Murray & Wyman might maintain suits against him, but *Fairbanks* v. *Phelps*, 22 Pick., 535, is directly to the point, that a vendor under such circumstances could not maintain trover, having parted with his right of possession to the conditional vendee, and *Ayer* v. *Bartlett*, 9 Pick., 156, settles it, that *case* would be the only remedy for an injury to such a reversionary interest as *they* had. What damages could *they* recover *in case*, here, when it appears that the plaintiff regularly paid his notes and made his special property absolute before the trial?

The plaintiff had a special property and the right of possession in the logs in controversy. He had taken possession of them, claiming them as owner. Nobody but his vendors, by virtue of the lien which they had reserved, could rightfully defeat his possession.

An outstanding lien, in favor of a third party, will not defeat the right of a person otherwise entitled to recover in trover, against a mere wrongdoer. *Ames* v. *Palmer*, 42 Maine, 197.

The instruction given, required the jury to find all the facts necessary for the maintenance of the action, unless the concluding words, "though the title to the logs had not passed to him," so qualify them as to mislead the jury. Applying the instructions to the facts developed, the meaning plainly is, if you find that the plaintiff had a special property and the right of possession by permission of the Coburns and Murray & Wyman, and had demanded these logs of the defendant, going onto them and claiming them

as his own, and that the defendant thereupon refused or neglected to give them up, you need not trouble yourselves with any question as to the right of the original owners to sell them, after the defendant had wrongfully taken them into his possession, nor as to the plaintiff's having the absolute unincumbered property in the logs, as between himself and his vendors.

Conceding that the language of the instructions, as reported in the exceptions, amounts to what is not tenable as an abstract legal proposition, it is not perceived that the defendant could have been injured thereby. Under such circumstances, exceptions will not be sustained. *Freeman* v. *Rankins*, 21 Maine, 449.

Special property, and possession by permission of the general owner, would entitle the plaintiff to maintain his action against the defendant.

Motion and exceptions overruled.

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

THOMAS L. STANTON *versus* JOHN HATCH, *appellant.*

A writ, made returnable before a trial justice, "at his dwellinghouse," to wit, "at his office," in R., &c., must be *entered* before him at such *dwellinghouse.*

If entered at a "place separate, and at a short distance from said dwellinghouse," in said R., "which place said justice uses as his *office* for the trial of actions brought before him," the justice has no jurisdiction; and, upon being appealed to this Court, the action will be dismissed on motion, if the record shows the facts.

ON EXCEPTIONS to the rulings, *pro forma*, of RICE, J., at *Nisi Prius.*

The defendant appeared at E. O. Bean's office, on the return day, and filed a written protest against the justice taking jurisdiction of the action. The justice overruled the objection, and required the defendant to proceed to trial at

said Bean's office. After trial, the justice gave judgment against the defendant who thereupon appealed.

At the term to which the action was appealed, the defendant seasonably filed a written motion to dismiss the action for the want of jurisdiction on the part of the justice. The presiding Justice overruled the motion, *pro forma*, and the defendant excepted.

The following is an extract from the justice's certified copy of the record:—

"Kennebec, ss.—At a court held before me, Moses Whittier, Esquire, one of the trial justices of the peace within and for said county of Kennebec, at my office in Readfield, in said county, being at the office of Emery O. Bean, a place separate and at a short distance from my dwelling-house, in said Readfield, and a place which I use as my office for the trial of actions brought before me," &c.

The remaining facts sufficiently appear in the opinion.

John W. May, for the defendant.

E. O. Bean, for the plaintiff.

1. The writ is in the form sanctioned by long and established practice, and the case finds that the magistrate was present at the time and place named in the precept, and that the parties appeared before him and were heard. So the objection is purely technical.

2. The words "to wit," may be intended to make definite, but it does not follow, by any necessary construction, that they refer and are to be limited to a particular place *within the one named*. That is, that the magistrate's office is necessarily *within his dwellinghouse*.

In all pleading, the very office of a *videlicet* is to mark, that the party is not required to make his proof precisely like his allegation. 2 Bouvier's Law Dic., 628; 1 Greenl. Ev., § 60; Chitty on Pleading, 318.

3. But if the doctrine contended for by the defendant were correct it cannot prevail in this case. Defendant, in his motion, avers that the Court was not holden at the *place*

named in the writ. This is an allegation of fact not apparent from the record, and can only be shown under plea in abatement. Gould's Pleadings, §§ 134–135; *Upham* v. *Bradley*, 17 Maine, 423; *Chamberlin* v. *Lake*, 36 Maine, 388; *Nye* v. *Liscomb*, 21 Pick., 263; *Amidown* v. *Peck*, 11 Met., 467.

4. The writ is the only and conclusive evidence of the time and place appointed for trial, and the record copy of the writ is the only evidence before the Court.

The statements of the magistrate, outside the papers, is not evidence, nor is any recital he may be induced to incorporate into his copy record evidence.

The opinion of a majority of the Court was drawn by

APPLETON, C. J.—By R. S. of 1860, c. 164, § 8, "No judgment of any trial justice shall be considered regular unless he shall be present with the plaintiff's writ at *the place appointed for trial*, within one hour after the time set in such writ, or unless the case be continued by some justice pursuant to the provisions of the Revised Statutes."

The writ in this case was returnable before Moses Whittier, Esq., a trial justice of Kennebec county, "at his dwellinghouse, *to wit*, at his office in Readfield, in said county." From the record of the magistrate, it appears that the action was entered before him at his office, being the office of Emery O. Bean, in Readfield, "a place separate and at a short distance from my (his) dwellinghouse in said Readfield."

The record shows that the action was not entered at the place appointed for trial, if that place was the dwelling of the magistrate, nor was said justice there, nor was the action continued by any other justice, nor was there an adjournment from the place designated to that where the trial was had.

The office of a *videlicet*, among other things, is, "to particularize that which was before general, and to explain that which is *indifferent*." 1 Chitty's Pl., 350, note. But the place of trial is not a matter indifferent or which can be so regarded.

The place of trial was at the dwellinghouse of the magistrate before whom the trial was to be. The writ not having ever been entered there, the cause, according to the provision of the statute, as well as to the whole course of authorities on the subject, was discontinued. *Martin* v. *Fales*, 18 Maine, 23; *Spenser* v. *Perry*, 17 Maine, 413.

Judgment for the defendant.

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

KENT, J., dissenting.—In this case, the writ was made returnable before a trial justice of the peace, on Saturday, the 9th day of November, 1861, at ten o'clock in the forenoon, "at my dwellinghouse, to wit, at my office in Readfield, in said county." On the return day, the defendant filed a written protest or motion, reciting that finding the Court opened at the office of Emery O. Bean, in Readfield, a place other than the place of return named and appointed in said writ; and not having been first opened at the place so named in the writ, and thence adjourned to this place, and that more than one hour had expired since the writ was returnable, at the dwellinghouse, to wit, at the office of the justice, which in law is but one certain place, and that the justice can in law have no jurisdiction at any other place, and concluding with the statement that he had duly appeared at the time and place named in the writ, and finding no Court or trial justice there, now protests against the entry or trial of said action, and prays the Court to take no cognizance of said action. This motion was overruled by the justice, and the case was tried upon its merits and judgment was rendered for the plaintiff. The defendant appealed, and, on the first day of the term, when the appeal was entered, he filed a motion setting forth the same facts as to the time and place of entry of the action before the trial justice, stated in the former motion, and alleging that the action was not entered at the "dwellinghouse" of the justice in Readfield, "his said dwellinghouse being his office," as

therein set forth. Wherefore he prayed this Court to take no cognizance of said action, and to dismiss the same because the justice had no jurisdiction, and all his proceedings were void. This motion was overruled by the presiding Judge—and, thereupon, the parties agreed upon a statement of facts, touching the merits of the case—the defendant excepting to the ruling on the motion to dismiss.

1. The exceptions. It is a familiar principle, that an action will be dismissed *on motion*, only for defects apparent on the record, and which appear on the same, without proof of extrinsic facts to make the objections tenable. When such facts are relied upon they must be pleaded in abatement.

The question that arises on inspection of the writ, and what is called "the return" portion of it, is, whether there is necessarily any such contradiction, uncertainty, or illegal specification of the time and place of trial, as presents or ousts the jurisdiction of the justice.

It is undoubtedly true, as a general principle, that, in a writ returnable before a justice of the peace, there can be but one place designated for the hearing and trial; a writ which should designate distinctly two places for the trial, distinct and apart from each other, would be clearly invalid. And so, if it designated two places in the alternative, as, "at my dwellinghouse *or* the town hall."

The statute, c. 164, § 8, of the laws of 1860, provides that "no judgment of a trial justice shall be deemed regular, unless he shall be present with the plaintiff's writ, *at the place appointed* for trial, within one hour after the time set in such writ."

But, does the language used in this case, "at my dwellinghouse, *to wit*, at my office," necessarily, on its face, distinctly and clearly indicate two different places; may not his office be in or a part of his dwellinghouse, and the *videlicet* merely indicate a distinct place in the dwelling?

It must be remembered, that the objection is purely technical, and it is therefore right to apply strict rules of con-

struction. There must be no doubt of an appointment of two distinct places for the trial on the face of the writ, before the objection can prevail. It must also be remembered that, in this view, on a mere motion, we cannot go out of the language to ascertain where in fact this trial was had, as that is a fact outside of the record and which should have been pleaded in abatement and verified, presenting a new and distinct issue as to a matter of fact.

But, as this form has been long in use in this State, I have been led to examine the statutes and the forms in use, that we might ascertain why and how this apparently unnecessary specification, under a *videlicet*, came into practice.

The form for a justice writ was enacted as early as 1701 in Massachusetts. In that form, the place for the trial is stated, but the time is left blank. The place named in the form is "my *dwelling* house in B." The same form is given in cases of attachment and in summons. The same form was reënacted in 1784, and has so continued unaltered in that Commonwealth up to this time.

In Maine, at the separation, the same forms that had been so long in use in Massachusetts, were reënacted. It was provided in our laws of 1821, relating to forms, that, "in all civil actions, the original and final process in the following cases, betwixt party and party, *shall be made out* in the form following." And, in reference to writs before a justice of the peace, it is enacted, "that the several forms of writs and processes underwritten shall be and hereby are established to be the forms to be granted and *used* in civil causes triable before a justice of the peace." The form given is precisely like the first one in Massachusetts, "to appear at my *dwellinghouse*," leaving the month and day, and time of day, in blank. In the subsequent revisions, in 1841 and in 1857, it is simply provided that the forms of writs in civil actions shall remain as established in 1821. It may be difficult to assign any good reason for this express designation of the place of trial, in the form of a justice writ, whilst the *time* is left to be inserted according to the

designation of the justice or the party. It probably originated in the almost universal custom of those early days, for a justice to hold his court in his dwellinghouse. But it is important to observe, there never has been any law in Massachusetts, or in this State, requiring that a magistrate shall hold his court at his "dwellinghouse," or in any particular place, unless this form is to be considered as thus designating the dwellinghouse as the only legal place. I do not so regard it. In process of time it became convenient for justices of the peace, especially in the larger towns and cities, to hold their court in offices or other places, and to designate such place in the writ. But the form, which the statute declared should be used in *all* civil suits, required the insertion of the words "at my dwellinghouse," and it was feared, doubtless, by the cautious and critical practitioners of the earlier days, that the omission of those words and the naked insertion of another place for the trial, might be fatal. They feared that a motion or plea in abatement, based upon the want of the exact words given in the statute form, might be sustained, and, therefore, they resorted to the present mode of retaining the words, but naming the real place intended, under a *videlicet*. This is not an unusual method in pleading, as is well known to all lawyers.

I do not intend to say that it is certain, notwithstanding the express words of the statute requiring the use of the words, that they may not be dispensed with, and that another place may not be directly named without their use. But I do not think the insertion of the statute form and the designation of the actual place intended, under a *videlicet*, is fatal. We have seen that the justice has a right to designate a place other than his dwellinghouse. In this case he does not designate two places, but, as is well understood in pleading, the place or matter named after a *videlicet* is always regarded as the place or matter intended. This is what is traversable when material. Gould's Pl., c. 3, § 37; 7 Cowan, 43; 2 Saunders, 291.

As in a declaration in a transitory action the venue is

often laid under such *videlicet*. — In declaring on a contract made in Boston, in a suit in Penobscot county, the form usually is — that the promise was made at Boston, to wit, at said Bangor. The controlling words are those that designate Bangor as the place intended. It is but a fiction to bring the case on the record within the jurisdiction of the Court. It is not a declaration of a promise in two distinct places at the same time. So here, the place of trial actually named and intended is the office, and not the dwellinghouse.

If we adopt any other construction, we must say that the party is in fault for using the form expressly sanctioned and *required* by the language of the statute, — or that a trial can be had at no other place than the dwellinghouse of the justice. I am not inclined to punish a man for using a form which the statute says he *shall* use. If he omits the form, he is liable to be met with an objection, — if he uses it strictly, then, according to the opinion, he must lose his case. The place is immaterial, provided it be within the county, and reasonably fit and suitable. Now, one of the uses of a *videlicet* is said to be, among other things, "to particularize that which was before general, and to *explain* that which is *indifferent*." 1 Chitty's Pl., 350, note. If, therefore, all the facts stated in the motion had been incorporated into a plea on abatement, I do not think that they would have been sufficient to render the proceedings before the justice void for want of jurisdiction.

2. On the merits, under the agreed statement of facts, it is clear that the plaintiff is entitled to recover.

WILLIAM H. BONNEY *versus* SAMUEL MORRILL.

When there are two monuments which may answer the call in a deed, and the true intendment can be ascertained by applying the legal rules of construction to the conveyance itself, the question is one of law.

The word "*from*" an object, or "*to*" an object, used in a deed, excludes the terminus referred to.

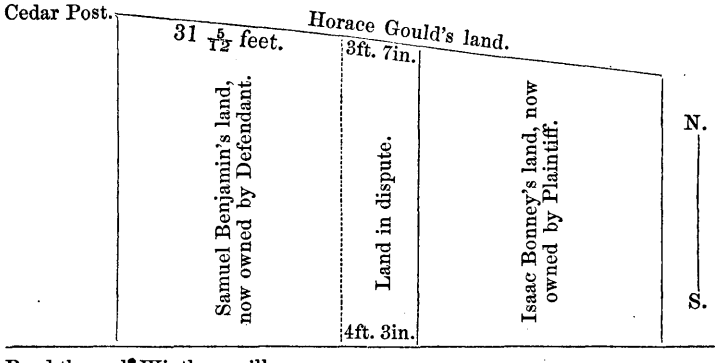
When a call in the deed is expressed as follows: — "thence easterly, about thirty-five feet, *to* land *now or formerly* owned by I. B., thence by I. B.'s land;" &c.; and, previously thereto, the grantor in such deed had conveyed to I. B., by deed of warranty, *not* recorded, a two foot strip of land off from the side of his land adjoining I. B.'s land, so that the said call *might* cover the two foot strip: — *Held*, the Court would not presume that the grantor intended to defraud his prior grantee; that the language excluded all the land which I. B. then owned, or had at any previous time owned there; and that I. B. did not the less own the two foot strip that his deed was not recorded.

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

WRIT OF ENTRY.

The question was as to the title to a two foot strip of land which the defendant's grantor conveyed by his deed of warranty to Isaac Bonney, in 1831, (which deed was not recorded until 1860,) off from the easterly side of his lot, and adjoining said Bonney's other land, under whom, through several mesne conveyances, the plaintiff holds.

The case will be readily understood by referring to the following diagram.



The facts are sufficiently stated in the opinion.

The presiding Judge ruled that the western line of the two foot strip was the boundary intended by Samuel Benjamin, the grantor, in the deed of September 21, 1846, to Samuel N. Tufts, and was therefore the true boundary between the parties to this suit.

If this ruling is correct, it is to be final on the defendant; but if said ruling is erroneous, then said action is to stand for trial; and, if the parties do not agree as to where the line is on the face of the earth, according to the decision of the Court, it is to be determined by the jury.

S. May, for the plaintiff.

Libbey, for the defendant, argued:—

1. The presiding Judge erred in his construction of the deed from Benjamin to Tufts. When there are two monuments, either of which will answer the calls of the deed, it is a question of fact for the jury to determine which is meant by the parties. *Lincoln* v. *Wilder*, 29 Maine, 169; *Madden* v. *Tucker*, 46 Maine, 367.

2. But, if it is a question of law for the Court, the construction adopted is not the true one. At the time of the deed from Benjamin to Tufts, Isaac Bonney owned the Bonney lot, but not the two foot strip. The language of the deed is, "now or formerly owned by Isaac Bonney." The two foot strip cannot be the land referred to as the land "*now*" owned by Bonney. B. formerly owned the two foot strip, and the Bonney lot, but his title to the strip was not recorded, and Tufts had no notice. The parties cannot be said to refer to a line, as a monument, of which the grantee had no knowledge, when there is another line answering the calls of the deed known to both parties. Where there are two boundaries which answer the calls of the deed, the one which is most certain will control. The west line of the Bonney lot answers both words, "now" and "formerly." The title was recorded and known, and it makes tenant's lot thirty-five feet wide as described in the deed. It should

govern. *Crosby* v. *Parker*, 4 Mass., 110; *Cleaveland* v. *Flagg*, 4 Cush., 76; *Crowell* v. *Jackson*, 9 Met., 150, and the case before cited.

When the meaning of the terms of the deed are doubtful, it is to be construed most strongly against grantor. *Vose* v. *Handy*, 2 Greenl., 322; *Herrick* v. *Hopkins*, 23 Maine, 217; *Ricker* v. *Barry*, 34 Maine, 116; *Alden* v. *Noonen*, 32 Maine, 113; *Abbott* v. *Pike*, 33 Maine, 204; *Dana* v. *Middlesex Bank*, 10 Met., 250; *Cook* v. *Babcock*, 7 Cush., 526; *Northrop* v. *Sumner*, 27 Barb., 196.

The opinion of the Court was drawn by

Barrows, J.—This is a question of boundary, depending upon the construction of the deeds under which the parties severally claim.

The plaintiff and defendant are the owners of adjoining lots, lying on the northerly side of a road, or street, running easterly and westerly, in the village of Winthrop. Prior to June 16, 1831, Samuel Benjamin owned the lot which the defendant now claims, and Isaac Bonney owned the plaintiff's lot, as per deed from Edmund Frost, and there seems to be no dispute as to where the dividing line between the lots at that time was.

On that day said Bonney received a conveyance from said Benjamin of a two foot strip adjoining said Benjamin's western line, and it is the title to this two foot strip which is now in controversy. Isaac Bonney neglected to place this deed from Benjamin on record, but he mortgaged it by deed duly recorded, with the rest of his lot, to Alexander Belcher, January 19, 1832, and the case finds that, whatever title Belcher thereby acquired, is now in the plaintiff. On Oct. 10, 1843, being still a mortgager in possession, he conveyed to B. C. Joy a strip three feet in width, on the west side of his lot, including, with the two foot strip purchased of Benjamin, one foot of the lot originally deeded to him by Frost, and this deed to Joy was duly recorded. Joy, also, who took only a right of redemption in the strip conveyed

to him, (the whole being at the time subject to Belcher's mortgage,) released to the plaintiff, so that it is clear that whatever Isaac Bonney could hold there now belongs to the plaintiff.

But, before the deed from Benjamin to Isaac Bonney was recorded, viz., on Sept. 21, 1846, Benjamin conveyed his lot, by deed duly acknowledged and recorded, to Samuel N. Tufts, and the defendant has Tuft's title. In the deed from Benjamin to Tufts, the grantor, commencing his description of the lot to be conveyed at the south-west corner of the same, and giving first the westerly line, extending to a cedar post at the north-west corner, proceeds as follows, — "thence easterly, by land of Horace Gould, to land now or formerly owned by Isaac Bonney, thence southerly, by said Bonney's land, to the aforesaid road," &c. Hereupon, the defendant contends that the west line of the land, conveyed by Frost to Isaac Bonney, answers the calls in the deed as well as the west line of the two foot strip, which Benjamin had conveyed to him in 1831, and, therefore, that it is a question of fact for the jury, which line was intended by the parties to this conveyance, and that, whether this be so or not, inasmuch as Benjamin's deed of the two foot strip had not been recorded, and it does not appear that Tufts had notice of it, the true construction of the deed is, that it conveys the land up to the line of the original Bonney lot, as if the unrecorded deed from Benjamin to Bonney had never been made.

But we think neither of these positions tenable.

It is true that when there are two monuments which answer the calls in the deed *equally well*, and there is nothing in the deeds by which it may be determined which is the true one, parol evidence is admissible to explain the latent ambiguity, and it becomes a question of fact for the jury. But, whenever the true intendment can be ascertained by applying the legal rules of construction to the conveyances themselves, it is necessary for the security of titles and the prevention of vexatious and uncertain controversies, in which

it would be by no means certain that the right would prevail, that questions of this character should be thus determined. Parties resting securely upon the legal interpretation of the conveyance which they hold should not needlessly be exposed to the hazards of a conflict of testimony, and their written muniments of title exchanged for the uncertainty of human memory and verbal illustration.

Applying familiar rules of construction to these conveyances, it will be seen that here is no latent ambiguity.

In 1846, Tufts is bounded by "land now or formerly of Isaac Bonney," as a monument. "From" an object, or "to" an object, excludes the terminus referred to. All the land which Isaac Bonney then owned or had at any previous time owned there, was excluded by Benjamin from the conveyance which he made to Tufts. Bonney did not the less own the two foot strip that his deed of it had not been recorded. He had a deed of it from Benjamin, who was Tufts' grantor.

We cannot *presume* that Benjamin intended a fraud upon his first grantee, and moreover, as before remarked, he excludes from his conveyance to Tufts all the land there then or previously owned by Isaac Bonney. Suppose the deed from Frost to Bonney had not been recorded, and Bonney had owned the lot next easterly of it, under a duly recorded deed, would the conveyance to Tufts have covered all the land to the *easterly* line of the Frost lot, because Isaac Bonney, though the owner, had no *recorded* title to land west of it?

The defendant's counsel does not claim that the easterly third of the three foot strip, conveyed by Isaac Bonney to Joy, in 1843, passed to Tufts, but it would be necessary to include *that*, in order to reach land that Isaac Bonney owned by a recorded title.

It was the business of Tufts, being limited as he was by land either then or previously owned by Isaac Bonney, to ascertain what land Isaac Bonney had had there, before he

took such a conveyance, and though the records might afford the readiest, they were not the sole means of ascertaining.

The essential facts in this case are not distinguishable from those in *Wellington* v. *Fuller*, as stated by the Court, 38 Maine, 62, 63.

There is no dispute between the parties as to the location of the lines upon the face of the earth, and the westerly line of the two foot strip is the one which first plainly answers the calls in the deed, and Tufts and his grantees can hold nothing beyond it, under his deed from Benjamin. The ruling of the Judge, at *Nisi Prius*, was correct, and, according to the stipulation in the report, is therefore to be final on the defendant. *Defendant defaulted.*

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

HIRAM G. CALL *versus* CHARLES B. FOSTER *& al.*

In debt, on a poor debtor's bond, good only at common law, given to procure a release from an arrest on an execution, damages should be assessed for the amount of the judgment, with interest, in the absence of other testimony.

If an execution creditor execute and deliver to the debtor a sealed release and discharge, purporting to be for value, of a judgment between the parties, after informing the debtor of a prior assignment of such judgment to an innocent purchaser, such release will not avoid the assignment.

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

DEBT on a poor debtor's bond.

It appeared that the judgment on which the execution on which the defendant Foster was arrested, when he gave the bond in suit, was assigned to John S. Abbott for a valuable consideration, and subsequently, and during the pendency of this suit, the plaintiff undertook to release and discharge, by a writing under seal, said judgment, execution and all subsequent suits and proceedings thereon," for a valuable

consideration, to the defendant Foster, after having made known to Foster his prior assignment to Abbott.

The remaining material facts appear in the opinion of the Court.

John S. Abbott, for the plaintiff.

Tallman & Larrabee, for the defendants.

The opinion of the Court was drawn by

DANFORTH, J. — This case has been once before the Court and it was then decided that the bond in suit is good at common law. It now comes back for a decision of two questions. That of a discharge, and, if not discharged, the amount of damage to be recovered. Some testimony has been introduced bearing upon the discharge, but neither party seems to have argued that point, and an examination of the testimony shows clearly that the discharge was unauthorized and improperly obtained, and is, therefore, without effect.

What damages, then, shall the plaintiff recover? No testimony has been offered by either party as to the ability of the debtor to pay, and none as to the damages suffered by the plaintiff, except the amount of the original judgment. It has been already decided that, in the absence of other testimony, the judgment is the measure of damages. *Sargent* v. *Pomroy & al.*, 33 Maine, 388; *Richards* v. *Morse & als.*, 36 Maine, 240.

An attempt has been made in the argument to distinguish these cases from the one at bar. It is said that these suits were upon statute bonds, while the one at bar is not. This is true, but it is also true, that the bonds in both the cases cited were given to procure the defendant's release from arrest upon *mesne process*. And, in such cases, a statute bond is very different from a statute bond taken on execution. In the former, the statute does not prescribe the amount of damages in case of breach, in the latter it does.

In the case of *Sargent* v. *Pomeroy & als.*, there cited,

it is well settled that a bond taken on mesne process is subject to chancery, though it is a statute bond, and that the plaintiff can recover only his actual damage. But it is also held that, when he shows the amount of his judgment, he shows the amount of his damage, unless the defendant offers some proof which should control it. So, in regard to bonds taken on execution, though not statute bonds, they are still valid, as is the bond under consideration, and are subject to chancery. The same rule, then, in assessing damages, so far as the amount goes, must be applied in each case, and, upon this question of damages, no distinction is perceived between the case at bar and those cited. No case has been cited, and it is believed none can be, in which a different rule prevails. In many of the cases reported, the damages assessed have been less than the debt, but in all such cases, so far as we have been able to ascertain, the damages were reduced by proof on the part of the defendant. This rule seems to be just, as well as sustained by authority. In the bond, the amount of the judgment is admitted, and one of the conditions is that the debtor shall pay that amount. A breach of this condition leaves no room to doubt the amount of damage the plaintiff has suffered. If he is unable to perform this one, he may still relieve himself by performing the others, and, if he fails to perform the others, it is but fair to presume that he failed or neglected to do so because he might have complied with the first, and this presumption should prevail until overcome by proof. We see no reason for disturbing the principle settled in the cases cited. They leave the burden of proof upon the plaintiff, and are consistent with the case of *Gowen* v. *Nowell*, 2 Greenleaf, 13, cited by defendant.

The plaintiff must have execution for the amount of his judgment, including interest and costs.

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

FREDERIC J. PARKS *versus* JOHN G. MORSE.

The owner of a mill upon a navigable stream is bound to exercise his rights in such manner as not to interfere unreasonably with the rights of the public in the use of the stream.

Such owner will be liable to an action by any citizen whose reasonable use of such stream, to float logs to market, he has prevented.

ON MOTION to set aside the verdict as being against law and the evidence.

TRESPASS for preventing the plaintiff from floating his logs through the flood gates of the defendant's dam on the Winnegance river.

The evidence tended to show that the Winnegance river is a navigable stream; that the defendant owned or occupied a mill thereon with a dam, in which were flood gates; that the plaintiff had a raft of logs in the stream, which he undertook to turn through these flood gates, without interfering with the operation of the defendant's mill; and that the defendant by force prevented his doing so.

The defendant introduced evidence of his title, and other evidence which is not material in the view of the case taken by the Court.

The verdict was for the plaintiff, and the defendant moved to set it aside.

Tallman & Larrabee, for defendant.

Gilbert & Sewall, for plaintiff.

The opinion of the Court was drawn by

BARROWS, J. — Whatever the construction of the deeds upon which the defendant relies, he cannot be permitted unreasonably to interfere with the right of the plaintiff, as a citizen, to use this navigable creek as a highway to float his boats, rafts or logs. Of this right the public cannot be deprived, nor in its use unreasonably obstructed. The rights of the mill owner and other citizens are not necessarily con-

flicting. On the contrary, if exercised in a reasonable manner, they are materially beneficial to each other. "While the mill proprietor may erect and maintain his dam, he must at the same time maintain, for the use of the public, a convenient and suitable passageway, through or by his dam. The privileges of the mill owner must be so exercised as not to interfere with the substantial rights of the public in the stream, as a highway for the purpose of transporting such property as in its natural capacity it is capable of floating. The use of both parties must be a reasonable use, and the rights of both must be exercised in a reasonable manner." *Veazie* v. *Dwinel*, 50 Maine, 479.

There is nothing in the testimony in this case to indicate that the plaintiff proposed to exercise his right in an unreasonable manner, or to the detriment of the defendant.

On the contrary, it appears that what he did, did not subject the operations of the defendant's mill to any inconvenience; that defendant had not many logs in his boom at the time, and that they were not exposed by the act of the plaintiff in running his own logs through the flood gates.

The verdict does not appear to be against either law or evidence. *Motion overruled.*

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

SAMUEL G. STINSON *versus* JAMES ROUSE.

R. S., c. 76, § 3, provided that the appraisers, in the levy of an execution on real estate, shall, "in a return made and signed by them on the back of the execution, state the nature of the estate and its value, and whether it is in severalty or in common, a fee simple or less estate, in possession, reversion or remainder, and describe it by metes and bounds," &c.

Where the appraisers return that they "*appraised*" at a sum named, "*a certain lot of land*" described by metes and bounds, and shown to them "as the property of" the debtor, which he "*held in fee simple and severalty*,"

although the language is not certain to every intent, it states with sufficient certainty that the debtor owned and held, and that they appraised, the entire property in the lot of land, present, and future.

Chapter 165 of the Public Laws of 1863 cannot affect levies made prior to its passage.

On Report from *Nisi Prius*, Dickerson, J., presiding.

Writ of Entry.

The only question raised was as to the sufficiency of the appraisers' return on a levy of an execution upon real estate.

So much of the return as is material was as follows:—

"*April* 26, 1860. We, the subscribers, being duly chosen to appraise such real estate," &c., "have viewed and examined, in company with the officer having the execution," &c., "the following described land, viz., a certain lot of land, situated," &c., "*held* by the said" debtor "*in fee simple and in severalty*, and bounded as follows." (Here follows a description by metes and bounds.) "Said lot of land being shown to us by" the attorney of the creditor "as the property of" the debtor; "and we have appraised said lot of land at the sum of," &c.

Jacob Smith, for the plaintiff, argued—

That the return of the appraisers was a sufficient compliance with R. S., c. 76, § 3.

If not, c. 165 of the Public Laws of 1863, amendatory of the former statute, cured the defect.

Evans & Putnam, for the defendant, contended—

That the appraiser's return does not state whether the estate set off was "in possession, reversion or remainder."

The statute of 1840 simply required that the estate might be described in any way to identify it.

Act of February, 1863, is prospective.

R. S., c. 76, § 3, distinctly requires that the appraisers shall *state* whether the property is "in possession, reversion or remainder," in addition to the other matters required to be stated. Where a statute gives no special directions as

to the form of a return, a substantial compliance will be sufficient, though not certain to every intent. But where, in a statute proceeding, the statute distinctly requires certain things to be "*stated*," it is otherwise.

The words "possession, reversion or remainder," do not occur in the appraisal, and they are neither implied or inferred from anything stated, unless in the words, "*held by said William Winslow in fee simple.*"

It is not implied in the word "*held*," which, as a legal term, is equally applicable to all "*tenements*," corporal, incorporeal, in possession, remainder or reversion. It is the common language of the books that "*tenements*" includes everything that may be holden.

Nor is it implied in the words "fee simple." It is a significant fact that the statute follows the analytical order of Blackstone's Commentaries, book 2, p. 103, requiring the appraisers to state the "*quantity* of interest," "the time when that quantity of interest is to be enjoyed," and the "*number* and *connections* of the co-tenants."

The words "*fee simple*" relate entirely to the *quantity* of interest, and not at all to the *time* of enjoyment. The whole analytical arrangement of Blackstone is based on this idea.

"Tenant in fee simple is he that hath lands, tenements or hereditaments, to hold to him and his heirs forever." Ibid, p. 105. The distinctive feature is that the estate is to him and his heirs "*generally*, absolutely and simply."

That feature is equally applicable to estates in reversion and remainder, as to estates in possession; and such estates may be not only life estates, or estates tail, but also to a man and his heirs, "generally, absolutely and simply." See, also, Ibid, pp. 107 and 177.

The opinion of the Court was drawn by

DAVIS, J.—By the statute of 1821, c. 60, § 27, appraisers of real estate set off on execution, were required to

"describe the same with as much precision as the nature and situation thereof will admit of."

This provision was made more specific by the Revised Statutes of 1841, c. 94, § 7;—"The nature of the estate appraised, (whether in severalty or undivided, a fee simple or less estate, in possession, reversion, or remainder,) shall be described either by metes and bounds, or such other mode that the same may be distinctly known and identified."

There were no parenthetical marks in the statute; but the language was obscure, or susceptible of two interpretations; and the Court construed that part enclosed in brackets as a parenthesis, leaving nothing necessary to be described but "the nature of the estate appraised." *Roop* v. *Johnson*, 23 Maine, 335.

But the provision in the R. S. of 1857, c. 76, § 3, is neither obscure, nor of doubtful construction. It requires the appraisers "to state in their return the nature of the estate and its value, *and* whether it is in severalty or in common, a fee simple or a less estate, in possession, reversion, or remainder, *and* describe it by metes and bounds, or in such other manner," &c.

There does not appear to have been any other change in the statute which rendered the amendment of this section necessary. By the former, as by the latter revision, the debtor's interest passed by the levy, though *less* than the estate described by the appraisers. And, under both alike, the creditor might waive the levy, even after it was recorded, and by *scire facias*, obtain a new execution, "if the estate levied upon was not the property of the debtor."

Whether any case ever arose in which it was found impossible to ascertain definitely what estate had been levied upon, whether in severalty or undivided, a fee simple or less estate, and whether in possession, reversion, or remainder, for the reason that the return of the appraisers was silent on these points, we are not informed. It is apparent that such a difficulty might have occurred. An extent by virtue of an execution upon a lot of land, by metes and

bounds, is not necessarily a levy upon the entire property in the land. The appraisers are to fix the value of the *debtor's interest* in the premises; and their return should state what that interest is, otherwise we cannot tell what they do appraise, whether the entire property in the land, or a reversion or remainder, an estate for life or a term of years. If they appraise an interest or estate *less* than the debtor owns in the land, except in some cases specially provided for by statute, the levy is void. If they appraise an interest *greater* than the debtor owns, except in case of a mortgage, for which special provision is made, the creditor may affirm the levy, and hold the debtor's interest by it, or he may waive it, as before stated. In either case it may be important that the return should show exactly what interest or estate was appraised.

Whether the Legislature changed the statute in 1857 for any such reasons as we have suggested, we do not know. The language, as amended, is unequivocal and imperative in its terms; and all levies made while it was in force which are not substantially according to its provisions, must be held to be void.

It is argued that such levies may be sustained by c. 165 of the laws of 1863, which repeals these provisions of the statute of 1857, and restores those of 1841, as construed by the Court. The wisdom of these repeated changes may well be doubted. It is very important that statutory provisions which direct the forms of civil proceedings, and largely affect titles to real estate, should be permanent. A slight change which, though well enough in itself, is of very little importance, may work great mischief.

But the statute of 1863 cannot affect this case. It does not claim to affect levies previously made. And, if it had, it would have made no difference. The owner of land does not lose his title by a void levy; nor can the Legislature divest him of it, by undertaking to make such a levy valid.

The appraisers' return, in the case at bar, is fuller than

such returns usually have been. Does it state all the particulars required by the statute?

It appears by the return that the estate was "held by the debtor in severalty." Then it was not "in common" with any other person. It also appears that he held it "in fee simple." Therefore it was not "a less estate."

It does not appear by the return that it was a "reversion," or a "remainder." Does it appear that they appraised the *entire property* in the land, so that it was an estate "in possession?" By this is meant, not that the debtor himself *occupies* the land. He may be in possession by a tenant, who will have to attorn to the creditor after the levy. Every estate is *in possession*, within the meaning of the statute, when the present interest in the use and occupation is in the debtor. It may be an estate for years, or for life; or it may be the entire interest in, and title to the land, present, and future.

The return states that they appraised "a certain lot of land" which is described by metes and bounds, which was shown to them "as the property of William Winslow," which he "held in fee simple and in severalty." Although this language is not certain to every intent, in precise technical phrase, we think it states with sufficient certainty that the debtor owned and held, and that they appraised, the entire property in the lot of land, present, and future. A "reversion," or a "remainder," has been said to be "*the residue of the fee*, after a less estate has been carved out of it, both these interests being but one estate." Jacob's Law Dic.; 1 Coke, c. 12, § 215. A fee simple *of the land* is the largest possible estate. 1 Coke, c. 1, § 11. And, though there may be a remainder or a reversion in fee, it is not the entire property, or, in popular language, *the land itself*, that is held in fee in such case, but only the *reversion*, or the *remainder*. A reversion, or a remainder, is described as such, the quality, value, and sometimes the validity, being dependent upon the precedent estate. If the grantor of "a lot of land" should covenant that it was "his property," and "held

by him in fee simple," his title to a reversion or a remainder would not satisfy such a covenant of title. The general description sufficiently excludes the idea of a limited and particular estate.

We think, therefore, that all the requirements of the statute are substantially embraced in the appraisers' return. According to the agreement of the parties the tenant must be defaulted.

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

CHARLES CROOKER, *in Equity*, *versus* WILLIAM D. CROOKER *& al.*

When the payee of a note of a co-partnership, given during its existence, for a co-partnership debt, exchanges it, after a dissolution of the firm, for the several note of each partner, for his share of the original note, he has a precedence over *partnership creditors*, as to the separate property of each member, which a court of equity will enforce; but he has no priority of claim upon the *partnership property*.

If one co-partner has paid more than his share of the partnership debts, he has a claim upon the partnership property, which, in equity, is superior to the claims of the separate creditors of his co-partners.

ON REPORT.

BILL IN EQUITY.

This bill was once before the Court on demurrer. *Vide Crooker* v. *Crooker*, 46 Maine, 250, where the bill is reported at length.

It now comes up to be heard on bill, answer and proof. The bill was originally against about forty defendants, including the President, Directors & Co. of the Lincoln Bank, which is the party now defending.

The bill set out a former co-partnership between the complainant and William D. Crooker; that it was owing debts to a large amount in 1854, when it was dissolved, which

were outstanding at the date of the bill; that its assets consisted of parts of ships and parcels of land purchased on the credit and with the moneys of the co-partnership, but conveyed to the complainant and William D. Crooker, as tenants in common; that the complainant has been obliged to pay debts of said co-partnership to a large amount; that the complainant has repeatedly urged William D. Crooker to adjust the partnership matters, and join him in selling this partnership property to pay its debts; that the defendants, at different times have brought actions against William D. Crooker, on debts incurred by said William on his own *separate* account and credit, and in the prosecution of business in which the complainant had no interest; that the defendants attached, on the writs in said actions, all of said William's interest in said lands, &c.; that they threaten to levy on William's interest, and that, if they do so, it will absorb one-half of the company assets, and the remainder will be insufficient to meet the company debts.

The prayer is, among other things, that the defendants may be restrained from satisfying their judgments in said actions by sale of any interest in the property of said partnership, or by levy on the estate of the said William in the parcels of land aforesaid, and that said attachments may be dissolved, &c.

The only part of the defendants' answer, material to the point raised, was as follows:—

That one of the notes embraced in their suit, to wit, one dated April 3, 1855, for $550, is a renewal of a note dated Jan. 2, 1855, which was given for a part of a note given said bank before the dissolution of the said co-partnership, by the said firm, and after their said dissolution divided by the request of said Charles, and each of the parties gave his separate note for one-half of said original note, &c.

May & Meserve, for the complainant.

The Reporter has no means of knowing who was the defendant's counsel.

The opinion of the Court was drawn by

APPLETON, C. J.—The right to maintain this bill was affirmed on demurrer thereto. *Crooker* v. *Crooker*, 46 Maine, 250.

The facts alleged in the bill having been sustained by proof, the only remaining question is, whether the same injunction shall issue against the President, Directors & Co. of the Lincoln Bank as has been decreed against the other creditors of William D. Crooker.

It is in proof that the Lincoln Bank had a note against the firm of C. & W. D. Crooker, given while their partnership was in existence; that, after its dissolution, the bank agreed to a division of the note between the members of the firm, taking the several note of each partner for his half, and surrendering up the note of the firm. Notwithstanding this, the claim is now made, that the bank has lost none of its rights as creditors of the firm, but are still to be regarded as such.

A negotiable note, given for an account, or in renewal of a preceding note, is presumed to be in payment of the original demand.

In *Evans* v. *Drummond*, 4 Esp., 89, a firm of two partners gave a partnership note for goods sold them. One of the partners retired. The bill, when due, was not paid, but was renewed by another bill, given by the partner who continued the business, which the creditor took, knowing of the dissolution. Lord KENYON held that, by so doing, the creditor had relied on the sole security of the continuing partner and had discharged the other. The decision in *Reid* v. *White*, 5 Esp., 122, was to the same effect. In *Thompson* v. *Percival & al.*, 5 Barn. & Ad., 925, the preceding cases were examined and the decisions therein affirmed. "It appears to us," observes DENMAN, C. J., "that the facts proved raised a question for the jury, whether it was agreed between the plaintiffs and James, (one of the defendants,) that the former should accept the latter as their *sole* debtor, and should take the bill of exchange accepted by him alone, by

way of satisfaction for the debt due from both. If it was so agreed, we think that the agreement and receipt of the bill would be a good answer, on the part of Charles Percival to this demand, by way of accord and satisfaction. It cannot be doubted, but that, if a chattel of any kind had been, by the agreement of the plaintiffs and both the defendants, given and accepted in satisfaction of the debt, it would have been a good discharge. It is not required that the chattel should be of equal value, for the party receiving it is always taken to be the best judge of that, in matters of uncertain value. *Andrew* v. *Boughey*, Dyer, 75, a. Nor can it be questioned but that the bill of exchange of third persons, given and accepted in satisfaction of the debt, would be a good discharge. But it is contended that an acceptance of a bill of exchange, by one of two debtors, cannot be a good satisfaction, because the creditor gets nothing which he had not before. The written security, however, which was negotiable and transferable, is of itself something different from that which he had before; and many cases may be conceived in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy or survivorship, or in various other ways; and, whether it was actually more beneficial in each particular case, cannot be made the subject of inquiry." When a promissory note is given by a partnership, and the payee afterwards takes the individual note of one of the partners for the amount, and he gives up the partnership note, it is a payment of the partnership note. *Arnold* v. *Camp*, 12 Johns., 409. The authority of this case was questioned by Mr. Justice COWAN, in *Cole* v. *Sackett*, 1 Hill, 516; but its correctness was sustained by the Court of Errors of New York, in *Waydell* v. *Luer*, 3 Denio, 410. In *Chase* v. *Vaughan*, 30 Maine, 412, the notes of the firm were not surrendered, neither was a new note given after the dissolution by the continuing partner.

In the present case, the several note of each partner for

his share, is taken and the note of the firm given up. Before this exchange, the bank had a priority of claim upon the partnership property. They now have a precedence over partnership creditors as to the separate property of each member, which a court of equity will enforce. *Crockett* v. *Craine*, 33 N. H., 542; *Holten* v. *Holten*, 40 N. H., 77; *Jackson* v. *Cornell*, 1 Sand. Ch., 348. The bank was competent to contract. Nobody has a right to object. They preferred the separate notes of the members for their share, to the note of the firm, for the amount due. There was neither fraud, misrepresentation nor concealment. They must be bound by their contract,—and, as a consequence of their own act, cannot be ranked among the creditors of the firm—for they have long since ceased to be such.

Their rights are in no respect superior to those of their co-defendants.

The rule in equity is well established, that if one co-partner has paid more than his share of the partnership debts, he has a claim upon the partnership property, which in equity is superior to the claims of the separate creditors of his co-partner. *Buchan* v. *Sumner*, 2 Barb. Ch., 165. This the bill alleges and the proof shows to have been done by the plaintiff. *Bill sustained.*

Injunction as prayed for.

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

JOANNA PHILBROOK *versus* EDWARD BURGESS.

In the trial of an action of debt upon a bond, which, by its terms, is to be void on condition that the defendant "shall truly and faithfully maintain" the plaintiff "during her life," &c., it is the legal duty of the presiding Judge to assess the damages.

In such case, such sum should be assessed as will not only cover present but prospective damages—such sum as shall be an equivalent for a full performance.

And, in such case, where the defendant pleaded *nil debit*, which plea was joined, and the presiding Judge instructed the *jury* to assess the damages sustained *to the time of trial;* and the defendant did not claim to have the damages assessed by the Court instead of the jury, nor claim a new trial because they were not so assessed, no new trial will be granted.

In the trial of such action, if the defendant prays oyer of the bond and pleads *nil debit* with a brief statement alleging performance, the burden of proving performance is upon the defendant.

And the instruction to the jury that the plaintiff must show how much she ought to recover, is in favor of the defendant, and he cannot complain of it.

So is the instruction that the jury are to assess all the damages that have accrued up to the time of the trial.

A new trial will not be granted because the presiding Judge admitted immaterial testimony *de bene esse*, against the objections of the defendant, when, in the charge, the jury were instructed to disregard it.

Principles governing the assessment of damages in actions upon bonds enunciated.

On Exceptions from *Nisi Prius*, Fox, J., presiding.

The facts are sufficiently set forth in the opinion.

Ruggles, for the defendant.

Gould, for the plaintiff.

The opinion of the Court was drawn by

Davis, J. — This is an action of debt for the penalty of a bond, given by the defendant, for the maintenance of the plaintiff and her late husband, during their lives. At the time the bond was given, the husband gave to the defendant a deed of his farm.

The evidence in regard to the insanity of the husband was immaterial; and the jury were properly instructed to disregard it. The plaintiff affirms the validity of the deed, by her suit upon the bond.

The defendant prayed oyer of the bond, and pleaded *nil debit*, with a brief statement of performance of the conditions. The jury were instructed that the burden of proving performance was upon the defendant. If the bond had been *for the performance of an agreement*, and the plaintiff had assigned specific breaches thereof, the rule might, perhaps, have been different. *Postmaster General* v. *Cochran*,

2 Johns., 413; *Palmer* v. *Stebbins*, 3 Pick., 188. But the suit not being upon such a bond, the instructions were correct. *McGregory* v. *Prescott*, 5 Cush., 67; *Perkins* v. *Rogers*, 20 Conn., 81.

The ruling that the *plaintiff* must show *how much* she ought to recover, whether correct or not, was in favor of the defendant; and he cannot complain. Such seems to have been held to be the rule in a hearing upon a motion to chancer the penalty in a bond. *Gowen* v. *Nowell*, 2 Greenl., 13. As this is not a case in which the plaintiff claimed judgment for the penal sum, it is unnecessary for us to express any opinion upon the question.

The jury were instructed to assess all the damages that had accrued up to *the time of the trial*. This rule would have been correct in a suit upon a bond for the performance of covenants or agreements, in which the damages must have been assessed *by the jury*. Is the case at bar one of this kind?

Two classes of bonds have always been recognized by courts of law, as well as of equity. But, in suits at *common law* upon bonds of either kind, before any provisions of statute were made, the jury determined nothing but the issues presented by the pleadings; and, if in any case, their verdict was in favor of the plaintiff, he was entitled to judgment for the penal sum, unless the amount should be reduced *by the Court*, upon a hearing in chancery. 1 Tidd's Pr., 509, 584, 879; *Hardy* v. *Bern*, 5 D. & E., 636.

In this country, in order to relieve the obligors from the rigorous rule of the common law, it seems to have been the practice in some of the States, for the Court to determine the amount of damages *justly due*, upon a hearing of the parties in the suit upon the bond, after default or verdict, without any *process* in equity therefor. When, or how this practice originated, it may not be easy to determine. The Provincial Act of 5 W. & M., c. 5, (1692,) recognized it as existing. By it the powers of common law courts were enlarged, and new courts were established, the highest of

which was a court of chancery. And, lest the powers conferred upon the latter should be held to abridge the power of the common law courts to proceed as before, it was specially provided that, notwithstanding the powers of the court of chancery, the justices of any of the other courts, "when the forfeiture of any penal bond is found, shall be and hereby are empowered to chancer the same unto the just debt or damage." And the Act of 1693, still further enlarging the powers of the court of chancery, contains a similar provision. Anc. Charters, 223, 275. This was reenacted in Massachusetts in 1785, and was subsequently adopted in this State, by a provision that, in any such action, "when the breach or non-performance shall be found by the jury, or by the default or the confession of the defendant, or upon demurrer, the court before which the action is, shall make up judgment therein for the plaintiff to recover so much as is due according to equity and good conscience." Laws of 1821, c. 50, § 2.

Originally, the proceedings appear to have been substantially the same in all suits upon bonds, of whatever kind. But, as before stated, there were two kinds of bonds; (1,) those made to secure the performance of "covenants or agreements;" and (2,) those which were to be void upon the performance of the conditions therein named, which the obligors were not otherwise bound to perform. In England, while the liabilities of the parties upon bonds of the latter kind remained unchanged, the Act of 8 & 9 W. 3, c. 11, § 8, provided "that in all actions upon any bond or bonds, or on any penal sum, for the non-performance of any *covenants or agreements*," the plaintiff might suggest or allege as many breaches of the covenants or agreements as he thought fit, and the *jury* should assess the damages sustained *at that time*. Thereupon *judgment* was to be entered for the penal sum, and *execution* was to be issued for the amount of damages assessed by the jury. *Drage* v. *Brand*, 2 Wilson, 377; *Murray* v. *Earl of Stair*, 2 B. & C., 82.

This statute was never adopted in New England. *Mooney*

v. *Demerritt*, 1 N. H., 187; *Bailey* v. *Rogers*, 1 Greenl., 186. But the Provincial Act of 8 Geo. 2, (1735) was substantially the same, except that, in suits upon *such bonds*, while the judgment should be for the penal sum, the *Court* should assess the damages "sustained at that time," and issue execution for such sum only. Anc. Charters, 499. This was reënacted in Massachusetts in 1798, and was incorporated into the laws of this State at the time of our separation. Laws of 1821, c. 50, § 3. The statute of 1830, c. 463, so far modified it that the damages were to be assessed *by the jury;* and, in suits upon *this kind* of bonds, the law has not been changed since that time. *Judgment* is entered for the penal sum; *the jury* assess the damages; and *execution* is issued for that amount only. Laws of 1842, c. 31, § 9; R. S., 1841, c. 115, § 78; R. S., 1857, c. 82, § 27.

But no such provisions were ever made applicable to suits upon bonds with merely a *condition of defeasance*. As before stated, in suits upon *such bonds*, it appears to have been the common law of New England, recognized in the early statutes, that the Court, without any process in equity therefor, should assess the damages justly due, not exceeding the penal sum and interest, and render judgment and issue execution therefor. In England, whenever damages are to be determined by *the Court*, in suits at common law, it is done personally or by an auditor, prothonotary, or master, upon whose report of the facts, unless invalidated, the amount is fixed, and judgment rendered. Tidd's Practice, 569–573; 10 Petersdorff, 631; 2 Saund., 106, note. In this State the practice has generally been for the parties to be heard in open Court, by the justice presiding.

The power of the Court to determine the damages in suits upon such bonds, was affirmed by the laws of 1821, c. 50, § 2, as we have previously stated. This section was repealed in 1841. But the statutes, as then revised, empowered this Court, "as a Court of equity, to hear and determine all cases of forfeitures in all civil obligations and contracts."

R. S., 1841, c. 96, § 10. And though then, for the first time, *the jury* were authorized to assess the damages in suits upon such bonds, it was only when *they* should find "that any of the conditions of such bonds had been broken." R. S., 1841, c. 115, § 78. In cases where the breach of the conditions appeared by the default, or confession of the defendant, or upon demurrer, no such authority was given to the jury. By the Act of 1842, c. 31, § 9, the power of the jury, in any case, to assess the damages in suits upon any bonds, except those given for the performance of covenants or agreements, was revoked. And though the statute of 1821, c. 50, § 2, was not, in terms, revived, the power of the Court in such a case to determine the amount of damages justly due, for which judgment is to be rendered, has never been questioned. This power has been uniformly exercised by the Court, in Massachusetts and this State, from the earliest settlement of the country, to the present time. *Hathaway* v. *Crosby*, 17 Maine, 448; *Burbank* v. *Berry*, 22 Maine, 483; *Fales* v. *Dow*, 24 Maine, 211; *Call* v. *Barker*, 27 Maine, 97; *Clifford* v. *Kimball*, 39 Maine, 413.

The defendant did not claim to have the damages assessed by the Court, instead of the jury. He does not claim a new trial because they were not so assessed. But he does claim a new trial because the jury were instructed to assess the damages sustained *to the time of the trial.*

At common law, in suits upon bonds for the performance of agreements, if the party could have another action for subsequent breaches, the Court assessed only such damages as had accrued *at the date of the writ. Hambleton* v. *Verre*, 2 Saund., 169, note. But, under the Act of 8 and 9, W. 3, and similar statutes in this country, it has been held, that the provision that the jury should assess the damages "sustained at the time," authorized the jury to assess the damages *to the time of the trial. Waldo* v. *Forbes*, 1 Mass., 10; *Gardiner* v. *Niles*, 16 Maine, 279; *Gennings* v. *Norton*, 35 Maine, 308; *Whitney* v. *Slayton*, 40 Maine, 224.

But, if the bond is not one for the performance of an

agreement or covenant, but is only *to be void* upon conditions therein specified, there can be but one breach of it, for which there can be but one suit, and one assessment of damages, for which judgment is rendered, and execution issued, as in other cases. Unless every particular in the condition is performed, the whole condition is broken, and all the damages are, in contemplation of law, sustained at that time. If the condition is a *continuing* one, as for the present and future support of the obligee, the damages must be not only to the time of the trial, but prospective beyond that. It is probably for this reason, with others, that it has been thought best for the damages in such cases to be determined upon equitable principles, by the Court. The plaintiff is entitled to recover such sum as, in equity and good conscience, is a present equivalent for a full performance.

The bond in the case at bar, is not one "for the performance of covenants or agreements." It is simply a bond with a condition of defeasance. It is not claimed that there was any covenant or agreement other than the bond itself. As was said by SHEPLEY, J., in *Hathaway* v. *Crosby*, 17 Maine, 448, "the obligor does not stipulate in the conditions to pay any sum of money, nor to perform any act. He only secures to himself an option to avoid the bond by the performance of certain acts. The obligees could not exact performance. They could only claim the penalty, by an action of debt, in case of neglect to perform."

If the damages had been assessed by the Court, they would have been *prospective*, for the maintenance of the plaintiff during her life, and not merely to the time of the trial. And, though neither party objected to the assessment of damages by the jury, the same rule should have been given to them by the instructions. Such would not have been the rule in an action upon a covenant for maintenance. *Powers* v. *Ware*, 4 Pick., 76. In such case the plaintiff would have further remedy for *future* maintenance. But in this case, there being no agreement, and no condi-

tion in the bond but one of defeasance, the plaintiff can have but one action, and one recovery of damages. The instructions to the jury, to assess the damages sustained *to the time of the trial*, only, were erroneous. But they were in favor of the defendant; and he cannot complain.

The defendant pleaded *nil debit*, instead of *non est factum;* and the plaintiff joined the issue tendered upon it. The verdict was according to the issue. It is now too late for either party to take any advantage of the irregularity. 2 Starkie, 463; *Garland* v. *Davis*, 4 How. U. S., 131; *Jansen* v. *Ostrander*, 1 Cowen, 670.

The exceptions and motion are overruled. And judgment will be rendered and execution issued for the amount awarded by the jury.

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

SAMUEL H. ALLEN *& al. versus* RICHARD TINKER, *Warden.*

By R. S., c. 140, § 20, the warden of the State Prison is authorized to submit to referees, approved by the inspectors, any claim on account of the State Prison respecting which a controversy has arisen.

The Resolve of February 20, 1860, c. 316, does not take from the warden the power to refer the claim therein mentioned.

The award of referees, to whom that claim was referred by the warden, is binding upon the parties.

ON FACTS AGREED. DEBT upon an award.

The plaintiffs, on the ninth day of January, 1861, having a claim against the State Prison, which was disputed by Thomas W. Hix, then warden, it was submitted by them and said Hix, in his capacity of warden, to referees approved by the inspectors.

An award in due form was made, upon which this suit was brought.

The only question raised was, whether Hix had authority to make the submission.

Gould, for the plaintiffs.

Drummond, *Attorney General*, for the defendant.

This action, though *nominally* against the warden, is *really* against the State.

The State cannot be sued. But it may authorize a suit against its agents. But it may also take away this power, at any time before judgment. A creditor of the State Prison has no *vested* right to a suit against the warden. It is a remedy given by statute, and may be taken away by statute. So also may the power of the warden to refer be taken away. The Legislature may take away the power generally, or the power to refer any particular claim. It may be done directly or indirectly.

It is well settled, that where a remedy is given by statute, and a subsequent statute gives a different remedy, the latter supersedes the former. *Titcomb* v. *Union Ins. Co.*, 8 Mass., 326; *Howe* v. *Starkweather*, 17 Mass., 240; *Bassett* v. *Carleton*, 32 Maine, 553.

The Resolve of Feb., 1860, passed before this reference was made, gave the plaintiffs a new remedy. This new remedy superseded the other, and took away the power of the warden to refer.

The warden having no power to refer, the award is void.

The opinion of the Court was drawn by

APPLETON, C. J.—By R. S., 1857, c. 140, § 20, it is enacted that, "when any controversy arises respecting any contract or claim on account of the State Prison, or any suit is pending thereon, the warden may submit the same to the determination of arbitrators or referees to be approved by the inspectors."

This suit is brought upon an award made by arbitrators or referees approved in writing by the inspectors.

Though the State is not liable to a suit at the instance of

its citizens, it may, nevertheless, render its officers thus liable — as is done by c. 140, § 19.

The counsel for the defendant insists that § 20 — so far as it relates to the plaintiff's claim, has been repealed by the Resolve of the Legislature of Feb. 20, 1860, c. 316, by which the Governor and Council were authorized "to adjudicate upon and settle the claims of Samuel H. Allen and Thomas O'Brien, for damages claimed in consequence of the termination of contracts by the action of the State Prison Commissioners, and draw their warrants for such sum or sums as they shall deem justly due such claimants."

But this statute neither repeals or purports to repeal R. S., c. 140, or any of its sections. It simply confers authority on the Governor and Council to act, when they had none before. The plaintiffs were under no legal obligation to submit to their jurisdiction. They might have presented their claims for adjustment, and had they done so, and the Governor and Council taken cognizance of and adjudicated upon the same, they might have been concluded by such adjudication. Not choosing to present their claims before this tribunal, they were in no way precluded from bringing a suit as authorized by c. 140, § 19, or from referring their claim, as provided by § 20.

It appears by the preamble to the resolve of March 15, 1861, c. 71, that the Legislature declined "to sanction" the award, which is the basis of this action. It was, therefore, resolved that the plaintiffs "be and they are hereby absolved from said submission, so that the same shall not be used, or pleaded against any proceeding or remedy, which the laws of the State afford them for redress in the matter of which they complain."

As the award was made in accordance with the laws of the State, it needed no legislative sanction. The plaintiffs could not be deprived of their rights acquired by a legal submission and a valid award under such submission. The Legislature might *absolve* "them from said submission and award," and this they have done. But this was a privilege

allowed the plaintiffs, which they might accept or renounce, at their option. They do not desire to be absolved from said award, but insist that the same shall be enforced, and have brought this suit for its enforcement.

The submission was entered into by parties competent to contract—and, in pursuance of the existing law. No exception is taken to the referees. No impeachment is made of the award. Nothing is shown against its validity. As the submission was entered into in accordance with the provisions of the statute, no reason is perceived why the award made in pursuance thereof should not be enforced.

Defendant defaulted for the amount of the award and interest.

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

NATHANIEL BUTLER *versus* WILLIAM E. STARRETT and ADONIRAM J. DAY, *trustee.*

A person, summoned as trustee, will not be entitled to costs, when he comes and files, on the 7th day of the first term, the written declaration (made under oath and mentioned in § 13, c. 86 of the R. S.,) denying that, "at the time of the service of the writ upon him, he had any goods," &c., "belonging to the principal defendant, in his possession," and that he "thereby submits himself to further examination, on oath;" unless, in accordance with the 12th rule of Court, he "give written notice to the attorney for the plaintiff" that "*he presents himself for examination,*" or in the absence of said attorney, "cause to be entered upon the docket" *that he presents himself for examination.*"

Filing such a declaration, and causing to be noted upon the docket "(7) trustee disclosure of A. J. Bird, received and filed," &c., is not sufficient.

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

The question raised is, whether the person summoned as trustee in this action may recover costs.

On the 7th day of the first term, the alleged trustee came and filed his general declaration, signed, and sworn to be-

fore the clerk, denying that, "at the time of the service of the writ upon him, he had any goods, effects or credits of said principal defendant in his possession," thereby "submitting himself to further examination on oath," and praying "to be discharged and for his costs."

The plaintiff's attorney was not in Court, when the above declaration was filed, nor at any time thereafter during the term, which closed the next day.

The entry upon the docket was as follows:—"(7) trustee dis. of A. J. Bird, received and filed, Feb. term, 1863."

The case was continued until April term, when the alleged trustee appeared three successive days to disclose further, but no interrogatories were put to him by the plaintiff's counsel, and the alleged trustee was discharged, claiming costs which were allowed by the clerk. An appeal was taken to the presiding Judge who affirmed the adjudication of the clerk, and the plaintiff excepted.

A. P. Gould, for the plaintiff.

L. W. Howes, for the trustee.

The opinion of a majority of the Court was drawn by

CUTTING, J. — Statute c. 86, § 13, provides that,—"If any supposed trustee comes into Court at the first term, and submits himself to examination on oath, *after* having, in writing, declared that, at the time of the service of the trustee process upon him, he had not any goods, effects or credits of the principal in his possession, he shall be entitled to his costs, as in civil actions where issue is joined for trial."

The allegation in the plaintiff's writ, in substance, is, that the principal defendant is indebted to the plaintiff, and, at the same time, the supposed trustee is indebted to the principal defendant; which, if true, there would be no necessity of the appearance of either in Court, but they should submit to a default, and the funds in the possession of the trustee would, by operation of law, and comparatively at small expense, be transferred to the judgment creditor to

the amount of his judgment, not exceeding, however, the amount in the trustee's hands at the time of service of the process upon him, which, if not paid to the officer holding the execution, on demand, within thirty days after judgment, would render such delinquent trustee liable to the process of *scire facias*.

But, in this case, it would seem, that the supposed trustee was justified in coming into Court and denying the plaintiff's allegation as to him. He does appear at the first term, and declares, in the language of the section, that at the time of the service of the trustee process upon him, he had not any goods, effects or credits of the principal defendant in his possession. Such denial was, in *Toothacre* v. *Allen & trustee*, 41 Maine, 324, considered in the nature of a plea; and in *Moore* v. *Towle & trustee*, 38 Maine, 133, equivalent to an answer in a bill in equity, both of which issues were to be settled on ulterior proceedings. This denial, plea or answer it was necessary for the trustee to make *before*, and as preliminary to submitting himself to examination on oath. The mere filing of such denial would constitute no submission, no more than a prior filing of a plea of the general issue would of itself constitute a defence, in the absence of the defendant when the case was called up for trial; or, in other words, a plea filed, never, in practice, dispenses with the personal attendance of the party so as to prevent a default.

Now, the trustee contends that, having appeared the first term and filed his denial, in the absence of both the plaintiff and his attorney, he is entitled to costs because, he argues, that such an act is equivalent to submitting himself to examination on oath. To whom did he submit himself to examination? Not to the party interested, or to any party. To submit to an examination implies an examining party authorized to put interrogatories eliciting true answers. *There has been no such submission.*

Is the trustee excusable for such neglect? The case finds that the declaration was filed on the seventh day of the term, the day previous to the final adjournment, and that the plain-

tiff's attorney was not present during the term. Upon which finding, it is contended that the trustee was excused from submitting himself to an examination under oath, inasmuch as no party was in Court to whom he could submit himself. Such excuse may be plausible, but not legal. The statute is peremptory that the submission shall be at the first term, and this Court has made ample provision for just such a contingency.

RULE 12. "In cases of foreign attachment, when any trustee shall present himself for examination, he or his attorney shall give written notice to the attorney for the plaintiff, *or, in his absence*, cause the same to be noted on the docket; and, upon motion, the Court may fix a time for the disclosure to be made."

In the absence of the attorney it was incumbent on the trustee to cause to be entered upon the docket that "he presented himself for examination," and, upon motion, to have a time fixed for the disclosure.

The absence of the plaintiff's attorney might dispense with the written notice, but not with such entry upon the docket and an order thereupon fixing the time for a disclosure. No such docket entry was made — no such time was fixed, and the rule was *wholly* disregarded. We cannot sanction such a practice, and we consider the party, who attempted it, to have forfeited all claim to judicial sympathy.

Exceptions sustained — costs disallowed.

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

The following dissenting opinion was drawn by

APPLETON, C. J. — On the seventh day of the first term, the trustee came into Court and made the following disclosure in which he submitted himself to further examination on oath: —

"And now at the said term of the Court, being the term at which said action was entered, said Bird, one of the alleged trustees, comes into Court and declares that, at the time of

the service of the writ in said action upon him, he had not any goods, effects or credits of said principal defendant in his possession, and said *Bird hereby submits to further examination on oath*, and asks to be discharged and for his costs."

This was subscribed by the trustee in person and sworn to in open Court before the clerk, and placed upon the files of the Court and notice thereof entered upon the docket. The plaintiff's attorney was not then in Court, nor did he afterwards come into Court during the term.

At the succeeding term, on motion of the plaintiff's counsel, the trustee, by order of Court, appeared, but no additional disclosure being desired by the plaintiff, he was discharged.

Did the trustee, by so doing, entitle himself to costs?

It is provided by R. S., c. 86 § 13, that "if any supposed trustee comes into Court at the *first* term and *submits himself* to *examination, on oath*, after having in writing declared that at the time of the service of the trustee process upon him, he had not any goods, effects or credits of the principal defendant in his possession, he *shall be entitled to his costs*," &c.

The trustee, in this case, has brought himself within the letter as well as the spirit of the statute. He has done the precise things required by the statute to entitle him to costs, and at the time and in the mode thereby prescribed. He has been guilty of no omission whatsoever.

But the plaintiff contends that he has failed to comply with the 12th rule of this Court relating to trustee disclosures and thereby has forfeited his claim to costs.

The rule, so far as applicable, is as follows: — "In cases of foreign attachment, when any trustee shall present himself for examination, he, or his attorney, shall give written notice thereof to the attorney for the plaintiff, or, in his absence, cause the same to be *noted on the docket;* and, *upon motion*, may fix a time for the disclosure to be made."

The plaintiff's attorney being absent, notice could not be

served upon him. The docket, which is the register on which are minuted briefly the acts of the Court and all proceedings therein, and which is at all times open for public inspection and information, is, by the rule, made the medium of notice to parties in Court. It would have been so without the rule. On this register, the acts of the Court, and papers and documents on file in Court, motions, pleadings, &c., are not entered at length, but minutes thereof which indicate where more extended and minute information may be found or from which the records of the Court are to be extended.

Now, of what, under this rule, was the plaintiff's counsel entitled to notice? Simply, that the trustee has *presented himself for examination*. The paper, which had been placed on file, contained that precise information under oath. It was not to be expected that the whole would be extended on the docket. The docket contained the entry. "(7) The dis. of A. J. Bird rec'd and filed Feb. T. 1863."

The statute prescribed what the disclosure should contain to entitle the trustee to costs — that he must make a general disclaimer of goods, &c., and submit himself to examination, on oath — the first term. This being done, and notice thereof entered on the docket, he has fully complied with the statute and the rule. No attorney could be misled by such a docket entry. It is the one universally made since the organization of the State. All the attorney for the plaintiff had to do was to read the paper filed, and he would see that the trustee submitted himself to examination, and he could then determine whether he wished further to examine him.

The trustee had no occasion to proceed further. Unless he had goods, effects and credits, he could not make a further disclosure. The motion for a further examination is to be made by the party requiring additional information.

A simple notice on the docket, that the trustee presented himself for examination at the return term, would not have entitled the trustee to costs. He must do all the statute re-

quires. This he has done with technical precision. He has in addition substantially complied with the rule of Court. He was entitled to a discharge upon the disclosure filed, in case no further examination was required.

The rule does not require the trustee to make the motion for fixing the time for the disclosure. It leaves it to any party to make it. There was no reason why he should make it. Having already disclosed that he had no funds, and having submitted himself to further examination, he was entitled to a discharge, unless some other party to the suit should desire a further disclosure and should move the Court to fix the time for that purpose. The trustee, both by statute and by the rule of Court, is entitled to costs.

ISAAC L. ORR, *Guardian of* EUGENE O. SMITH, *versus* OLIVER MOSES, *Adm'r, with will annexed.*

A testator bequeathed to his mother $350, to be paid quarterly, during her natural life, and after her decease, the same sum to his two sisters, (naming them,) and the survivor of them, to be equally divided, payable quarterly. The will then provided, "I give, bequeath and devise all the residue of my estate, real or personal, of which I shall die seized," &c., "to my beloved wife" (naming her) "and my dear son" (naming him), "It being understood that the *estate is subject to the payment of the annual sum of* $350," &c. "And it is my wish that my executrix *retain in her hands and properly invest a sum sufficient to pay* the annuities to my mother and sisters, and, at their decease, to pay *the sum so retained and invested* to my wife and son." The will, in the sixth and last article, appointed the wife executrix and then continued: "wishing and *directing her to invest a sufficient sum to produce annually* the sum of $350," to be paid as hereinbefore directed. *Held:* —

1. That the sum to be "retained and properly invested" was limited to the amount required for the purchase of the annuity, and after such investment, the residuary legatees were entitled to the balance;

2. That the administrator could not invest and hold invested a surplus above the amount now sufficient, and, in the exercise of ordinary care and prudence, likely to remain sufficient to produce the annuity, commissions and contingent expenses, to guard against contingent losses and possible depreciations of securities; but when a "sum sufficient" to meet the requirements is invested, — a just regard being had to the future as well as

the present in determining the nature and kind of investment to be made, — the annuitants must abide the fate of the investment; and

3. That by the provision "that the estate is subject to the payment of the annual sum of $350," the testator intended that the estate should be subject to the investment of a "sum sufficient" to be expended in the purchase of the annuity.

Where there is a conflict in the different provisions of a will, the last expression of the testator's intention shall govern.

On Report.

Assumpsit. The case came before this Court under § 18, c. 77, of the R. S.

John P. Smith died testate, leaving a wife, son, mother and two sisters.

The widow declined the appointment of executrix, and defendant was appointed administrator with the will annexed. The widow waived the provisions made for her in the will, and received her legal benefits under the statute.

Since administration was commenced the mother of the testator has died.

The administrator settled his final account of administration, showing a balance of personal assets against himself of $10,441,35. Of this sum he invested $2000 in U. S. bonds, payable in 1881, with interest semi-annually, the interest subject to a tax of three per cent.; and $4000 in city of Bath bonds, payable in 1890, with interest semi-annually, which interest is also subject to the same tax.

The administrator claimed the right to invest and hold invested a surplus above the amount now sufficient to produce the annuity to the sisters, commissions and contingent expenses, to guard against contingent losses or depreciation of the securities held by him.

The plaintiff, as guardian of the minor heir and devisee, claimed that the administrator, under the will and by its authority, has power to invest only so much as will produce the annuity with the necessary expenses and commissions, and brought this action to recover the residue.

The parties agreed that the Court might decide as to the duty of the administrator, and all rights of the parties in-

volved in the case, give all needful and proper directions, or otherwise dispose of the case as law and justice might require.

The material provisions of the will appear in the opinion of the Court.

Gilbert, for the plaintiff.

Tallman & Larrabee, for the defendant.

The opinion of the Court was drawn by

APPLETON, C. J. — We are called upon to give a construction to the following clauses found in the will of John P. Smith.

"Second. I give and bequeath to my honored mother, Charlotte G. Brown, the sum of three hundred and fifty dollars, to be paid out of my estate in quarterly payments, during her natural life — after the decease of my mother aforesaid, I give and bequeath to my sisters Cynthia G. Smith and Frances B. Smith, and the survivor of them, the sum of three hundred and fifty dollars annually, to be equally divided between them during their joint lives; which sum I direct my executrix to pay to my sisters Cynthia and Frances, in quarterly payments, during their lives and the life of the survivor of them. If either of my sisters die, the *annuity* to be paid in full to the survivor during her natural life.

"Fourth. I give and bequeath, and devise *all the residue of my estate, whether real or personal*, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, to my beloved wife, Emily O. Smith and my dear son, Eugene O. Smith, in such shares to each as the laws of the State prescribe for the descent of real and personal estate. It being understood that *the estate is subject to the payment of the annual sum of three hundred and fifty dollars* to my mother and sisters, as herein before in the second article of this, my last will and testament, set forth; and it is my wish that my executrix *retain in her hands and*

properly invest a sum sufficient to pay the annuities to my mother and sisters, and, *at their decease, to pay the sum so retained and invested to my wife and son*, and their heirs, in shares as herein before described.

"Sixth. I hereby constitute and appoint my beloved wife, Emily O. Smith, my sole executrix of this my last will and testament, wishing and *directing her to invest a sufficient sum to produce annually* the sum of three hundred and fifty dollars, which sum I wish paid to my mother in quarterly payments, so long as she shall live, and, after her decease, the like sum, in the same manner, annually, to my sisters Cynthia and Frances, during their joint lives, and the life of the survivor of them, as herein before set forth in article second of this my last will and testament."

The question presented is whether the executrix, by the provisions of the will, is required to retain the whole estate as security for the annuity given to the mother, and, after her death, to the sisters during their joint lives, and the life of the survivor, or "to invest a sufficient sum to produce annually" the amount of the annuity, and, after such investment, to pay over the balance remaining in her hands to the residuary legatees.

The testator cannot be deemed indifferent to the welfare and maintenance of his wife and child — neither is it to be presumed that he would postpone their interests to those of his mother and sisters, so far that they could derive no benefit from the estate until after the decease of the annuitants. If no payments are to be made of "the residue," after investing a sum sufficient to produce the required annuity, until after the expiration of three lives, the wife may never receive anything, and the minor child nothing, until after he has arrived at middle age.

It is manifestly not the meaning of the testator that the whole estate shall remain as security for the annuity, as the counsel for the defendant contends. The intentions of the testator must be gathered from the whole will. In the very clause in which the bequest of the annuity is made, the ex-

ecutrix was directed "to *retain in her own hands and properly invest a sum sufficient* to pay the annuities," &c., to "the mother and sisters." The whole estate was not to be so invested, but only a limited and defined portion thereof. It is not required that more should be invested than is sufficient to produce the required annuity. "*The* sum *so* retained and invested," was to be paid, after the decease of the mother and sisters, to the wife and son of the testator, or to their heirs. The sum to be invested is limited to the amount required for the purchase of the specified annuity.

The second clause in the will provides for the annuity. By the fourth "all the residue" of the estate, whether real or personal, was bequeathed to the wife and child of the testator. But this residue is manifestly distinct from "the sufficient sum" to be retained and invested in the purchase of the annuity. It is the residue after such retention and investment. If the whole estate was to be retained and invested to secure the annuity, there could be no residue. Indeed, the very term residue primarily implies the sum remaining after "a sufficient sum" has been "retained and invested" "to produce annually the sum of three hundred and fifty dollars."

The amount to be retained and invested is as fully specified as though it had been stated in dollars and cents. It is an amount ascertainable, and no more. That "sufficient sum" properly invested, the residue belongs to the residuary legatees.

Nor is this construction inconsistent with the clause in the will, "that the estate is subject to the payment of the annual sum of three hundred and fifty dollars." The testator deeming his estate ample, intended first to make a limited provision for the support of his mother and sisters; and that the estate should be subject to the investment of a "sufficient sum" to be expended in the purchase of the annuity bequeathed; and when the executrix shall have done this, she will have accomplished the designs and satisfied the intention of the testator.

If there were any doubt upon the subject, the rule is well

settled where there is a conflict in the different provisions of a will, the last expression of the testator's intention shall govern, and by that the executrix is directed "to invest a sufficient sum to produce annually three hundred and fifty dollars," and no authority is given to invest any other or different sum.

The claim of the administrator to invest and hold invested a surplus above the amount now sufficient, and in the exercise of ordinary care and prudence likely to remain sufficient, to produce the annuity to the mother and sister or sisters surviving, and commissions and contingent expenses, to guard against contingent losses and possible depreciations of the securities in which the investment may be made, is entirely untenable. The will makes no provision for any such purpose. Who can foreknow contingent losses? Who can estimate possible depreciations? Who can determine the "sufficient sum" to meet these unforeseen possibilities? The executrix, by the will, is to invest a "sum sufficient" to meet its requirements—a just regard being had to the future as well as the present in determining the nature and kind of investment to be made; and that done, the annuitants must abide the fate of the investment.

The amount invested should be enough to enable the administrator to pay the *full* annuity to the annuitants, and without charge to them.

Indeed, we think no satisfactory answer has been or can be given to the clear and conclusive argument of the learned counsel for the plaintiff. The result is, that by the agreement of the parties, the plaintiff is entitled to recover.

We presume the investment already made will be deemed satisfactory to all parties—both in respect to the sum invested and its safety. If so, the plaintiff is to have judgment for the balance remaining in the defendant's hands, and interest thereon from the date of the demand. If not, the parties may be heard before the Judge at *Nisi Prius*, as to the amount of damages. *Defendant defaulted.*

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

COCHECO BANK *versus* JAMES S. BERRY.

The effect of a subsequent contract upon a pre-existing one is a question for the Court to determine from their terms.

If the provisions of the second contract were only *additional* to those of the first, and not inconsistent and irreconcilable therewith, they might be treated as one.

But where two contracts of different dates, made upon the same subject matter, cannot be reconciled without rejecting some of the material stipulations in the one or the other, or in both, effect will be given to such one of the contracts as the intention of the parties shall seem to require.

If a former contract is to be revived, simply because it may have become obsolete, it need not be re-written; but the time of performance only changed.

If the latter contract contain new stipulations which are inconsistent with those in the former, it cannot be considered a supplement.

When A entered into a written contract, in May, 1853, to build a house in accordance with certain specifications, at an agreed price, to be completed on or before September following; and he did nothing but make the doors until the fall of 1857; when another written contract was made materially different from the former in regard to the specifications, considerations, rights and duties of the parties, containing stipulations inconsistent with those of the former but complete in itself; — *Held*, that the latter contract cannot be construed as a supplement to the former, but as a new and independent contract; and a mechanic's lien secured upon the house could not refer back to the former.

ON FACTS AGREED.

WRIT OF ENTRY.

Both parties derive title from Daniel E. Somes, who received his title from Lawrence Barnes, Nov. 14, 1857.

On Nov. 24, 1857, Somes mortgaged the premises to the plaintiffs, by deed duly recorded Nov. 27, 1857.

On May 8, 1861, the plaintiffs having, in an action against Somes, commenced in 1859, recovered judgment for possession of the premises, for breach of the condition of the mortgage, received seizin and possession thereof from the officer, under the writ of *habere facias*, which was duly recorded May 21, 1857; and, on April 1, 1862, the plaintiffs commenced this action, to recover their possession, against the defendant, who, in the meantime, had entered and disseized them.

The defendant claims title by virtue of an alleged lien under a contract between one William B. Pierce and the said Somes, for building a house upon the demanded premises, secured by an attachment of the same on mesne process, made Nov. 13, 1858, and duly followed by levy, Oct. 29, 1860; and by a conveyance by a deed of warranty from said Pierce to the defendant, Jan. 1, 1862.

The main question was whether or not the Pierce lien commenced prior to Nov. 24, 1857, the date of the plaintiffs' mortgage. The defendant contended it did, and put in the following contracts, A and B, together with the deposition of the said Pierce.

"A.

"This agreement, made this twenty-fourth day of May, 1853, between William B. Pierce and Daniel E. Somes, both of Biddeford, witnesseth, that the said William B. Pierce agrees, for the consideration hereinafter expressed, to provide and put up for the said Somes, the frame of a dwellinghouse, 28 feet long by 20 feet wide, two stories high, the lower story to be 8½ feet, and the second story to be 8 feet high, with square roof; to board the same with suitable boards, and shingle the roof with good white hemlock shingles, the eaves to project 10 inches; to build two chimneys, which are to be well leaded to prevent leaking through the roof; to finish and put on the outside trimmings; two outside panel doors, 13 window frames and sash for 12 lights, each 9 by 12 inches; and to lay under floors for both stories of the house; all to be done in a good, workmanlike manner, on or before the fifteenth day of June next.

"The said William B. Pierce also further agrees, for the consideration hereinafter named, to provide all the materials of suitable quality, free from rot and shakes, and build and finish on a lot to be selected by said Somes in Saco, a two-story dwellinghouse and out buildings, according to the plan this day agreed upon and signed by them; the walls to be well boarded and covered with good, fair clapboards worth $16,00 per thousand, the roof to be square and shin-

gled with good white hemlock shingles, the eaves to project 14 inches, and to be sheathed underneath; chimneys to be of suitable size, and to be well built and leaded to prevent leakage through the roof; windows to have 12 lights, each 9 by 13 glass; the finishing boards to be free from sap and generally free from knots; the doors below to have morticed latches, and the doors above to have common handle latches; all the wood work inside and the outside to be painted with two good coats of white lead paint, or such other color of paint as said Somes shall prefer. The whole to be built and finished in a good and workmanlike manner, and to be completed on or before the first day of September next. Said house to be well plastered with one coat and smoothed.

"And the said Daniel E. Somes on his part, hereby agrees to dig and stone the cellar, and provide and set up the underpinning for the last mentioned house so as not to delay the said Pierce in the performance of the contract aforesaid, and to pay to the said Pierce the sum of eleven hundred and fifteen dollars, which is to be in full satisfaction for the performance of the aforesaid contract, in part payment of which sum the said Somes is to make and deliver to the said Pierce a good and valid conveyance of four acres of land, out of a tract of forty-four acres heretofore conveyed to said Somes and others, by William Cutts, to be laid out in one body in a convenient form in any part of said tract which said Pierce shall select, not to interfere with the road to be made across said tract, which said Pierce is to receive in payment of three hundred and twenty dollars of the sum aforesaid; the residue to be paid by said Somes in cash."

(Signed) "Wm. B. Pierce,
"D. E. Somes and others."

Witness.—"James S. Anderson."
"B.

"Memorandum of an agreement between D. E. Somes, of the one part, and William B. Pierce, of the other part, entered into at Biddeford, this 25th of January, 1858, witnesses:—

"That said William B. Pierce agrees to find all materials and to build, finish and complete, above the underpinning, a two-story wooden house to be situated near the dwelling-house of Nathaniel Currier in Saco; main house to be two stories and 20 by 28 feet on the ground, with an L part one story high, 12 feet by 22 feet; rooms in the first story are to be 9 feet high, and in the second story 8 feet high; one chimney in the main house and a chimney in the L part,—no oven in either. House in its arrangements, finish and painting to be in all particulars the same as the one on Mt. Vernon street, Biddeford, built by Charles Hardy and by him sold to Charles H. Milliken, except, that the roof is to be covered with cloth and painted instead of being *tinned*.

"Said Somes, on his part, is to furnish the foundation for said house and to pay said Pierce for said house, entirely completed, the sum of eight hundred dollars. And it is further agreed between said parties, that said Somes shall furnish the frame of said house at the rate of $9 per M feet, and the hemlock boards for the same at the rate of $8 per M feet, and all sheathing boards, flooring and finishing boards at the rate of $10 per M feet, and all glass, hardware, paint and oil for the same as cheap as can be bought for cash anywhere, for all of which materials said Pierce is to account and pay said Somes. And said Somes agrees to convey to said Pierce, by a good and sufficient warranty deed thereof, a house lot situated on Maple street, in said Saco, numbered ——, on plan of lots of D. E. Somes and others, for the sum of three hundred dollars, which sum said Pierce agrees to allow to said Somes for the same, in part payment of the said eight hundred dollars. Said house to be completed on or before the first day of June next.

And said Somes is to advance to said Pierce the sum of fifty dollars in cash in the month of February next, towards the said eight hundred dollars and the balance that may be due on the completion of said house."

(Signed) "D. E. Somes,

Witness.—"S. W. Luques." "Wm. B. Pierce."

The first item of account in the suit, *Pierce* v. *Somes*, was as follows:—

"Aug. 26, 1858.—Daniel E. Somes to Wm. B. Pierce, Dr.

"To building house, northwest side of Maple street in Saco, and furnishing labor and materials for same, price as per first agreement, $800."

The material parts of the said deposition are as follows:—

"*Direct examination.*—2. I completed a house for Daniel E. Somes, in 1858, on land in Saco.

"3. I built it in pursuance of a contract between him and me.

"4. The original contract was made, as near as I can recollect, some three or four years previous to building the house.

"5. The first work I did for this house was in the winter of 1856–7; the doors were made then. The first materials purchased were for the doors, either when they were made or shortly before.

"6. I made doors, as before stated, and then he had not fully made up his mind—some alterations and arrangements he wanted to make, and he concluded to defer the matter till the next winter—the next winter, he concluded what alterations he wanted, and I went on and built the house. This was in the winter of 1857–8. I then made blinds and sash for the house, and, in May, 1858, I raised the frame, and completed the house that season.

"*Cross-examination.*—12. Our agreement, in the fall of 1856–7, was, that I was to build the house at my leisure. That winter I made the doors. The next spring I was busily engaged and put off the commencement of the house, from time to time, to suit my convenience. Fall of 1856–7, I commenced again, and, before snow came, we staked out the cellar and had some digging done for the foundation.

"17. The lot was not specified when the contract was made.

"18. The lot was selected in the fall of 1857, the fall before the house was built.

"22. He agreed, in the fall of 1857, to pay me for building the house the price charged in my writ, with the alterations which were made from the original plan.

"24. The final plan was agreed upon in the fall of 1857, and the plan was not fully completed until we finished the building of the house.

"29. The principal alterations were agreed upon before framing. The plan was agreed upon and the time when the building should be completed, but alterations were suggested and agreed upon during the building of the house.

"30. The house was to be completed in June, 1858—June or July—but, from another arrangement, it was not completed until August.

"34. I built the house in accordance with contract "B," drawn in 1857, with what alterations were made afterwards.

"37. The house I levied upon was the house I built under that specification and in fufilment of the original contract.

"39. We altered the size of the L part and the inside of the main house—one additional chimney—plan of L altered. The alterations were made under an agreement with Somes.

"*Direct resumed*—1. The original contract was unperformed and in force, and contract "B" was drawn up for the purpose of carrying out contract "A," with the alterations and substituted specifications which had been at that time, and previously, agreed upon between me and Somes.

"It was my custom to make doors, sash, blinds, &c., in the winter, for houses I had contracted for; sometimes, for houses not contracted for."

The Court was to draw such inferences as a jury might; and judgment was to be rendered for whichever party the Court should find the title to be in.

P. Eastman & Son, for the plaintiffs.

John M. Goodwin, for the defendant, argued that—

Both parties derive title from the same person, Daniel E. Somes. The real question is, then, which has the older and better title.

The plaintiffs' title can only date from Nov. 24, 1857, the date of their mortgage deed from Somes.

The defendant's title, if the lien of Pierce was a good and valid lien, and was made available by the levy and prior attachment, bears date some time prior to the 24th of Nov., 1857.

This must depend upon the question, whether Pierce had or not a lien under the statute, upon the demanded premises, for the amount of the debt due him from Somes, at the time of the commencement of his suit against Somes, and for which he recovered judgment at the Sept. term, 1860, of S. J. Court, and whether the proper legal steps were taken to secure the benefit of that lien.

The evidence to show whether Pierce had a lien or not, is to be found in his deposition. The evidence to show whether the proper legal steps were taken to perfect and secure the benefit of said lien, if any existed, is to be found in the copies of proceedings in the suit, *Pierce* v. *Somes*, making a part of this case.

Did Pierce do the work and furnish the materials for which he recovered judgment against said Somes, *by virtue of a contract*, with said Somes for building the house, part of the demanded premises? If he did, he had a *lien* on said house and the lot on which it stands to secure payment of the sum due him therefor.

The deposition of Pierce shows that every article of materials furnished, and all the labor performed in building said house, was under and by virtue of contract with Somes; that the contract was first made in May, 1853; that part of the contract was fulfilled prior to November, 1857, and prior to the execution of the plaintiff's mortgage, and the remainder of the work was done after said mortgage was given. But the plaintiff's counsel argues that the contract of May, 1853, became *not null and void*, but "*effete*" — was "waived," &c. The performance of the contract of May, 1853, was postponed from time to time by the agreement or consent

of parties, and the witness Pierce tells why it was so done. But it never was waived or abandoned.

Pierce did work under this contract for or upon the house on the demanded premises, in the winter of 1856 and 1857, when he made the doors. (See answer to 5th interrogatory.)

In the fall of 1857, he was at work getting out the materials; the cellar was staked out, and the foundations partly prepared; and, in the winter, the sash and blinds were made. (See answers to 6th direct interrogatory and 12th cross-interrogatory.)

This was all done previous to the writing of the contract of Jan. 25, 1858, and shows that there was no waiver or abandonment of the prior contract of 1853.

The contract of Jan. 25, 1858, was merely substituted for the other, for the purpose of adapting it to the alterations as agreed upon between Somes and Pierce. The work went on to its completion the same as if no second or substituted contract had been written out. The same house, on the same lot, and for the same owner, was finished up in the summer of 1858, that had been commenced in the summer and fall of 1857, before the second contract, (so to speak, for want of a better term,) was written out.

The payment for the work was not, under either writing, to be made until the work was completed.

The lien, therefore, was in no way affected by the alterations in the contract as agreed upon by Somes and Pierce.

It was a lien throughout, for work done and materials furnished, in building a house by *virtue* of a *contract*, having its inception and its termination at the same points of time, whether the whole work was done under one and precisely the same contract, or whether it was done under a contract changed at different times, in reference to some of the minor details relating to the plan and specifications of building.

The substantial part of the contract was the undertaking to *build a house*, and for the payment of the sum that might become due on the completion of this undertaking, the stat-

ute gave the builder a continuous, indivisible and entire *lien*, covering all that was done from the time of making the original to the final completion of the building.

That changes in the plan and specifications, or even prices, were made, as the work proceeded, could make no difference. The work was still prosecuted at each step under and *by virtue* of a *contract*, and the continuity and *oneness* of the *lien* was preserved, by the work being done upon the same house, for the same owner, by the same builder, and the time of payment also being the same, *viz.*, the time of finishing the building.

The opinion of the Court was drawn by

DICKERSON, J. — Writ of entry. Both parties claim to derive their title to the demanded premises from Daniel E. Somes. The demandant claims under a mortgage deed from said Somes to him, dated Nov. 24, 1857, and recorded Nov. 27, of the same year. To make out his claim of title the tenant introduces a warranty deed from William B. Pierce to him, dated January 1st, and recorded Feb. 13, 1862. The tenant, also, puts into the case the copy of a writ with the officer's return, William B. Pierce against Daniel E. Somes, dated Nov. 13, 1858, and secured by attachment of the demanded premises on the same day, a copy of the execution, issued on the judgment rendered thereon, and dated Sept. 29, 1860, and a copy of a levy of the same on the premises in controversy, Oct. 29, 1860.

The demand in the suit, Pierce against Somes, is a lien claim for building a house on the demanded premises; and the principal question is whether the proceedings in that case can avail the defendant to defeat the plaintiffs' action.

Two written contracts for building a house are introduced, the one dated May 4, 1853, and signed by William B. Pierce, on the one part, and "D. E. Somes and others," on the other part; the other is dated January 25, 1858, and signed by William B. Pierce and D. E. Somes. The defendant claims that the house was built under the first contract, the second

contract being only a supplement to the first; and the plaintiff contends that both contracts are entire and independent, and that the second superseded the first.

The construction of contracts is a question for the Court, and the intention of the parties is to be gathered from the terms of the contract, and not from parol testimony. So, also, the effect of a subsequent contract upon a pre-existing one is to be determined by the Court.

Though some of the stipulations in these contracts are identical, yet they differ widely in respect to date, consideration, time of performance, the rights and duties of the parties in regard to materials to be furnished, and the style of finish required. No reference is made in either contract to the other. Each of itself is a complete, entire, and independent contract; and each is inconsistent, and irreconcilable with the other. Both are impossible of execution in respect to the same subject matter. Amidst this conflict of provisions, which shall take precedence? Upon this point both contracts are silent. The Court has no right to decide that a particular provision in one contract shall control, or supersede a particular provision in the other, as this would be making a new contract for the parties. If the provisions of the second contract were only *additional* to those of the first contract, and not inconsistent and irreconcilable therewith, the Court might treat them as *one* contract. But, where parties make two contracts upon the same subject matter, which cannot be reconciled without rejecting some of the material stipulations in the one or the other or both, the Court will not enter upon this work of expurgation, but will endeavor to give effect to the one contract or the other, as the intention of the parties shall seem to require.

In making the second contract—the parties had *some* purpose. Was it to revive the first contract, or to supplement it, or make a new and independent one? There was no occasion to re-write the old contract, in order to revive it, if it had become obsolete. The parties had only to carry out all its provisions, except that relating to *the time* of per-

formance — to make it effectual. That they intended to do something more than to revive the old contract is clear from the fact that they introduced new provisions into the second instrument. If their purpose had been simply to supplement the first contract, they would have introduced *additional* provisions *only*, and not inconsistent ones; for they cannot *be presumed* to have intended to nullify certain stipulations of the first contract in the second one, and to preserve the others, in the absence of any intimation to that effect, except what arises from the fact of their repugnancy. The intention and purpose of the parties in entering into the engagement of January 25, 1858, can be carried into effect only upon the ground that they then made a new, entire and independent contract. This construction is sustained by the completeness, harmony, and independence of the provisions of that contract, and the acts of the parties.

The first contract, though required by its terms to be performed in June, 1853, was allowed to slumber till the winter of 1856 and 1857, when a few doors were made. Again, it reposed till the fall of 1857, when "the parties staked out the ground, and Somes had some digging done for the foundation." The second contract was entered into Jan. 25, 1858, and the entire work was completed in the following August. This contract seems to have imparted activity to the parties, and given practical effect to their intentions. The wants and tastes of Somes in regard to materials, arrangement, and style of finish had changed during the lapse of five years; and a contract was entered into, suited to this altered condition of things. This contract superseded the contract of May 4, 1853, if indeed that continued in force till this was made; by entering into this contract, the parties waived all their rights under the other.

Nor is this state of things changed, as is argued by the counsel for the defendant, from the testimony of Pierce, that the work was done under the old contract. The interest of this witness, as warrantor, of the defendant's title, is so strong, and his testimony is so inconsistent with itself, and

irreconcilable in this respect with the terms of the second contract, and other facts in the case, that we cannot adopt the conclusion arrived at by his counsel.

From the view we have taken of this case, it becomes unnecessary to determine at what particular time the lot was staked out by the parties or the legal effect that act, and the making of the doors in the winter of "1856 and 1857" had upon the parties under the first contract. Their rights are to be settled under the contract of Jan. 25, 1858.

At that time Somes was mortgager of the demanded premises, and Pierce's lien claim, if any he had, attached exclusively to Somes' right of redemption. It does not appear, from the report of the case, that the necessary legal measures have been taken by Somes, Pierce, or the defendant, to redeem the demanded premises from the plaintiffs' mortgage, and there must be

Judgment for demandant.

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

EDWIN S. HOVEY *versus* WILLIAM CHASE.

The Act of March 17, 1862, in relation to the use of office copies of deeds, does not repeal the twenty-sixth rule of Court, but enlarges its operation.

When such copy is admissible in the case, no exception lies to its admission at any particular time.

Exceptions to the exclusion of interrogatories in a deposition, will not be sustained, when it appears that the same questions, with their answers, have been admitted in another part of the deposition; nor when the deponent answers that he cannot tell positively, but *presumes* that a particular state of facts exists.

On the trial of an issue, whether the grantor in a deed was of sound mind at the time of its execution, neither the judgment of the Court setting aside his will, nor the record of the appointment of a guardian made nearly a year after the date of the deed, is admissible.

If the facts assumed in a hypothetical question, propounded to an expert, are

not themselves proved substantially, the answer to such question is not to be considered by the jury.

A man may not have sufficient intelligence and understanding to manage his affairs and transact business *in a proper and prudent manner*, and yet may not be *non compos mentis*.

The law fixes no particular standard of intelligence necessary to be possessed by parties in making a contract.

Legal competency in a party to a contract is the possession of mental capacity sufficient to transact business *with intelligence* and an *intelligent* understanding of what he is doing.

Instructions to the jury upon questions not passed upon by them in rendering their verdict, are no cause for setting it aside, even if they were erroneous.

Of setting aside a verdict as being against the evidence.

ON EXCEPTIONS to the rulings of CUTTING, J., and on MOTION to set aside the verdict.

REAL ACTION. Both parties claimed under Stephen Neal. The plaintiff alleged that the conveyance from Neal, under which the tenant claimed was invalid, because Neal, at the time of making it, was *non compos mentis*.

The tenant offered an office copy of this deed in evidence, and it was admitted by the presiding Judge, against the demandant's objection.

The demandant offered the judgment of the Supreme Court, setting aside the will of said Neal, but it was excluded; also, the record of the appointment of a guardian of said Neal, as being *non compos*, made about a year after the date of the deed, but it was excluded.

The testimony was very voluminous, but it is sufficiently stated in the opinion, so far as it affects the questions of law decided.

The demandant requested certain instructions which the presiding Judge declined giving, except so far as they were contained in those given. The requested instructions are stated in the opinion sufficiently to show the questions of law raised.

The presiding Judge gave the following instructions.

"The demandant claims a certain lot of land in this city, and traces his title from Stephen Neal, through Mrs. Den-

nett, sole heiress of said Neal, by deed from her. Under modern legislation, the plaintiff had a right to make the purchase of Mrs. Dennett and she had a right to sell to him.

"The defendant also claims to derive his title from Stephen Neal. So both claim under the same owner. And the question is, what is the effect of a certain deed from Stephen Neal to Samuel E. Crocker, dated July 27, 1835. If that was a valid deed, then the estate did not descend to Mrs. Dennett, and she had no title to convey to the plaintiff. So it becomes necessary for the plaintiff to impeach that deed, and the burden is on him. If he has done it successfully, then he is entitled to recover.

"There must be two minds, two intelligences, to make a valid contract or conveyance. Whether Stephen Neal had such a mind is a mixed question of law and fact. Courts cannot weigh in scales, more than they can the everlasting hills, what is the amount of intelligence necessary to make a contract. The law can fix no particular standard of intelligence necessary to make a contract. The rule I give you is this:—The grantor must be of sound mind, and have legal competency. No degree of physical or mental imbecility can avoid his deed if he had legal competency. Legal competency to act, is the possession of mental capacity sufficient to transact business with intelligence, and an intelligent understanding of what he was doing.

"Had he such capacity on the 27th day of July, 1835? The presumption is, that all have it. As to minors, that is an arbitrary rule which protects them.

"The plaintiff has introduced the record of the Probate Court to show that, in April, 1834, Stephen Neal was put under guardianship, which transferred all his rights and control over his property to his guardian. If the case had stopped here the deed would not be operative for two reasons, one is his incompetency, disclosed in the record, and one is that the legal control of his property is taken away.

"But, on the first Tuesday of Sept., 1834, the guardianship was removed for causes disclosed in the record of re-

moval. That restored him to his legal rights as fully as they were before he was put under guardianship. The plaintiff cannot impeach that record.

The deed to Crocker was made in the subsequent July, some months afterwards. Now, the question is, what was the condition of his mind at the time of the date of this conveyance. The law determines that to be the time the situation of his mind must be ascertained. Here they have gone before and afterwards. Considerable latitude has been given. Therefore you will bear in mind the dates of all the incidents brought up, to show whether he had legal capacity to make the conveyance on the 27th of July, 1835.

"That brings you to the mass of testimony on both sides. It is for you to decide. The burden is upon the plaintiff to show that Neal had not legal capacity. If he fails to show you that Neal had not legal capacity, he fails in his case. I shall not repeat the evidence, nor give you any intimation in regard to its effect. It has been fully commented on by counsel on both sides.

"I shall only refer to the experts. You have heard a long interrogatory read to both of these experts, and they unhesitatingly state that, if all these facts are true, said Neal was laboring under *senile dementia*, or insanity. It is for you to say whether those facts are true or not. If you are satisfied they are not true, then their opinion as experts goes for nothing. Suppose the defendant had read a question to the experts embracing what his witnesses had testified to, their opinion might have been that he was of sound mind. So you will perceive, if the question had not been asked until after the testimony for the defence had been given, they might not have answered it as they did.

"If their opinion had been asked after the evidence was all in on both sides, so that it could have been based upon all the testimony in the case, it might have been different. The plaintiff must satisfy you that the facts in his hypothetical questions are substantially true, to entitle their opinion to much weight.

"If you find that Stephen Neal had legal capacity to act, as to which I have already instructed you, still, if advantage is taken of his weakness to obtain from him a deed which is unfavorable, by misrepresentation, imposition or undue influence, such contract cannot be upheld."

Instructions were given upon other points, but they did not become material.

The verdict was for the tenant and the demandant excepted.

Albert Merrill, for the plaintiff.

1. The copy of deed from Neal to Crocker was improperly admitted. 1. Because the original deed itself would not have been admissible, without tenant's showing that he derived title under it. 2 Greenl. Ev., § 556, and note 6; *Shapleigh* v. *Pillsbury*, 1 Maine, 290; *Stanley* v. *Perley*, 5 Maine, 372; *Walcott* v. *Knight*, 6 Mass., 490; *Mechanics' Bank* v. *Williams*, 17 Pick., 441. 2. Because the copy was not admissible under the statute of March 17, 1862.

2. The final judgment and decree of the Supreme Court of Probate, setting aside the will of Stephen Neal, was improperly excluded. 1 Greenl. Ev., §§ 510, 511, 522, 523, 524, 525, 538, 539; *Dublin* v. *Chadburn*, 16 Mass., 433; *Laughton* v. *Atkins*, 1 Pick., 535; *Queen* v. *Newman*, Law Reporter for August, 1852, p. 231.

3. The record of the second guardianship was improperly excluded. *Tuttle* v. *Gates*, 24 Maine, 397.

4. The 12th and 16th interrogatories and answers in the deposition of Ira Bradford were improperly excluded. *DeWitt* v. *Baily & al.*, 17 N. Y. Ct. Appls., 345; *Gibson* v. *Gibson*, 9 Yerg., 329; *Baxter* v. *Abbott*, 7 Gray, 72; *Commonwealth* v. *Rich*, 14 Gray, 335.

5. The question to Steele, as to Mrs. Dennett's request to have the Crocker mortgage increased, was clearly illegal and should have been excluded.

6. The charge in relation to the testimony of the experts was erroneous. *Hastings* v. *Bangor House Prop.*, 18 Maine,

430; *Peirce* v. *Whitney*, 22 Maine, 113; *Woodbury* v. *Obeir*, 7 Gray, 467; *Commonwealth* v. *Rogers*, 7 Met., 404-405; *The People* v. *Lake*, 2. Kern., 362.

7. The presiding Judge's definition of a sound mind, or what constitutes legal competency, was erroneous. He did not give the true rule of law, to guide the jury in deciding a mixed question of law and fact. *Chase & al.* v. *Breed*, 5 Gray, 444; Kent's Com., (vol. 2,) 452; Black.'s Com., (vol. 1,) 304; *Ridgeway* v. *Darwin*, 8 Ves., jr., 66; *Ex parte Cranmer*, 12 Ves., jr., 454; The matter of *Barker*, 2 Johns. N. Y. Ch. R., 236; *Jackson* v. *King*, 4 Cow., 218; *DeWitt* v. *Baily & al.*, (cited above); *Gibson* v. *Soper*, 6 Gray, 282.

The Judge only gave the degree of intelligence required to make a will which is lower than that required to make a deed. *Henison* v. *Bowen*, 3 Wash. C. C. R., 580; *Stevens* v. *Van Cleve*, 4 Ib., 262; *Kinne* v. *Kinne*, 9 Conn., 102; *Steward* v. *Lispenard*, 26 Wend., 306; *Lowe* v. *Williamson*, 1 Green. N. Y. Ch. R., 82; *Wilmark* v. *Stryker*, 1 Ib., 9; *Watson* v. *Watson*, 2 B. Munroe, 74; *Reed's will*, (Ib.,) 79; *Van Alst* v. *Hunter*, 5 Johns. Ch. R., 158; 1 Jar. on Wills, 29, note; *Stone* v. *Damon*, 12 Mass., 480; *Leonard* v. *Leonard*, 14 Pick., 280; *Breed* v. *Pratt*, 18 Pick., 115; *Gilmore* v. *McNeal*, 45 Maine, 599.

8. First, third, fourth, fifth and sixth instructions requested were improperly withheld, and the instructions instead thereof upon the effect of the proceedings before the Probate Court were erroneous. *Waite* v. *Maxwell*, 5 Pick., 217; 1 Greenl. Ev., §§ 525 and 550; 2 Smith's Leading Cases, 440; *Lord* v. *Chadburn*, 42 Maine, 443; *Baxter* v. *N. E. Mutual Ins. Co.*, 6 Mass., 277; *Dublin* v. *Chadburn*, 42 Maine, 443; *Laughton* v. *Atkins*, 1 Pick., 535; *Littlefield* v. *Cudworth*, 15 Pick., 24; *Loring* v. *Steineman*, 1 Met., 208; *McDonnald* v. *Morton*, 1 Mass., 543; *Leonard* v. *Leonard*, 14 Pick., 280; *State* v. *Richardson*, 6 Foster, (N. H.,) 241; *Kimball* v. *Fish*, 39 N. H., 117; *Wardsworth* v. *Sharpstein*, 4 Seldon, 388; *Hix* v. *Whit-*

more, 4 Met., 545; Collinson on Lunacy, 55; 1 Greenl. Ev., § 42; 2 Ib., § 37; Shelford on Lunatics, 275; *Chase* v. *Hathaway*, 14 Mass., 224; Statutes, 1821, c. 51, §§ 3, 5 and 49; *Howard, Pet'r*, 31 Maine, 552; *Smith* v. *Rice*, 11 Mass., 512; *Hathaway* v. *Clark*, 5 Pick., 490; *Whitman* v. *Watson*, 16 Maine, 463; *Harris* v. *Sturdivant*, 29 Maine, 367; *Vose* v. *Morton*, 4 Cush., 31; *Marlow* v. *Hynde*, 12 Wheat., 193; *Hall* v. *Williams*, 10 Maine, 290; *Limeric, Pet'rs*, 18 Maine, 186; *Woodman* v. *Somerset*, 37 Maine, 37; *Peters* v. *Peters*, 8 Cush., 543; 4 Kent's Com., 309, and note *a*; *Webster* v. *Cooper*, 14 How. U. S. R., 488; *Nowell* v. *Nowell*, 8 Maine, 220; *Morton* v. *Burnett*, 22 Maine, 257; *Conkey* v. *Kingman*, 24 Pick., 115.

9. The record of removal of the guardian should have been excluded, because it was void for want of jurisdiction of the subject matter, and of all parties in interest to the proceedings; and, if not void or voidable, it was admissible only to show that the legal disability of the guardianship was removed, and not to prove the facts recited in it, viz., a restoration of mental competency. *Stone* v. *Damon*, 12 Mass., 489; Statutes, 1821, §§ 2 and 68 of c. 51, § 2 of c. 52; *Penniman* v. *French*, 2 Mass., 140; *Boynton* v. *Dyer*, 14 Pick., 3; *Deering* v. *Adams*, 34 Maine, 41; *Lunt* v. *Auburn*, 39 Maine, 392; *Allis* v. *Morton*, 4 Gray, 64; Art. 1, § 20, Cons. of Maine; *Abbott* v. *Wood*, 22 Maine, 548; *Harlow* v. *Pike*, 3 Maine, 439; *Lutz* v. *Linthicum*, 8 Pet., 179; *Thayer* v. *Putnam*, 12 Mass., 279; *Shields* v. *Barrows*, 17 How. S. C. R., 141; *Lewis* v. *Darling*, 16 Ib., 8 and 9; *Waterville Iron Man. Co.* v. *Goodwin*, 43 Maine, 432; *Granite Bank* v. *Treat*, 18 Maine, 342; *Jenks* v. *Howland*, 3 Gray, 538; *Hathaway* v. *Clark*, 5 Pick., 491.

Other points were argued which do not become material in the view of the case taken by the Court.

Rand and *H. P. Deane*, for the defendants.

The opinion of the Court was drawn by

APPLETON, C. J.—It is in proof that Stephen Neal,

from whom both parties derive their title, was decreed to be *non compos* and incapable of managing his own affairs, and was placed under guardianship by the Judge of Probate for this county, at a Court holden by him on the third Tuesday of April, 1834.

The disability thus imposed was removed by the same Judge, at a Court holden by him on the first Tuesday of the following September, on the ground that his intellect was so far restored that he was capable of managing his own affairs.

Upon the death of Stephen Neal, in 1836, his estate, real and personal, descended to Lydia Dennett, his sole heir, by whom the demanded premises were conveyed to the demandant by deed dated July 15, 1858.

The tenant has the elder title. On July 27, 1835, Stephen Neal conveyed the land in controversy to Samuel E. Crocker, from whom, by various mesne conveyances, the title passed to the tenant. The validity of this deed from Neal to Crocker was contested on the ground that the grantor was not of sound mind at the time of its execution.

A verdict was rendered by the jury affirming the validity of the deed in question, and the case is now before us on exceptions to the rulings or refusals to rule of the presiding Justice, and upon a motion for a new trial. The questions presented have been argued very elaborately and with great ability.

(1.) The copy of the deed from Stephen Neal to Samuel E. Crocker, dated July 17, 1835, was admissible under the 26th rule of this Court. 37 Maine, 576.

The design of the statute of March 17, 1862, c. 112, was to extend the use of office copies to all cases, whether touching the realty or not, "where the original deeds would be admissible" and "neither the party offering such office copy, nor the party opposing, is a party to the deed, or claims as heir, or justifies as servant of the grantee or his heirs." The deed was properly received, as neither party is within any of these exceptions.

The evidence is all reported. It shows that the only title of the tenant was derived from and under this deed. It was entirely immaterial whether the deeds by which the title was conveyed to the tenant, were introduced then or at a subsequent time—and this is abundantly apparent. The plaintiff, therefore, could in no way have been injured by the admission of the deed at the particular time it was received.

(2.) The final judgment and decree of the Supreme Court of Probate, setting aside the will of Stephen Neal, dated Oct. 19, 1835, was rightfully excluded. It was rendered months subsequent to the deed to Crocker. The tenant was neither party nor privy to that judgment. Neither party claimed through nor under the will of Neal. The tenant could not avail himself of the will to negative the demandant's rights, because it had never received probate. He was a stranger to all these proceedings. "It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger." 1 Greenl. Ev., § 522.

(3.) The record, showing the appointment of a guardian to Stephen Neal, in June, 1836, was clearly inadmissible. Whether he was then sane or insane could not affect the tenant's title. Neither party claimed under these proceedings. They were long subsequent to the conveyance from Neal to Crocker. They were *res inter alios*—as to all which the tenant was a stranger and not to be affected thereby.

(4.) The plaintiff can in no way have suffered from the exclusion of the 12th and 16th interrogatories and answers in the deposition of Bradford. The answers are to the effect that he (Neal) did not *appear* to know how to make change.

But, substantially, the same interrogatory was proposed when the direct examination was resumed, and this interrogatory and the answer thereto were received.

Assuming, therefore, the evidence admissible, which may be regarded as a matter of grave doubt, still the facts at-

tempted to be proved by the excluded questions and answers, are established as far as the witness could do it. To the inquiry "whether, when you gave him back change he counted it or paid any attention to the amount you gave him?" the witness answered, "I could not remember. He might sometimes or might not."

To the other interrogatory proposed and excluded, the witness answers, that he cannot tell, but *presumes* the fact may be as is assumed in the interrogatory. But the presumptions of a witness, as to the existence or non-existence of facts, are not admissible as evidence. Besides, the fact inquired about, is impliedly proved by the evidence admitted without objection.

(5.) The remark of Mrs. Dennett, as to the amount for which the mortgage was to be given, was immaterial to the issue. The question at issue was the sanity of Stephen Neal. The casual remark of the wife, as to the mortgage, whether it should be given for more or less, was entirely irrelevant, so far as relates to that inquiry.

(6.) In reference to the experts, the presiding Judge uses the following language. "You have heard a long interrogatory read to both of these experts, and they unhesitatingly state that, if all the facts were true, said Neal was laboring under *senile dementia*, or insanity. It is for you to say whether these facts are true or not. If you are satisfied they are not true, then their opinion goes for nothing." To these remarks no exception can reasonably be taken. It is obvious enough, that the assumed facts upon which the opinion of the experts is based, must be established — for it is only to the extent of the facts proved, that there is any basis upon which their judgment can rest. If none of the facts assumed are proved, then there could be no foundation for their opinion.

The Judge further added, — "suppose the defendant had read a question to the experts embracing what his witnesses had testified to, their opinion might have been that he was of sound mind. So you will perceive, if the question had

not been asked until after the testimony of the defence had been given, they might not have answered it as they did. If their opinion had been asked after the evidence was all in on both sides, so that it could have been based upon all the testimony in the case, it might have been different." These suggestions involve no question nor rule of law. They give no rule for the guidance of the jury as matter of law. They embrace no error of law or mistake of fact. They are suppositions merely, of the correctness of which the Judge gives no opinion. The jury could not know to what extent the introduction of new elements for their consideration might change or modify the judgment of the experts, and the Judge so remarked.

The concluding remark, that "the plaintiff must satisfy them that the facts in his hypothetical questions are substantially true, to entitle their opinion to much weight," was unobjectionable. If not substantially true, upon what would their opinion be formed? The facts not proved but assumed in the interrogatory and by the experts, as existing, might be those deemed by those experts as of controlling importance.

(7.) The counsel for the demandant requested the presiding Judge to instruct the jury, 1st, "to find and decide the fact whether, on the day of the execution of Stephen Neal's deed to Samuel E. Crocker, said Neal was *non compos mentis*, or of unsound mind, which terms and phrases mean the same thing, viz., that he had not sufficient intelligence and understanding to manage his affairs and *transact business in a proper and provident manner*,"—and, 2d, that "this is the fact you are to decide and find, viz., whether he had sufficient intelligence and understanding to *transact business* in a *proper* and *provident manner*, for, if he had not, he was of unsound mind, and said deed to Crocker was *void*, and the plaintiff is entitled to recover."

The substance of this request is, that every man who fails to manage his affairs "in a *proper* and *provident* manner," "is *non compos mentis*, or of unsound mind." Many sane

men, some of transcendent ability but of speculative tendencies, manage their affairs neither in a proper nor a prudent manner. The definition of a *non compos*, proposed, has, at any rate, the merit of originality. It varies in most important essentials from the law, as laid down by the jurists, to whose decision the counsel for the plaintiff has referred us. "We find," remarks Mr. Senator VERPLANK, in *Steward* v. *Lispenard*, 26 Wend., 255, "that, from Fitzherbert to Blackstone, the phrase *non compos mentis* is used by the greatest authorities of the common law as synonymous with that of *non sane* mind and memory—the unsound mind of modern phraseology and our own statute books. But the same line of unvarying authorities shows that, in legal intent, the natural defect of mind, thus absolutely shutting persons from the ordinary rights of society, does not consist in a limited degree of intelligence, but in the entire absence of what, in the philosophy of olden times, was termed "discourse of reason." The idiot was one, according to Fitzherbert, "who has not any use of reason, has no understanding to tell his age, who is his father or mother, what shall be his profit or loss." F. N. B., 233; Comyn's Dig., Tit. Idiot. And the same old rigid rule is repeated two centuries afterwards, by Blackstone;—"A man is not an idiot if he hath any *glimmering of reason*, so that he can tell his parents, his age, or the like common matters." 1 Black. Com., 304. In the same understanding of language Lord HARDWICK, in *ex parte Barnsby*, 3 Atk., 167, says, "*non compos mentis*, or since the proceedings have been in English, of *unsound mind*, (which means the same thing,) are legal terms of a definite signification, understood by courts of law, importing *not weakness of understanding* but a total deprivation of reason." Men may be sane, who are neither sagacious nor successful, and who transact their business in an improper and improvident manner.

The authorities cited by the counsel for the plaintiff are to the effect that the deed of an insane man is voidable and not *void*. The insane man, when restored to his right mind,

may affirm the contract he made when insane. *Allis* v. *Billing*, 6 Met., 415; *Arnold* v. *Richmond Iron Works*, 1 Gray, 434; *Gibson* v. *Soper*, 6 Gray, 282.

These requested instructions were properly withheld.

(8.) The counsel complain of the following remarks of the presiding Judge;—"Courts of law cannot weigh in scales, more than they can the everlasting hills, what is the amount of intelligence necessary to make a contract. The law can fix no particular standard of intelligence necessary to make a contract." It is not the business of the Court to weigh the intellectual capacities of parties to contracts to determine whether they are of unsound mind or not. That is the province of the jury. These remarks mainly refer to the difficulty of fixing with precision the exact line where sanity ends and insanity begins—a difficulty sufficiently apparent to all, and fully appreciated by the Court in the cases to which we have been referred. "The common law," remarks WOODWORTH, J., in *Jackson* v. *King*, 4 Cow., 218, "seems not to have drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. The difficulty of making such discrimination is apparent."

But these remarks were not given nor do they purport to be given as a rule of law. That is specifically given in what follows.

(9.) The instruction as to the degree of intelligence necessary to render the deed valid was in these words:—"The rule I give you is this, the grantor must be of sound mind and have legal competency. No degree of physical or mental imbecility can avoid his deed if he have legal competency. Legal competency to act is the possession of mental capacity sufficient to transact business *with intelligence* and *an intelligent* understanding of what he was doing."

"Lord COKE defines *non compos mentis* "to be, a person who was of good and sound memory, and by the visitation of God had lost it," or "he that by sickness, grief or other

accident, *wholly* loseth his understanding." *Beverly's case*, 4 Coke, 123; Co. Lit., 247, a. The deeds of all such persons are void; for, the terms "*non compos*," of unsound mind, are legal terms and import a total deprivation of sense," observes WOODWORTH, J., in *Jackson* v. *King*. But one, who can "transact business with intelligence and an intelligent understanding of what he was doing," can hardly be deemed of unsound mind.

In a case of alleged insanity, it was held that, to prove a person sane, it was not necessary that he should be shown competent to "manage his business with judgment and discernment," but that it was sufficient to show that he "knew what he was about." *Moffitt* v. *Witherspoon*, 10 Iredell, 185. "We," remarks NASH, J., in delivering the opinion of the Court, "do not agree with his Honor in his declarations to the jury, upon the mental capacity of Ann Donahoe, as to the rule by which they were to ascertain the fact. He charged, that Ann Donahoe was deemed in law capable of making a contract, until the contrary was proved. This is correct, so far as this case is concerned." He then proceeds, in judging of the sufficiency of her intellect, "it was not sufficient, that she should be able, merely, to answer familiar questions, but to manage her business, with judgment and discernment." We do not consider the rule so laid down to be correct. If all persons are to be judged incapable of making contracts, who do not manage their business with judgment and discernment, "we apprehend there are many more disqualified by law than are now considered so. We know no better rule upon this subject, than that laid down by Lord COKE, that the person must be able to understand what he is about. To the same effect is the language of Chief Justice TAYLOR, in the case of *Armstrong and Arrington against Short*, 1 Harr., 11."

(10.) The instructions as to the effect of the Probate proceeding were in accordance with the law as set forth in *Hovey* v. *Harmon*, 49 Maine, 269. Stephen Neal, while under guardianship, was incapacitated from contracting.

After the decree by which he was relieved from guardianship, his contracts would be valid so long as he was of sound mind.

(11.) It is needless to examine the various instructions given, or requested to be given, in relation to the law of disseizin and adverse possession — because the presiding Judge peremptorily instructed the jury that, if the plaintiff had successfully impeached the deed from Neal to Crocker, "he was entitled to recover." The instruction referred to required a verdict at the hands of the jury if this deed was impeached. More the plaintiff could not ask. Assume all the requested instructions of the plaintiff to have been correct, he could not have been harmed by the omission to give them for the obvious reason that the instruction given was more favorable to him than the ones requested. It was equivalent to a peremptory ruling that no title was acquired by adverse possession — thus superseding all necessity of considering that question.

As the verdict of the jury was for the tenant, they must have found the deed from Neal to Crocker valid, and that his title passed thereby to Crocker. If so, no question of betterments could arise for the tenant was seized of the fee.

The plaintiff could not have been benefitted if the requested instructions had been given, nor was he harmed by those given, whether erroneous or not, for the contingency of their materiality did not arise.

(12.) The plaintiff claims that the deed of Neal to Crocker was void by reason of the mental imbecility of the grantor at the time of its execution, and that, having acquired the title of his heir, that he can avoid it — and that the verdict of the jury affirming the deed should be set aside as against evidence.

The land in controversy was sold to Crocker for $4000 in 1835, and he and his grantees have ever since remained in possession of the same. The evidence introduced tends to show that the price was a reasonable one at the time. Indeed, had it not been for the great public improvements

made since, the erection of which probably never entered into the mind of either grantor or grantee, there can be little doubt that the price paid, and interest and taxes, could not have been realized from its sale. The bargain was made when speculation was rife. There is nothing indicating unfairness in the price — regard being had to the time when the sale was made. The estate of Neal has reaped the benefit of this sale. The proceeds are in the hands of the heir or they have been expended for the benefit of the estate. The price paid is retained. The estate thus sold is sought to be recovered from the possession of a *bona fide* purchaser without notice.

It has been seen that the instructions given were correct. The evidence was conflicting. The presumption of law is in favor of sanity. The burthen was on the plaintiff to establish the fact of insanity. This he has failed to do to the satisfaction of that tribunal to which the law has assigned the duty of determining, amid controverted facts, which are true and which are false. The inquiry is not what our judgment would have been upon the proof. After a long, laborious and impartial trial, after seeing and hearing the witnesses and observing their appearance and manner, the jury have established the validity of the conveyance in controversy — and we find in the evidence no such proof of fraud, corruption, gross partiality or mistake as imperatively requires us to set aside the verdict as against evidence.

Exceptions and motion overruled.

Judgment on the verdict.

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

NANCY JORDAN *versus* TRISTRAM JORDAN.

By the common law, the personal property of the wife, which she had at the time of her marriage in her own right, such as *money*, goods and chattels, vests immediately and absolutely in the husband.

Where the plaintiff owned the money sued for, in her own right, at the time of her marriage, in 1834, and it was never reduced to possession by her husband during her coverture, but remained under her sole control; — *Held*, that the money became absolutely vested in the husband, at the time of his marriage, and, at his death, descended to his heirs.

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

ASSUMPSIT, for money had and received.

It appeared that the money in controversy was the money of the plaintiff before her marriage, in June, 1834, and was never reduced to possession by her husband during their marriage, but remained during that time under her sole control.

The defendant claimed the money as belonging to the estate.

The presiding Judge instructed the jury that, if they believed from the testimony, that the plaintiff retained possession and control of the money sued for, during coverture till the husband's death, then the money remained her property.

The verdict was for the plaintiff and the defendant excepted.

Drummond, in support of the exceptions.

Verrill, *contra*, cited *Stanwood* v. *Stanwood*, 17 Mass., 57; *Fisk* v. *Cushing*, 6 Cush.

The opinion of the Court was drawn by

APPLETON, C. J. — By the common law, the personal property of the wife, which she had at the time of her marriage in her own right, such as money, goods and chattels

vests, immediately and absolutely in the husband, who can dispose of them as he pleases. On his death, they go to his representatives, as being entirely his property. 2 Kent's Com., 135. "As to chattels personal, which the wife has in her own right, as *ready money*, jewels, household goods, and the like, the husband has therein an immediate and absolute property devolved to him by marriage, not potentially, but in fact, which never again can revest in the wife or her representatives." 2 Black. Com., 435. These doctrines of the common law have received the sanction of Courts of the highest authority in this country. *Burleigh* v. *Coffin*, 2 Foster, 118; *Wheeler* v. *Moore*, 13 N. H., 478; *Hyde* v. *Strong*, 9 Cow., 230; *Blanchard* v. *Blood*, 2 Barb., 353; *Ames* v. *Chew*, 5 Met., 321; *Washburn* v. *Hale*, 10 Pick., 428; *Savage* v. *King*, 17 Maine, 301.

The choses in action of the wife do not thus vest absolutely in the husband. He must reduce them to possession in the lifetime of the wife. If not so reduced to possession upon his death, they belong to the wife and not to the representatives of the husband.

The instructions given were at variance with the rules of the common law, which had not been modified by legislation in 1834, and were erroneous.

How far existing statutes may affect the rights of the parties is not now before us, either upon the instruction requested or those given. *Exceptions sustained.*

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

Daniel C. Emery *versus* Piscataqua F. & M. Ins. Co.

By c. 34, § 2, of the Public Laws of 1861, an agent authorized by an insurance company to receive applications for insurance or payments of premium, or whose name shall be borne on the policy, shall be deemed the agent of said company in all matters of insurance; any application for insurance or valuation or description of the property, or of the *interest of the insured* therein, if drawn by said agent, shall be conclusive upon the company, but *not* upon the insured, although signed by him; all acts, proceedings and doings of such agent with the insured, shall be as binding upon the company as if done and performed by the person specially empowered or designated therefor by the contract.

By § 3, all statements of description or valuation in any *contract of insurance* or *application* therefor, shall be deemed representations and not warranties. Any misrepresentation of the *title* or *interest* of the insured, unless the same is fraudulent, shall not prevent his recovering on the policy the amount of his insurable interest.

By § 5, all provisions contained in any policy or contract of insurance, in conflict with any of the provisions of this Act, are hereby declared void, and all contracts of insurance hereafter made, renewed or extended in this State or on property within this State, shall be subject to the provisions of this Act.

Where a policy of insurance, issued to the plaintiff by an agent since May 1, 1861, bore upon its face the name of such agent, and no written application was made, but the agent examined the premises and was fully informed of the state of the title of the insured; and one of the conditions of the policy, which, by its terms, was made a part thereof, was that "if the property to be insured be held in trust or on commission, or be a leasehold, or *other interest not absolute*, it must be so represented to the company, and *expressed* in the *policy*, in writing, *otherwise* the *insurance*, as to such property, *shall be void;* and the interest of the insured was in fact that of mortgagee, but that fact, or that his interest as such was to be insured, did not appear in the policy; — *Held*,

1. That, if there be an error in the description of the interest of the insured in the policy, it is imputable to the defendant's agent, and the policy is not void by reason thereof; and,

2. That, if there had been a misrepresentation as to the interest of the insured, it would not prevent a recovery to the full amount of the interest insurable, unless such misrepresentation was fraudulent.

Said chapter simply annuls the *provisions* at *variance* with its requirements, leaving the policy in all other respects in full force.

In the trial of an action upon the policy insuring a mortgagee's interest, the defendants will not be permitted to ask the mortgagee, when testifying as a witness, "what claims he had against the mortgager, at the time of the loss.

They may ask what claims he had against the mortgager *which* were *secured* by the *mortgage.*

On Exceptions from *Nisi Prius*, Davis, J., presiding.

Assumpsit, upon a policy of insurance against fire.

The verdict was for the plaintiff, and the defendants moved that it be set aside as being against the weight of evidence, and also on the ground of newly discovered testimony. But the view taken by the Court renders a report of the testimony useless.

The facts sufficiently appear in the opinion of the Court.

Rand, for the defendants.

George B. Emery, for the plaintiff.

The opinion of a majority of the Court was drawn by

Appleton, C. J.—The plaintiff's title to the property insured, was acquired by a mortgage from Ira Winn to him, bearing date Dec. 1, 1860. The policy in suit was issued Oct. 5, 1861.

Whether we regard the proof adduced on the trial, or that upon which the motion to set aside the verdict on the ground of newly discovered evidence, rests, it is obvious that the mortgage of the plaintiff was not foreclosed and that the finding of the jury that the plaintiff's title had become absolute, was clearly against evidence.

A mortgagee has an insurable interest. But the fact that the plaintiff was mortgagee, and that his interest as such was to be insured, does not appear in the policy.

The third of the conditions of insurance, which by the terms of the policy is made part thereof, is in these words: "If the property to be insured, be held in trust, or on commission, or other interest not absolute, it must be represented to the company and expressed in the policy in writing; otherwise the insurance, as to such property, shall be void."

It is insisted, as the plaintiff was insured as the absolute owner of the property at risk, when he was only the mortgagee of the same, that therefore the policy is void.

A misrepresentation by the applicant for insurance, as to his interest in the property to be insured, as when, being mortgagee, he is insured as the owner of the fee, has been held to avoid the policy. *Battles* v. *York County M. F. Ins. Co.*, 41 Maine, 208. So, a policy issued under the condition that it shall be null in case of subsequent insurance, without the written consent of the insurers, has been held void, when a subsequent insurance has been obtained without such consent in writing. *Hale* v. *Mechanics' M. F. Ins. Co.*, 6 Gray, 169.

These, and many similar decisions, are made to depend upon the peculiar language of the polices then under consideration. To avoid their effect, the Act of 1861, c. 34, entitled "an Act in relation to Fire and Marine Insurance Companies and actions on contracts of insurance," was passed. The present policy is subsequent to the passage of the Act referred to, and is subject to its provisions.

By the Act of March 15, 1861, c. 34, § 2, "an agent authorized by an insurance company to receive applications for insurance, or payments of premium, *or whose name shall be borne on the policy*, shall be deemed the agent of the company in all matters of insurance; any notice required to be given to said company or any of its officers, by the insured, may be given to such agent; any application for insurance or valuation, or description of the property, *or of the interest* of the insured therein, if drawn by said agent shall be *conclusive* upon the company, but *not* upon the insured, although signed by him," &c.

The policy in suit bears upon its face the name of John E. Dow, as agent. It was issued by him as such agent. No interrogatories were proposed and no written application for an insurance was made. The defendants' agent, according to the uncontradicted testimony of the plaintiff, was fully cognizant of the state of his title, and, if there is error in the description of his interest in the policy, it would seem to be justly imputable to such agent, all whose acts, it is provided, "shall be as binding upon the company as if done

and performed by the person specially empowered and designated therefor by the contract."

A mistake, such as occurred in the present case, if the misdescription of the plaintiff's interest arose from the neglect of the defendants' agent, would be corrected by a court of chancery, and the insurers would be held responsible. Where a mortgagee applied for insurance, through an agent of the insurance company, intending to effect an insurance of his interest as mortgagee, and so stated to the agent, but the agent drew the application as for an insurance on the property itself, in the name of the mortgager, and as his property, the amount to be payable in case of loss to the mortgagee, and so made the application and had the policy so made, in the belief that this was the proper legal mode of effecting insurance on the mortgagee's interest, it was held that such mistake could be corrected by a court of chancery. *Woodbury Savings Bank* v. *Charter Oak Ins. Co.*, 31 Conn.,. 517. And this notwithstanding the insured had failed in a suit at law upon the same policy. S. C., 29 Conn., 374. In equity, the Court held there was a mutual mistake as to the proper mode of filling out the insurance, and decreed the correction of such mistake.

By § 3, "all statements of description or valuation *in any contract for insurance or application* therefor, shall be deemed representations and not warranties. * * Any misrepresentation of the *title* or *interest* of the insured, unless the same is fraudulent, shall not *prevent* his recovering on the policy the amount of his *insurable* interest."

In this case, there is no proof of any misrepresentation of the plaintiff's interest, but, if he is to be believed, it was fully disclosed to the agent of the defendants. Had there been a misrepresentation as to the interest of the insured, it is specially provided that it shall not prevent a recovery to the full amount of the interest insurable, unless such misrepresentation is fraudulent. Warranties on these points — the valuation and interest of the insured — are to be treated as representations and nothing more.

By § 4, "no insurance company shall *avoid* payment of a loss, by reason of incorrect statements of value or erroneous description by the insured, in the *contract of insurance, if the jury shall find the difference between the property as described and as really existing*, did not contribute to the loss or materially increase the risk," &c.

The policy bears date since the passage of the Act referred to. By § 5, of the same, it is provided that, "all provisions contained in any policy or a contract of insurance, *in conflict with the provisions of this Act*, are hereby declared *null and void*, and all contracts of insurance hereafter made, renewed or extended, in this State, *shall be subject to the provisions* of this Act."

The policy in suit, if enforced according to its terms, is directly in conflict with the statute to which we have referred. But the statute is imperative and must control. The contract is and must be subject to its provisions.

"*Jus publicum privatorum pactis mutari non potest*," says Papinian. The contracts of private persons cannot alter a rule established on grounds of public policy. The Legislature have deemed it wise to impose restrictions upon the general liberty of contracting which the law accords to parties. Parties cannot by their contracts avoid the obligations of a statute, or be bound by agreements contrary to its mandates.

The statute, it is to be observed, does not annul a policy having provisions at variance with its requirements. It simply annuls and renders void those provisions. It leaves the policy in all other respects in full force. The Act is to be regarded as included in, and a part of policies, issued since its passage. Nor is this any hardship upon parties, for all are deemed to have contracted with a knowledge of its existence and subject to its provisions.

Similar or analogous legislation is to be found in other statutes. In the usury law, all interest is illegal beyond the statute rate, yet, subject to that modification, the contract is enforced.

Both parties intended a contract of insurance. They intended or should have intended that it should be a valid one and in accordance with the statutes of the State. To such a contract we give force and effect, eliminating therefrom any provisions at variance with the will of the Legislature as expressed in its enactments. Upon any other construction, the statute becomes inoperative.

It follows, therefore, that the defendants cannot escape the performance of their contracts by reason of a misdescription of the plaintiff's interest, unless the same was material and fraudulent on his part. Assuredly they should not, if it arose from the fault of their agent.

The point that this misdescription was material and fraudulent within the statute, was not taken. The jury were not asked to pass upon it, nor was the Court requested to give any instructions in relation thereto, nor does the evidence as reported afford any indications that the result would have been changed, had instruction relating thereto been given.

The exception, that the question as to what claims the plaintiff had against Winn, was not permitted to be answered, is not well taken. If the inquiry had been what claims he had which were secured by the mortgage, it might have been material. But the question was not thus limited, and was therefore properly excluded.

Exceptions overruled.

CUTTING, KENT, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

Dissenting opinion by

DAVIS, J. — The defendants made a policy of insurance, Oct. 5, 1861, upon certain buildings and machinery, the whole being personal property. The plaintiff made no written application therefor; but the contract was with him as the owner of the property.

In order to show that he had an insurable interest, the plaintiff, at the trial, introduced in evidence a mortgage to himself, from Ira Winn, dated Dec. 1, 1860, given to se-

cure certain liabilities under a written contract of the same date. And he testified that he took possession of the property, for a breach of the condition in the mortgage, June 14, 1861; and that he and Winn, on the same day, terminated the contract, by an agreement written upon the back of it, signed by them both.

The plaintiff Emery, had been notified to produce the contract secured by the mortgage, at the trial. This he declined to do. But, in the trial of another cause, in which he was not a party, on a subsequent day, he was called as a witness, and was compelled to produce the contract by a *subpœna duces tecum*. The same counsel being employed by the defendants in both cases, the contents of the written indorsements upon the back of the contract then became known to him. He thereupon filed a motion for a new trial in the case at bar, on the ground that he had discovered new evidence material to the issue.

The indorsements on the contract were as follows: —

"Portland, June 15, 1861. — This agreement, so far as services and the salary of the within named Daniel C. Emery is concerned, is this day terminated by mutual consent, leaving the amount due Emery to this date, on which interest is to be paid, $3,744,79, not including liabilities for indorsing notes.

"Daniel C. Emery,
"Ira Winn."

"Portland, Jan. 1, 1863. — The liabilities of the within named Emery having been ascertained, the amount now due said Emery on the written contract is four thousand eighty-two dollars and eighty-one cents, (4,082,81) and the within contract is finally terminated by mutual consent.

"Daniel C. Emery,
"Ira Winn."

The contract provided for services and loans by Emery, and payment therefor by Winn upon its termination, either party having the right to terminate it, after giving to the other three months notice. The termination of the *contract*, therefore, could not affect the *mortgage*, until the amount

due Emery was paid. As the property was valued at a much larger sum than the amount due Emery, if he had taken it, it would have operated as a payment. Any recognition of it as still due and unpaid, was evidence, therefore, that the breach of the condition had been waived, and that the mortgage was still subsisting.

If it was essential for Emery to prove that he was *absolute owner* of the property, the indorsements upon the contract were important evidence for the defendants. They tended to show that the mortgage was treated by the parties, not as having been paid, but as still in force; that Winn's right to pay the amount due, and redeem the property, was still recognized; and that the amount thus remaining due from him, he still owning the property, subject to the mortgage, was agreed upon by the parties as late as Jan. 1, 1863.

It is not pretended that the defendants, or their counsel, had any knowledge of these facts, until after the trial. The plaintiff refused to produce the contract, though requested and notified to do so. The affidavit of their counsel was admitted without objection; and all the circumstances in the case show that the defendants could not have had any knowledge on the subject.

The newly discovered evidence was material, if it was necessary for Emery, in order to recover, to prove that he was *absolute owner* of the property, when he procured his policy of insurance.

By the third condition of his policy it is provided, that, "if the property to be insured be held in trust, or on commission, or be a leasehold or other interest *not absolute*, it must be so represented to the company, *and expressed in the policy in writing;* otherwise the insurance, as to such property, shall be void."

If the mortgage was still in force, and the breach of the condition had been *waived* by Emery, then his title was not *absolute* but *contingent*. It was liable to be defeated by the payment of the amount due. Not being so "expressed in the policy, in writing," the insurance was void by the terms

of the contract, unless it was made valid by the statute of 1861. *Day* v. *Charter Oak F. M. Ins. Co.*, 51 Maine, 91.

Prior to that time, an erroneous description of the property, in any matter material to the risk, or if such description was a warranty, rendered the policy void. *Battles* v. *Insurance Co.*, 41 Maine, 208. And, if the mistake related to a *part* of the property, the *whole policy* was void. *Lovejoy* v. *Augusta Ins. Co.*, 45 Maine, 472. This resulted from general principles, without any condition in the policy to that effect. Such a *mistake* avoided the policy *by its own force.*

One design of the statute of 1861 was to avoid such a result. And there can be no doubt that it is effective to this end. Such a mistake in describing the property no longer, of *itself*, will render the insurance void.

But there had been before, as there have since, contracts of insurance in which the parties *expressly stipulate* that such a mistake shall render the policy void. In such a case, though a material mistake will not, of *itself*, make the insurance void, will not the insertion of the *stipulation* have that effect? If the insured represents himself as the "absolute owner" of the property, and it is insured on *that condition*, with an express agreement that, if he is not, the policy shall be void, are the insurers, if the property is *mortgaged*, bound to a contract *they have never made?*

The fifth section of the statute provides that "all provisions contained in any policy or contract of insurance, in conflict with any of the provisions of this Act, are hereby declared null and void."

It will be observed that the statute does not, in such a case, declare the entire contract void, — but only *certain parts* of it. What effect will this have on the rest? When a *part* of a contract, by reason of a statute, is void, can *any* of it be enforced? This question has often been raised in suits at law, and is clearly settled.

When some of the stipulations in a contract are void, either at common law, or by statute, and there are other

distinct and *independent* stipulations, capable of being separated from those which are void, the latter are valid and obligatory, and may be enforced. Chitty's Con., 693, 694; *Leavitt* v. *Blatchford*, 5 Barb. Sup. Ct., 9; *Leavitt* v. *Palmer*, (S. C.,) 3 Comst., 19.

But if the contract is single, and there is not any valid part *independent* of that which is void, and capable of separation from it, then, being void in part, *the whole* is void. Chitty's Con., 693; *Filson's Trustees* v. *Himes*, 5 Barr., 452.

Thus, a usurious promissory note is valid, by our present statute, though the promise to pay the illegal interest is void. For the promise to pay the principal is separable from that to pay the interest, and is in no sense dependent upon it.

But, if one makes a *parol* contract to sell land and also personal property, for one price for *both*, the whole is void; for the agreement to sell the *personal* property cannot be separated from the other. *Cooke* v. *Toombs*, 3 Anst., 420; Sugd. Vend., 78. So when a part of any contract is void by the statute of frauds, the other part, unless it is entirely *distinct*, cannot be enforced; and *the whole* is void. *Loomis* v. *Newhall*, 15 Pick., 159; *Van Alstine* v. *Wimple*, 5 Cow., 162.

In the case at bar, the provision which is void, instead of being distinct and separable from the others, is the very foundation of them. It is the condition on which alone the others are to be binding. Without it, the parties never agreed upon anything. Unless the plaintiff was the absolute owner of the property, the company never promised to insure it. It was only property of which he *was such owner* that they undertook to insure. Therefore, if the condition is void, it leaves the parties without any contract. Their minds never met, nor assented to any other. The Legislature have no power to hold parties to stipulations *to which they never agreed*, — though it may make void those to which they *have agreed;* and we should not presume that anything of the kind was intended.

The great design of the statute is to prevent certain mistakes, or misdescriptions, from making polices void, *of their own force*. If the parties see fit to make a *special contract* that if the property, or the title, is not such as is represented, upon the faith of which the insurance is made, then the policy shall be void, they have a right to do so.

For the statute contains no prohibition. Like the statute of frauds, it simply provides that certain agreements shall be void. They are not made void as a *penal offence*. They were not *mala in se* before. They are not *mala prohibita* now. No question, therefore, can arise whether the parties are *in pari delicto;* for neither is in any wrong. They both enter into a contract, one provision of which, by the statute, is void; and this is so connected with the rest that *the whole* is void. The law leaves the parties as they stood before. In doing so, it does equal justice to *both*. It is often very important for insurers to know whether the insured has an *absolute* title to the property, or only a contingent or *conditional* one. The company agreed to insure if the plaintiff was the absolute owner; otherwise not. He represented himself to be so, and so made his contract. If he was not, he has no reason to complain.

The newly discovered evidence being material, and having been concealed from the defendants by the plaintiff, so that it did not come to their knowledge until after the trial, the verdict ought to be set aside, and a new trial granted.

WALTON, J., concurred.

EDWARD FOX *& al., Ex'rs, versus* PHENIX FIRE INS. CO.

By c. 34, § 3, of the Public Laws of 1861, a misrepresentation of title to a parcel of the property insured, shall not affect the contract as to other parcels, either real or personal, covered by the policy.

Hence, where the plaintiffs, as mortgagees of a part of the machine works and buildings occupied by the mortgager, procured a policy of insurance upon their interest, covering all the said works and buildings; — *Held*,

That, in an action on said policy, the plaintiffs could recover the amount of their policy, if the loss upon the machine works and buildings, covered by the mortgage, was more than the amount insured.

Where the plaintiffs, as mortgagees, procured a policy on their interest in the mortgaged property, and the policy contains the usual apportionment provision; and a subsequent mortgagee procures an insurance in another company on the same property; the plaintiffs, in case of loss, are not liable to be apportioned with such subsequent mortgagee, but are entitled to recover the whole amount insured by them, being less than the loss or damage to the property.

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

ASSUMPSIT on a policy of insurance against fire.

The policy covered all the buildings occupied by the mortgager, when in fact he owned and mortgaged to the plaintiffs' testate only a portion of them.

The defendants contended that the plaintiffs, having insured what they had no interest in, the policy was void.

The defendants filed a motion to set aside the verdict as being against the weight of evidence in the case; but the view taken by the Court renders a report of the evidence unnecessary.

The remaining facts sufficiently appear in the opinion of the Court.

Rand, for the defendants.

Fox, for the plaintiffs.

The opinion of the Court was drawn by

DAVIS, J. — The plaintiffs, as executors of the will of Hezekiah Winslow, insured a mortgagee's interest in certain buildings and machinery, in the defendant company.

Daniel C. Emery, another mortgagee, whose mortgage was of a later date, but was recorded earlier, also had a policy of insurance, issued by another company, upon the same property.

In the plaintiffs' policy there is a provision that, "in case of any other contract of insurance upon the property hereby insured, whether such other contract shall be valid or not, as against the parties thereto, the assured shall not, in case of loss or damage, be entitled to recover of this company any greater portion of the loss or damage sustained, than the amount hereby insured shall bear to the whole amount insured on said property." And the counsel for the defendants contended that the plaintiffs were entitled to recover only that proportion of the loss which the amount insured in their policy bears to the amount insured in both policies. But the jury were instructed that the plaintiffs were not liable to be apportioned with Emery, but were entitled to recover the whole amount insured by them, being less than the loss or damage to the property. To this instruction the defendants excepted.

A mortgagee may insure his interest in the property, without regard to the mortgager. And, in case of loss, he may recover the amount, without any liability to account to the mortgager therefor. *Concord M. F. Ins. Co.* v. *Woodbury*, 45 Maine, 447. So, different mortgagees of the same property have independent interests, which each may insure for his own benefit, to the full amount.

Policies of insurance against fire, as in the case at bar, usually contain a provision against other insurance, without notice; and also providing, in case of other insurance on the same property, for an apportionment of any loss. But, as the parties would not be likely to make a contract that could be affected or avoided by the acts of third persons, over which they could have no control, such provisions have been understood to refer to other insurance *by the same person*, or to other insurance *of his interest*. Such a construction is

reasonable, and is not in conflict with the language, however ambiguous.

"If this provision," says NELSON, J., in *Ætna F. Ins. Co.* v. *Tyler*, 12 Wend., 507, "is to be literally construed, it would include an insurance by any person. * * But the rational interpretation, I think, is, to confine the provisions to previous insurance *by the party himself.*" And this construction was confirmed by the Court of Errors, in the same case, in an opinion by Chancellor WALWORTH, 16 Wend., 386.

This view was also sustained in the case of *Mut. Safety Ins. Co.* v. *Hone*, 2 Coms., 235. "The phrase *property hereby insured*," says GARDINER, J., "refers to the *interest of the assured.* * * The object was to guard against double insurance, which is an insurance of the *same interest.*" And CADY, J., says, "when it speaks of other insurance on the property it has reference to an insurance *to which the assured can resort for a part of his indemnity.* The clause was inserted in the policy to restrain the insured, if he had more than one policy, from recovering more than a proportional part of the loss on any one policy."

We think this construction is reasonable, and must have been intended by the parties. The instruction was therefore correct.

Some questions have been raised in regard to the title to the property described in the policy. But the statute of 1861, c. 34, was in force when the policy was made. There is no special provision in the policy that any mistake in the description of the title or interest of the insured in the property shall render it void. And, under the *statute*, the mistake itself, of its own force, cannot have that effect. *Emery* v. *Piscataqua Ins. Co.*, *ante*, p. 322.

Exceptions and Motion overruled.

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

North Berwick Co. *versus* New England F. & M. Ins. Co.

A forfeiture of a policy of insurance is to be construed strictly; and its enforcement is not to be favored.

The act of receiving an additional premium for a variation of the risk after the existence of facts which would authorize a forfeiture had become known to the insurers, must, in the absence of fraud and concealment, be regarded as a waiver of the forfeiture.

From the answer to a question in an application, that the factory insured is "worked *usually*" certain specified hours in the day time "in the summer," and certain specified hours "in the winter—*short time now*," it may be inferred that it was expected at times the factory would be run nights.

Where an agent, by the power of attorney appointing him, was authorized to "make insurance by policies of" the defendant company, "to renew the same, and to indorse upon policies issued by him permission to the assured to *vary the risk*, according to the rules and instructions he shall from time to time receive from said company, and all policies, issued by said agent, shall be to all *intents* valid and binding upon said company;" and, upon the receipt of an additional premium, fixed by him, such agent varied the risk by a written permission to run the factory insured "day *and night*," until the expiration of the policy, without prejudice;" and the factory was burned in the night; — *Held*, that in the absence of any proof that the agent had violated any rules or regulations he may have received from the company, the permit to *run nights* was binding on the company, and the agent had ample power to waive such previous running which had come to his knowledge.

When the plaintiffs procured a policy on their merchandize in their store house, and another on their factory; and the former contained a provision that, "if the risk be increased by *any means whatever* within the *control* of the *assured*," it should be void, but no limitation as to the time the plaintiffs were to run their factory; but such limitation was contained in the latter; and, subsequently, such limitation was removed by the written permit of the defendants in consideration of an additional premium; — *Held*, that the policies were distinct and independent; and the removing of the limitation was not an "*increase of the risk*," within the meaning of the former policy.

It is no objection that only a *few*, and not *all*, of the letters comprising a correspondence between the parties, are offered in evidence.

On Exceptions from *Nisi Prius*, Davis, J., presiding.

Assumpsit on two policies of insurance against fire.

One policy (No. 48) was on the merchandize in the "store house." This policy contained a provision that, "if the risk

be increased by any means whatever, within the control of the assured," the policy shall be void.

The other policy (No. 110) was on a factory and other buildings (not including the "storehouse") and machinery, standing about eighty feet from the "storehouse."

The material facts sufficiently appear in the opinion of the Court.

Rand, for the defendants.

This is an action upon two policies of insurance, both issued and based upon "surveys and descriptions," which, (by condition 12 on policies,) are a part of the policy and warranty on the part of the insured.

Question 17, in survey, &c., upon which policy 110 issued, asked, "during what hours is the factory worked?" and the answer stated, "usually 6½ A. M. to 12¼ P. M., and 1 to 7 P. M. in summer," &c.

This answer was a warranty, and, if not strictly kept, avoided the policy. The importance of this answer is obvious.

It is a common and familiar principle that, in insurance, warranties are regarded as conditions precedent, and no contract exists unless they are strictly and literally complied with.

In fact, as appears by Hobbs' testimony, the mill was run all night, from August 1, and was burnt in the night; that this was a gross breach of warranty, and avoided the policy from the moment they began to run all night, cannot be denied.

But the plaintiffs attempt to avoid this fatality to policy 110, by setting up a pretended waiver of this breach of warranty. But it will be found, upon a careful examination of the letters of the parties, and of the indorsement upon the policy, that there was no waiver of the breach, but only a permit to run by night from and after a certain date, (either Oct. 19, 24, or 26, date of letters, or Nov. 1st, date of indorsement on the policy.)

In the letter of Oct. 19, the plaintiffs say, they wish to run by night "from now" to the end of the policy. In that of Oct. 24, defendants say they will give such permit "for the unexpired time," "by paying one-fourth per cent. for three months." In that of Oct. 26, the plaintiffs state their own understanding of the permit "for three months."

The indorsement of Nov. 1st, upon the policy, is in accordance with the correspondence, and prospective only.

It will be perceived that nothing is said about their having run already from Aug. 1, to date of their first letter, (Oct. 19;) not a word about their having already broken their contract and avoided their policy, but a simple request for permission to run in future for a consideration.

The defendants had no knowledge of any breach and discharge, and could not waive that of which they knew nothing. If the plaintiffs would set up a waiver, they must show that they communicated all the facts to the defendants, and that the defendants acted understandingly with full knowledge of all the facts. This the plaintiffs did not do. Even an express waiver, made without a full knowledge of the facts, particularly where the facts are solely within the knowledge of the other party, is no waiver.

But, if it be said that the defendants' agent, Slade, knew of the running, and he waived, it does not appear that he knew they had been running from August 1st. He may have known that they had been running from October 24, when permit was given by letter.

But the agent had no authority to waive a breach of the contract or a total avoidance of the policy. His authority is in writing; his powers are limited to those set forth in the writing, and that confers upon him no authority to waive breaches of warranty, or to revive policies. He testifies that he did not communicate in any way with the office. Indeed, there is no evidence of any direct waiver by him, and any inference that he did so, is only an inference that he did what he had no authority to do.

As to policy 48, and the property covered by it. The

building containing the property insured, was 88 feet distant from the factory insured by policy 110. This property was destroyed at the same time, by fire communicated from the burning factory.

By the 2d paragraph of the 1st condition of insurance, it is declared that "if, after insurance is effected, the risk be increased by any means whatever within the control of the assured, such insurance shall be void and of no effect.

The running the mill, (insured by policy 110,) by night, in violation of policy 110, increased the risk under policy 48, and, if so, avoided the latter policy.

The jury should have been instructed that, if the running the factory (policy 110) by night, as testified, increased the risk under policy 48; such increase of risk by the assured, avoided the policy 48. At any rate, the instruction given to the jury upon this point was clearly erroneous. *Houghton* v. *Manuf. Ins. Co.*, 8 Met., 121–2; Angell on Fire Insurance, 196, § 162.

The *copies of letters* introduced by the plaintiffs, were inadmissible, because they were only part of the correspondence, and because notice to produce originals was insufficient. 1 Greenl. Ev., § 562, note.

T. M. Hayes, for the plaintiffs.

The opinion of the Court was drawn by

APPLETON, C. J.—This is an action upon two policies of insurance issued by the defendants.

The policy, No. 110, insures the plaintiffs' factory and other buildings and machinery, for the term of one year from Jan. 1, 1861.

The seventeenth interrogatory in the application and survey is,—"during what hours is the factory worked?" The answer is,—"usually from 6½ A. M. to 12¼ P. M. and 1 to 7 P. M. in summer; from 6¾ A. M. to 12¼ P. M. and 1 to 7 P. M. in winter. Short time now."

It appears that after Aug. 1, the mill was run all night, and that on Oct. 19th, the plaintiffs applied to John P.

Slade, the defendants' agent, for permission to run it all night from "now to the end of the policy;" that, on Oct. 24th, Slade writes that the insurance companies will give the defendants a permit to run their "mill nights for the unexpired time due" on their policies, "by paying ¼ per cent. premium, for three months." The plaintiffs, on 26th of October, acceded to these terms. Thereupon, Slade the agent of the defendants, indorsed on the plaintiffs' policy, the following memorandum: —

"Fall River, Nov. 1, 1861.

"In consideration of fourteen and $\frac{39}{100}$ dollars additional premium, paid by the insured, permission is granted that the within named property may be run night and day until the expiration of this policy, without prejudice to the same."

"John P. Slade, *Agent.*"

The buildings and property insured were burned on the morning of Nov. 2.

The defendants insist that the answer to the 17th interrogatory is a warranty on the part of the plaintiffs, that their factory is not to be run nights, and that having been broken by running from Aug. 1st to 19th of October, the policy thereby became void; and that thus they are absolved from all legal obligation.

The defendants were not harmed by the running of the mill all night between the first of August and the 24th of October, when their agent stated to the plaintiffs the extra premium he should require for such running. From the answer to the seventeenth interrogatory, it may fairly be inferred that it was expected that at times the mill would be run nights. Whether such running, unattended with loss, would render the plaintiffs' policy void, it is neither necessary to consider nor to determine.

A forfeiture is to be construed strictly. Its enforcement is not to be favored. It may be waived by the acts and conduct of the party whose right it is to exact it. The renewal of a policy, after the existence of facts which would authorize the insurer to insist upon a forfeiture would be

deemed a waiver. Thus the forfeiture, by reason of a misrepresentation or concealment, may be waived by the insurers; as by receiving a new premium on a fire policy, after the misrepresentation is known. 1 Phil. on Insurance, § 668; *Allen* v. *Vermont Mut. Fire Ins. Co.*, 12 Vermont, 366. So the act of receiving an additional premium for the variation of a risk, must, in the absence of fraud or concealment, be regarded as having the same effect. It would be a gross fraud to receive a premium for the continuance of a policy or the variation of a risk, with the intention of avoiding the insurance, if the risk provided for should occur, and of retaining the premium in case it should not.

The agent of the defendants testified he knew the plaintiffs had been running their mill nights, when he gave his permission of Nov. 1, 1861. In his letter to the defendants of Nov. 2, he writes,—"they had been working night and day for some time. They wrote to me a few days ago for a permit to work day and night, and agreed to keep a watchman." The extra premium for permission to run the mill nights was received by the defendants after the loss, and without objection. No complaint appears to have been made on their part of any concealment or misrepresentation on the part of the plaintiffs or of their agent.

Nor is this all. The defendants, by their power of attorney under seal, appointed John P. Slade of Fall River, their agent; "and, as such agent, he is authorized and empowered to receive proposals for insurance against loss or damage by fire, and *to make* insurances by policies of said New England Fire and Marine Insurance Company of Hartford; *to renew* the same, or to *vary the risk*, according to the rules and instructions he shall from time to time receive from the said company. And all policies of insurance against loss or damage by fire, *issued by* said agent, shall be to *all intents* valid and binding upon the said New England Fire and Marine Insurance Company of Hartford."

There is no proof that the agent has violated any rules or regulations he may have received from the defendants.

His authority is most ample. He may issue polices. He may renew them. He may vary the risk. His *acts* are "to all intents valid and binding" on the defendants. Notice to him must be deemed notice to the company. The insured had a right to rely on his acts. Indeed, it has been held that a general agent may waive under some circumstances, a condition in the policy that no insurance shall he considered as binding till actual payment. *Sheldon* v. *Atlantic F. & M. Ins. Co.*, 26 N. Y., 460. Much more would he be deemed to have such right, when powers as ample as in the present case are conferred.

In the policy on the personal property there is found no limitation as to the time the plaintiffs were to run their mill. The plaintiffs might, therefore, so far as regards this risk, run their mill the maximum of time. The two policies have no connection. Each must be construed by itself. The instructions in this respect were correct. There was no increase of risk within the meaning of the policy — for the plaintiffs were under no restrictions by its terms as to the time they might run their mill.

The letters introduced were legally admissible. They were originals. The plaintiffs were under no obligations to offer more of the letters of the defendants' agent than they should deem conducive to their interest.

Motion and exceptions overruled.

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

CHARLES A. WARREN *versus* JAMES R. S. WILLIAMS.

Where, in the trial of a writ of entry, the title of the tenant depends upon a conveyance to him alleged by the plaintiff to be fraudulent as to existing creditors, it appeared that the grantor of the tenant was one of the two members of a firm which conveyed, at about the same time he made the conveyance in controversy, all of their property, whether owned by the firm or by the partners separately, to different persons — but principally to the father of one, and the son of the other; — *Held*, that while it was not competent for the plaintiff to prove the subsequent *declarations* or the *general acts* of the grantor, he may the *subsequent disposition* of the property thus conveyed by the firm, for *their benefit*, or for the benefit of the alleged fraudulent grantor, or that they *subsequently received the earnings or proceeds thereof.*

The holder of a note given by a fraudulent grantor *before*, but not purchased until *after*, the conveyance, may impeach the conveyance.

Whether the special finding of a jury were regular or not, or whether against the evidence in the case or not; it will not be set aside, when it could not have affected the result, or injured the party moving to have it set aside.

Thus, where in the trial of a writ of entry, the title of the tenant depended upon a conveyance to him alleged to be fraudulent as to existing creditors, the jury, after their general verdict had been read, were orally asked by the presiding Judge, whether, in arriving at their verdict, they had decided whether or not the tenant paid any valuable consideration for the deed in controversy, to which the foreman replied, "the jury had found, that the tenant did not pay any consideration for the deed;" and the presiding Judge thereupon wrote out the question to which the above answer is responsive, and the verdict, together with said question and answer, was then read to the jury, and by them affirmed; — *Held*, that said special finding would not be set aside on motion of the defendant, the demand held by the plaintiff against the defendant being an existing one at the time of said conveyance.

ON EXCEPTIONS AND MOTION, from *Nisi Prius*, DAVIS, J., presiding.

WRIT OF ENTRY.

Plea, general issue, and joinder.

The verdict was for the plaintiff.

After said verdict had been read to the Court, the Judge orally asked the jury, whether, in arriving at their verdict, they had decided the question whether the tenant paid any valuable consideration for the deed of June 16, 1851, from

Royal Williams?—to which the foreman replied: That the jury had found that the tenant did not pay any consideration for the deed.

The presiding Justice then wrote the following question and answer: —

"Did the tenant pay any valuable consideration for the deed of the premises in controversy, given to him by Royal Williams, June 16, 1851?"

Answer. — "He did not."

The question and answer were not signed by the foreman or any of the jury.

The verdict, together with said question and answer, was then read by the clerk to the jury, and by them affirmed.

The remaining facts sufficiently appear in the opinion of the Court.

Rand, for the defendant.

The plaintiff claims title to the estate under a levy upon the same, as the property of Royal Williams. The tenant claims the same under a prior conveyance from Royal Williams; and the question is not only upon the validity of the conveyance, but upon the plaintiff's right to impeach it.

Upon the first point. If the conveyance was made with the intent, on the part of both grantor and grantee, to defraud creditors of the grantor, it was void.

But there is no evidence of any such intent, and, if the jury based their verdict upon any such evidence of such intent, it is manifestly against the evidence and should be set aside.

Evidence of the subsequent disposition of other property conveyed about the same time, by Royal Williams, or by Williams & McLellan, to other persons, was improperly admitted by the Court. Such acts could not affect the tenant. He had nothing to do with them.

It is well settled, that even acts and declarations of the grantor subsequent to the conveyance, are not admissib e against the grantee. *Bridge* v. *Eggleston*, 14 Mass., 245;

Foster v. *Hall*, 12 Pick., 100; *Aldrich* v. *Earle*, 13 Gray, 578; *Taylor* v. *Robinson*, 2 Allen, 562.

Upon the second point. The plaintiff was not a creditor of Royal Williams, or of Williams & McLellan, at the time of the conveyance to the tenant, and consequently cannot impeach the conveyance upon the ground of fraud. He did not become a creditor, (as he testifies,) until more than three years afterwards. The instructions of the Court upon this point were erroneous. Conveyances made to defraud creditors, are void as to existing creditors only, not as to subsequent ones. And the instruction requested by the tenant should have been given.

The oral question put by the Judge to the jury, after they had returned their verdict, and orally answered by the foreman, and then reduced to writing by the Judge, although read to the jury and by them affirmed, is no part of their verdict, and should be rejected as surplusage. It was not signed by the jury; it was not responsive to any question submitted to them when the case was committed to them. The whole proceeding was irregular, and, in considering that requested instruction, this question and answer should be disregarded.

Fessenden & Butler, for the plaintiff.

The opinion of the Court was drawn by

DAVIS, J. — Royal Williams and Eben McLellan were doing business as partners, under the name of Williams & McLellan, in 1851. In March, April, and May, of that year, they gave several promissory notes, payable in four months; and in June they failed. Some of these notes were purchased by the plaintiff in 1854, and were put in suit in 1857.

June 16, 1851, about the time of the failure, Royal Williams conveyed the premises in controversy to his son, the present defendant. The plaintiff recovered judgment in his suit upon the notes, November 19, 1859, and caused his

execution to be levied thereon, claiming that the conveyance to the son was fraudulent and void as to the creditors of the father. And he has brought this writ of entry, to recover possession.

At the trial, there was evidence that, at about the same time, Williams & McLellan conveyed all their property, whether owned by the firm, or by the partners separately, to different persons — but principally to the father of one, and the son of the other. Some of the real estate so conveyed was afterwards sold for their benefit; and they subsequently received a part of the earnings of some vessels conveyed by them at the same time.

No *declarations* of Royal Williams, made *after* his conveyance to the defendant, would have been admissible. *Clark* v. *Waite*, 12 Mass., 439; *Aldrich* v. *Earle*, 13 Gray, 578. No such declarations were admitted in evidence. The ruling of the Court was, "that any evidence of the subsequent *disposition* of the property, conveyed by Royal Williams or Williams & McLellan about the same time of the conveyance in controversy, *for their benefit*, or for the benefit of Royal Williams, or that they subsequently *received the earnings or proceeds thereof*, would be admissible."

This ruling involves the question of the admissibility of evidence that the debtor conveyed *other property*, at about the same time; and of proof that such other conveyances were *fraudulent*, by showing that such property was subsequently disposed of or used for his benefit.

1. The proof of other fraudulent conveyances, made about the same time, has always been held admissible in this class of cases. *Flagg* v. *Willington*, 6 Maine, 386. "The proposition to be established by the attaching creditor who seeks to vacate a prior conveyance on the ground of fraud, is, (1,) that the *grantor made* his conveyance with the intent and for the purpose of defrauding his creditors; and, (2,) that the *grantee knew* of this intent, and participated in it. These propositions are in some measure independent of each other. And the evidence to prove them may be of different

kinds, and drawn from different sources." *Foster* v. *Hall*, 12 Pick., 89.

The other conveyances are proved as evidence of the intent of the *grantor*. It is not necessary, therefore, to show that the *grantee* had any knowledge of them. It is sufficient if he knew that the particular conveyance to *himself* was made with such intent. So it was expressly held in the case cited. Evidence of other conveyances is not admitted to show the intent of the *grantee;* and therefore *his* knowledge of them is immaterial. It is admitted to show the intent of the *grantor*, and is important for that purpose. If a debtor conveys *any* of his property to defraud his creditors, he must convey the whole of it not exempted from attachment, or his purpose would not be accomplished. One such conveyance, therefore, tends to show that any other conveyance, made about the same time, was made for the same purpose. *Howe* v. *Reed*, 10 Maine, 515; *Taylor* v. *Robinson*, 2 Allen, 562.

The knowledge and participation of the *grantee* in the fraudulent design of the conveyance to *himself*, is generally proved by other testimony. No question is raised upon this branch of the case. The exceptions find that other appropriate instructions were given.

2. When other conveyances are proved, how can *they* be shown to have been *fraudulent?* The *declarations*, or the *general acts* of the grantor, *subsequent* to the conveyance, are not admissible. His *admission*, though evidence against himself, if he were a party to the suit, is not evidence against his grantee. It is but the declaration of one, not under oath, nor in Court, who may be admitted as a witness.

But evidence of the subsequent *dealings of the grantor with the property conveyed*, stands upon a different basis. These are acts *in pais*, directly affecting the grantee or vendee. But subsequent possession and use by the vendor not only show *his* intention; they show the intention of the *vendee also*, whose assent is presumed. *Rollins* v. *Mooers*, 25 Maine, 192. This is but a negative way of proving that

the vendee did not, after the alleged sale, assert and exercise the rights of an actual, *bona fide* owner. The continued exercise of such rights by the *vendor*, after the sale, unless explained, has always been held strong evidence of fraud, as against *both* of the parties. *Allen* v. *Wheeler*, 4 Gray, 123; *Homes* v. *Crane*, 2 Pick., 607.

The evidence that some of the property sold by Williams & McLellan about the same time of the conveyance in controversy, was subsequently disposed of for their benefit, and that Williams afterwards received some of the earnings of the vessels then sold by them, was clearly admissible, in order to show that those sales were fraudulent. For, if other *fraudulent* sales were made, about the same time, then, as we have seen, the sale to the defendant, if attended with the same badges of fraud, may be presumed to have been made for the same purpose. The ruling on this point was correct.

The Court was requested to instruct the jury that, if the conveyance was made "for a valuable consideration, and the plaintiff, at the time of such conveyance, was not a creditor of Williams, then *he* cannot impeach the validity of the conveyance on the ground of a fraudulent intent by the grantor and grantee." This was not given; but the jury were instructed "that the notes having been given before the conveyance, though not purchased by the plaintiff until afterwards, he was such a creditor as could impeach the conveyance on the ground of fraud."

By the statute 13 Eliz., c. 5, all conveyances made "to delay, hinder, or defraud creditors *and others* of their lawful *actions*, *suits*, *debts*, accounts, damages," &c., were made void, "as against such person or persons, his or their heirs, successors, executors, administrators, and *assigns*, whose actions, &c., by such fraudulent devices and practices are, shall, or might be in any way disturbed, hindered, delayed, or defrauded."

The design of this statute was to make such conveyances void as against all persons, or demands, liable to be affected

thereby. The right to hold them void was not merely *personal.* The creditor could not treat them as void, except *as to* his demands, or suits. Upon *payment*, or after a *transfer* of his claim, he, personally, could no longer impeach the conveyance on the ground of fraud.

But, as to the "demand," or any "suit" thereon, until paid or discharged, such a conveyance was "utterly void." The debt, whoever might become the owner of it, could be enforced against the *property*, the same as if it had not been conveyed. The conveyance was void as against the person intended to be defrauded, and his heirs, successors, executors, administrators, and *assigns*, if *their* actions, suits, debts, &c., were liable to be delayed or hindered thereby. That this embraces a suit brought by the subsequent purchaser of a preëxisting note, there can be no doubt.

The jury returned a special verdict, that the conveyance to the defendant was "without consideration." Upon this point there is a motion for a new trial, on the ground that the finding was irregular, and was against the evidence in the case. But the demand having been an existing one at the time of the conveyance, if it was *fraudulent*, it is immaterial whether it was voluntary, or for a valuable consideration. In either case it was void. The special finding, whether correct or not, could not have affected the result, or injured the defendant.

The exceptions and motion are overruled.

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

Lemuel Dyer *versus* Ammi C. Chick.

Where the complainant, holding mortgages of the premises in controversy, consisting of a lot of land with a house on a portion of it, purchased the respondent's right in equity to redeem, at a sheriff's sale of the same on execution; and, in the temporary personal absence of the respondent, his family still being in the house, the complainant entered peaceably and unobstructed into the possession of a part of the land, but did not enter the house; and, while so in possession, the respondent returned and expelled him by force; — *Held*,

1. That the sheriff's deed conveyed to the complainant all of the title of the debtor in the premises;
2. That the complainant had a right to the immediate possession of the premises;
3. That he obtained a lawful possession and seizin;
4. That, having gained possession of a part of the premises, he might lawfully take possession of the residue, if it could be done without a breach of the peace;
5. That the respondent disseized the complainant; and,
6. That the disseizin was such as to entitle the complainant to the process of forcible entry and detainer.

On Exceptions from *Nisi Prius*, Davis, J., presiding.

Forcible Entry and Detainer.

The premises consisted of a lot of land, with a house on one portion of it.

The respondent acquired his title in 1857, and he has ever since been in possession and occupation of the same, his family living in the house.

Subsequently, the respondent executed two mortgages of the premises, which came by assignment into the hands of the complainant, prior to March 21, 1863. On April 21, 1863, the complainant purchased the respondent's right in equity, the same having been sold on execution, and took a sheriff's deed of the same.

On May 1, 1863, the complainant apprised the respondent of the former's title, and requested him to remove from the premises.

On June 10, following, the complainant went peaceably and unopposed upon a part of the said lot to take posses-

sion, but did not enter the house. The respondent was at the time temporarily absent, but his family, together with his furniture, were in the house. Soon after, the respondent returned and demanded of the complainant what he was there for?

The complainant replied:—"I wish you to move or I will move you." The respondent refused to remove, and ordered the complainant to leave the premises; and, upon the complainant's declining to go, the respondent ejected him by actual force.

The process was brought before the Municipal Court, June 12, 1863, in Portland, and, the respondent, having pleaded the general issue and title in himself, removed to the S. J. Court.

At the trial at *Nisi Prius*, the parties submitted the case to the presiding Judge, reserving the right to except.

Upon the facts, the respondent contended that this process would not lie; but the presiding Judge ruled otherwise, and ordered judgment for the complainant, to which ruling and order, the respondent excepted.

S. C. Strout, for the respondent, contended—

Prior to March 21, the respondent's title was that of mortgager. On that day, his right in equity was sold, but his *right to redeem from that sale* existed when this process was commenced. R. S., c. 76, § 37.

The title held by the respondent at the date of this process was a legal and an attachable interest in the land. Ib.

The complainant, as mortgagee, could not maintain this process. *Reed* v. *Elwell*, 46 Maine, 278.

The sheriff's sale did not put the complainant in better condition to maintain this process. This process is not designed to settle titles, but to oust mere trespassers in possession *without title or color of right*. The respondent was in possession under legal title.

The sale of an equity of redemption is analogous to a levy upon an equity. In case of a levy, the statute provides that

the "*debtor in possession is not to be ousted*" by the officer, but his right assigned to the creditor, and a momentary seizin delivered to the creditor, *sufficient to authorize him to bring an action.* What action? A writ of entry, where the whole proceedings and title may be investigated and settled. Chap. 76, §§ 12 and 13.

The debtor's rights of redemption and *possession* are the same in each case in principle. The creditor's rights are no greater in one case than in the other. Are his remedies different?

The facts will not warrant the maintenance of this process. Except as between landlord and tenant, (which relation did not exist between these parties,) this kind of process lies only against a "*disseizor who has not acquired any claim by possession and improvement.*" R. S., c. 94, § 1.

Respondent on June 12, 1863, had never denied the complainant's title, but held subject to it. Respondent's possession, continued *for any length of time*, would not give him any title by *possession* or *right to betterments.* It is only to *such* a disseizin that this process applies, — not to the nominal disseizin maintained in R. S., c. 104, § 6, which allows a demandant in a real action to treat any party as a disseizor, *for the purpose of trying the title*, but an *actual disseizin.*

Respondent, as mortgager, could not disseize his mortgagee or his assignee. *Hunt* v. *Hunt*, 14 Pick., 374.

The seizin of a title claimed under a sheriff's sale of an equity of redemption, is not adverse to the debtor. *Abbott* v. *Sturtevant*, 30 Maine, 40. *A fortiori* the debtor does not hold adversely to such title.

After a levy upon land, the debtor has been called *tenant at will* to the debtor. *Bryant* v. *Tucker*, 19 Maine, 386.

A landlord is liable in trespass for entering upon his *tenant at will*, as complainant entered in the case at bar, unless he has first legally determined the tenancy. *Dickinson* v. *Goodspeed*, 8 Cush., 119; *Gordan* v. *Gilman*, 48 Maine, 475; *Young* v. *Young*, 36 Maine, 133.

Complainant can *acquire no rights* against the respondent,

by an act in itself a trespass, especially when the respondent had a *legal interest*, which, at *his election*, might ripen into a perfect title.

The entry of the complainant did not give him possession. Possession was in the respondent all of the time, and never in the complainant; and the respondent did not, therefore, oust him of possession.

If forcible entry and detainer be maintainable upon these facts, real actions will be superseded.

If the premises had been unoccupied, complainant might have taken actual possession; but he had no right to take possession by force, and at the hazard of a breach of the peace. He should have brought a writ of entry. *Com.* v. *Haley*, 4 Allen, 318.

Fessenden & Butler, for the complainant.

The opinion of the Court was drawn by

APPLETON, C. J.—The complainant, holding mortgages of the premises in controversy, purchased at a public sale on execution the respondent's equity of redemption and entered peaceably and unopposed into the possession of said premises. While so in possession, the respondent entered upon and expelled him by force therefrom; whereupon this process of forcible entry and detainer was instituted.

As mortgagee, the complainant had a right to enter peaceably upon the mortgaged premises. It is not necessary to determine whether this process could be maintained against the mortgager, if he should forcibly expel the mortgagee thus rightfully in possession. *Howard* v. *Howard*, 3 Met., 548; *Reed* v. *Elwell*, 46 Maine, 270; *Dunning* v. *Finson*, 46 Maine, 546.

The complainant, by his purchase of the respondent's equity of redemption, acquired "all the title of the debtor in the premises." R. S., 1857, c. 76, § 33. He had a right to the immediate possession of the premises, to the rents

and profits thereof, and to maintain a real action therefor, as against the judgment debtor. *Jewett* v. *Felker*, 2 Greenl., 339; *Fox* v. *Harding*, 21 Maine, 104.

Having the right to enter, and having entered peaceably and unopposed and gained possession of a part of the premises, he might lawfully take possession of the residue, if it could be done without a breach of the peace. This assuredly cannot be denied. *Mugford* v. *Richardson*, 6 Allen, 76. The respondent could not rightfully interfere with the possession thus acquired.

The complainant, by his deed, acquired a title to the premises in dispute, and, by his peaceable entry therein, obtained a lawful possession and seizin of the same. Disseizin is a wrongful putting out of him that is seized of a freehold. Co. Lit., 277. By R. S., 1857, c. 94, § 1, the "process of forcible entry and detainer may be commenced against a disseizor, who has not acquired any claim by possession and improvement." The respondent has acquired no such claim. His former title is in the complainant, whom he has ejected and excluded, by actual force, from premises into which he had a right to enter, and into which he had peaceably entered. This constitutes a disseizin and entitles the complainant to this process. *Kinsley* v. *Ames*, 2 Met., 29.

The evidence shows, too, a forcible detainer, as against the complainant, who had rightfully entered upon his own premises. *Benedict* v. *Hart*, 1 Cush., 487.

Exceptions overruled.

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

PETER R. HALL *versus* ISAAC SANDS.

Under our statutes, a creditor may levy upon real estate, which the debtor, having had the legal title thereto, has fraudulently conveyed.

Such land may be attached, as well in actions of *tort* as of *contract*, and held as against subsequent conveyances.

The plaintiff in an action of tort becomes a *creditor*, when he recovers his judgment.

By the statute 13 Eliz., c. 5, a fraudulent conveyance, for a valuable consideration, is void as to all persons liable or intended to be injured thereby.

And if it is both *fraudulent* and *voluntary*, so as to raise the presumption of a secret trust, it is a continuing fraud, and void both as to *existing* and *subsequent* creditors.

A fraudulent conveyance, for a sufficient consideration, is void as to *subsequent* creditors, only when it was made for the purpose of defrauding them.

A plaintiff in an action of tort, attaching real estate which the defendant had previously mortgaged, can avoid the mortgage only by showing that it was fraudulent *as to him*.

In such a case, an instruction to the jury, "that, if the mortgage was fraudulent, it could only be avoided, on that ground, by the then existing creditors of the grantor," is erroneous.

If such mortgage was intended to delay or defraud subsequent creditors, it is voidable as to them; and the question of fraudulent interest is one of *fact* for the jury.

ON EXCEPTIONS to the ruling of DAVIS, J.

REAL ACTION. The plaintiff claimed under a levy; the defendant under a mortgage.

The plaintiff commenced an action against one James P. Hall, and attached the premises, Feb. 9, 1861, recovered judgment, May 22, 1862, and levied his execution on the premises, June 5, 1862. James P. Hall mortgaged the premises in question to one Low, June 24, 1851, and April 15, 1861, released his equity of redemption to the defendant, who had become assignee of the mortgage, April 4, 1861.

The plaintiff contended that this mortgage was fraudulent and void as to creditors.

The Judge instructed the jury, that, if the mortgage from James P. Hall to Low was fraudulent and designed to defraud Hall's creditors, it could only be avoided on that

ground by then existing creditors of James P. Hall; that, as between the parties, such a deed would be valid, and would be good as against all other parties except creditors of James P. Hall at time of conveyance; that, if the conveyance is to be taken as made in 1851, plaintiff is not entitled to recover, although the jury should find the deed was intended to defraud the creditors of said Hall, as plaintiff was not then a creditor of James P. Hall. But that, if it was designed and intended that the property should continue James P. Hall's, there being nothing due Winslow Hall, and the object of the mortgage being to deter the creditors of James P. Hall from attaching it, then the jury would be authorized to find the conveyance to have been made in April, 1861, and, in that case, if said assignment and conveyance to Sands was intended to defeat, defraud, or delay the creditors of James P. Hall, the plaintiff is entitled to recover. But, if the assignment and conveyance to Sands was not made with such intent, then the plaintiff was not entitled to recover on the ground of fraud.

The plaintiff requested the Court to instruct the jury, that, if the original mortgage to Low was fraudulent as to the creditors of James P. Hall, and without consideration, and the property was still held in trust for the benefit of James P. Hall, then the plaintiff's rights accrued from his attachment on the writ, and he could recover in the action. But the Court ruled that, under these circumstances, plaintiff could not recover unless the assignment and conveyance to Sands was also intended to defraud, defeat, or delay the creditors of said James P. Hall.

The verdict was for the defendant, and the plaintiff excepted.

E. & F. Fox, for plaintiff.

The requested instruction should have been given. *Clark* v. *French*, 23 Maine, 221; *Smith* v. *Parker*, 41 Maine, 452; R. S., c. 81, §§ 27 and 28; *Davenport* v. *Tilton*, 10 Met., 327; *Hubbard* v. *Hamilton*, 7 Met., 345; *Trull* v.

Bigelow, 16 Mass., 410; *Nason* v. *Grant*, 21 Maine, 164; *Brown* v. *Williams*, 31 Maine, 406; *Saco* v. *Hopkinton*, 29 Maine, 272; *Flynt* v. *Arnold*, 2 Met., 621; *Anderson* v. *Roberts*, 18 Johns., 532.

In *Saco* v. *Hopkinton*, if this point had been made and decided according to the instruction in question, it would have disposed of the case. But the Court examined the validity of the attachment and decided the case upon the ground that it was invalid, whereas, if the doctrine of the instruction in this case is correct, it made no difference whether the attachment was valid or not.

Again, the defendant took this mortgage and note, long after it was due, and it may be impeached in his hands, as well as in the grantee's. *Sprague* v. *Graham*, 29 Maine, 162.

Fessenden & Butler, for defendant.

The instructions taken together were correct. *Bullard* v. *Hinkley*, 6 Maine, 289.

The previous attachment of the plaintiff, in Feb., 1861, did not interfere with defendant's rights under his assignment of April, 1861, because, (1,) the record title of the mortgage was in Francis Low, and defendant was not bound to take notice of an attachment against J. P. Hall subsequent to the date of the mortgage; and, (2,) the plaintiff not having become a creditor of J. P. Hall until his judgment, his levy, *as against defendant*, did not relate back to his attachment.

The opinion of the Court was drawn by

DAVIS, J.—By our Revised Statutes, c. 76, § 13, derived from the statutes and Province laws of Massachusetts, a levy may be made upon land fraudulently conveyed by a debtor. This applies to land of which the debtor had the legal title before the conveyance. And, by c. 81, § 28, all real estate liable to be thus taken in execution may be attached on mesne process. By such attachment, the creditor acquires a lien upon the property, which is preserved and

perfected by the levy, so as to be good against any intervening conveyance. Such a lien, by attachment, may be secured as well in actions on the case for *torts*, as in suits upon contracts. *Lowry* v. *Pinson*, 2 Bailey, 324. And the plaintiff in such an action becomes a *creditor* when he recovers his judgment.

By the statute 13 Eliz., c. 5, all such conveyances are void, but "*only* as against that person or persons, his or their heirs, successors, executors, administrators and assigns, whose actions, suits, debts, accounts, damages, penalties, &c., *are*, *shall*, or *might be* in any way thereby *disturbed*, *hindered*, *delayed*, or *defrauded*."

By the statute 27 Eliz., c. 4, all *voluntary* conveyances, whether fraudulent or not, were made void as to subsequent *purchasers*, without notice.

Though these statutes were entirely distinct, they have often been connected, for the reason that a *voluntary* conveyance, by an insolvent debtor, is also presumed to have been *fraudulent*, with the reservation of a secret trust for his own benefit. Such a conveyance being void for one reason as to one class of persons, and void for another reason as to another class, some confusion has resulted in the judicial decisions.

Under the first statute, a *fraudulent* deed, whether voluntary, or for a good consideration, is void as to *all persons liable or intended to be injured thereby*. Such is the obvious meaning of the language. But the fact that it is *voluntary* is not, therefore, immaterial. It may affect the case in two very important particulars.

1. Upon the question of intent to defraud *any person*, it may be decisive. For, often, the most conclusive evidence of fraud, if the grantor was in debt, is the fact that he received no consideration for his deed.

2. And it may be quite as decisive upon the question as to *what persons* were liable or intended to be defrauded. For if it was both *fraudulent* and *voluntary*, so as to raise the presumption of a secret trust, it is a *continuing fraud*,

affecting those who subsequently give credit to the grantor. He not only *puts* his property beyond the reach of *existing* creditors; he *keeps* it beyond the reach of *subsequent* creditors. His conveyance operates, and must be presumed to have been *intended* to operate, to the injury and delay of both classes of creditors alike. It is therefore void as to both alike. *Carlisle* v. *Rich*, 8 N. H., 44; *Parkman* v. *Welch*, 19 Pick., 231.

A debtor may make a fraudulent conveyance for a good and sufficient consideration, and afterwards, with the proceeds of the sale, pay or adjust all claims against him. Such cases are not infrequent. It is not easy to perceive how such a conveyance could operate to the injury of *subsequent* creditors; or that it could have been made *for that purpose*. That such must have been the purpose, or effect, in order to render the deed void *as to them*, seems to be clear. *Howe* v. *Ward*, 4 Greenl., 195.

The same conclusion would seem to result, not only from the language of the statute, but from the construction given to it, in that class of cases where debtors have conveyed property not liable to attachment or execution. Such conveyances, though made with a fraudulent intent, are held to be valid, for the reason that creditors cannot be injured by them. 1 Story's Eq., §§ 366–369; *Legro* v. *Lord*, 10 Maine, 161.

In the case at bar, the conveyance was a mortgage, and was made June 24, 1851. Nearly ten years afterwards, Feb. 9, 1861, the plaintiff commenced his action on the case for slander, and attached the premises as the property of the mortgager. The mortgage was assigned to the defendant, April 4, 1861; and the mortgager released the right of redemption to the defendant, April 15, 1861. The plaintiff recovered judgment against the mortgager, May 22, 1862, and extended his execution on the premises, June 5th, 1862. By his attachment, his rights are superior to those of the defendant under his release of the equity of redemption from the mortgager, but inferior to the rights of defendant as as-

signee of the mortgage, unless the mortgage was fraudulent and void as to him. He could not be considered a creditor until long after the mortgage had been given. And the jury were instructed "that, if the mortgage was fraudulent, it could only be avoided on that ground by the then existing creditors of the grantor." The question, whether subsequent creditors were intended or liable to be injured by it, was not submitted to the jury, or alluded to as having any bearing on the case. A fraudulent *mortgage* is almost necessarily a continuing fraud, affecting subsequent as well as prior creditors. But it is not correct to say of any fraudulent conveyance, as a rule of *law*, that it can only be avoided for that reason by "*existing* creditors." The question is one of *fact*. If it is valid as to *subsequent* creditors, in any case, it is on the ground that *they* were not intended or liable to be delayed, disturbed, hindered, or defrauded by it; and the jury should be so instructed. The instructions were therefore erroneous.

The exceptions must be sustained, and a new trial granted.

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

CALVIN EDWARDS *& als. versus* STEPHEN GALE.

Where the defendant leased a lot of land to the plaintiffs for a specified annual ground rent, and therein covenanted to erect a building thereon within a stated time, and to let to them the building at a specified rent; and the lease further provided that, "if the said" defendant "shall decline to erect said building" within the time mentioned, "it is agreed that the plaintiffs "*may* go forward and erect the same," &c.; — *Held*, that, in an action of covenant broken for not erecting the building, the language, "if the said" defendant "shall decline to erect said building," must be construed to mean — if the said defendant shall violate his contract, then the plaintiffs may proceed and perform it for him.

This permission may be relied upon only in the reduction of damages, and not for such purpose if the defendant has thrown any obstacles in the way of a reasonable performance of the plaintiffs' stipulated rights.

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

COVENANT BROKEN. The action was upon the following covenant in a lease, dated June 2, 1854, given by the defendant and his wife, in her right, to the plaintiffs: — "And the said Gales agree, during the year 1855, to build upon said lot, [a lot described in the lease,] a brick building, four stories high, with the same fitted for two stores underneath; and the said Gales agree to keep an accurate account of the expense of building said block of stores, and exhibit the same to the said Calvin Edwards & Co., and to let them to the said Calvin Edwards & Co., until the first day of Jan., 1866."

The lease also contained the following clause: — "And if the said Gales shall decline to build said block of stores in the year 1855, it is agreed, between the parties, that the said Calvin Edwards & Co. *may go forward and build said block* with two stores underneath, in the year 1855, and keep an exact account of the expense of said building and exhibit — the said Gales, and then the said Calvin Edwards & Co. may occupy and have the use of said building until the first day of January, 1866, by paying the ground rent above."

It appeared that the defendant did not erect any building upon the lot described.

The presiding Judge directed a nonsuit, and the defendant excepted.

John Rand, for the defendant, contended that the defendant did not bind himself *absolutely* to erect the building.

If he declined to erect the building, he was not to pay damages, but the plaintiffs might go forward and build, &c. It was optional with the defendant whether to build or not.

J. C. Woodman & M. B. Butler, for the plaintiffs.

The opinion of the Court was drawn by

CUTTING, J. — The plaintiffs seek to recover damages for the non-performance of a covenant in the lease to them from the defendant and his wife, in her right, of a certain lot of land situated in Portland, on Middle street, being forty feet in front and ninety feet deep, dated June 2d, 1854.

The breach all egedis of the following covenant, viz. : — "And the said Gales agree, during the year 1855, to build upon said lot a brick building, four stories high, with the same fitted for two stores underneath; and the said Gales agree to keep an accurate account of the expense of building said block of stores, and exhibit the same to said Calvin Edwards & Co., and to let them to the said Calvin Edwards & Co., until the first day of January, 1866."

It requires no citation of authorities to show that this is an absolute, unconditional and independent covenant, which, having been broken, authorized the recovery of damages, unless the defendant can invoke some other part of the lease which will justify the breach. This he attempts to do, and refers to the following subsequent clause, viz. : —

"And if the said Gales shall decline to build said block of stores in the year 1855, it is agreed, between the parties, that the said Calvin Edwards & Co. may go forward and build said block with two stores underneath, in the year 1855, and keep an exact account of the expense of said building and exhibit — the said Gales, and then the said Calvin Edwards & Co. may occupy and have the use of said building until the first day of January, 1865, by paying the ground rent above."

We think this stipulation is not a full defence to this action. It was manifestly inserted for the benefit of the lessees. *They may go forward*, not, *shall* go forward. The language, "if the said Gales shall decline to build said block," must be construed to mean — if the said Gales shall violate their covenant, then the plaintiffs may proceed and perform it for them, which permission can be relied upon only in the re-

duction of damages, and not even for such purpose, provided it shall appear, on another trial, that the defendant has thrown any obstacles in the way of a reasonable performance of the plaintiffs' stipulated rights, which will be a question of fact for the jury to settle.

Nonsuit taken off and the action to stand for trial.

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

The following views were submitted by

DAVIS, J. — I am strongly inclined to the opinion, taking the whole agreement together, that it was the intention of the parties that it should be at the option of the defendants whether to build, or to "decline," and let the plaintiffs build. But if so, there were still conditions to be performed by defendants, which they could not perform after conveying the land; and the plaintiffs, even if not actually prevented, could not "go forward and build" with any safety. The defendants, therefore, not only *declined* to build; they, by their conveyance, prevented the plaintiffs from building. Whatever construction, therefore, is given to the agreement, the facts proved show a breach of it, for which the damages recoverable would be the same. I therefore concur in the conclusion of the opinion.

STEPHEN GALE *& ux. versus* CALVIN EDWARDS *& als.*

Where the reversionary interest to land leased is conveyed by the owner, and, before the first quarter's rent is due under the lease, without any reservation to the grantor in his deed, expressed in language fit and appropriate, the rent will pass by the deed.

Where the deed conveying such reversion, declares the premises are "subject to the lease," describing it, and the grantor covenants to defend against all lawful claims, &c., "except said lessees or assigns;" — these words are only intended as a protection against the general covenants of warranty, against the claims and demands of the lessees, and not the grantor's claims against them.

Gale *v.* Edwards.

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

COVENANT BROKEN.

This action was to recover rent under a lease dated June 2, 1854, to take effect April 22, 1855, in which the defendants covenanted to pay "the annual ground rent of $240, payable quarterly."

The defendants put in a copy of a deed of the premises from the plaintiffs to John M. Wood, dated May 15, 1855, in which, immediately following a description of the premises, occurred the following clause:—

"Subject also to a certain indenture of lease of said premises, made by the grantors herein named to Calvin Edwards, William G. Twombly, and Henry S. Edwards, on the second day of June, 1854, and recorded in said registry, book 250, pages 496 and 497, to which reference is had."

The deed contained a covenant that the premises "were free of all incumbrances *except that above mentioned;*" and that the grantors would warrant and defend the premises "against the lawful claims and demands of all persons, *except said lessees or assigns.*"

The view taken by the Court renders a report of the exceptions as to admissibility of evidence unnecessary.

Rand, for the plaintiffs.

J. C. Woodman & M. B. Butler, for the defendants.

The opinion of the Court was drawn by

CUTTING, J.—We are satisfied with the correctness of the verdict, as this case is presented on the documentary evidence, which renders a consideration of the exceptions, as to the admissibility of the parol evidence, immaterial.

The lease introduced by the plaintiffs from them to the defendants bears date June 2d, 1854, to take effect on April 22d, 1855. The deed introduced by the defendants from the plaintiffs to John M. Wood, conveying the same leased premises, is dated May 15th, 1855, only twenty-three days after the lease became operative.

This grant to Wood conveyed to him a reversionary interest in fee, and the rent was incident to such reversion and passed with it. The numerous authorities cited by the defendants' counsel fully sustain this proposition. The legal claim for rent was then transferred to Wood, who, in his own name, alone, could maintain an action for it, unless it was reserved to the grantors in their deed, in language fit and appropriate for such a reservation; none such was inserted, but words only intended as a protection against the general covenants of warranty, against "the claims and demands of the lessees," and not the grantor's claims against them.

Exceptions not sustained.

Judgment on the verdict.

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

ALFRED LEMONT *& als. versus* IVORY LORD *& als.*

The master of a ship is *primarily* the agent and representative of its owners; but, in his character of master, he has originally a latent potentiality of other powers which subsequent events may call into exercise.

If his voyage is prosperous and free from disaster, he has no right to intermeddle with the cargo, on the voyage or on its safe termination; but in case of disaster, peril or stress of weather, he may be called upon, in the absence of all other parties, to act from necessity as the agent of each and all persons interested in the vessel, cargo and insurance.

When a vessel is lost by the perils of the sea, or it puts into a port in distress, and is condemned as unseaworthy, the ship owner is not bound by the terms of the charter party which excepts the "perils of the sea," to forward the goods saved; but the ship owner, or the master, as his agent, *may*, and it is his *duty* to tranship them, if thereby anything can be saved as freight to the owner.

If this cannot be secured, the master cannot bind his owners to pay to the owner of the second ship, a rate in excess of the original freight.

The master *may*, and it is his duty to act as agent or supercargo of the owners of the cargo, when he can send the cargo forward at a rate of freight which, under the circumstances, reasonably promised to be for the interest

of the owner of the cargo. In so doing, he acts as agent of the shippers, and not of the owners of the ship.

Where a ship was condemned at an intermediate port, and the master in his own name as master, in the absence of all others interested, after publicly advertising for tenders to forward the cargo, transhipped it at a rate in excess of the original freight, (that being the lowest tender,) to the original consignees; and, upon arrival at the port of destination, the consignees, refusing to receive the cargo transhipped, the master of the second ship, after due preliminaries, lawfully sold the cargo, the net proceeds of which were less than the amount of freight due; — *Held*, that the owners of the second ship could not recover of the owners of the first, the balance of freight thus stipulated, either on the bill of lading or on an implied assumpsit.

ON FACTS AGREED.

ASSUMPSIT.

The facts sufficiently appear in the opinion of the Court.

P. Barnes, for the plaintiffs, substantially argued as follows: —

I. The carrier, who is unable to obtain his freight, on right delivery of cargo, or offer to deliver, may recover it by suit against the party who contracted for the carriage, the shipper or consignor. *Blanchard* v. *Page*, 8 Gray, 281.

This case, as reported above, is to be distinguished from the same case as cited in 1 Parsons' Maritime Law, 222, note. That citation appears to be from the *first* decision, which was afterwards reversed, by the same Court, on rehearing, as stated in the report by Gray, *ubi supra*.

The point stated by Parsons in the same note, that, in the case supposed, the shipper or consignor can be sued, only when he is the owner of the goods, (which proposition is against the authority of the final decision in *Blanchard* v. *Page*,) is also disposed of by the fact, that, in the case at bar, the owners of the Waban were bailees — special owners — of the cargo, which the Lemont was engaged to carry, and so within the rule stated by Parsons.

II. The question in the present case is, who was the shipper in the Lemont, of the coal carried by that vessel, from the Mauritius to Rangoon? Did the master of the Waban,

in making the contract with Anderson, act as the servant of the owners of the Waban, or only as agent for the owner of the cargo?

This involves the question — when a ship is unable, by reason of sea damage, to complete her voyage, what is the duty of the master, in respect to forwarding the cargo in another vessel?

To inquire, however, what is the duty of the *master?* is the same thing as to inquire, what is the duty and liability of the *owner* of the disabled ship? "No distinction can be made between the two." "The rule will be the same, whether the transhipment be made by the ship owner or the master." Lord DENMAN, in *Shipton* v. *Thornton*, 9 Ad. & El., 314.

By some systems of law, and by some jurists, it has been held, that the master, or his owner, has the *right* to tranship, if he is able and chooses to do so, to earn his own freight. Others hold that it is a *duty*, which must be performed, when it can be, reasonably, and that, if extra expense arises from the hire of the substituted vessel, it is to be borne, eventually, by the owner of the cargo, or his insurer.

The different doctrines are stated, much in the same manner, in Marshall on Ins., 378, note; 3 Kent's Com., Lect. 47; *Shipton* v. *Thornton*, *ubi supra*; 1 Parsons' Mar. Law, 161, note, resulting in this: —

The ancient systems of law, prior to the larger development of modern civilization and commerce, held only (so far as is known) that the master had the right or power to tranship.

The French law, by the terms of its positive codes, and the authority of its highest jurists, makes it the duty of the master to tranship, if he can.

The English law (it is said) has not decided, whether it is a duty, or only a right.

The American law agrees with the French.

III. Although the French cases are but systems of positive law, the enactments of legislators, yet it is well shown

in the prefaces, both of Emerigon and of Valin, how wisely and firmly the ordonnance of 1681 was planted upon the judgments of the Parliaments and Admiralties, the customs of merchants, and the consultations of learned men; giving it, in fact, a judicial character, and making it worthy of regard as a basis of universal maritime law. In like manner, Chancellor Kent, in Lectures 42 and 48, finds, in both these codes, foundation and support for the settled American law of shipping and insurance. Valin, tom. I., pref. iii., pp. 651–653; Emerigon, tom. I., pref. xv., pp. 423 & *seq.*

The English jurists, however they have delayed to admit, into the law of shipping, the *duty* of the master to hire another vessel, have not hesitated to hold, in their doctrine of insurance, all that the French codes require on this head, as a rule of the general maritime law.

Valin and Pothier are said to have opposed the rule of the ordonnance respecting the hire of another ship. Rather, it may be said, they oppose the interpretation which they themselves put upon the article in question. Pothier, tom. II., p. 394.

The ancient systems of law, and Pothier and Valin, in like manner, so far as appears in their criticism upon Article XI., differing from Emerigon, left the cargo to perish, or exposed it to a destructive sale, at the place or port of distress, if the master, in the absence of the freighter, did not choose to gain his freight by sending it on.

IV. Pressed by such consequences, the modern commercial law has sought to establish rules for the preservation of the cargo, and the protection of the freighter's interests. At some times, and in the terms employed by some authorities, these rules are stated as though a theoretical doctrine had been *invented* (the expression is not used offensively) for the protection of cargo interests.

Lord DENMAN, in the case cited above, assuming a transhipment to be at a higher rate than the original, states, as the expression of the master's power, "another principle *will be introduced*, that of agency for the merchant."

Kent says, 3 Com., Lect. 47, "the character of agent of the owner of the cargo is *cast* upon him [the master] from the necessity of the case."

Lord STOWELL, in the *Gratitude*, 3 C. Robinson's Adm., 240, says, "the authority of agent is necessarily *devolved* upon him;" and, in another place, "the character of agent and supercargo is *forced* upon him;" and again, "the character of agent, respecting the cargo, is *thrown* upon the master."

These expressions may seem to imply that something *new* is brought forward at the place of distress, invented or imported, to relieve a difficulty, and to guard against sacrifice of the interests of the cargo owner.

If such terms are to be interpreted as meaning that, in any case, even that of transhipment at a higher rate, the master can act, only and exclusively, for the owner of the cargo, and that his character as servant of the ship owner is divested and extinct, then the defence in the case at bar, is made out. But it is to be seen whether they are not to be interpreted consistently with the principle that the duty to preserve and forward the cargo rests upon the ship owner, to be performed by himself, or by his servant, the master, as an implied, but actual, part of his original duty as a carrier.

Certainly, Lord DENMAN declares, that whatever duty rests upon the master, rests also upon the owner of the original ship, even though the new freight is in excess of the first.

And Sergeant SHEE, in his additions to Abbott, after stating that it is *either* the *duty* or the *right* of the *ship owner* to tranship, adds, (p. 369.) "If it be the former, it must be so *in virtue of his original contract.*"

And this is said in immediate connection with the quotation from Lord DENMAN last referred to.

V. But the late case of *Thwing* v. *Washington Insurance Company*, 10 Gray, 443, an *insurance* case decided in 1858, not published till 1864, contains some very strong state-

ments to the effect that, where the transhipment can be made only at a rate in excess of the original freight, the master cannot bind his owner by a contract for such transhipment.

It was the case of a guano ship, which, immediately upon leaving the Chinchas, became disabled by sea peril. The cargo was forwarded to its destination by another vessel, at the same rate of freight. The owner of the original ship sued the insurer of his freight, for a total loss.

The actual decision of the only issue in the cause was, in effect, that freight, which is lost in the very act of earning it, may be recovered from the insurer.

The counsel for the defence contended that here was no total loss of freight, but that the cargo was, in fact, carried safely, and freight was earned. In response to such argument, the opinion, by BIGELOW, J., contains such expressions as these: —

"We think it may safely be said, that whenever, and as soon as, the owner of a vessel, by reason of the perils of the sea, *ceases to have any interest*, either in the ship or freight, so that nothing of either can be saved or protected, by any act of the master, *his authority to bind the owner is at an end*. The subject matter of the master's agency for the owner of the ship has, in such case, *ceased to exist*, and his *power to bind his principal ceases* with it." p. 460.

It is questionable, whether these propositions, found, as they are, in a mere insurance cause, have any higher authority than that of *dicta*, upon an issue arising under the general law of shipping. The master may not have had such power as to bar his owner from recovering insurance on freight, and yet, upon the same facts, he may have been empowered to bind him to the owner of the second ship.

VI. But the expressions quoted from the opinion of BIGELOW, J., if pressed, in the case at bar, appear to be open to these objections.

First. They are unique and unprecedented. So far as investigations have been made, on the plaintiffs' side, no text-

writer, code, or Judge has ever before declared, that in any predicament, while cargo subsists in charge of the master, does the master "*cease*" to be the servant of the ship owner, in respect to such cargo. The absolute and peremptory divesting the master of his agency for his owner, and vesting him with a separate, independent and exclusive agency for the owner of cargo, is a novelty in the law of shipping. "Double agency," "agency for both parties," "agent for all concerned,"—these and such expressions are found in all the books; so also the idea of an *added* agency, or enlarged power, "*cast*," "*thrown*," "*devolved*" upon the master, is familiar enough, as the quotations from Lord STOWELL, Lord DENMAN, Chancellor KENT show. But these expressions by no means include the idea, that all agency for the ship owner in respect to the cargo is *cast off*, *terminated* and *extinct*. And, as Lord DENMAN declares and deliberately repeats, that, in the extreme predicament of the case at bar, the same duty, whatever it is, rests both upon master and owner, and, as the owner usually cannot act, and is never expected to act, otherwise than through the master, Lord DENMAN'S authority appears to be in direct opposition to the *dicta* now under comment.

Second. That a rule of conduct made up from such expressions, would be a rule, measuring the duty of the original ship owner, by a simple balancing of his own profit in the case, and so not unfrequently placing him, and his servant, the master, under a most inexpedient bias against the interest of the freighter.

If it is desirable for the first ship owner to be freed from further responsibility for the cargo, and so placed that no person can "*bind*" him to any further duty about it, would there be much difficulty, at a remote port, in so shaping arrangements for the new freight, by himself, or by the master, usually in sympathy with him, often a co-partowner, as to divest himself of all care or concern for its preservation?

Third. Such a rule would be essentially an arbitrary one. Strictly and narrowly stated—and yet not too strict-

ly, according to these *dicta*, it would be a rule of mere comparison with a precise sum. In *Thwing* v. *Washington Ins. Co.*, the new freight was exactly the same as the first. In the case at bar, it was one-eighth greater. In other cases, a dollar more, or a shilling more, or less, would turn the balance between responsibility and immunity.

But the general law, and the jurisprudence of tribunals never originate arbitrary rules. Statutes do this; usage and the custom of merchants may do it, and, when customs are adopted by the courts, they become a part of the law. But all the benches of Judges in all the commercial world cannot make an arbitrary rule.

Fourth. Since the rule, if any, must be, that, in case the new freight is less than the first, the master *can* "bind" his owner by contract to send it forward, and must do so—other things being equal—then the rule is self-abrogated, so far as it depends upon the question of "interest" or advantage to the ship owner. For, in many cases, readily supposable, it may be greatly for *his* mere advantage to "cease" to have any further liability for the cargo, even though it could be sent on, for something less than the original freight. As between him, and his underwriter on freight, he owes the latter a duty to save what he can; and there are methods in the law, by which the underwriter, if proper steps are taken, may have the benefit of even a small saving. But freight is not always insured, and the master is not presumed to know, and often does not know, whether it is or not; so that the rule of his action, at the place of distress, is not to be framed merely upon that element of the case. And what a rule it would be, to be engrafted upon the general maritime law, that a ship owner is bound to save, for the insurer of freight, a hundred dollars, or any little sum, which can be gained in the transhipment, but may leave a whole cargo to perish, so far as he is concerned, rather than incur a primary and contingent liability — to be compensated for, eventually, by transhipping for that much

more than the first freight? Does not the supposed rule forget the cargo owner, and the insurers of cargo?

VII. Recurring to the question of the present case:—Is it the duty of the ship owner, by himself or his servant, the master, to make engagements for sending on the cargo, when it can be done *reasonably?* And is this duty a part of his original contract of carriage?

If so, then, when he hires the substituted ship, it is that he may fulfil this part of *his own* duty, and, by saving the cargo for its owner, may discharge his own liability for its conservation. And when, to effect this, he enters into contract, by himself or his servant, with parties whom he finds at the place or port of distress, to assist him in performing his own duty, he secures a benefit to himself, on which he is liable, primarily, as on any other contract, made upon like consideration. The parties, who so assist him, may look to him for their hire.

These parties are not merely the master and owners of the substituted vessel, but all concerned in the acts of preservation,—wreckers, lightermen, porters, teamsters, warehousemen and the like.

VIII. This duty of the master, to forward cargo by another vessel, is broadly enough stated by English Common Law Courts of the highest authority, and by their approved text writers,—and that without any such limitation of *gain* to the owner of the disabled vessel.

It would seem that the English law has hitherto adopted the principle, only as a rule of *insurance*, and cases have not yet arisen, requiring Courts to assert it as a part of the general law of shipping. Hence, in cases under the latter head, involving allusions to the principle, but not requiring its absolute assertion, they hesitate, (or *some* of them do,) while in insurance cases and discussions, their statements are as unqualified as the French code; nor has any case or *dictum* been found, in which the English courts or jurists hold that, under any circumstances, this duty of the master

is one which he performs *merely* as agent for the owner of the *cargo*.

Thus, *Marshall* on *Insurance*, (1802,) p. 378, under the title, "Of Changing the Ship," says:—

"If, in the course of the voyage, the ship be disabled, the captain *ought* to hire another vessel for the transport of his goods, and proceed on the voyage, if, under all the circumstances of his situation, it be for the interest *of all concerned* that he should do so."

He cites *Plantamour* v. *Staples*, Douglas, 219, an insurance case, decided by Lord MANSFIELD and his associates in 1783, where, on a round voyage, two ships had been lost, and two others employed. No question arose about rates of freight, and, in fact, much of the case went upon admissions; but, as to what was controverted, Lord MANSFIELD said—"That being done, which was the best that could be done, the underwriters are liable."

And, in the same case, BULLER, J., said, more explicitly, "In *Mills* v. *Fletcher*, it was decided that *the captain has a general power*, and is *bound in duty* to do the best *for all concerned;* and what was done in this case, was manifestly for their interest."

In *Mills* v. *Fletcher*, 1 Douglas, 230, also an insurance case, (decided in 1779,) Lord MANSFIELD "told the jury that, if they were satisfied the captain had done what was best *for the benefit of all concerned*, they must find as for a total loss."

And afterwards, *in banc*, his Lordship said, "the captain had an implied *authority for both sides*, to do what was right and fit to be done, as none of them had agents in the place." ——"I left it for the jury to determine whether what the captain had done was *for the benefit of all concerned*."

And, in *Cook* v. *Jennings*, 7 D. & E., 381, (1797,) which was on a charter party, LAWRENCE, J., did not hesitate to say—"When a ship is driven on shore, it is the *duty* of the master either to repair his ship, or procure another, and,

having performed his voyage, he is then entitled to his freight."

Plainly, it is the conservation of the cargo which is the foundation of those rules of the modern commercial law, which declare the duty of the ship owner or ship master to forward by another ship, or do any other reasonable acts which the safety of the cargo requires. And hence, when, in the development of modern commerce, there had sprung up the interest of underwriters, it becomes plain why the modern maritime law, amongst other things to be done for the preservation of the cargo, demands, as a *duty*, that when the first ship is disabled the goods shall be sent forward in another ship, if it can be done reasonably; and that too, without stopping to measure this duty merely by the minor incident of a small gain to the first ship owner, or loss to the cargo owner, in the hire to be paid for the new service.

Hence it is that the French code of 1681, so decisively provides for the safety of the cargo by transhipment, while the Rhodian law, with other early systems, left it to perish.

Had the English law of insurance been reduced to scientific system, as early as the French, there can be little doubt that the doctrine, now found so abundantly in the English insurance cases, would long since have been admitted into their general jurisprudence, as a part of the law of shipping. In fact, the French code was a law of insurance as well as of shipping; while it was more than a hundred years later, before the principles of the English law of insurance were "judiciously collected." Kent's Com., Lect. 48.

IX. Chancellor KENT, stating the American law, says, (Lect. 47,) "In this country, we have followed the doctrine of Emerigon, and the spirit of the English cases."

"The spirit of the English cases" plainly means, that although the jurisprudence of England has delayed to declare, as a part of the general law of shipping, that transhipment is a duty in any case, yet the English *insurance cases*, from Lord MANSFIELD down, if not before, fully hold that the

master must do the best he can, when his ship is disabled, for the benefit of *all concerned.*

His reference to Emerigon brings us to the highest scientific authority, and, probably, shows the original of all the expressions about the master's "agency for the owner of the cargo."

Emerigon's comprehension of the whole maritime law, in the spirit of the ordonnance, enabled him to use accurately, whether discussing questions of insurance or of shipping, the principles common to both. Hence, in his chapter on change of ship, he takes issue with Valin and Pothier, who had discussed Article XI., not as a subject of insurance, but of freight, and declares in terms, which it is impossible to misunderstand, —

"But, if the accident has happened in a far country, so that the freighters cannot give their order, neither by themselves, nor by their correspondent, it is not doubtful that the captain, who is *not less* the agent of the freighters, than of the ship owners, ought to watch for the preservation of the merchandize, and do all that which the circumstances demand for the best."

"*His quality of captain makes him master*, and confers upon him the care of all that which concerns the ship and the cargo."

"He is then obliged to do that which it is to be presumed that the freighters would, if they were present."

"He would be, by consequence, very blamable, if, causing a part of the goods saved to be sold, for his freight so far, he should leave the rest in the far country, while he might have been able to forward the whole, by another ship, to the place of destination."

These expressions of Emerigon certainly do not imply that the master's authority is a novelty, specially originating at the moment of distress. "*Not less* the agent of freighters than of ship owners," imports an intrinsic permanent charge of the interests of both. And, it is not the accident, not the excess of new freight, that require him to

act for the cargo owner, but his "*quality of captain*," his official character, as servant to the ship owner. It is *that* which "confers upon him the care," &c.

Nor is there any color to the idea that, in any contingency, does the master "cease" to be the servant of the ship owner. Emerigon enters into no balancing of a gain to be made, or a loss to be suffered by transhipment, at a lower or a higher rate.

And yet he does not fail to observe and provide for the case that the new service may involve an increase of freight, and gives the ultimate solution of that case, by casting the additional charge upon the insurers of the cargo. These are his words:—

"And it is much better that, in such a case, the captain should be, on the one part, obliged to hire another ship, and that, on the other, the increase of freight should be for the account of the merchandize and the insurers."

Is there not, therefore, a common principle, with which the various expressions used by Emerigon, Mansfield, Buller, Stowell, Kent and Denman, are all plainly consistent?

Concede, if technically desirable, that the master's power and duty, with respect to cargo, and as to all but its simple carriage, are merely dormant while his ship is sound, and that they come into active exercise only when the disabling of his vessel requires something new to be done, for the safety of the goods, ———— do not all these jurists agree that then the master is bound to do whatever the exigency *reasonably* requires? And as to the expressions that an agency for the owner of the cargo is then "forced," "cast," "thrown," "devolved" upon him, (expressions not found in Emerigon,) do they mean anything more than that the exigency "forces" him to use the powers, which are inherent in his "quality as captain?"—that, at the time and place of distress, the master's powers are enlarged, but his *quality* is not altered?

X. "The best for all concerned." There are always two original parties concerned in what is done at a port of dis-

tress, the ship owner and the freighter. There may also be insurers of ship, of cargo, and of freight.

The master's agency for the ship owner is original, direct and express, by actual contract of service. The duty, which he owes to the others, or any of them, although it may be cotemporaneous, is indirect, implied, contingent, and often entirely uncertain, in the sense that he does not know, and cannot inform others, who is the owner of the cargo, nor whether there are insurers or not.

Amongst these parties, so concerned in the original shipment, he is agent for them all. But the new parties, strangers, whose assistance he implores in distress, know him only as the master of the ship, and servant of the ship owners. They have no means of knowing him in any other quality.

The ship owner is always known. The owner of cargo is not known except by hearsay; consignor and consignee are named in the bill of lading, but both may be nominal and formal.

The master's judgment, at the port of distress, may often be erroneous, as to what the interest of one or another of the original parties requires. He may suppose that he is securing a benefit for one, or leaving a burden to be borne by another, but his judgment and his acts are subject to revision by those parties, or by the courts of law, deciding upon the issues they raise.

But the new parties, with whom he contracts for relief, are not to be involved in these outside implications and questions of relative interests. If they were to be hung up in suspense, until it should be settled in whose precise interest the master was acting in any particular engagement for relief, they would refuse to act, or demand their hire beforehand and, in either case, usually, the goods would perish.

In the case at bar, it does not appear that Anderson had any knowledge of the original rate of freight. He and his owners are wholly unaffected by any question of saving or loss to the owners of the Waban.

The new contract was made by tender. When Hartridge put out proposals, when the tender came to his hands, down to the last moment, he was servant of the ship owner, and so necessarily regarded by Anderson. When he *accepted* the tender, did his agency shift — *instanter* — Anderson ignorant both of the fact, and of the reason for it?

XI. The theory that the master is agent for all parties is not a rule which affects his relation to those giving assistance at the place of distress, nor one that makes his agency oscillate and shift between one original party and another, — not a rule, which, in any form of exigency, terminates and excludes, then and there, all right to act as the servant of his owner, and gives him, on the spot, a new, separate and independent service for freighter or insurer, — not a rule, which, by its uncertain aspect toward those invited to repair the accident, or furnish relief, would, in effect, repel them, and prevent relief; but a rule, which, recognizing the necessary enlargement of the master's power, when his ship is disabled, provides for the ultimate adjustment of the whole transaction between the original parties, when all is done and closed, and for distributing to each one of them, their several shares of benefit, expense and loss, according to their several interests, and according to the principles and tenor of their several contracts, whether of carriage or insurance.

Such must, undoubtedly, be the use of the rule intended by *Philips*, (2 Phil. Ins., § 1634,) quoted by BIGELOW, J., where, speaking of the motives of the master as being wholly on the side of one party, "he must be presumed *to have acted* in behalf of such party."

As a rule of insurance law, to be applied between original parties, after the acts done and finished, as unobjectionable as it is familiar, but not controlling the immediate parties to a contract for assistance to a disabled ship, charges incurred at a place of distress for the preservation of the cargo, must be paid to those who render the service, by those who primarily engage the service; but, in consonance with the

contract of insurance, they may, eventually, fall upon the insurer of the cargo or of freight, upon whose *ultimate* behalf the master shall be held "*to have acted.*"

XII. In fact, if the master's agency were to be limited, with respect to third parties, with whom he contracts for transhipment or other service, merely by interests and consequent motives, as between original parties, and if his duty were to be a shifting one, as these interests might "cease" or change, then, it would not be enough to say, in a case like the present, that the second carrier must look to the owner of the goods for his hire. *Non constat*, in any case, but that the freighter may have abandoned to insurers, and that his abandonment may have been accepted. Acceptance of abandonment passes all title, and "terminates" the interest of the freighter. It relates back to the date of the loss; the insurer takes *cum onere*, and is bound, eventually, to pay the bills. Is the second carrier to be repelled, first, in his suit against the ship owner, who employed him, because the interest of the latter had "ceased," and then to be cast a second time, in his suit against the freighter, because the latter had abandoned, and all *his* interest had "ceased" and gone over to the insurer? Rather, is not the second carrier to be paid by the party who employed him,—and the latter then to have his recourse over, in final adjustment, directly or indirectly, against the freighter or insurer, as their interests and liabilities may prove *to have been?*

In the case at bar, the plaintiffs are ignorant, and the case does not find, whether there was insurance on cargo or not. The extraordinary course pursued by the consignees may well raise a presumption that they *supposed* the interest of the cargo owner had "ceased," before we offered the coal at Rangoon, and the insurer may have acted upon the same supposition. The defendants are probably as ignorant as we are, who was the absolute "*owner*" of the coal, and whether it was insured or not. Are we to search through the British Isles and the British dependencies, to find out, first, to whom the coal really belonged?—and afterwards,

to begin another round of inquiry and suit, if, haply, we may find the insurer, and sustain a claim against him?

But the defendants have no such difficulty. They have an absolute contract under the hand of a known charterer, binding him to pay them, according to the legal principles of that contract, for delivery of the coal at Rangoon. It has been delivered. If they pay us, their recourse against the charterer is simple and perfect. Their suit would be sustained in the courts of every commercial country in the world. If the charterer was not the owner, he may then recur to his principal, whom he knows. The latter may then recur to his underwriter, if the cargo is insured.

And these successive demands may be sustained, after we are paid, not only for the unsatisfied balance of the original freight, but also for the excess of the new freight. All the authorities, from Emerigon down, so hold.

XIII. The practical solution of this case, on the plaintiffs hypothesis, shows that their doctrine does not tend to any hardship or injustice toward any party, and involves no rights or interests in any legal embarrassment.

The case relates solely to the 850 tons, on which there was due at Rangoon, at the original rate, £1700, and, by force of the new contract, £212.10s. additional, and no more.

Can there be any room for doubt that Hartridge, in deciding to send forward, at the small increase of twelve and a half per cent. on the original freight, such a cargo as coal, for the indispensable use of a steam navigation company, in that remote part of the world, decided reasonably and beneficially? The *apparent* undervaluing of his endeavors by those acting at Rangoon would have been easily enough explained, if it had been pertinent to the present question to put some other facts into the case.

The conduct of the consignees, if honest, is hardly to be accounted for, except upon their apprehension that, if they accepted the cargo, the charterer would be liable for both freights, or at least, for a heavy sum, as *pro rata* freight to

the Mauritius, besides the freight of the Lemont. Under such apprehensions, they may have thought themselves justified in throwing off the burden, to be borne by whom it might concern.

But such apprehension was a gross mistake. In no event could the owner of the cargo be charged with more than the original freight, and the *expense* of 5*s.* a ton for bringing it forward.

He has paid nothing. We received from the sale something more than one-half our due. It is not for the defendants to say that they do not choose to call on the charterer for the deficiency, for it is incontestably due them by our act and service. It is not for the charterer to say that it is a burden for him to pay it, for he has received, or might have received the equivalent commodity, by paying what he agreed to pay, and the small additional expense reasonably incurred for his benefit, and legally due from him.

If his agents have thrown away his opportunity to save his goods, it is a blunder or a wrong which he must bear.

If the defendants' freight was not insured, they are as if ship and cargo had sunk at sea. It is their own loss. If their freight was insured and the loss has been paid, their insurer can recover from the charterer, in their names, by the simplest right of subrogation.

XIV. A test of the plaintiffs' whole case is presented by the question, — Suppose that, upon a proper occasion for transhipment, the master should mistake in his judgment, and omit to tranship, when he might, — who answers for the error?

The solution is given explicitly by our latest and most scientific expositor of the maritime law.

"It is the duty of the master to tranship the goods, or send them on, even by land carriage, if he can with reasonable endeavors; if he fail to do this and a total loss ensues, this is a loss by the misconduct of the master, and if the insurers have insured against that they are answerable. But *the shippers have a right to look to the owners* for compensa-

tion for damage sustained by the wrongdoing of the master; and this right or claim passes to the insurer by abandonment." 2 Parsons' Mar. Law, 372.

Upon two points made by defendants, the plaintiffs reply.

1. As to the citation from 1 Phil. Ins., § 1462, and statements there made, that it is not the duty of the master to tranship "at the charge of his owner," &c., — they are propositions of insurance law, and, as such, are plainly correct, like the similar propositions under § 1634. That the master cannot so bind his owner, as that the latter must bear these expenses, *finally*, at his own charge, we admit; and the right of the ship owner to recover over against the freighter for these charges, and thereby to lay the foundation of claim against the insurer of the cargo, is a part of our case. We only claim that the ship owner is bound to us, in the first instance. The law, both of shipping and of insurance, provides for what shall fall thereon, between him and the other parties, in accordance with the doctrine of Philips, and all other authorities.

2. The contract with De Mattos was made in England, and the contract with Anderson was made, and was to be performed, within British dependencies. The question is not — certainly ought not to be — one of local law, and if it were, there is no such difference between the English and American law as to make these circumstances of any consequence. But the contract between the master of the two American ships was an American contract, if local at all. *Pope* v. *Nickerson*, 3 Story, 465.

Joseph Dane and *T. M. Hayes*, for the defendants.

The opinion of the Court was drawn by

KENT, J. — The plaintiffs claim to recover of the defendants, in an action of assumpsit, on an account annexed and with the usual money counts, for the carriage of coal from the Mauritius to Rangoon.

The case comes before us on an agreed statement of facts. The plaintiffs are the owners of the barque Alfred Le-

mont; the defendants were the owners of the ship Waban; both American vessels. The "Waban" having on board a cargo of coal, which had been laden in pursuance of the terms of a charter party, entered into at London, sailed on her voyage from Cardiff to Rangoon, where the coal was to be delivered to consignees named, at a freight of £2 per ton.

On the voyage, the ship met with disasters by the perils of the seas, and was so much injured before putting into Port Louis, or Mauritius, as to be wholly disabled from resuming and completing the voyage to Rangoon, and, upon survey, she was condemned. A part of the cargo had been jettisoned at sea, a part sold by the master at Port Louis for payment of his expenses, and the remainder, about 850 tons, had been put on shore. In this state of affairs, the plaintiffs' barque, the Lemont, arrived at the same port, and the master of the Waban stated to the master of the Lemont what the condition of his vessel was, and that he had discharged his cargo, and that perhaps he should want the Lemont to carry the coal to Rangoon; to which the master of the Lemont replied, expressing his readiness to take it, if terms could be agreed upon. Two days afterwards, after public notice calling for proposals, the master of the Lemont put in proposals, and his offer, being the lowest, was accepted. The rate of freight agreed upon was £2, 5 shillings; being five shillings per ton more than the rate on the original shipment for the whole voyage. The coal was taken on board and a bill of lading was signed by the master, which states that there had been "shipped, in good order and well conditioned, by S. A. Hartridge, master of ship Waban, in and upon the Alfred Lemont, 850 tons of coal; to be delivered, (perils of seas excepted,) to the same consignees named in the original charter party and bill of lading given by the Waban, at the same port of Rangoon. "Freight for said goods to be paid in cash on right delivery of the cargo, two pounds five shillings." The Lemont arrived safely at Rangoon. The consignees refused to receive

the coal. Thereupon the master of the Lemont, after proper proceedings, caused the coal to be sold at auction. The proceeds of the sale were not sufficient to pay the stipulated freight of two pounds five shillings.

This action is brought by the owners of the Lemont against the owners of the first ship, the Waban, to recover the balance of the freight, for conveying the coal from Port Louis to Rangoon.

The plaintiffs claim to maintain this action, on the ground that the defendants were the shippers of the goods on board the Lemont. There is nothing in the language of the bill of lading, signed by the master of the Lemont, which declares in terms by whom the freight was to be paid. It does not contain the condition, usually found in such bills of lading, after the designation of the consignees, "he or they paying freight for the same." But it has been determined that the shipper named in the bill of lading is liable primarily for the freight, although he does not own the goods, and although there is no express stipulation on the part of the shipper to pay freight. His liability results from having engaged the ship owner to take on board and carry the goods at his instance. *Blanchard* v. *Page*, 8 Gray, 290; *Worster* v. *Tarr*, 8 Allen, 270. If, therefore, the defendants were the actual shippers, by themselves or their legally authorized agent, they may be held to pay the stipulated freight.

Were they such shippers?

The goods, as declared in the bill of lading, were "shipped by Hartridge, master of the Waban." The contract was clearly made by him. The case finds that Hartridge "acquainted the master of the Lemont with the condition of his vessel," and informed him that he had landed his cargo. The master of the Lemont then knew that he was acting with the master of a vessel, which had in effect perished by the perils of the sea, and could not be repaired. There is no evidence, beyond these facts, that the master contracted for the carriage of these goods in the name or on behalf of

the owners of the ship. Nothing appears to have been said or understood, between the two masters, as to the capacity in which he acted, whether as agent for the owners of the cargo or of the ship. He put the coal on board at a freight stipulated. The plaintiffs contend that the law fixes the liability of the defendants, from the fact that the master of the disabled vessel thus placed the goods on board, and that he must be held as rightfully representing them in the transaction as their agent.

What, then, are the rights, duties and obligations of the owners of a vessel, which has, by the perils of the sea, become totally disabled from resuming and completing the original voyage, as to the transhipment and forwarding of the cargo to the port of destination?

It is not contended that the Waban could have been repaired within a reasonable time, or at a reasonable expense. She was a vessel lost by the perils of the sea.

The first question is, whether the law requires that the owners of the vessel, *by virtue of the charter party or bill of lading*, should, under all circumstances, forward the cargo in such case, as part of their original undertaking. This, clearly, is not according to the terms of the charter party, nor does it result from the nature of such maritime contract. The agreement is to take on board the vessel named, the goods, and to carry and deliver the same at the port of discharge, — "the perils, dangers and accidents of the seas, rivers and navigation, during the voyage, always mutually excepted." The perils of the seas, did, in this case, prevent the prosecution of the voyage.

Emerigon, c. 12, § 16, says, — "the perils of the sea is present, whenever the vessel has been placed out of a state fit for navigation, whether by tempest or stranding." "The right to abandon, as for a total loss, exists when the ship, for all useful purposes of the voyage, is gone from the control of the owner." 3 Kent's Com., 321; *Peele* v. *Ins. Co.*, 3 Mason, 27.

The ship owner is absolved from his contract to carry, if

prevented by the perils of the seas. *Benson* v. *Duncan*, 3 Ex. Rep., (Welsby & Hartstone,) 655; 3 Kent's Com., 216. It follows that, if sued for non-delivering under the contract of affreightment, he may reply that he was prevented from so doing by the perils of the sea, which were expressly provided for, and in terms made a sufficient excuse for non-performance. We then have the case where there is no legal obligation, *under the contract*, on the part of the ship owners, to tranship and carry forward the goods, to fulfil their obligation.

But is the cargo to be abandoned and left to perish, without any care or attempt to forward it to the port originally designated by the parties? Does no duty devolve upon the ship owner or the master?

If both the ship owner and the owner of the cargo, or the authorized agents of each, should happen to be at the port of disaster, in a case like this, could the owner of the cargo require, as matter of right and duty, that the ship owner should obtain and employ another ship at a higher rate of freight than that agreed upon for the entire voyage? All the writers and authorities agree that no such claim could be sustained, because the original contract being ended, and both parties being present to look after their rights and property, there was no unlooked for emergency, which forced upon any person or party, from necessity, a care or agency in respect to the goods. Emerigon so states the rule, c. 12, § 16.

The case at bar, however, is one where neither party is present, and the master of the ship is the only person who is in a position to look after the interests of all parties concerned. What are his duties and powers, and whom can he or does he bind by his acts or contracts? His ship is lost, but the cargo remains, discharged from the ship and in a state fit for re-shipment. This condition of things, of course, has not been uncommon, since the days of the earliest navigators, and has called the attention of the earliest writers on the law of the seas.

Emerigon says, that, in such a case, "it is not doubtful that the captain, who is *not less the agent of the shippers* than of the owners, must watch over the preservation of the merchandize, and do all that circumstances require for the best."

The Roman law decided that the captain was released from his engagements, if by accident and without his fault the vessel becomes unnavigable during the voyage. Faber and Vinnius, on this law, say that, in such case, the captain is not bound to seek another vessel. The "*Jugemens d' Oleron*," speaking of the vessel placed out of a state fit to continue the voyage, determines that the master *may* hire another vessel to finish the voyage, and shall have his freight on the wares saved. The ordonnance of Wesby also says that the master may hire another vessel. The French have an "ordonnance" on this subject, which seems to make it the duty of the master to obtain another ship, although both Valin and Pothier differ from Emerigon in his construction of it. They insist that the master is only bound to hire another ship, if he wishes to earn the whole of his freight.

The English authorities seem to leave the question as yet undecided, whether it is the *right* or the *duty* of the master to reship.

The American law is now understood to be that stated by Chancellor KENT, in his Commentaries. "In this country, we have followed the doctrine of Emerigon, and the spirit of the English cases, and hold it to be the duty of the master, *from his character of agent of the owners of the cargo*, which is cast upon him from the necessity of the case, to act in the port of necessity *for the best interest* of all concerned, and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel in the same, or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it, but still he is to exercise

a sound discretion adapted to the case." 3 Kent's Com., 212.

Now, in the case before us, the master *did* deem it proper to send on a portion of the cargo of the Waban. He found a vessel, the master of which agreed to carry it to Rangoon for 45 shillings per ton, as stated before. He decided that the interest, which he represented, required or justified such transhipment. We see nothing in the case which leads us to doubt that the master acted in good faith, and that, under all the circumstances, it was a reasonable exercise of his powers. But the question behind all this is, did he, by the act, bind the owners of the ship to pay the whole freight, and can this action be sustained against them on an implied promise, arising from the acts of the master? Or, as before stated, were they the shippers of the coal on board the Lemont?

It is important to distinguish between general and limited agency. The master of a vessel is not an unlimited agent for the owners of the ship. He has, undoubtedly, extensive powers, but he cannot act for or bind his owners beyond the authority given to him by them or by the law. It is unnecessary to state more definitely the matters in which he is undoubtedly their agent, and in which his acts bind them. It is enough to say, that, like all other agents, he cannot act or bind his principals beyond the scope of his authority. It does not follow that every contract he may make, even about the ship, is from that fact alone binding. In every case, then, where it is attempted to charge the owners on a contract made by the master, they have a right to require the proof of such facts as show that he had acted within the limits of his authority. Nor does it follow that the owners will be held because the master acted in good faith, nor because the party dealing with him believed, and acted on the belief, that the master had power to bind his owners. The whole matter, as in other cases of agency, must be brought to the test of the law, and the owners will only be held, when the case is brought within the limits of the mas-

ter's power to bind them. *Pope* v. *Nickerson*, 3 Story, 465. There is nothing mystical or unusual in this matter of a master's agency. His general authority to bind the owners of the ship by his contracts is derived from his general and ordinary character of master, and in that character he can only bind the owners by contracts relative to the usual employment of the ship, and the means requisite for that employment. The master as to the *cargo* is limited to the duties and authority of safe custody and conveyance only, and except in cases of unforeseen necessity, he is a stranger to the cargo beyond these purposes. *Millward* v. *Hallet*, 2 Carnes, 82; Story on Agency, § 118.

The owner can only be affected by contracts relative to the master's trust, who is set over the ship and not the cargo, and the owner of the ship cannot be bound by any contract of the master concerning the purchase of goods or charges attending them. Ib.

"It would be of most dangerous consequences," (says Chancellor KENT, in the case above cited,) "to ship owners, to be held responsible for all the master's contracts and loans relative to the goods on board; and it would be unjust in principle, because such contracts are not within the purview of the master's trust."

But still, as we have seen, the master may, and is bound in certain contingencies, to assume authority over the cargo, and to act efficiently in causing it to be forwarded. How does he acquire that authority, and from what source is it derived?

May not a solution of the question, and the reconcilement of some apparent contradictions in the authorities and in the doctrines of the writers on maritime law, be found in the true character of the master and his relations to all parties interested in ship and cargo. When a master stands upon the deck of his ship, as he sails out of his port of departure, he is primarily, and as he then stands, the representative and agent of the owners of the ship. If his voyage is prosperous and free from disaster, he has no right,

as we have seen, to intermeddle with the cargo on the voyage, or on its safe termination. But he has, so to speak, within himself a latent potentiality, existing in possibility and not in act, of other and distinct powers and agencies, which subsequent events may call into exercise. From a simple captain of the ship, and of that alone, he may, in case of disaster, peril or stress of weather, become an absolute master over the cargo. He may cast it overboard, if the safety of the vessel requires the sacrifice; he may, in case of absolute necessity, sell a part of the cargo; he may, when not forbidden by a positive statute of his country, ransom both ship and cargo. He may be, as he often is, placed in such circumstances that he is from necessity, chiefly by reason of the absence of all other parties, the agent of each and all persons interested in the vessel, the cargo, the freight and the insurance.

Now does the law contemplate, when these latent potentialities are brought into action, and the master is forced to assume, not *new* powers suddenly cast or thrown upon him, but the powers which inhered in him from the first, undeveloped, and in abeyance, that the ship owner is necessarily bound by all his contracts, acts or assumptions of a pecuniary nature, however onerous to him, and although he can never derive any benefit therefrom, and which yet may be of vital importance to the other party for whose use the contract was made?

The master may be, by *appointment* of the owners of the cargo before sailing, the agent or supercargo or factor for such owners. His duties and liabilities under his two characters are as distinct and independent as they would be if the trusts were confided to different persons. *The Waldo*, Daveis, 261, (WARE D. Judge;) *Williams* v. *Nichols*, 13 Wend., 358.

In *Shipton* v. *Thornton*, 9 Ad. & Ellis, 314, Lord DENMAN, speaking of a case of a transhipment at a higher rate than the original freight, says, "another principle will be introduced, — that of agency for the merchant."

Chancellor KENT says, "the character of agent and supercargo of the owner of the cargo is forced upon the master, and he must, in case of emergency, exercise the discretion of an authorized agent. *Searle* v. *Scovill*, 4 J. C. R., 224.

In the leading case of "*The Gratitudene*," 3 C. Robinson's Adm., 240, Lord STOWELL says, "the authority of agent is necessarily devolved upon him,"—"the character of agent and supercargo is forced upon him," and, in another place,—"the character of agent respecting the cargo is thrown upon the master."

We are inclined to agree with the learned counsel for the plaintiff, that the expressions denoting that the agency or powers of a supercargo are "forced," "cast," "thrown," devolved, mean only that the exigency requires him to bring into action the latent powers inherent in him in his original character of master for the voyage. But however the agency originates, it is an agency in fact, with the powers, rights and duties of a supercargo. If so, does the cause or mode of appointment affect or vary the actual powers?

When the master becomes the supercargo, does it make any difference whether he was originally designated by the owners, before the voyage commenced, or whether he become such by necessity and force of circumstances? In either case he is an agent for the merchant.

If, in the case at bar, Hartridge, the master, had been appointed supercargo, by the owners of the cargo, before he sailed from Cardiff, and he had made this shipment, under the circumstances as detailed, and without any more definite designation of the party to pay the freight, could the ship owners have been held on an implied promise to pay it? Would not the law hold that he must have acted for the owners of the cargo, for which he was supercargo? Does not the same result follow, if he was such agent or supercargo by force of circumstances? Were his powers to bind those he represented less, because those powers were brought into exercise by reason of the disaster to the vessel? The essential question is, what powers did he actually

possess, and for whom had he a right to act in the shipment on the Lemont?

Instead of a prosperous voyage, the master of the Waban found himself at Port Louis, his ship totally disabled and, in legal contemplation, lost. A portion of his cargo he sold to defray his expenses. This was his first act of authority in reference to the disposition of the cargo. In that sale, he necessarily acted as agent for the owners of the cargo in selling and transferring the title to the goods. The title remained in the owners notwithstanding the disaster. Only an authorized agent could transfer the title in their absence.

The remainder of the cargo was on shore. What was the master's duty in reference to it? There were two absent parties, both of whom he represented, who were, or might be, interested in the disposition of the cargo. The original object of both these parties was the same, viz., that the coal should be transported to Rangoon. The ship owner desired this, that he might secure his freight; the merchant, that he might have his coal where it was required for immediate use.

The sum of all the authorities seems to be that the master "is bound in duty to do the best for all concerned," or, in more colloquial language, to do the best he can. *Plantamour* v. *Staples*, Douglass, 219. Assuming that the American law imposed upon him the right and the duty both, to cause the cargo to be carried forward, if it could be done reasonably, the master in this case did do it, in the manner before stated. For whom did he do it and who is responsible pecuniarily for his contract? When a master finds himself in this position of responsibility, and called upon to act, he is to remember that the owners of his ship will lose all their freight, if the goods are not forwarded, and that he, on their behalf, as master, has a right to retain possession, for the purpose of transhipping in order to earn the original freight or a part at least. *Mason* v. *Lickbarrow*, 1 H. B., 359. If this can be done, it answers all the purposes of the original contract, so far as the principal ob-

ject of the voyage is concerned. If, then, the master can find in the port, or in one within a reasonable distance, another ship, the master of which will agree to carry on the cargo, at a rate at which something may be saved to the owners of the ship out of both freights, it would be his right and his duty to employ the new ship, for the benefit of his owners, and acting on their behalf. For, although there is no legal obligation, under the original contract, yet the owners of the vessel may, if they find it for their interest, forward the cargo in another vessel. It is therefore the right and duty of the master to make all reasonable efforts to obtain another vessel, on such terms as will eventually save something to the owners of the ship. *Hugg* v. *Augusta Ins. Co.*, 7 Howard, 595. In doing this, he acts as master of the vessel, still having in his possession the cargo for the owners of the ship, and has not any occasion, nor is there any necessity for him, to assume the character of supercargo or agent for the merchant. This latent and dormant office still remains in abeyance. 1 Parsons' C. Law, 158; *McGaw* v. *Ocean Ins. Co.*, 23 Pick., 405.

But if he cannot find any such vessel, which will take the goods for any sum less than the original freight, is the master at once to abandon the cargo without further effort? Would that be reasonable or right? Although the ship owner may have no duty or interest touching the cargo, its owners may have great interest in having it transported to the port of destination, even at an enhanced price.

In such a condition of affairs, the office of a supercargo comes into action, and it becomes the duty of the master to act for the interest of his principals, and to determine whether it is reasonable to believe that their interests would be subserved by transhipment. He is to do what a judicious and honest supercargo would do in the same circumstances. If he acts in good faith, great latitude may be extended to him, and mere error of opinion and judgment, if there was reasonable ground for his decision, will not render his acts void or make him responsible.

It follows that there may be cases where it is plain that the act of the master, or as supercargo, in employing another vessel, was so unreasonable and so manifestly against the interest of the party he represented, that no one but himself should be bound thereby. The counsel for the plaintiffs, in his able argument, admits that "the duty in question is, not to employ another vessel at all events, but, if it is reasonable, to do so." He however maintains that of this reasonableness the master is the judge, and his judgment is final, so far as a third party is concerned. If this be so, then the qualification that the master must act reasonably is inoperative. If he is required to act reasonably, and yet he is to determine absolutely what is reasonable, it amounts only to saying that whatever the master determines to do is reasonable. It leaves the master with absolute power to bind his owners.

But the counsel further contends that, although it may be true that, as between themselves, the master is agent for all concerned, yet that, in his dealings with others, he is to be regarded only in his capacity of master of the ship and servant of the ship owner. He urges that the ship owner is always known, or may easily be found, whilst the owner of the cargo may not be known; that the new parties, with whom he contracts for relief, are not to be involved in these questions of relative interests. In short, that the new party has a right to regard the ship master as acting, in all these matters, as the authorized agent of the owners of the ship, and that he is not bound to ascertain any of the facts.

There is, it must be confessed, at first view, some plausibility in this position. But it claims too much. Why is not the master of the new ship bound to know or ascertain with whom he is dealing, as in other cases of agency? It will not do to say that the ship owners are bound by *every* contract of the master, made with a third party. We have seen that the master's powers to bind are limited to certain well defined cases. Suppose that a master, at an intermediate port, should engage another vessel to take on a part of

his cargo, his own vessel being uninjured, but he, desiring to make more room for his own personal accommodation, transhipps a part of his cargo, although there was no necessity in the case. Would his owners be bound to pay the freight? Clearly not. And why not? Because the master had no right thus to defraud his owners. The master would be bound, doubtless, as he is in all cases of contracts made by himself. There are many like cases, where the owners are not bound by the master's contracts, although made in their name.

This case finds, in the agreed statement of facts, that the master of the Lemont knew that the party seeking the use of his vessel was, or had been, the master of a disabled and lost ship; that his cargo had been landed. He knew, then, that he was acting with an agent. If he desired to know more as to the condition of affairs, and the relation of the master to ship and cargo, and for whom he could legally act, he could have inquired, as he probably did. If not, he doubtless relied upon his lien on the goods as ample security, as it commonly is. If, as in this case, that lien proves insufficient, the party can recover only of the person that was the shipper himself, or by an authorized agent. The question, then, returns as to the agency, in fact and in law.

It is, at first view, somewhat singular that no case can be found where the precise question before us has been determined, on an action by the second ship to recover of any party for the freight, on the ground of personal obligation. The reason of this undoubtedly is that, in most of the cases, the lien on the goods has been sufficient to protect the ship owners, and to compel the consignees, or some party, to pay the stipulated freight, in order to obtain possession of the goods.

The legal principles which lie at the foundation of the action, and upon which it must stand or fall, have been more or less distinctly discussed or alluded to by various authors and in different cases. Several of these have already been referred to in this opinion. Chancellor KENT says, that "we

have followed the doctrine of Emerigon," and he is undoubtedly of the highest authority in all questions of maritime law. What does Emerigon say as to agency of the master? He declares that, "the quality of *captain* makes him *master*," (that is, as we understand him, master of the situation in all its aspects and demands.) He adds, "and attributes to him the care of all that concerns the vessel and cargo. He is bound to do what it is to be presumed the shippers would do if they were present." c. 12, § 16. The same author, in commenting on and condemning a decision under the French ordonnance, states the argument of the master of the ship as follows, — (in substance,) — that the voyage had been determined by the loss of the vessel, still he was bound to neglect nothing for the preservation of the goods; that he had been obliged to hire other vessels to bring them to their destination. Why should the captain, who preserves the goods and brings them to their place of destination, be ruined by the additional freight of the substituted vessel? *The captain is obliged to hire another vessel only in his quality of factor.* He has therefore to have the choice, either of claiming his freight in entirety, in which case the freight of the substituted vessel is at his (owners) charge, or of reducing his freight in proportion to the voyage accomplished, in which case the freight of the substituted vessel is at the charge of the goods saved.

Emerigon adds, after this statement, "these reasons were at once forcible and *legal*."

Shipton v. *Thornton*, 9 Ad. & Ellis, 314, is the only English authority in which we find a distinct reference to a case where the voyage cannot be completed, except at a rate of freight from the port of necessity higher than the original rate. Lord DENMAN, in that case, says, "it may well be that the master's right to reship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the shipper, and that where the freight cannot be procured at that rate, another, but familiar principle, will

be introduced,—*that of agency for the merchant.* For it must never be forgotten, that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods. These interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty, under all circumstances, in any but very general terms. The case now put supposes an inability to complete the contract on the original terms in another bottom, and therefore the owner's *right* to tranship will be at an end, but still, all the circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master, *as his agent*, to do so. *In such a case*, the freighter will be bound by the act of his agent, and of course be liable for the increased freight."

There are several American cases in which the right and duty of the master to reship in case of disaster are considered. The result of them seems to be what is stated in *Bryant* v. *Com. Ins. Co.*, 6 Pick., 143. "After all, it becomes a question of *reasonable* care and conduct on the part of the master, and, like other questions of that nature, after the facts are found, the law arising from them will be pronounced by the Court." All the cases admit that there is no imperative and inexorable duty in every case to tranship, even for the owner of the cargo, and even if a vessel can be found. The terms may be so onorous as to absorb wholly the value of the goods at the port to which they were destined; the value of the cargo may be nearly or quite as great at the port of disaster as at that port, or there may be other circumstances which would render transhipment manifestly and indubitably injurious to the interest of all parties. Every case must depend upon its own surrounding circumstances. The test question is, what was reasonably required of the master or supercargo under a plain and common sense view of the situation? *Saltus* v.

Ocean Ins. Co., 12 John., 107; *Treadwell* v. *Union Ins. Co.*, 6 Cowen, 270.

"What is reasonable and just in the execution of his powers in such cases is legal."

The case of *Thwing* v. *Washington Ins. Co.*, 10 Gray, 443, is a very recent decision by the Court of Massachusetts, and discusses, with the usual ability and learning of that eminent tribunal, the points involved in the case before us. Although that was not a case against the owners of the first ship to recover freight, yet its consideration involved the principles on which such a claim rests. The Court, in that case, deny the proposition that the master is obliged, in his capacity as agent for the owners of the vessel, in all cases of disaster to the ship, to send forward the cargo, even if it remains in a condition to render its transhipment judicious and expedient; but hold that no such duty or burden is imposed by virtue of the contract of affreightment. That contract is always subject to the proviso that its performance may be defeated and excused by the perils of the sea. The opinion, however, distinctly recognizes the right and duty of the master to act as agent for the owner of the cargo, after he has ceased to have any such right to act for the ship owner. After alluding to the difficulty of drawing the exact line, which would distinguish the master's authority to act for the various parties interested, the learned Judge, (now C. J. BIGELOW,) states the conclusion as follows:—

"But we think that it may be safely said that whenever, and as soon as the owner of a vessel, by reason of the perils of the sea, ceases to have any interest, either in the ship or freight, so that nothing of either can be saved or protected by any act of the master, *his authority to bind the owner is at an end.*

"The subject matter of the master's agency for the owners of the ship, in such a case, ceased to exist, and his power to bind the principal ceases with it. * * * * In the absence of any adoption or recognition by the owner (of the ship) of such transhipment, we know of no principle or au-

thority on which it can be held absolutely binding on him. On the contrary, the more reasonable doctrine is that stated in 2 Philips on Insurance, § 1634. 'If the motives of the master's course are wholly on the side of one party, then he must be presumed to have acted on behalf of such party.'"

The same general doctrine as to the interests of the party to be affected by a contract by the master is found in *Duncan* v. *Benson*, (Ex. R.,) 1 Welsby & Harlestone, 557.

"In other cases, where, by no possibility the shipper could *derive benefit*, there is no implied authority from him to the master, and the act of sale, or pledge, would be simply wrongful." Why is not the same rule to be applied to the ship owners in their relation to the cargo, situated as this was? In the case of the *Gratitudene*, 3 Rob. Ad. R., 261, the Court declares, "that in all cases, it is the prospect of benefit to the proprietor that is the foundation of the authority of the master."

The case of *Gibbs* v. *Gray*, (Ex. R.,) 2 Harlstone & Norman, 21, is one where, in a case of disaster like the present, the master made the contract of reshipment in direct terms for the owners of the cargo, and as their agent. Although, in that case, the Court denied his power to bind them, yet it was upon the ground that the owners of the cargo had an agent at the port of reshipment, who was not consulted, and, on the further ground, that the contract was *unreasonable*, as it provided for the payment of dead freight. But the power so to bind the owners of the cargo in a proper case was not doubted.

It is urged that the owners of the ship *appoint* the master, and therefore they must be held responsible for his contracts. It is true that they do make the appointment, but they do not thereby themselves create or limit all his powers and duties. The *law* fixes them in almost every respect. The shipper knows, or may know, who he is, and what his character and reputation is or has been. He krows, or is held to know, the law applicable to a master. He knows that he may, in certain contingencies, be called upon to act

in reference to the cargo as his agent or supercargo. He knows, that when those contingencies arise, he may no longer be agent for the ship owners, who appointed him, but for himself. It does not, therefore, necessarily follow that when the owners of the ship employ the master, they confer on him any powers relating to the cargo, as their employee. The law steps in and defines and confers the powers in question on the office he holds.

We are not called upon, in this case, to consider any question arising between the ship owners and the original shippers. Nor are we called upon to consider the question, how far, as between the ship owner and the charterers, the former may be liable for the wrongdoings or *non-feasances* of the master. None such are intimated in the case before us. Our question relates entirely to the validity of a contract, and its binding obligation on the ship owners made with a new and third party.

In this case, we are not called upon to determine, whether, by this shipment of the coal, the master bound the owners of the cargo, by a reasonable exercise of his powers in their behalf. As we have seen, there may be cases where he binds no one but himself. The precise question before us is, whether the ship owners are liable, as on implied promise, to pay the stipulated freight in the second ship on the facts stated. If they are, then the owners of the ship are to be holden liable, as shippers of the cargo, for the freight of goods in which they never had any ownership or title, and from the further carriage of which, under the contract, they have been absolutely absolved, and from the transportation of which in the new ship, as it is admitted, they cannot derive any benefit, or save any part of the original freight, and where they are not named or recognized as such shippers in the bill of lading, or by the master in his negotiations, and where no subsequent ratification is pretended.

We do not think that, under the circumstances of the case as they existed, it would have been "a reasonable exercise of the master's powers, if he had attempted to bind

the owners of his ship by a distinct promise in their behalf to pay the new freight.

And it would be, certainly, as unreasonable in the Court to hold them liable on an implied promise, and as the actual shippers of the coal, in the absence of any evidence of an attempted agency, or direct promise on the part of the master. *Plaintiffs nonsuit.*

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

CHARLES H. MCLELLAN *versus* DAVID PENNELL *& al.*

When, in assumpsit against the defendants as surviving partners of a firm alleged to have consisted of themselves and a person deceased, the partnership is in issue, the declarations of such deceased person, made in the absence of the defendants, and not communicated to either of them, are not admissible against the seasonable objections of the defendants with the instruction that they were not evidence against the defendants, but were admissible to prove that the deceased was a partner; and that such proof was necessary.

Neither are promissory notes, bearing date long after the debt in suit was contracted, signed by the deceased, using his name and Co., — the name of the alleged firm, — when it is not proposed to show that either of the defendants ever had any knowledge of such notes, until after the death of the deceased.

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

ASSUMPSIT on count annexed.

The facts are sufficiently stated in the opinion of the Court.

Tallman & Larrabee, for the plaintiff.

J. S. Abbott, for the defendants.

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

The opinion of the Court was drawn by

DANFORTH, J. — The plaintiff declares against the defend-

ants as surviving partners of a firm, consisting of themselves, and one Harmon Pennell, deceased. The partnership was denied, and this was the only question of fact in issue at the trial. To sustain this issue on his part, the plaintiff offered the declarations of said Harmon, which were admitted with the instruction to the jury that they were not evidence against the defendants, but were admissible as against Harmon, for the purpose of proving him a member of the alleged firm, and that such proof was necessary. These declarations were not shown to have been communicated to, or in any way made known to either of the defendants.

Under this issue, and between these parties, it is not easy to see how any testimony can affect Harmon Pennell alone. His liability is not in issue, and any verdict which may be rendered in the action will not tend in any degree to relieve him from, or impose any liability, upon him or his estate. Nor is it any easier to perceive how any testimony tending to sustain the issue in any degree, though it may be but one step in the process, can have that effect and not operate against the defendants. If it sustains the issue, it establishes their liability. So far as it tends to sustain it, it tends to establish their liability. It follows, then, that no testimony is admissible, except such as may legally affect the defendants. It is admitted that the testimony in question is not of that character, and therefore we think it should have been excluded.

True, the jury were instructed not to give it any effect as against the defendants, but they were also instructed that it tended to prove a fact which must necessarily affect them, and thereby wrongfully influence their verdict.

In accordance with this view is the case of *Allcott* v. *Strong*, 9 Cush., 323. In that case, the declarations of a deceased partner were offered to show that a partnership, which it was admitted had once existed, continued to exist at the date of the contract sued. These declarations were excluded, SHAW, C. J., in giving the opinion, saying that, "the evidence, to show the continuance of the partnership,

after it had once been dissolved, with notice to the parties, must be as satisfactory as that which is required to show its establishment." Thus putting the testimony upon the same ground as if offered to prove the establishment of the partnership, and, being rejected for one purpose, it must be also for the other.

It is true that, in that case, no such distinction is made as is attempted in the case at bar. But the fact that it is not referred to by the Court, after argument and mature deliberation, may perhaps satisfy us that, in their opinion, none such exists.

In *Ostrom* v. *Jacobs & al.*, 9 Met., 454, similar declarations of a deceased partner were rejected. DEWEY, J., on page 457, says, "the objection to the competency of the declarations of Upson, to charge this upon the partnership, is the same in principle as if his admissions were offered to establish the fact of a partnership." The distinction referred to is again overlooked, when, if it existed, the rejected testimony should have been admitted. In this last case other authorities are referred to as establishing the same principle.

It is true that, in numerous cases, the admissions of one alleged partner have been admitted to prove him a member of the firm, when these admissions have not come to the knowledge of, and should not affect the other alleged members. But, in all these cases, the person, whose declarations were received, was a party to the suit, and of course in a situation to be affected by them. And it is believed that no case can be found, where declarations similar to those in question have been received as testimony.

But further, the declarations in question cannot be admitted without a violation of clear and well settled principles of law. The law has quite distinctly marked the limits within which declarations of parties must come, in order to be received as testimony. These do not come within those limits. They are not the admissions of a party to the record, nor of a person under whom any of the parties claim title. Neither are they the admissions of one in privity with a

party, for that is the very thing to be proved. And before the admissions or declarations can be received, this relationship must be proved by other testimony. Neither can these be considered as the declarations of one against his interest, for if Harmon Pennell had any interest it was promoted by these very statements. When they were made, he was seeking to obtain a credit, which was only given, according to the testimony of the plaintiff, to the alleged partnership, and, if they were to have any effect, it would be to relieve him of a portion of the debt. So that we do not perceive any ground on which they can be admitted for any purpose whatever.

In regard to the notes received, they are liable to objection in point of time. All of them bear date long after the making of the account sued in the writ. If, then, they are admissions, and receivable as such, to show that Harmon was a member of the firm, they would show only that he was a member at the time they were given, and not prior to that. And although, when a partnership is once formed, it may ordinarily be presumed to continue till a dissolution is shown, yet no such presumption obtains as to any prior existence.

It therefore becomes unnecessary to consider the motion.

Exceptions sustained.—New trial granted.

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

JAMES A. CROOKER, *in Equity*, *versus* SIMON C. FRAZIER.

If a judgment creditor extend his execution on a portion of the land mortgaged to secure the same debt, and the debtor neglect to redeem for the space of one year thereafter, so much of the estate as is covered by the levy is absolute in the creditor, notwithstanding the mortgage.

The creditor may redeem the residue, however, by bill in equity; and the Court will appoint a master to ascertain the amount of rents and profits

upon the whole of the premises, to the time of the levy, and upon the residue, from that time, until a release shall be executed and possession surrendered by the respondent, for which sum and costs execution will be issued.

BILL IN EQUITY.

The case was heard on demurrer.

The facts sufficiently appear in the opinion of the Court.

Tallman & Larrabee, for the plaintiff.

Whitmore, for the defendant.

The opinion of the Court was drawn by

BARROWS, J.—This plaintiff, on the 20th day of December, 1858, conveyed in mortgage to the defendant a piece of land, in Bath, with a dwellinghouse thereon, to secure his note to the defendant for the sum of $100, payable on the 1st day of June, 1859, with interest. The defendant entered into possession of the mortgaged property when the mortgage was executed, and still retains possession of it. But it appears that he commenced a suit against the plaintiff upon the note secured by the mortgage, for the December term of this Court, 1859, in which judgment was finally rendered in his favor at the April term, 1861, and he levied his execution upon a portion of the mortgaged premises. The debtor took no steps to redeem from this levy, or to have the amount due ascertained, according to the statute, but, about a year afterwards brings this bill, claiming the right to redeem the mortgaged premises and hold them unencumbered by mortgage or levy, upon payment, which he offers to make, of any balance that may be found due upon the mortgage debt, after deducting the net rents and profits received by this defendant. He insists that this defendant had no right to levy his execution upon a portion of the mortgaged premises, and thereby reduce the time allowed him for redemption from three years to one.

But it was held in *Porter* v. *King*, 1 Greenl., 297, that a mortgagee may extend his execution on land mortgaged

for the same debt, and, if the debtor neglect to redeem within the year after the extent, the estate becomes absolute in the creditor notwithstanding the mortgage. No reason is perceived for reversing this decision.

The debt is the principal thing. The mortgage is designed to secure the ultimate payment of it to the creditor. But if he pleases to waive that security and proceed to collect his debt in the ordinary process of law, it is not for the debtor to complain. He is subjected to no illegal burden. The accepting a mortgage does not impose upon the creditor the necessity of giving credit for the term of three years beyond that which is stipulated for in the principal contract. The relation of the parties is changed by the levy. The levying creditor can no longer be considered as entitled under his mortgage. He is to be considered as holding by virtue of his levy, and his title must depend upon the regularity of his proceedings. He can claim no priority over other attaching creditors, or intervening incumbrances by reason of his mortgage. And the debtor, if he would not be considered as assenting to the absolute alienation of his property in fee, at the appraised value, must redeem within the year. The plaintiff's counsel argues *that*, to foreclose the mortgage, the mortgagee should have pursued one of the methods pointed out by the statute, and cites *Ireland* v. *Abbott*, 24 Maine, 155, to show that a mortgage can be foreclosed in no other way. The argument would be sound, and the citation apposite, if the creditor now claimed under the mortgage.

What is the result of this view of the law as to the rights of these parties?

The plaintiff, the original debtor, having taken no seasonable steps to redeem his property from the levy which was made upon it, has lost the right of redeeming that portion which was covered by the levy. But the debt originally secured by the mortgage has been paid by the levy. What was the mortgagee bound in right and equity therefore to do? Plainly he should have at once resigned the possession

of the remainder of the mortgaged property, and cleared the mortgager's title to that portion from the cloud thrown upon it by the mortgage, and accounted for the rents and profits received by him in his capacity of mortgagee. He has done neither of these things. He cannot, by his own act, in electing not to rely upon his mortgage for the collection of his demand, avoid doing equity to the mortgager. Section 14, c. 90, R. S., provides that when the amount due on a mortgage has been paid to the mortgagee by the mortgager within the time limited by statute, to wit, before the lapse of three years after the commencement of any legal process for foreclosure, the mortgager may have a bill in equity for the redemption of the mortgaged premises, and compel the mortgagee to release to him all his right and title therein. If the payment be made by the absolute alienation of a portion of the mortgaged premises, a release of the remainder only can be required. In this case, the levy was a statute conveyance from the mortgager to the mortgagee. This respondent, having chosen to compel payment of his debt, cannot be permitted to escape his liability in equity to release his hold of the remaining portion of the mortgaged premises. By section 19, of the same chapter of the R. S., it is further provided that the Court, when a decree is made for the redemption of mortgaged lands, may award execution as the case requires, and for sums found due for rents and profits over and above the sums reasonably expended in repairing and increasing the value of the estate redeemed. The report of a master, appointed by consent of parties, of rents and profits accrued up to October, 1862, was filed in April, 1863, but, as it may fairly be presumed that his inquiry was conducted upon the hypothesis that the plaintiff would be found entitled to redeem the whole of the mortgaged premises, this must be set aside, and, unless the parties can agree what is the proper sum for which execution should issue in the plaintiff's favor, the case should go again to the master with instructions to report the sum he may find to have accrued for rents and profits upon the

whole of the premises up to the time of the levy, and upon that portion not included in the levy, from that time till the release shall be executed by the respondent in conformity with the opinion, and the premises surrendered, and for such sum, with costs for the complainant, execution is to issue.

Decree for redemption accordingly.

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

LAZARUS FARRIN *versus* JAMES ROWSE.

By R. S., c. 81, § 30, no attachment of real estate on mesne process shall create any lien thereon, unless the officer making it, within five days thereafter, files in the office of the register of deeds in the county or district in which all or any part of said estate is situated, an *attested copy* of so much of his return on the writ as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ, and the Court to which it is returnable.

A simple copy of so much of the officer's return on the writ as relates to the attachment, without being *attested*, is not sufficient to create a valid attachment against subsequent purchasers.

Neither is the filing of a statement of "*the sum sued for*," instead of "*the value of the defendant's property*," which the officer is commanded to attach.

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

WRIT OF ENTRY.

The plaintiff's title depended upon the validity of an attachment of the land in dispute. The defendant's title was a deed executed after the alleged attachment and before the levy.

The following is a copy of the officer's certificate on the back of the writ, together with a copy of the paper filed with the register, to wit:—

"Sagadahoc, ss.—February 3d, 1858.—I filed in the

registry of deeds office, for said county, a true copy of the above return, together with the names of the parties to this writ, sum sued for, date of writ and Court to which the same is returnable. "John Harris, *Dep. Sheriff.*"

"Sagadahoc, ss.—January 30th, 1858.—At eight o'clock thirty minutes, in the forenoon, by virtue of the within writ, I attached all the right, title, interest, estate, claims and demands of every name and nature, of the within named defendant, in any and to all and every real estate in said county of Sagadahoc. "John Harris, *Dep. Sheriff.*"

"Names of the parties to this writ, Lazarus Farrin, plaintiff, William Winslow, defendant. Sum sued for, four hundred dollars. Date of writ, twenty-eighth day of January, 1858. Court to which the same is returnable, Supreme Judicial, Sagadahoc county, April term, 1858.

"John Harris, *Dep. Sheriff.*"

I. & M. H. Smith, for the plaintiff.

Evans & Putnam, for the defendant.

The opinion of the Court was drawn by

WALTON, J.—This is a real action and is before us on report. Both parties claim title under the same person,—the plaintiff under an attachment and levy, and the defendant under a deed. The defendant's deed was recorded *after* the attachment, but *before* the levy. The plaintiff must show, therefore, not only a valid levy, but a valid attachment, in order to make good his title. We will first consider the validity of the attachment.

The Revised Statutes of 1857 went into operation January 1, 1858. The attachment was made January 30, 1858. Its validity, therefore, must be tried by the Revised Statutes of 1857. Chapter 81, section 30, provides that no attachment of real estate shall create any lien thereon, unless the officer making it files, in the office of the register of deeds in the county or district, "an *attested copy* of so much of his return on the writ as relates to the attachment, *with the value of*

the defendant's property which he is thereby commanded to attach."

In this case, the officer did not file in the office of the register of deeds an *attested copy* of so much of his return on the writ as related to the attachment, nor did he return the value of the defendant's property which he was commanded to attach. He returned a paper into the registry of deeds, but it had no certificate of attestation upon it, and does not purport to be a *copy* of anything — it reads like an original — and the officer in his return upon the writ does not state that it was an *attested* copy. He says it was a *true* copy, but he does not say it was an *attested* copy; and an examination of the paper itself shows that it was not in fact attested. The return of such a paper was not a compliance with the law.

The officer certifies, in his return upon the writ, that he filed with the register of deeds "the sum sued for," which the law did not require, but does not certify that he returned "the value of the defendant's property which he was thereby commanded to attach," which the law did require; and an examination of the paper filed shows that in fact no mention was made of the value of the defendant's property which he was commanded to attach. Such a return is fatally defective.

When the law declares that no lien shall be created by an attachment unless certain things are done, and those things are not done, it is idle to ask the Court to override the law and hold such an attachment valid. In this case, the officer not having stated, in his return upon the writ, that he had filed in the office of the register of deeds an attested copy of so much of his return as related to the attachment, and the paper which he did in fact file not purporting to be an attested copy, and the officer not having returned the value of the defendant's property which he was commanded to attach, the attachment was void.

The attachment being void, and the defendant's deed being recorded, and his title thereby perfected before the levy

was made, the demandant's title fails, and it is unnecessary to consider whether the levy was sufficiently formal or not.

Judgment for defendant.

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

GIVEN JAMESON, *petitioner*, *versus* ANDROSCOGGIN R. R. Co.
EMELINE E. MERRILL *& al.* do. *versus* same.
OLIVER W. WHITE, do. *versus* same.

A party seeking a new trial, by reason of interest in a juror, should negative his knowledge of such interest.

A simple denial of such knowledge, made in the motion, omitting to negative such knowledge on the part of his counsel, unaccompanied by any affidavit or other proof establishing the truth of such denial, is not sufficient to warrant the Court to set aside the verdict.

The verdict of a jury, summoned to estimate damages consequent upon the taking, &c., of the lands of several petitioners, over which to locate a railroad, will not be set aside, because the officer, presiding at the hearing, instructed the jury that they should first view the several lots of the respective petitioners, and the hearings thereon should be at one time and in their order.

Any objection to the competency of a sheriff's jury, on the ground that they were not regularly certified or summoned, will be deemed to be waived, unless taken at the trial.

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

PETITION for increase of damages sustained by the petitioners, consequent upon the taking, holding and occupying of their land by the Androscoggin Railroad Company.

To the acceptance of the verdict of the jury, the petitioners filed the following objections, viz. :—

1. Because one of the jurors drawn from the town of Phipsburg, removed to the city of Bath after he was drawn and before the time of view and hearing; that said city of Bath is, and, at the time of said hearing, was interested in

said Androscoggin Railroad; and that the residence of said juror was not then known to said petitioners.

2. Because the instruction of the officer, who presided at the view and hearing, to the effect that the jury, to whom were committed the cases of several petitioners, should view the premises of all the petitioners before the hearing in either case, was in disregard of said Jameson, who should have had his land viewed, and that the view should be immediately followed by a hearing in his case, without regard to the cases of the other petitioners. And the said petitioner believes that, by reason of said instruction, he failed to have such a view and hearing by the jury as is contemplated by the statute; and that he has been greatly injured thereby.

Adams, for the petitioner Jameson.

Gilbert, for the respondents.

The opinion of the Court was drawn by

APPLETON, C. J.—It is admitted that, at the time of the appraisal of damages, the city of Bath was interested in the defendant corporation, and that one of the jury, by whom the damages were appraised, was an inhabitant thereof.

1. It is objected that the juryman in question was disqualified by reason of such interest.

It does not appear that, at the hearing, any objection to the juryman on account of such interest was taken, or that inquiries on that subject were made. For aught that is shown, the petitioners or their counsel might have been aware of the existence of the alleged interest on account of which they seek to set aside the verdict. It is true the motion filed denies knowledge on the part of the petitioner of such interest,—but it omits to negative such knowledge on the part of his counsel. Nor is the motion verified by affidavit, nor its truth established by any proof whatever.

The interest of a juryman, if known to counsel at the time of trial, though not known to the client until after verdict, is no ground for setting it aside. *Kent* v. *Charlestown*,

2 Gray, 281. Knowledge of the interest of a juryman and then voluntarily proceeding to trial is a waiver of any objection on that account. Where a new trial is sought for because of a juror's interest, the ignorance of such fact, both on the part of client and counsel, should be fully established. In *Davis* v. *Allen*, 11 Pick., 466, the petitioner for a new trial was required to make affidavit of his ignorance, at the trial of the interest of the juryman, before the Court would grant a review. In *Lane* v. *Goodwin*, 47 Maine, 593, the ignorance of the party, of the relationship of the juryman to the adverse party at and before the trial, was clearly shown. In *Quinebaug Bank* v. *Leavens*, 20 Conn., 86, the Court held the party was bound to make inquiries as to interest or relationship at trial, and if he neglected so to do, he had no claim to be relieved from the consequences of his negligence. But most assuredly a party seeking a new trial by reason of interest in a juror should negative his knowledge of such interest. *Tilton* v. *Kimball*, 52 Maine.

2. The sheriff ruled that the jury should first view the several lots of the respective petitioners, and the hearings of the same should be at one time, and in their order—that is—that all the lots should be viewed, and then the damages of each petitioner should be appraised separately—and the appraisal of each be made in its order. It is difficult to perceive what objection can reasonably be made to this course. It is much more convenient than that proposed by the counsel for the petitioners, and tends to a more speedy trial of the matters in controversy.

3. It is urged that it does not appear that jurymen were legally drawn or returned, or that the jury was legally organized.

No objection was taken at the hearing as to the mode in which the jury were drawn, returned or organized. No error is pointed out as to any of the proceedings in this respect. Any objection to the competency of a sheriff's jury, on the ground that they were not regularly certified or sum-

moned, will be deemed to be waived, unless taken at the trial. The suggestion is too late here. *Walker* v. *Boston & Maine Railroad*, 3 Cush., 20; *Fowler* v. *County Commissioners of Middlesex*, 6 Allen, 92; *Pittsfield* v. *Barnstead*, 40 N. H., 477.

Exceptions overruled.

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

JOHN B. SWANTON *& al. versus* JAMES A. CROOKER *& al.*

A petition for partition, which describes the premises as "a parcel of land situate in B., in the county of S., and bounded as follows, viz.: — Beginning at a spruce tree in the wall, near Freeman's field, so called, thence north, sixty-eight degrees west, to N. river, as surveyed by T. B., March 15, 1849, — thence, beginning at said spruce tree and running southerly by the west line of the Freeman field, as now fenced, to low water mark, thence easterly, northerly and westerly to N. river, and by the river to the B. line," is void for indefiniteness, and no valid judgment can be rendered upon it.

Such a petition may be amended at any time before the interlocutory judgment, in the discretion of the Court, but not afterwards; and it will be dismissed, even after the report of the commissioners is made.

ON EXCEPTIONS to the ruling of BARROWS, J.

PETITION FOR PARTITION, in which the premises are described as, — "A parcel of land situate in West Bath, in the county of Sagadahoc, and bounded as follows, to wit: — Beginning at a spruce tree in the wall, near Freeman's field, so called, — thence north, sixty-eight degrees west, to New Meadows river, as surveyed by Timothy Batchelder, March 15th, 1849; thence beginning at said spruce tree, and running southerly by the west line of the Freeman field, as now fenced, to low water mark; thence easterly, northerly and westerly to New Meadows river; and by the river to the Batchelder line."

After verdict for the petitioners, judgment was entered for partition, and commissioners were appointed. The war-

rant to them followed the petition in the description of the premises. They made their report and the respondents objected to its acceptance; but the presiding Judge overruled the objections and accepted the report, and the respondents excepted.

W. Gilbert, for respondents.

Tallman & Larrabee, for petitioners.

The opinion of the Court was drawn by

DAVIS, J. — The petition neither states nor refers to any boundaries by which it would be possible to ascertain the premises of which partition is claimed. It would have been dismissed upon motion, demurrer, or plea, as too indefinite for any judgment to be rendered upon it. *Miller* v. *Miller*, 16 Pick., 215. A survey may sometimes be made; but this can be done only when the petition *refers* to the facts by which that which is uncertain may be made certain. The petition in this case can furnish the commissioners no facts, by reference or otherwise, from which they, by a survey or other examination, can find the premises to be divided.

The petition might, in the discretion of the Court, have been amended at any time before the interlocutory judgment.

But it is now too late, unless the verdict is first set aside by consent; for it is uncertain what the judgment would have been upon the petition as amended. The exceptions are sustained; and the motion for the acceptance of the report of the commissioners, and the entry of judgment for partition upon it, must be denied.

When this case was before us upon a former occasion, no copy of the petition was presented; and no question was raised as to its sufficiency.

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

The Androscoggin and Kennebec Railroad Company *versus* The Androscoggin Railroad Company.

If railroads make a connection under a contract, its continuance, in certain cases, will be enforced in equity.

But, where such contract has been terminated by the parties, equity will not interfere.

The seventh section of the charter of the Androscoggin Railroad Company gives that company the right to connect its railroad with that of the Androscoggin and Kennebec Railroad Company, and the latter to connect its road with that of the former; but each company has the election whether it will thus connect or not; and the provision in question is a privilege and not a contract.

It seems that either company, having once elected to connect, might at its pleasure disconnect.

If not, the Legislature may authorize it to do so; and the other company cannot complain.

It seems, that if one company has elected to connect, that it does not impose on the other company the obligation of continuing the guage as existing at the time of the connection.

But, if so, the right does not become vested until the election to connect; and if, *before* such election, the other company is relieved by an Act of the Legislature, accepted by them, a subsequent election to connect is of no avail.

Chapter 475 of the laws of 1860, authorized the Androscoggin Railroad Company to change the guage of their road, and the Androscoggin and Kennebec Railroad Company, not having elected to connect their road with that of the former company until after that Act was passed and accepted, can now do it only in subordination to the rights conferred on the Androscoggin Railroad Company by it.

Bill in Equity.

The hearing was on bill, answer and proof.

The main allegations in the bill were that the defendants by the seventh section of their charter were authorized, if they should elect so to do, to connect their railroad with the plaintiffs' railroad in Leeds, and the plaintiffs were required, in that event, to receive and transport all passengers and freight brought to them by the defendants, at certain rates of toll; and that the plaintiffs were authorized, if they should so elect, to connect their railroad with that of the de-

fendants, and in that event they were required to receive and transport all persons and property brought to them by the plaintiffs, &c.; that, if either party failed to transport persons, &c., thus brought to them by the other, the latter had the right to draw their cars over the road of the former with their own engines; that both roads were constructed with the same gauge, each elected to connect with the other, and had actually connected in 1852, and that the connection still continues; that the defendants were threatening to break up the connection, and change the gauge of their railroad, and thus deprive the plaintiffs of their rights; and prayed for an injunction.

A supplemental bill was filed, setting forth the granting of a temporary injunction, but that the defendants, disregarding the order of Court, had actually broken up the connection and changed the gauge of their railroad, and praying for relief.

The answer denied that any vote of either company was ever passed to connect their railroads, and denied, on belief, that any such connection ever was made; except that a physical connection was made between a side-track of the defendants' road with a side-track of the plaintiffs' road, and that these side-tracks were constructed by special agreement of the agents of the two companies, and not in mutual recognition of chartered rights; it alleged that a contract for the *connecting business* was made in 1852, and continued till May, 1855, and was abrogated by the plaintiffs; that under this contract their cars passed to and from the plaintiffs' road; it further alleged, on belief, that from May, 1855, to Feb. 1, 1857, there was no practical connection between the two roads, although the plaintiffs did receive and transport all the persons, &c., brought to them by the defendants, but at local rates; also, that on Jan. 30, 1857, another contract was made for the transportation of persons, &c., *as a joint business*, whereby their freight cars were drawn over plaintiffs' road, and this continued till Nov. 10, 1859, when the plaintiffs abrogated it in accordance with a

provision contained in it, in consequence of a non-compliance by the defendants for a few days with some of its provisions; and that, after that time, the plaintiffs denied to them all the rights of a connection between the roads, and carried their passengers, &c., only at local rates; and so the defendants,

1. Deny that there is or ever was any connection between said roads, such as is intended by their charter or the laws of the State.

2. If the Court shall be of a different opinion, deny that such connection was made under the provisions of their charter or of the statutes of the State; and aver that it was made under agreement and mutual arrangements, as before set forth.

3. If the Court should come to a contrary conclusion, deny that a connection rightfully made under their charter would bind them always to continue such connection; or, if it would, that it would bind them to maintain their road upon any particular gauge; or that either road was subordinate to the other.

4. Aver that, by the acts of plaintiffs herein set forth, they waived the right of connection, if any they had.

They admit that they changed the gauge, but allege that their intention to do so was notorious, and the plaintiffs must have known it, and yet suffered them to expend large sums of money before commencing these proceedings, which expenditure would be almost a total loss if the injunction prayed for should be ordered; and they claimed authority under the Act of Feb. 15, 1860, authorizing the extension of their railroad, to do all they had done.

The testimony is voluminous, and only so much is given as bears upon the questions decided.

Abstract of plaintiffs' testimony.

William Small.—A connection was formed between the railroads of the two companies, in July or August, 1852, at a point near the station of plaintiffs at Leeds junction; the road-way of defendants intersected or passed within the limits of plaintiffs' road, at a point about 300 feet north of

plaintiffs' depot; and the track of defendants' road was laid parallel to the track of plaintiffs' road and upon their road-bed, from the point of connection between the road-ways, to the point of connection between the tracks, the defendant's track passing over a stone bridge, built by the plaintiffs, between the points named. In order to effect a connection as convenient as might be, the station-house of plaintiffs was moved back from their track about sixteen feet, so as to admit a platform between the two tracks of plaintiffs' road for the accommodation of both parties; the defendants furnished help in the removal of the building; the frog, switch and fixtures, requisite to effect the connection, were furnished and put in position by plaintiffs, and extended one length of rail from the frog to meet the track of the defendants, from which point, to the place where the road-ways came together, the track was laid and kept in repair by defendants, although it was upon the plaintiffs' road-bed; while the labor of forming the connection was going on, the directors of defendant company held frequent meetings at Leeds junction, and their engineer was frequently on the premises; and they frequently had conversations.

After the defendants' road was opened for travel, the defendants made use of the plaintiffs' depot for their freight and passenger traffic, and could not reach it with their engines and cars without entering on the track of plaintiffs' road, and their engines and cars had daily access to it to connect with the train on plaintiffs' road; passengers passed from one road to the other over the platform before spoken of; the passenger cars of each company, whenever occasion required, were allowed to pass to and be used by the other company on their road; the freight cars of the defendants, with their contents, were allowed to pass with the freight train of plaintiffs, to and from Portland and intermediate stations, when they were in a safe running condition. The defendants were allowed to ticket passengers and to way-bill merchandise to Portland and intermediate points, whenever there was a contract existing between the parties, in

relation to a division of the receipts for such service; when there was no such contract in force, each party was confined to its own road, as to ticketing passengers or way-billing merchandise.

From 1852 till 1860, in no instance were the engines or cars of the defendants prevented, obstructed or hindered by plaintiffs or their agents in passing from and to the station-house on plaintiffs' road, to make such connection of trains as was desired by them; and in no instance, within that period, did the plaintiffs or their officers or agents refuse or neglect, when requested, to receive the cars, passengers or merchandise brought over the defendants' road, or transport them upon their road, and *vice versa*, except when, in the opinion of the proper agent, the cars of the defendants were deemed unsafe, and, in such cases, the freight was transferred to the plaintiffs' cars.

There was much controversy between said parties, growing out of the business common to both roads. It related to the division of the receipts from passengers and merchandise; or what compensation should be paid or allowed to plaintiffs for their proportion of the joint business. But there was no controversy or question raised relative to the connection of the two roads, and no denial or refusal, by either party, to have the connection between said roads formed, under the provisions of their respective charters.

Alonzo Garcelon.—Was a director in defendant company from December, 1849, to December, 1857, and president of it in 1850, 1851, 1852, 1855, 1856 and 1857, and during that period had free access to and knowledge of all their proceedings. During my presidency, there was a connection formed between the railroads of plaintiffs and defendants, by the mutual consent of both parties; there was a meeting of persons on the part of each party to determine the mode and manner of forming such connection, about the last of July, 1852. John Reed, the engineer of defendants' road, was present with me on their behalf, and there might have been others also. Mr. Edwin Noyes, superintendent of

plaintiffs' road, was present on their part. The right of connection did not come into discussion, but only the manner of making it. The right of connection was never questioned to my knowledge while I was president. The connection was formed in the manner agreed upon at that meeting. The agreement was that we should run our track down by the side of their track and cross a small stream so as to run directly down by the side of their depot; that we were to lengthen the abutments of the bridge so as to enable us to lay our track upon the bridge, and to do the necessary filling to enable them to lay the track; and to lay the rails to the point where the other company were to, and did, put in a frog and switch and rail according to the usual custom of connecting roads. The plaintiffs were to give us the use of their depot and side-track; that agreement was carried into effect as soon as could be. The defendants continued to use that side-track and depot without interruption so long as the gauge remained the same. I never heard a denial on the part of plaintiffs to have that connection maintained; it was considered a very convenient arrangement and was satisfactory to the employees of the road; never heard complaint on either side.

There was constant quarrel between the roads, which grew out of the question of the division of the tolls received on business common to both roads; commenced soon after the connection was formed. A contract was made soon after, on 4th December, 1852, under which the business was done; the parties to it on part of defendants were Alonzo Garcelon and Allen Haines, and on part of plaintiffs Edwin Noyes and William M. Longley; that was the first written contract ever entered into between the parties; I have no knowledge of any intervening contract between that and one made in January, 1857; a good deal of negotiation before that. Before this last was made, and after the first, there was a submission of the matters in controversy to William R. Lee, and an award made by him, which was never carried into effect because defendants repudiated it.

Before the second contract was made, the defendants had applied to the Supreme Court for the appointment of commissioners for adjustment of matters in dispute. That application was pending when the second contract was made, and was afterwards dismissed when the contract was concluded, as part of the arrangement then made. In entering into these contracts, submission and application, I was directly authorized by the directors of the defendants; never permitted myself to do any act as president without express authority. At the time of making the contract of 1857, there was a balance of $16,000 or $18,000, claimed to be due to the plaintiffs, which the defendants were unable to pay. In compromise thereof, the defendants paid to plaintiffs, in 3d bonds of their company, at par, $8,000. On two or three occasions, while I was president, Mr. Noyes requested me to state upon what terms their company could run their cars over our road; no reply was ever given to his applications and no terms ever agreed upon.

The plaintiffs always claimed the right to run their cars over our road, under the charters.

Mr. Noyes never refused to do the business of the defendants' road, while I was president. After the balance, which plaintiffs claimed and defendants refused to pay, had accumulated to a large amount, I was notified, as president, that plaintiffs would refuse to take passengers and merchandise from our road, unless the fares and toll thereon collected by defendants, should be paid over directly to them. They refused to take either, unless paid for it, being unwilling that the debt should accumulate farther in defendants' hands.

Edwin Noyes. — Was treasurer of plaintiffs, from 1847 to July, 1849; and from thence to the present time, superintendent of their road, except from September, 1850, to August, 1851, and from August, 1853, to September, 1854.

Have had knowledge and full means of knowing all arrangements and agreements between the parties, both as to the connection of their roads and the traffic common to both, during the period above spoken of, and means of

knowing all arrangements made during the times when I was not superintendent; have participated in making all contracts between them, and such as are in writing I have drawn, and in all cases have been authorized by the directors to do what I did.

A connection of the two roads was formed in 1852, in Leeds, by the officers and agents of the two companies, and under the supervision of officers of both; the plaintiffs furnished and put in the frogs and switches and one rail, and the defendants laid their track along the road-bed of plaintiffs to connect therewith.

Prior to the formation of this connection, conversations had taken place between Dr. Garcelon, president of defendants, and myself, in regard to the most convenient place and mode of effecting the same, and the use of our road-bed for that purpose; and also as to the use of our depot and side-track; at his suggestion, a committee was appointed by plaintiffs, August 11, 1852, (vote annexed marked A.) Mr. Benson and myself were the committee. I met the persons representing the defendants, at Leeds, at the time agreed upon, Dr. Garcelon and some of their directors; we went over the ground and agreed upon the place and mode of connection, as it was afterwards executed as already stated. This was assented to by our directors, and also by the defendants' directors, as far as I knew from conversations with them. They performed their part of the service. It was taken for granted by our company, so far as I ever heard, that defendants had a right by their Act of incorporation as well as by plaintiffs' Act of incorporation, to connect their road with ours; the connection was always desired by this company, (plaintiff.) In all the conversations I had with defendants' officers prior to the connection and since, I never heard any question made about the right under the charter to make the connection.

To 5th Int., viz.:—"Was there any compensation made or paid by either party to the other, directly or indirectly,

to obtain the consent of such other to have said connection formed?"

Ans.—None whatever by either party to the other.

There has never been any denial, refusal or obstruction to such connection being made and continued, on part of plaintiffs or their officers or agents, nor have the defendants been by them in any way obstructed or impeded, in making the same.

Two contracts have been made between the parties respecting the mode of transacting business common to both roads, and the compensation to be received therefor; one, Dec. 4, 1852, about the time defendants' road was opened to Livermore Falls; the other, Jan. 30, 1857. A submission was also entered into, of the same matters, to Wm. R. Lee, and an award thereon made by him, Nov. 29, 1855. Under the contract of Dec., 1852, the business was conducted, and settlements made generally once a month, regularly, till August, 1853, when defendants requested some diminution of the price received by plaintiffs for transportation of defendants' freight; no modification of the contract was agreed upon. After which, defendants ceased to settle and pay over to plaintiffs sums belonging to them, received on the joint business, agreeably to the contract. Payments were from time to time made of such sums as defendants saw fit, but much less than the contract required. Lee's award was opened by the parties, soon after its date, but the defendants refused to abide by it or make any payments or settlements in accordance with it. Under the last contract, of Jan. 30, 1857, business was transacted and settlements made until Oct., 1859, when defendants ceased to pay as they had agreed, and, on 10th Nov., 1859, the contract was terminated for that reason by the plaintiffs, and notice thereof given to defendants. In 1858, the defendants had become very irregular in their payments, and so continued till the contract was terminated; and were frequently notified, that unless they settled and paid according to the contract, it would be declared void.

Plaintiffs have never refused to receive and transport in connection with their trains, defendants' cars and their contents, when the rates agreed upon or established were paid or offered, and their cars were in a condition to be run safely. States particularly the manner of doing the connecting business under first contract; defendants way-billed merchandise and sold tickets to passengers, over both roads, and received full compensation for both; their own cars, laden with merchandise, were transported over plaintiffs' road; passengers changed cars at Leeds junction; through fares were collected at each end of the entire route, at prices fixed by defendants, till March 24, 1856, at which time, no settlement having been made since August, 1853, and the defendants having in their hands a large amount, collected by them for through fares and freights, belonging to plaintiffs, the plaintiffs refused longer to allow the defendants to sell tickets and way-bill merchandise, and collect the fares and tolls therefor, over plaintiffs' road; and also refused to deliver to defendants, for transportation over their road, any merchandise, until the amount due to them thereon was paid. This was done to prevent the defendants from obtaining possession of any more money belonging to plaintiffs, and they were so informed and notified. No change was made in the mode of running passenger cars, or transferring passengers from the cars of one road to those of the other. When the merchandise cars came from defendants' road on to the plaintiffs', in order to way-bill and send them forward, and ascertain the rates of toll therefor, it became necessary that the contents of the cars and the weight of the different kinds of goods in them should be ascertained, and hence the cars, as a general thing, had to be unloaded, and afterwards reloaded into plaintiffs' cars, and way-billed at their established rates. Sometimes, when the contents of the cars were apparent, the cars were forwarded without unloading. The defendants at no time requested the goods to be reloaded and forwarded in defendants' cars, charged with rates established by plaintiffs. The tracks remained

connected as at first, and cars and engines passed from one to the other.

In Jan., 1857, when the second contract was made, about $18,000 was due to the plaintiffs, on the unsettled traffic prior to March, 1856, which plaintiffs discharged by receiving less than half the amount in defendants' bonds at par. Under that contract, the business of the roads was transacted, as before, under the former one; through tickets were sold, and merchandise way-billed, at through rates. After this contract was terminated, Nov. 1859, the business was done in the same manner as described, on and after March 29, 1856, up to the time when the gauge was changed and the defendants' cars ceased to run to plaintiffs' depot. Soon after the termination of the last contract, John B. Jones, president of defendants, notified me verbally that, on a given day, he should expect plaintiffs to receive and transport defendants' passenger car over plaintiffs' road, with its passengers, and would tender me the pay therefor; accordingly I went to Leeds junction on the train of that day, found Jones there, with a car containing passengers; there was a mechanic present in defendants' employ. The car appeared to be in an unsafe condition to run with a passenger train, at the usual speed, and I so informed Jones, and refused to take it, but took the passengers as usual. No offer or tender of the fare as established by plaintiffs was made by any person. Ensign Otis, one of the defendants' directors, was present and made some remark about offering to pay such a sum as he or they considered we were bound to take, but no offer of money was made by anybody. This was the only time I was ever requested to draw defendants' cars.

There has been no controversy whatever, between the time of opening their road and the time when the gauge was changed, upon any subject, other than the sum which plaintiffs should receive for the business common to both roads, or the share which each should have of the sums received for such business. Whenever contracts have been terminated, it has been because defendants would not or

could not pay to plaintiffs, money belonging to them, as they had agreed. In no instance have defendants or any of their officers or agents complained of a want of proper connection of the roads, or suggested any alteration or improvement, so far as I know or have heard.

In arranging the place and mode of connection originally, no compensation was required by plaintiffs for the use of their road-bed, bridge or culvert, over which defendants' road was laid, or of the side-track or station house. Some year or two afterwards, the defendants made some improvements in one of the rooms of the station house, for their own accommodation, at a trifling expense. Plaintiffs have always kept the switch and frog forming the connection in repair, and once renewed the frog. The station agent has always had charge of the switches about the station, and this among the rest; he has always been ordered, at suitable times, to admit the defendants' cars and engines to cross this switch and enter on plaintiffs' track in front of the depot, and arrangements have always been made to have the track ready to receive their trains when due. When the gauge was changed by defendants, the connection was broken at a point about 800 feet easterly of where the original connection was formed.

In no proposition of the defendants, or of any committee of defendants, did they offer to pay plaintiffs for doing their part of the business common to both roads, so much as they were entitled to according to the rates by them established.

In 1855, the defendants applied to the S. J. C. for the appointment of commissioners to fix the terms for which plaintiffs should do the business, under the statute of 1854. On the making of the contract of June 30, 1857, this petition, then pending, was entered "neither party" in Court.

In November, 1859, they applied by petition to the railroad commissioners, and were heard by them; an award was made and delivered to J. B. Jones, their president, but was never returned to Court.

They applied again in April or May, 1860. I have been

present at all the hearings by the commissioners on each of said petitions, and in no case has it been claimed or pretended, by the defendants or their officers or agents, that said roads had not been connected; but, on the contrary, both parties have conceded that such connection existed, and the defendants have claimed that under 7th section of their charter they had rights as a connecting road; they differed as to the rates of compensation thereby provided. Both the arbitrator and the commissioners awarded to plaintiffs more than was fixed by the contract of 1857. In Nov., 1859, when that contract was terminated, there was due to plaintiffs on traffic for September previous, $530,81, and of October, $1,610,01, which has not been paid.

"A.

"At a meeting of the board of directors of the Androscoggin & Kennebec Railroad Company, August 11, 1852,—

"*Voted*, That the president and superintendent be a committee to make such arrangement and contracts for the connection of the Androscoggin Railroad with the Androscoggin & Kennebec Railroad, for the use of any of our side-tracks and lands at Leeds, as they shall deem proper. And that the president be authorized to make and execute any conveyances necessary to carry out the same."

Various documents were put in by plaintiffs, but they do not become material.

The testimony of the defendants tended to show that there was "a junction or geographical connection of the two roads" under an agreement between the agents of the two companies; but that there never was any vote of defendants electing to connect their road with that of plaintiffs.

There was also testimony as to the contracts for the "connecting business" of the two roads, not materially different from that of plaintiffs.

The defendants put in the following vote of plaintiffs' directors, Nov. 27, 1860:—

"*Voted*, That this company do elect to connect their railroad with the railroad of the Androscoggin Railroad Com-

pany, at the point of junction of the two railroads, in the town of Leeds, in accordance with the provisions for that purpose, contained in the seventh section of the Act incorporating the said Androscoggin Railroad Company, approved August 10th, 1848, and that they so connect.

"*Voted*, That the president be instructed to furnish the president of the Androscoggin Railroad Company with a certified copy of the foregoing vote, and that the clerk be directed to furnish the clerk of that corporation with a certified copy of the same."

Evans, for plaintiffs.

The railroads were connected as early as 1852. The defendants deny that this was done under the charter, or that either party ever "elected" to connect, — meaning thereby that "no vote of stockholders or directors was ever passed to that effect."

These denials are "upon information and belief," are of very little weight, and do not require evidence equivalent to the testimony of two witnesses to overcome. 2 Dan. Ch. Pr., 984, note 1, and cases cited; *Copeland* v. *Crane*, 9 Pick., 78.

I. The evidence in the case abundantly shows that both parties *did* elect to form the connection authorized by their charters. No better evidence can be had of such election, than the *fact* admitted in the answer, and proved by all the witnesses, that an *actual connection* was formed, by the mutual *assent* of both parties, and by their joint labor.

This "election" may be proved in other modes than by the records of the corporations.

The ancient rule, that corporations can bind themselves only by deed, and by votes duly recorded, &c., is entirely exploded. *Contracts*, even, may now be implied from the acts of corporations or their authorized agents. 2 Kent's Com., 233; *Cram* v. *Bangor House*, 12 Maine, 357; Angel & Ames on Cor., §§ 228, 229 and seq.; 3 Met., 137; *Bank* v. *Dandridge*, 12 Wheat., 68; *Bank of Col.* v. *Patterson*, 7 Cranch, 305–306.

II. But the "election" does appear of record. As to the defendants:—As early as 25th August, 1849, their directors had determined not only to effect a junction with the plaintiffs, but had also designated the place where it should be; (See extract from records,) a location *from the junction* ordered, and a committee appointed, and an *agent to negotiate with the plaintiffs.*

On 9th October, 1849, the located line "*from the junction*," &c., accepted.

September 7, 1850, ordered to lay the track from the junction, &c.

So, on the part of plaintiffs:—On 11th August, 1852, their directors passed a vote appointing a committee to make such an arrangement for the connection of the roads as they should deem proper.

And, under this authority, the *place*, *mode* and *manner* of forming the connection was fixed and agreed upon.

III. The acts and conduct of the parties, for a series of years afterwards, show most conclusively the election to make the connection on both sides; and that each thereafter constantly claimed rights under it, by virtue of the Acts of incorporation.

The defendants made application, April, 1865, to the Supreme Judicial Court, to have commissioners appointed to fix rates of toll. The petition set forth that the roads *had been connected, &c.*, but that they failed to agree "upon terms of connection and *the rates*" for transportation.

The answer to this application set forth the terms of the Acts of incorporation, and averred that the then petitioners, now defendants, "had elected so to connect their road; and the then respondents, now plaintiffs, have assented to and acquiesced in such connection; and averred that this connection, so made, with its legal incidents, was still in force, and binding on both parties, till it should be changed or abrogated by mutual consent."

The petition of defendants of Nov. 19, 1859, to the railroad commissioners sets forth, in so many words, "that, by

virtue of its charter, and the charter of the Androscoggin and Kennebec Railroad Company, it has long since become a connecting road."

V. Assuming, then, that the roads were connected, by the election of both parties, in conformity with their charters, and by mutual agreement as to the place, mode and manner, what rights thereby accrued to the parties respectively?

We maintain that each thereby acquired the right to have the connection, so formed, kept up and maintained indefinitely, as it then existed; that neither could be deprived of this right, or debarred of its enjoyment, but by its own consent, or the law of the land; that it was a perfect, absolute and vested right—a franchise, a property, protected by law, and beyond even the reach of legislative control. It rests in grant from the sovereign power; it is given by statute; consummated and carried into execution by the mutual assent and agreement of both parties, and which neither can rightfully abrogate or impair.

These are familiar principles, and are sustained by numerous and familiar authorities.

It can hardly be necessary to refer even remotely to *Fletcher* v. *Peck*, and the Dartmouth College case, or any of the long list of decisions in the National and State Courts, where these principles are maintained.

They are familiar to the Court, and will be found recognized and approved in a late case in Maine. *State* v. *Noyes*, 47 Maine, 189.

The case of *Oxford Central R. R.* v. *At. & St. L. R. R.*, 46 Maine, 69, is to the same purport.

Boston & Lowell R. R. v. *Salem & Lowell R. R.*, 2 Gray, 1, bears a close resemblance to this in many respects, and stands upon precisely the same principles. In the arguments of counsel on both sides, and the opinion of the Court, the law of the case is most fully exhausted.

It is a decisive authority, also, for the jurisdiction of the Court, and the appropriateness of the remedy.

VI. The right of connection, secured by the charters and exercised by the parties, is permanent in its nature, and obligatory, until by mutual consent or process of law it be abrogated.

"A contract between two railways, that each shall run upon the track of a portion of the other's line, is of a permanent character, and cannot be determined without the consent of both parties." Redfield on Railways, § 213, cl. 6; *Great Northern, &c.* v. *Manchester, &c.*, 10 English Law and Eq., 11.

VII. The acts of the defendants, in breaking up the connection and changing the gauge, were a violation of the plaintiffs' right, — a private nuisance, for which the only adequate remedy is that sought in this bill. See 2 Gray, *ub. sup.*

Even if the connection had been formed, as averred in the answer, by an agreement between the parties, independent of the statute, yet, being formed and consummated on good consideration, neither party could abrogate it; *a fortiori*, when founded on statute. *Columbus & Piqua Railroad* v. *Indianapolis & Bell. Railroad*, 5 McLean's C. C. R., 450, which is an authority for the mode of remedy, also; Redfield, § 215, cl. 1, 2, 3, 4.

VIII. The Acts of Feb. 15 and March 20, 1860, authorizing the extension of defendants' road, did not, either directly or by necessary implication, authorize them to change their gauge or break up the connection then existing. On the contrary, by § 2, p. 56, they were made subject to all the duties and liabilities in regard to the extended part, which they were under respecting the then existing part, — that is, among others, the liability to a connection with the plaintiffs' road.

But, if the Legislature did intend to authorize defendants to break the connection, it furnishes no justification; — such a provision, invalidating the rights of plaintiffs given by charter, being clearly unconstitutional.

IX. The plaintiffs have not lost any of their rights by acquiescence or delay in enforcing them.

Gilbert, for defendants.

The opinion of the Court was drawn by

APPLETON, C. J.—Railroads may make a connection by virtue of a contract mutually entered into between them, or under the provisions of a statute authorizing such connection.

(1.) If the connection be under and by force of contract, its continuance in certain cases will be enforced in equity. *Columbus, Piqua, &c. Railroad Co.* v. *Indianapolis Railroad Co.*, 5 McLean, 450; *The Great Northern Railroad Co.* v. *Manchester, &c. Railroad Co.*, 10 English Law and Eq., 11.

There have been two contracts between these parties, both terminated by the complainants for reasons deemed by them satisfactory. Having claimed and exercised the right of terminating these agreements, they cannot have the aid of a court of equity to enforce the performance of contracts already terminated.

(2.) The respective rights and obligations arising from a connection, made in pursuance of statutory provisions, can only be ascertained by recurring to the statutes conferring rights and imposing obligations.

By the charter of the Androscoggin & Kennebec Railroad, granted March 28, 1845, c. 270, § 7, the Legislature reserved the power to authorize other railroads, "coming from a northerly or easterly direction," to connect with that railroad.

By the charter of the Androscoggin Railroad, granted in 1848, c. 184, § 7, that road was "authorized and empowered to connect, *if it shall elect so to do*, with the Androscoggin & Kennebec Railroad, at any point in either of the towns mentioned in the first section of this Act, which the directors of said corporation may select; and said Androscoggin & Kennebec Railroad *shall receive and transport* all persons, goods

and property of all descriptions, which may be carried and transported to its railroad on said Androscoggin Railroad, at the same rates of freight and toll on such passengers and other property as may be prescribed by said Androscoggin & Kennebec Railroad Company, so that the rates of freight and toll on such passsengers and other property as may be received from said Androscoggin Railroad shall not exceed the general rates of freight and toll on its road received for freight and passengers at any of the deposits of said corporation; *provided, also*, that the Androscoggin and Kennebec Railroad Company, *if they shall elect so to do*, are hereby authorized to connect with the said Androscoggin Railroad, subject to the provisions of an Act relating to railroads, approved March seventh, one thousand eight hundred and forty-two."

By this section either railroad could elect to connect or both could so elect. If either elects to connect and does so connect, it thereby acquires the rights of a connecting railroad and not otherwise.

No definite gauge is established in the charter of either railroad company, and each has the right to make "such rules, regulations and provisions, as the directors shall from time to time prescribe and direct." Each corporation had by its charter the right to fix its own gauge or to alter it, as should be deemed most conducive to its own interests.

The Androscoggin Railroad is "authorized to connect, if it shall so elect, with the Androscoggin & Kennebec Railroad," &c. This is not the language of a contract. It is a privilege conferred. When one corporation elects to become a connecting road and the connection is made, it acquires the right to have the railroad, with which the connection is made, "receive and transport persons, goods and property of all descriptions, which may be carried and transported" thereto. The exercise of this right is a matter of election. The continuance of such exercise is equally a matter of election. There is nothing compulsory on the

railroad thus electing. It is thereby deprived of none of its rights. The electing and connecting railroad enters into no contract. It merely elects to make use of a privilege conferred — to enjoy certain rights. It may abstain from enforcing its rights or claiming its privilege. So any individual may omit or neglect to bring his goods or property to the railroad for transportation.

The duty or obligation thus imposed upon the railroad with which the connection is made, does not restrict it in the general management and control of its road. The obligation to receive and transport is subordinate to the general powers of the corporation to manage and control its property and determine its gauge. It authorized the connecting railroad to require the reception and transportation of all persons and property it might transport *to* the rail with which it is connected. It imposed upon the latter only the obligation to receive and to transport. It did not require the former to bring persons or goods to be transported. It left the general rights of the corporation unaffected and unmodified, except as changed in this single respect.

"When, in the charter of a railway company, a right is reserved to the Legislature to allow other railways to connect with the former, upon such terms as shall be reasonable, complying with the established regulations of such company upon the subject, and, in pursuance of such reservation, a junction is made by a second railway company with the first, which, in faith of such connection, proceeds to make expensive and permanent repairs for the accommodation of the enlarged business thus brought upon its track, it was held that this imposed no obligation upon the second company to continue the connection permanently. And, also, that the second company might lawfully obtain an extension of their own road, so as to do their own business, without continuing the connection." Redfield on Railways, 436; *Boston & Lowell Railway* v. *Boston & Maine Railway*, 5 Cush., 375.

But, if it were assumed that a connecting road could not, at its own election, withdraw a connection once made, the Legislature, which authorized and empowered it to connect, might, it would seem, authorize and empower it to disconnect. This has been done by the Acts of 1860, c. 386, by which the extension of the Androscoggin Railroad was authorized, and by c. 475, by which it is empowered "*to connect with the Kennebec and Portland Railroad.*" To allow a disconnection was, as to the defendants, merely allowing them to surrender a right. To this the Androscoggin Railroad Company cannot object, for they have accepted the provisions of the Act. The complainants thereby have been relieved from a burden imposed. There is no violated agreement of which they can complain.

The complainants allege that they have a vested right to the continuance of a connection once made; that this connection, once established, imposes on the connected road the perpetual obligation of ever continuing the gauge as existing at the time of the connection, and is an interdiction to any future change. If this be so, the obligation and the interdiction are matters of inference merely, and it is difficult to find the language in the charter of either corporation from which such inferences can be legitimately drawn.

But, suppose it to be so, the rights given by statute do not become vested till the election to connect is made. As, by § 7, one of the corporations may elect to connect and not the other, it is manifest there may be an actual connection, in the making of which each may have an agency, while there is but one connecting road — that is, one road which has elected to be such. In the making of the connection, consultations may be had as to the place where and agreements be made as to the mode in which the connection shall be had, without the railroad with which the connection is made thereby becoming a connecting road. Neither road can become such by § 7 without its own election thus to be.

The offer to the complainants, by § 7, to be a connecting road can afford no rights until its acceptance. The statute

authorizing the election may be repealed. If repealed, before the acceptance of the rights thus conferred, a subsequent acceptance would be of no avail. A repeal may be in express terms or by necessary implication.

The special Act of 1860, c. 475, expressly authorizes the Androscoggin Railroad to connect with a railroad of a narrower gauge. Neither the statute granting the charter of the complainants nor that of the respondents established a gauge for either. The statute c. 475, by necessary implication, authorized a change of gauge. It authorized a connection which could not be made with the gauge then in use. The respondents have accepted the change in their charter, and acted under it by making the connection thus sanctioned. They are entitled to the protection of the law, when in the exercise of their chartered rights.

The special Act of 1860, c. 475, authorizing the connection of the Androscoggin Railroad with the Portland & Kennebec Railroad, was passed and went into effect on 20th of March of that year. This empowered a change of gauge, for it permitted and allowed a connection to be made with a railroad of a different gauge. It was accepted by the defendant corporation — which thus became entitled to all the rights and privileges thus conferred.

The complainants, at a meeting of their corporation, held on 27th of Nov., 1860, voted to "*elect* to connect their railroad with the railroad of the Androscoggin Railroad Company, at the point of junction of the two railroads in the town of Leeds, in accordance with the provisions for that purpose contained in the seventh section of the Act incorporating the said Androscoggin Railroad Company, approved August 10th, 1848, and that they so connect." The president was further directed to furnish the president of the Androscoggin Railroad Company with a certified copy of the foregoing vote.

When the complainants thus, by their vote, elected to become a connecting road, it was *after* the defendant corporation had been authorized to form a new connection with a

different gauge,—had accepted this modification of their original charter and had acquired new rights under it. The complainants did not seasonably make their election. They had no vested right arising from any election made when the defendants were empowered to make the change which they have made.

The complainants do not ask for a connection with the road as it now is, with its altered gauge.

The prayer of their bill is, that the respondents may be enjoined to change their existing gauge to that of the complainants. But when the complainants made their election to connect, it was made with a full knowledge of the rights conferred on the respondents by the Acts of 1860, c. 386 and c. 475, and of their probable action under those Acts. The complainants could not, at that late day, so elect to connect as to deprive the respondents of the new privileges thus conferred. If, then, they may claim to connect, it is only in subordination to the rights of the repondents, existing when their election was made.

The privilege of a connection was proffered the complainants. It was not accepted until it was too late. It never vested, or if it did vest, it was a right to *connect* subject to the changes the defendants were empowered to make in the gauge. But this is not the connection prayed for in their bill. The complainants have shown no vested right in any particular gauge, and have no ground of complaint.

The present bill was filed Sept. 20, 1861, long after the respondents had expended large sums of money in building the extension, and in purchasing cars, &c., for their altered gauge. It does not appear that the complainants had ever run their cars over the respondents' track, or had contemplated so doing. The expenditures, thus made upon the extension, were made with a clear understanding on the part of those controlling the complainants' corporation of the purposes and objects, for which they were so made. The complainants delayed filing their bill until after this great outlay had been made. After so great a delay in enforcirg their

alleged rights they can neither equitably nor legally interfere. *Bill dismissed with costs for respondents.*

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

DAVIS, J., dissented.

DAVIS, J. — The Androscoggin and Kennebec Railroad Company was incorporated March 28, 1845. In their charter, the Legislature reserved the right to "authorize other companies to connect their railroads with the railroad" of that company.

August 10, 1848, this reserved power was exercised by the Legislature, by granting such right of connection to the Androscoggin Railroad Company.

Generally, such a right is conferred upon *one* company, as a *privilege*, and imposed upon the *other*, as a *burden*, or servitude. The former may exercise it or not, at its election; and, if the connection has been formed, it may withdraw and discontinue it, whether the other company consents or not. *Boston and Lowell Railroad* v. *A. and W. Railroad Co.*, 5 Cush., 375. But the latter company has no such right to disconnect; for that would be abrogating a right reserved, and expressly conferred by the Legislature upon the other company. Such have been the rights and liabilities of connection under all the charters granted in this State, except in the case at bar.

In this case, when the right of connection was conferred upon the Androscoggin Railroad Company, it was provided that the Androscoggin & Kennebec Railroad Company should also have the right to connect their railroad with that of the former company. Such right, however, was not the less absolute in each, because conferred upon both. The former company, it is true, was under no obligation to *construct* its road. But, having constructed it, the right of the other company, like its own, became fixed and perfect. And this right was thereupon as absolute in *each*, as it would have been in either one, if conferred upon one only.

And even if this right, in either company, would have been lost, without an *election*, within any period of time, to exercise it, it was not so lost in this case. For it is not questioned that, immediately after the latter railroad was finished, the two railroads were actually connected, by the joint action, and at the mutual expense, of the two companies. They thereby *both* "elected" to avail themselves of the right conferred by the Legislature.

Since that time there have been many difficulties and controversies between the companies. Business connections have been formed, and afterwards terminated. Under additional authority, granted by the Legislature, Feb. 15, 1860, the Androscoggin Railroad Company extended its railroad from Leeds to Brunswick; and having constructed the extension upon a different gauge from that of the portion previously made, the gauge of that was then changed to correspond with it. This practically disconnected the railroad from that of the Androscoggin & Kennebec Railroad Company, by making them of a different gauge. It is for this that the present suit in equity is brought, praying that the former company may be enjoined to restore the rails upon their road to the same gauge as before, so as to make the connection available as it previously existed.

It is contended in defence, that the charter confers no right except to a *business* connection; and that, if it is held otherwise, the right is not *perpetual*.

A *business* connection can be predicated of the *companies* only; the *railroads* may be connected *physically*. Either may exist without the other. The former is necessarily a matter of *contract;* the latter can be obtained only by contract or by legislative grant. For every company, except as limited by its charter, or by general statute, has the exclusive control of its own track.

Business connections are common in this country, not only between companies owning intersecting or adjacent railroads, but between companies that own roads widely separated. Freight and passengers are transported long dis-

tances upon one ticket, or by one contract, made by one company for itself and others. No legislative grant is necessary for this purpose. The details of any such arrangement are necessarily so diversified and fluctuating, that it cannot be supposed that the Legislature would ever attempt to grant any such right.

And the express terms in which the right of connection has been reserved or granted excludes the idea that it is a right to a *business* connection. It is a connection of the *railroads* and not of the *companies.* In nearly all the numerous charters granted between 1835 and 1842, the Legislature reserved the right to "authorize any other company to *connect any other railroad* with the *railroad* of said corporation, *at any points of intersection* on the route." In 1842, the general statute required every railroad corporation to draw over its railroad the cars of any other company, "which has been or may be authorized by the Legislature to connect *their railroad* with the *railroad* of such corporation." And, in case of refusal, the company having the right of connection was authorized to "draw its own cars over the other road, with its own locomotive."

This language clearly relates to a connection of the *rails*, and not to any *business* arrangements. And, in subsequent charters, the language is still more clear and definite, giving the right of connecting other railroads "coming from a northerly or easterly direction," as in the case before us; or "on the easterly side thereof," as in the charter of the Atlantic and St. Lawrence Railroad Company. By the right of connection, therefore, is meant a *physical* connection, by which trains can pass from one railroad to the other. Such a connection was actually made between the two railroads in controversy, by the joint action of the companies, in 1852; and that connection continued, without interruption, until September, 1861, when it was interrupted by the change of gauge complained of in this suit.

Is the right of connection, when thus reserved and granted by the Legislature, *perpetual?* Or may the company

subject to such connection in any way interrupt or terminate it?

That a railroad company may be bound by its *contract*, therefore, to maintain a connection perpetually, there can be no doubt. But, in such cases, the *perpetuity* of the connection must appear by the contract to have been intended by the parties. They are not held to be perpetual from the nature of the connection; nor from the interests involved in it; but because the parties have *agreed* that they shall be perpetual. And this applies as well to cases in which two companies agree to connect their *railroads*, so as to run trains from one to the other, as to cases in which such companies agree to a *business* connection, either with or without any connection of their *roads*, by a junction of the rails.

A right, which a company has, to connect its *railroad* with that of another company, originating, not in any contract, but reserved and granted by the Legislature, if the roads are, and continued to be, of the same gauge, is in its nature perpetual. It is like a reservation in a deed, or the grant of an easement. Like any other right under the charter, it cannot be abrogated or lost, except by a forfeiture of the charter itself. A reservation made in a grant, or a condition annexed to it, is an inseparable incident of the thing granted; and this familiar principle is as applicable to grants of corporate rights, powers, and franchises by the Legislature, as it is to other grants.

What, then, is the extent of the right so reserved and granted? What construction is to be given to the reservation and the grant?

It is obvious that the general statute, first enacted in 1842, and all provisions in railroad charters relating to connections of different roads, *assume* that the tracks to be connected are of *the same gauge*. We have assumed it, thus far, in discussing the questions involved in the case before us.

But is a company, with whose road another is connected, not by any contract, but by authority of the Legislature, thereby forever *bound to retain* the same gauge? It is gen-

erally the right of every company, under its charter, to fix the gauge of its own road, and to change it at pleasure. Is this right annulled or abridged by reserving the right of connection for another company?

It may be said that the Legislature never intended to annul or restrict this right in any such case, and that a reasonable construction of such provisions of charters, and of the statute, does not lead to such a conclusion. Such statutes and charters assume that the roads so connected are of the same guage; and while they *remain* so, the right of connection is absolute, and perfect. Nor would the company subject to such a connection be allowed *wantonly* to change the gauge of its road, *for the purpose* of interrupting the connection. But was its right to fix or change the gauge of its own road intended to be taken away? Acting, not wantonly, but in good faith, for the reason that another gauge is better, or for the purpose of making another connection, more profitable for the company, or for the better accommodation of the public, may not such company change the gauge of its road, although the previous connection is thereby practically interrupted? Is not the right of connection granted to a railroad company intended to be subject to such a contingency?

Whether the defendants have been free from fault in all matters, we need not determine. In changing the gauge of their railroad, there is no evidence that they acted wantonly *towards the plaintiffs*, or with any improper purpose. Under authority given by the Legislature in 1860, they *extended* their road, so as to form a connection with the road of another company, of a different gauge. The change in the gauge of their road was not made for the purpose of breaking the previous connection, but for the purpose of making one with another railroad, which could not be done without it. Had they the right to do this under the general powers conferred by their charter?

Upon this question, my own mind is not free from doubt, though I am inclined to the opinion that a right to connect

two railroads, reserved in the charter of the first company, and granted in the second, is, in its nature, absolute and perpetual; that the right of either to change the gauge is subject to this, and not this to that; and that the former is paramount, and must control the latter. But my associates are of a different opinion; and I do not feel very confident. My dissent is not so much from their conclusion upon this point, as upon the nature of the right conferred by charters, in which the right "to connect" is granted.

JOSEPH EATON *versus* DANIEL JACOBS.

By R. S., c. 105, § 10, to constitute a disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, it shall not be necessary for such lands to be surrounded with fences or rendered inaccessible by water; but it shall be sufficient, if the possession, occupation and improvement are open, notorious, and comporting with the ordinary management of a farm; although tha part of the same, which composes the woodland belonging to such farm and used therewith as a woodlot, is not so enclosed.

Whether or not the open and exclusive possession of a tenant, continued for thirty years, was adverse, is a question of fact for the jury.

Hence, when the tenant proved his open and exclusive occupation for thirty years, receiving rents and profits without rendering any account thereof to any one, clearing the land and erecting buildings thereon, it is erroneous for the presiding Judge to instruct the jury to bring in a verdict *pro forma* for the plaintiff.

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

WRIT OF ENTRY.

The plaintiff traced a record title to the demanded premises back to 1824.

The defendant claimed title in himself by virtue of an alleged adverse possession since 1831.

Paul T. Stevens, called by defendant, testified:—Am acquainted with Daniel Jacobs, and have been since fall of 1829. He was on the place where he now lives in April,

1832, and has been there ever since. The farm was but little better than in a wild state; was, I think, new where the stumps had been taken out; there was a mere apology for a house, no room in it plastered; very poor barn; were, I think, no doors; was only framed with stuff that was picked up on the land. He commenced making improvements on it that season. I helped him fifteen days. The house now on the place is a very good one; think it would cost $700 or $800; a new barn was put on worth from $150 to $200; the old barn has been shingled; three-fourths of the place has been cleared; improvements on land I should think worth $400; is mostly well fenced; lived about two miles from him from 1837 to 1842.

John Merrill, called by defendant. Live in Sidney; moved there in 1832; first knew Jacobs in June, 1832; he then lived where he now does; he has resided there ever since. Our land joins. He has occupied and controlled the place the whole time since I moved there. In 1832, the house was very poor; has been a new barn built, and the old one repaired. The land was very stumpy; but very little of it was cleared; perhaps half an acre. Now about forty acres are cleared; the other ten woodland; good fence now; not any of any consequence in 1832. From 1842, for twelve or thirteen years, I was one of the assessors. I went there to take the valuation, and always found him in possession; was taxed to Jacobs; one year, quite recently, was taxed to Oliver and Daniel Jacobs. He was then living at home with his father; house worth some $700; the barn worth $150 or perhaps more. Improvements on the land I don't know the exact value of.

Carey Ellis, called by defendant. Have known Jacobs over forty years; live about three-fourths of a mile from him. He went on there in the fall of 1831. For thirty-two years he has occupied it. He alone has carried on the place and had the entire occupation of it during all that time; worth $600 or $700 when he went on; now worth $1700 or $1800; was in a rough state when he went on; was an old

house and barn. He has built a house and barn; the buildings worth $900; improvements on land perhaps $300; fences very poor when he went on; good cedar fence now.

Cross-examination.—The old house was either wholly or partly taken down; has cleared up several acres within past fifteen years; rent perhaps worth $50, not more certainly; farm worth $1800 since buildings were put on; not worth more than $50 per year if properly carried on.

Seth Nason, called by defendant. Am a carpenter; I worked on Jacobs' farm nineteen years last summer; was a little house there; the top of the old one was worked into the new one; cellar under the whole house; is painted inside and outside; one room painted, also the entry; other rooms plastered and painted. I worked there four months; Jacobs paid me $150; paid $50 in cash, took cow for $25, and note for $75, which he paid at its maturity. The house certainly worth $800; barn built two years before the house; I worked on it some ten or twelve days; barn would cost from $175 to $200; followed carpenter's business some ten or twelve years; I did the work by the job; were several at work on the outside; Jacobs found the lumber and he boarded me; did not see Ancil Brackett while I was there; Jacobs then had two children at home. The barn I measured a few days ago; is 30 by 36 feet; Jacobs carried on and controlled the place while I was there; no one else had any thing to do with it.

R. H. & G. C. Vose, for the defendant.

Evans, for the plaintiff.

In granting a new trial, the Court proceeded, not upon the ground that the verdict was against the preponderance or weight of evidence merely, but for the reason that there was *no evidence whatever* to sustain it.

The ruling was undoubtedly correct. The controversy respected the character of the possession in one of its material aspects. Was it *adverse?* There was no controversy as to the fact of possession, the length of time of it, or its

openness, notoriety and exclusiveness. But these, however clearly established, are not enough. One thing is wanting, *a claim of title.*

It was incumbent on the tenant to prove this. The burden was on him. There was not a particle of evidence that the tenant at any time, or on any occasion, ever set up a claim or title to any part of the demanded premises. He was competent as a witness, and might have testified—but was not called. The question was not put to any one of the witnesses by the counsel for the tenant, whether the defendant, to his knowledge, had ever asserted or set up a title in himself adverse to the record title.

A title of disseizin commences in wrong, and *no presumptions in its favor* are to be made. On the other hand, every presumption in favor of the true owner is to be made.

Possession merely, however open, notorious or exclusive, is not sufficient to establish title. It authorizes no presumption that it is *adverse also.* The law will presume, until some evidence to the contrary be produced, that the possession is *rightful*, and in subordination to the true owner. Angel on Lim., last edition, § 235, and cases cited.

Hence, a possession by one of several co-tenants or co-heirs, however long continued, exclusive and open, is never regarded as adverse without further proof. This is too well established and too familiar to need authorities.

Possession merely, as it bears upon title, is *equivocal.* It is perfectly consistent with an admission of title in another. It is not necessarily an assertion of title, or evidence of an asserted title, in the tenant. Something more is wanted to give it that character.

If the tenant has put on record a deed to himself, in most cases, probably, it would be held, accompanying possession, an assertion of title. That, or some other equivalent and significant act, must be done, before *possession*, which the law presumes to be rightful as to the true owner, can be held as *adverse* and wrongful.

In *Elmendorf* v. *Taylor*, 10 Wheat., 168, the Court say

the possession must be "*unequivocally* adverse." It must not be left uncertain. The uncertainty (if any) must be removed *by proof;* and that proof must come from the party upon whom is the burden.

Possession, even under claim of right, however strong that claim is asserted, as under deed recorded, has been held insufficient to work a disseizin of the true owner, if it appear that such claim was made by mistake. *Brown* v. *Gay*, 3 Maine, 126.

This principle has been repeatedly affirmed, and the case cited and sustained both here and in Massachusetts, and corroborates the position, that whether long continued, open and notorious possession be adverse or not, depends upon other things to be proved — viz. : — the intentions, purposes and claims of the party taking possession.

Our latest decisions in Maine are to this effect. In *Chadbourne* v. *Swan*, 40 Maine, 261, the instructions to the jury were, if they should find the original entry of the tenant was "*under claim to own the land*, * * * * and that he has since occupied the land as his own, *claiming it adversely*, acknowledging no other title," &c., &c.

These instructions were not found erroneous, though a new trial was granted in the case for another deficiency, not pertinent to the present case.

On p. 262, the Court say, "the possession of a tenant may be open, notorious and exclusive, and yet *not adverse* to the rights of the legal owner of the premises.

Whether it be so or not, must depend, therefore, in every case, upon proof to be adduced as to the further and independent fact of claim of title.

The case of *Otis* v. *Moulton*, 20 Maine, 205, where a title by disseizin was sustained, is by no means inconsistent with these views, but rather in accordance with them. The Court, in giving reasons for supporting the disseizin, say, (p. 211,) "the original disseizor" entered upon the premises "*under a deed recorded*," and continued to occupy till he died, twenty-three years. "During all this time he was not disturbed in

his occupation, and there is proof that he claimed to do so by right," &c.

On p. 212:—"The case presents all the elements necessary to constitute a disseizin. The occupation was open, notorious, exclusive, adverse and under a recorded title, with a claim of ownership according to that title," &c.

This "*necessary* element," upon which so much stress was there laid by the Court, is wholly wanting in the case at bar. There is not a glimmer of proof of its existence. Nothing, as the Court have said, "even tending to show" it.

A verdict, even, that the tenant has held quiet possession over twenty years, does not establish a disseizin. *Pejepscot Proprietors* v. *Nichols*, 10 Maine, 256.

The finding must be an *adverse* possession, or under claim of title, as well as a *quiet* one; and must be upon proof establishing the fact "*unequivocally*," to sustain such a defence.

In *Cook* v. *Babcock*, 11 Cush., 209, the Court say:—"All these elements," (actual, open, exclusive and adverse,) *are essential to be proved*, and the failure to establish any one of them is fatal to the validity of the claim." "In weighing and applying the evidence in support of such a title, the acts of the wrongdoer are to be construed strictly, and the true owner is not to be barred of his right, except upon clear proof," &c., citing 2 Greenl. Ev., § 557; Stearns on Real Actions, 39.

The language of TENNEY, C. J., in *Small* v. *Clifford*, 38 Maine, 214, in a case between co-tenants, is,—"From this fact alone," (possession by the tenant,) "an ouster is not to be presumed, but it may be proved by a *notorious claim of exclusive right*, accompanying exclusive possession."

Entering into exclusive possession, and "openly asserting his own exclusive property in the lands, denying the title of any other person, is an adverse possession," &c. Ib., 214.

Nothing short of this can overthrow the record title, which it is the object and policy of our laws to uphold. Angel on Lim., (last ed.,) §§ 380, 384, 390, note 1.

2. Although the question of adverse possession was for the jury, it was competent for the Judge, in his discretion, to give the direction which he did, the evidence to sustain the defence being wholly insufficient to authorize a verdict in favor of the tenant. This is the usual practice. *Smith* v. *Frye*, 14 Maine, 497; *Thorn* v. *Rice*, 15 Maine, 266; *Davis* v. *Maxwell*, 12 Met., 289, 290.

In *Mara* v. *Pierce*, 9 Gray, 307, the Court say,—"If, in point of law the evidence is entirely insufficient to authorize the jury to find *actual* notice," (which was the controverted fact there,) "the Court would so instruct the jury, and direct them to find a verdict accordingly," which was done in that case.

The case just cited bears some analogy to the present. Long continued and open possession was relied upon as *sufficient* evidence to warrant a jury to find actual knowledge of the existence of an unrecorded deed.

The Court said, it "might properly be submitted to the jury, *accompanied with other evidence* tending to show" knowledge, &c.; "but none other of that character was offered." The same remark applies to the case at bar; and the insufficiency in the one case, for reasons equally cogent, exists in the other.

To send this case back for a new trial, upon the absolute certainty which, upon an examination of *all the testimony* in both the former trials, must be seen to exist, that the defence cannot be sustained, would be doing the defendant an injury instead of a benefit.

The opinion of the Court was drawn by

APPLETON, C. J.—The plaintiff traces a record title to the demanded premises as far back as 1827, but does not prove that during the last thirty years, he, or those from whom he derives his title, have been in possession.

The tenant entered into possession of the land in controversy in 1831, and has remained in the undisturbed occupation of the same to the present time. When he first entered

on the lot, most of it was in a state of nature. He has since cleared and fenced it—built a house and barn thereon—paid the taxes assessed on the same, and received the rents and profits accruing therefrom to the present time. He is not shown to have entered under an agreement to purchase nor to have occupied in subordination to the outstanding legal title of the plaintiff, or in any way to have recognized its existence.

Mere possession is the first degree of title and constitutes a valid right to real property, except as against the legal owner. A prior naked possession is sufficient to enable the possessor to maintain ejectment against an intruder. *Hubbard* v. *Little*, 9 Cush., 476. "Actual possession is *prima facie* evidence of legal title in the possessor, and it may, by length of time and negligence of him who hath right, by degree ripen into a perfect and indefeasible title." 2 Black. Com., 389.

The tenant, so far as the case discloses, entered without color of right. His entry was a trespass. His continued possession was a series of continued trespasses. But every trespass, by force of the term, is adverse to the real owner. "There is a presumption," remarks GIBSON, C. J., in *Patterson* v. *Reigle*, 4 Barr., 201, "which lasts until it is rebutted, that an intruder enters to hold for himself, and it is not to be doubted that a trespasser, entering to gain a title, though conscious that he is a wrongdoer, will accomplish his object if the owner do not enter or prosecute his claim within the prescribed period. But, to do so, it is necessary that the possession be adverse from the first; and, to infer that he intended it to be other, would be to impute to him an inconsistency of purpose."

"It appears," observes MELLEN, C. J., in *The Proprietors of the Kennebec Purchase* v. *Laboree*, 2 Greenl., 281, "that, on the trials which have taken place in the Supreme Judicial Court, before we became an independent State, it was never considered incumbent on the tenant, in the case of a count on the demandant's own seizin, to prove anything

more than his continued and exclusive possession and occupancy, for thirty years next before the commencement of the action, using and improving the premises, after the manner of the owner of the fee; such possession, occupancy and improvement, affording satisfactory evidence to the jury that such tenant claimed to hold the lands as his own."

These views have received the sanction of the Legislature. "To constitute a *disseizin*, or such exclusive and adverse possession of lands as to bar the right of the true owner thereof to recover them, it shall not be necessary for such lands to be surrounded with fences or rendered inaccessible by water; *but it shall be sufficient*, if the possession, occupation and improvement are *open, notorious, and comporting with the ordinary management of a farm;* although that part of the same, which composes the woodland belonging to such farm, and used therewith as a woodlot, is not so enclosed." R. S., 1857, c. 105, § 10.

The possession of the tenant was unquestioned. It had continued for thirty years. It was open and exclusive, resembling that of every farmer in the community in all its essential characteristics. The occupation of land, receiving rents and profits without rendering an account thereof to any one, clearing the land and erecting buildings thereon, are acts indicative of a claim of title adverse to all. These facts being established, it was for the demandant to show how such long continued occupation, under such circumstances, was consistent with a recognition of and subordination to his title, on the part of the tenant.

To constitute an adverse possession it is not necessary that there should be a rightful title. Disseizin excludes the idea of right. The fact of the possession, and the *quo animo* it commenced and continued, are the tests. The fact of open, notorious and exclusive possession was not controverted. The remaining inquiry related to the *intention* of the tenant. But this, by all the authorities, was a matter of fact to be determined by the jury and not by the Court. The intention may be ascertained by acts as well as by

words, — indeed, more satisfactorily by the former than the latter, — for words may be deceptitious, and are more likely to be so than a continued series of acts, all tending in one direction and leading to one conclusion.

The presiding Judge peremptorily withdrew from the consideration of the jury the evidence which was before them. In this he erred. The intention of the tenant, whether occupying adversely or not, was for the jury. The verdict rendered was not their judgment upon the facts proved, but that of the presiding Judge.

It may not be amiss to remark, that, in the case as now presented, there is no proof of the material facts upon which Mr. Justice CUTTING rests his opinion in *Eaton* v. *Jacobs*, 49 Maine, 559. There is no evidence that the tenant entered in subordination to the legal title, or with the intention or expectation of acquiring it by purchase. Of the correctness of his opinion, upon the facts before him, we have no doubt. But the law as there laid down is entirely inapplicable to the facts as now presented.

Exceptions sustained.

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

KENT, J., concurred in the result, and submitted the following views: —

I concur in the result, because I consider the case of *The Proprietors of the Kennebec Purchase* v. *Laboree*, 2 Maine, 281, as an authority directly in point, and as binding upon the Court. That opinion, evidently, is based upon the fact, that the long continued practice in Massachusetts and in this State has settled the law here, and not upon the doctrines of the common law as elsewhere understood. C. J. MELLEN, in that case, admits, in effect, that the decision cannot be sustained on the established principles of the common law as understood in England, or in other States of the Union. I think that, upon the general doctrines and analogies of the common law, the presiding Judge was justified

in giving the directions he did. I do not propose to discuss the question at any length, but to state one or two principles, well established.

The demandant shows a perfect legal title to the land he claims. Why should he not recover possession of what he owns in fee? The tenant says he should not recover it. He shows no title by deed, — but he says I have a better title, acquired by disseizin of the true owner. The issue between the parties is not about present possession, but about the title to the premises. The tenant says he has acquired a title, — not by grant, or by right, but by a long continued wrong. No one doubts that he may thus acquire a title, — or at least such a right as enables him to hold against the real owner. But how is such a right or title acquired? Not by mere possession. It must have been an open, notorious, exclusive and continued possession for twenty years. But this is not enough. It must have been also *adverse* to the title of the true owner. All the other requirements may exist and yet be entirely consistent with an acknowledged possession in another. Possession, however open, exclusive and continued, does not itself import that it was adverse. It may be under a lease verbal or written, or under a life estate, or under a contract to cultivate. Indeed, the law always presumes that every possession is lawful and under some right. It does not assume that a man is attempting to steal his neighbor's land, and that he entered upon it without right and holds it as a naked trespasser, and in wrong and adversely to a legal title. This is an affirmative fact to be proved by the tenant, as the foundation of the title, which he sets up.

But it is said the Court and jury may infer that the holding was exclusive, because it is open, and adverse, and continued. And this is the whole question in this case. If this be so, why was this element of adverse holding inserted in the definition. If it is enough to prove the other points, or, if they constitute such disseizin as may represent a perfect title, why not omit the other?

An open and exclusive possession does not justify the presumption that it was also adverse. The presumption is decidedly the other way. How can a jury be justified in inferring the existence of a fact, which cannot necessarily or even fairly be deduced from the facts proved,—which facts, are, *at least*, as consistent with honest holding in subserviency to some title, as with the assumption that the holding was in wrong and adverse to the true owner? Why should the true owner be obliged to explain the nature of the holding by his adversary? The tenant, as all agree, is bound to establish the adverse nature of his holding as the very essence of his claim of title. He must establish this as an affirmative fact, either by direct proof of claim in words or by acts from which such adverse holding is fairly established. I do not see how it can reasonably be inferred from mere possession,—however open or exclusive.

There is less reason for so doing since the change of the law, by which parties and persons interested are allowed to testify as to their acts and intentions. Ought a party to be enabled to make out a title or right by adverse seizin, by proving mere actual possession for twenty years, without any other evidence as to the nature and object of his entry and holding, whilst he sits by his counsel, and declines to be examined as a witness? This, as I understand it, was the fact in the case at bar.

PENOBSCOT RAILROAD COMPANY *versus* ISRAEL WEEKS.

No Court can rightfully render judgment in a cause, until it has acquired complete jurisdiction over the parties, the subject matter of the suit, and the process.

Such jurisdiction is not acquired until the defendant is in some way notified of the pendency of the suit.

If, upon inspection of the record, a judgment, by whatever Court rendered, and by whatever means brought in question, appears to have been rendered without such notice, it is absolutely void for such purposes.

On Report from *Nisi Prius*, Cutting, J., presiding.

Debt.

The action was on a judgment recovered against the defendant, before the Supreme Judicial Court, at the October term, 1853, in and for the county of Penobscot, on which several executions had been issued, the last bearing date Feb. 14, 1862.

The plaintiffs put into the case a copy of the judgment and the last execution. Nothing appeared to have been paid on the judgment.

The defendant put in a copy of the writ in the original suit.

The original writ described the defendant as "of Orono, in the county of Penobscot;" and the officer's return thereon contained a general attachment of the defendant's real estate, concluding as follows:—"and said defendant not being found in my precinct, I made no further service."

Attached to the writ was the following obligation:—

"Know all men by these presents, that I, Nathaniel Wilson of Orono, in the county of Penobscot, Esquire, am bound, and hereby bind and obligate myself, to indemnify and save N. Weston, jr., Esq., Clerk of the Courts for the county of Penobscot, harmless from any and all damage and cost that can or may accrue to him in any and all ways, from issuing and delivering to me, as attorney to the Penobscot Railroad Co., an execution on the writ in the name of said company, against Israel or Isaac N. Weeks. Said writ bearing date Sept. 20, 1863, and real estate being returned as attached by the officer, but no further service, the said debtor *not* (then) being within the precinct of the officer, and said action being duly entered at the October term of the Supreme Judicial Court, 1853, and defaulted.

"Witness my hand and seal.

"July 19, 1854. "N. Wilson. [L. S.]

"In presence of Elliot G. Vaughan."

The full Court were to render judgment for the plaintiffs or defendant as the law required.

S. Heath, for the plaintiffs.

1st. The judgment declared on was one recovered in this State and the Court had jurisdiction of the subject matter thereof, and was obtained according to the provisions of law. R. S., 1841, c. 115, §§ 3, 4, 5, 6, 7, 8, the latter sections guarding the rights of defendant.

2d. Property of defendant was attached, according to the officer's return; because plaintiffs did not choose to levy, is not proof that there was none; want of jurisdiction, under the conditions of the original judgment, is a matter to be proved. The legal presumptions are in favor of plaintiffs.

3d. When a party obtains a judgment according to the laws of the State, it can hardly be said to be obtained by *fraud*. But, according to the case cited by defendant, a *domestic judgment*, *fraudulently* obtained, is conclusive until reversed. Cases cited by the Court in *Granger* v. *Clark*, 22 Maine, 128.

4th. But the objections made by defendant to the validity of the judgment do not lie; it cannot be invalidated in this way. The judgment is good until reversed. *Hawes* v. *Hathaway*, 14 Mass., 233.

J. Baker, for the defendant.

The opinion of the Court was drawn by

WALTON, J.—No Court can rightfully render judgment in a cause until it has acquired complete jurisdiction over the parties, the subject matter of the suit, and the process.

Such jurisdiction is not acquired until the defendant is in some way notified of the pendency of the suit.

If, upon inspection of the record, a judgment appears to have been rendered without such notice, it is absolutely void,—a mere nullity.

If the record of a judgment of a domestic Court of general jurisdiction declares notice to have been given, such declaration cannot be contradicted by plea and proof; because, for reasons of public policy, the records of such

Courts are conclusively presumed to speak the truth, and can be tried only by inspection.

The records of courts of limited jurisdiction, and of foreign courts, may sometimes be contradicted by plea and proof, when the purpose is to show want of jurisdiction; but the records of domestic courts of general jurisdiction cannot be thus contradicted, — it can only be done when proceedings are instituted for the express purpose of setting them aside.

But the records of all courts are liable to be impeached if it can be done by inspection alone; and if such inspection discloses want of jurisdiction over the person of the defendant, the judgment as against him will be void for every purpose.

The judgment declared on in this case was obtained in a manner highly objectionable. The writ was returned with a nominal attachment of real estate upon it, but without service upon the defendant, the officer giving as an excuse that he could not be found in his precinct. It was then the duty of the plaintiff's attorney, if he desired to prosecute the suit further, to obtain from the Court an order of notice, and to have that order complied with. Instead of this he allowed the action to be called and defaulted. This was a fraud upon the Court. The action was not in a condition to be defaulted, a fact which the Court had no means of knowing, but which must have been known to the plaintiff's counsel. He then took advantage of this default, and, by means of an indemnifying bond, induced the clerk to enter upon the records of this Court a judgment against the defendant. This was illegal, and rendered the guilty parties liable to summary punishment, as for a contempt. There are many precedents of summary punishment for such practices.

It needs no argument to demonstrate that such a record is not entitled to the respect due to a solemn judgment of this Court. It was an illegal interpolation, and ought to be erased. Such would be its fate in England, and, we pre-

sume, in every other country where fairness and common honesty are elements in the administration of justice.

It is enough, however, for our present purpose, to say that such a record, being illegal and void upon its face, will not support an action of debt.

The authorities are numerous which support the foregoing propositions. A few only will be referred to.

"If a judgment be obtained in a Superior Court, clandestinely, by abuse of its forms, and by deceiving its officers, the defendant, against whom it is sought to enforce such judgment, may obtain a speedy remedy by applying to have it set aside, *and the offender punished by attachment.*" Brown's Legal Maxims, 232, 4th ed.

"In this country [England] a party may, as we know, obtain a judgment against another behind his back, if he will abuse the forms of the Superior Court and deceive its officers. To be sure, if he were to attempt to enforce such a judgment, the defendant would have a speedy remedy by applying to have it set aside, *and the offender punished by attachment.*" 2 Smith's Leading Cases, 500, edition of 1847. For numerous instances of the application of this doctrine, see Bouvier's Bacon, tit. "Attachment."

In *Harris* v. *Hardiman*, 14 Howard, 334, (20 Curtis, 206,) the Reporter's abstract is as follows:—"The Circuit Court may set aside a judgment of a former term, rendered on default of a defendant who had no notice of the action; such a judgment being merely void, the Court has power *summarily* to declare it to be inoperative, and to stop all proceedings under it." In the course of the opinion, the Court say:—"In all judgments by default, whatever may affect their competency or regularity, every proceeding, indeed, from the writ and indorsements thereon, down to the judgment itself, inclusive, is part of the record, and is open to examination. That such cases differ essentially, in this respect, from those in which there is an appearance and a *contestatio litis*, in which the parties have elected the grounds on which they choose to place the controversy, expressly or

impliedly waiving all others. * * * It would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent on him to fulfil. The Court entering such a judgment by default, could have no jurisdiction over the person as to render such personal judgment, unless, by summons, or other process, the person was legally before it. * * * A judgment depending upon proceedings *in personem* can have no force as to one on whom there had been no service of process, actual or constructive; who has had no day in Court, and no notice of any proceeding against him. That, with respect to such a person, such a judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community. * * * It is believed to be the well settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis*, or *audita querela*, the same objects may be effected by motion to the Court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense."

In 1 Smith's Leading Cases, (5th American ed.,) 834, the result of many authorities is summed up as follows:— "While domestic judgments are tried in some particulars, by a severer test than those of foreign tribunals, they are protected in others by stronger barriers, and an averment of notice or appearance on the record, cannot be contradicted by extraneous evidence; but the judgment is sustained under these circumstances, not because a judgment rendered without notice is good, but because the law will not permit any proof to weigh against that which its policy treats as absolute verity, and remits the injured party to his remedy against those by whom the record has been falsified. When, however, the record itself shows expressly, or by a necessary implication, that a foreign or domestic, a superior or inferior tribunal, has proceeded without notice, and without

any sufficient reason or excuse for the want of notice, no further presumption can be made in its favor, and it may be impeached and set aside collaterally, as well as in the course of regular proceedings in error."

In *Capel* v. *Child*, 2 Cr. & J., 558, BAYLEY, B., said, "that no judicial proceeding should deprive a man of any part of his property, without giving him an opportunity of being heard;" while PARKE, B., remarked, in *Bancher* v. *Evans*, that the above case showed "how firmly the Court adhered to the great principle of justice, that in every judicial proceeding *qui aliquid statuerit, parte inaudita altera, aequum licet statuerit non aequus fuerit.*"

"Before the rights of an individual can be bound by a judicial sentence," said ROGERS, J., in *M'Kee* v. *M'Kee*, 2 Harris, 231, "he must have notice of the proceeding against him. This is announced as a maxim of natural justice and *universal application* by MARSHALL, C. J., in the case of the *Mary*, 3 Peters, 312. Such notice is indispensably necessary to give jurisdiction over the person of the party; and it has been truly said, that, without citation and an opportunity of being heard, the judgment of a Court, whether ecclesiastical or civil, is absolutely void." The same ground was taken in *Bloom* v. *Burdick*, where BRONSON, J., said,—"It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into Court; and, if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the Court had undertaken to act where the subject matter was not within its cognizance."

The opinions thus expressed, are supported by a great number of cases, in which notice has been said to be essential to jurisdiction in suits *inter partes*, and the failure to give it, held to render the proceedings, both of superior and inferior tribunals, not voidable merely, but absolutely void.

In *The lessee of Walden* v. *Craig's heirs*, 14 Pet., 154, it was held that the service of process, or notice, is necessary to enable the Court to exercise jurisdiction in a cause; and that, if jurisdiction be taken when there has been no service of process or notice, the proceeding is a nullity, not voidable only, but absolutely void. And, in *Hollingsworth* v. *Barbour*, 4 Peters, 475, and *Shriver's lessee* v. *Lynn*, 2 Howard, 43, it was held that a judgment without notice or appearance, is a nullity, and will be so held when brought into question collaterally. And, in *Steen* v. *Steen*, 3 Cushman, (25 Miss.,) 513; and, in *Hess* v. *Cole*, 3 New Jersey, 116, it was held that unless the record show notice, the judgment is simply void, and may be disregarded in any collateral proceeding in which it is relied on, either as a cause of action, or as a defence. In *Bigelow* v. *Stearns*, 19 Johns., 39, SPENSER, C. J., declared that, if a Court, whether of limited or superior jurisdiction, undertake to hold cognizance of a cause of action, without having gained jurisdiction of the persons of the parties, by having them before the Court in the manner required by law, the proceedings would be void.

There are many cases in which it has been held that the judgments of all courts, whenever and wherever brought in question, may be avoided, by proof that notice was not given to the parties prejudiced by them, in opposition to a positive averment on the record that it was, such averment being treated only as *prima facie* and not conclusive evidence of the fact. But the weight of authority seems to be, with respect to domestic judgments of courts of general and common law jurisdiction, that the recital of notice will be conclusive when the judgment is attacked collaterally, and that such judgment will be regarded as absolutely void only when the want of notice is apparent upon inspection.

The judgment now under consideration contains no recital of notice. It is not even silent upon the subject. The officer returns that the writ was not served upon the defendant, giving as an excuse that he could not find him within

his precinct. The action was defaulted and judgment made up at the return term, so that it is impossible to indulge in any reasonable presumption that an order of notice was obtained and complied with; and to sustain a judgment obtained as this was, no unreasonable presumption should be indulged in. The case is one where it is apparent upon inspection of the record alone that no notice was given; and it is believed that no case can be found in England or America, in conflict with the doctrine, that such a judgment, by whatever court rendered, and by whatever means brought in question, is void—not voidable merely, but absolutely void for all purposes—and will be so held in any proceeding, collateral or otherwise, in which its validity may be brought in question. These remarks do not apply to proceedings under the 3d and 4th sections of the 82d chap. R. S. authorizing judgments against absent defendants, and the issuing of execution upon the judgment creditor's filing with the clerk a bond conditioned to repay the amount to the defendant if the judgment is reversed on review, to which he is entitled of right, if brought within one year. In this case there is nothing to indicate that the defendant was absent from the State, nor was any such bond filed. The bond filed by the plaintiffs was to the clerk to indemnify him for entering up the illegal judgment, and not to the defendant, to indemnify him against the consequences of it.

The fallacy of the argument in support of this judgment consists in the assumption that jurisdiction relates only to the subject matter of the suit, whereas in fact it embraces, not only the subject matter of the suit, but also the persons of the parties and the process; and, in overlooking the distinction between impeaching a record by evidence *aliunde*, which in this State and many others is not allowable, and impeaching it by *inspection*, which is allowable. These distinctions have often been overlooked by judges when declaring that judgments could not be impeached by plea and proof, or evidence *aliunde*, and there are many loose expressions to the effect that all judgments of courts of general juris-

diction are conclusive till reversed. But whenever the attention of Judges have been called to these distinctions, they have been at once recognized, and their soundness acknowledged. *Plaintiffs nonsuit.*

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

A. G. STINCHFIELD *versus* ORRIN EMERSON *& ux.*

Although an estoppel *in pais* may not always run with the land, a subsequent purchaser *with knowledge* of the facts constituting the estoppel, can stand in no better condition than his grantor.

An absence of seven years or more from the *established residence* of a party must be proved before the presumption of his death can be raised.

And where a title is claimed to be in the father, because of the death of his son, not only the death of the son must be shown, but also that he died without issue.

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

WRIT OF ENTRY.

The facts sufficiently appear in the opinion of the Court.

Stinchfield, pro se.

J. Baker, for the defendants.

The opinion of the Court was drawn by

DAVIS, J.—This case, though with different parties, for whom the present plaintiff was counsel, was once before presented to this Court. *Stevens* v. *McNamara*, 36 Maine, 176.

After that suit was determined, a deed was made from Stevens to Otis, witnessed by and acknowledged before the plaintiff, Jan. 20, 1855. Otis deeded the premises to the plaintiff, Jan. 24, 1855. A suit was commenced in the name of Otis, Jan. 23, 1855, which was afterwards discontinued.

It was held in the previous case that Stevens was estopped

from claiming any title to the premises, unless he acquired it subsequent to the purchase of the defendant, which was made at his request. And though an estoppel *in pais* may not always run with the land, a subsequent purchaser *with knowledge* of the facts constituting the estoppel can stand in no better condition than his grantor. It is clear that the present plaintiff, from his connection with the former suit, had full knowledge of the facts relating to it. And we infer, by the authority given us in the report, as a jury might have done, that the deed to Otis was made through his agency, and for his benefit. In such case, his knowledge of the facts rendered the estoppel as much a bar to *his* title, as it was to the title of Stevens. *Fitzsimmons* v. *Josselyn*, 21 Vt., 129; *Hart* v. *F. & M. Bank*, 33 Vt., 252; *Dresser* v. *Norwood*, London Jurist, June, 1864.

But he claims that Stevens acquired a title to *a part* of the premises *after* the purchase of Patience W. McNamara, by the death of Jonathan Stevens, his son, without issue. The only evidence of his death is his absence from Hallowell nearly twenty years. As there is no evidence that he ever established his residence there, his absence raises no presumption of his death. And even if he is not living, the case does not show that he did *not* leave children, who are his heirs at law. *Judgment for the defendants.*

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

WATERVILLE BANK *versus* WILLIAM REDINGTON.

When the defendant, at the time of signing a promissory note, affixes the word "principal" to his signature, the note will be conclusive evidence that he is principal, in an action upon a mortgage given by the defendant to the plaintiff to secure its payment.

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

The material facts sufficiently appear in the opinion of the Court.

Libbey and *E. F. Webb*, for the plaintiffs.

Baker & Foster, for the defendant, contended—

The note is not conclusive but may be explained by parol.

I. The words "principal" and "surety," on this note, are no part of the contract between the promisees and promisors. The contract is the promise to pay so much money in such a time, and whether a signer is principal or surety, does not vary his contract. No demand or notice is necessary for a surety, as in case of an indorser. *Mariner's Bank* v. *Abbott*, 28 Maine, 284–5; Story on Notes, § 57; *Harris* v. *Brooks*, 21 Pick., 195; 9 Met., 511, 547; *Bank* v. *Kent*, 4 N. H., 221.

It is mere "*descriptio personae*," and is no more a part of the contract than if the signer had annexed to his name "esquire," or "yeoman," or "laborer," or "gentleman."

It also describes the relation which the signers sustained to each other, and not to the promisees, and is one mode of proving their rights among themselves; but it is only *prima facie* evidence, and liable to be explained and contradicted by parol.

It also serves as a notice to the promisees and holders, of the relation of the signers to each other, and thus saves the inconvenience of proving notice otherwise; but does not exclude other modes of proof. They do not and cannot affect the contract in any possible way.

Suppose a note is written just as this was, and, by mere mistake in the hurry of business, the surety writes his name opposite the word "principal," and the principal writes his opposite the word "surety." Could it be held that the surety is conclusively bound and shut out from showing the actual facts?

The words principal and surety on a note can never affect the promisees or operate to their prejudice, and, in fact, can never have any vitality as to them except at their op-

tion. It is only when they undertake to change that contract, to engraft into it a foreign element, voluntarily to deal with the principal without consent of the sureties, that they infuse life into these words. Both arise long after the contract was made, and are collateral to it. If the promisees elect to change the original contract, why should not the sureties invoke the dormant power of these words? *Mariner's Bank* v. *Abbott*, before cited, 285.

Since these words are no part of the contract, why should not sureties be allowed to show their actual relation according to the truth?

II. *On authority.* In *Cummings* v. *Little*, 45 Maine, 183, and in other cases like it, parol evidence was admitted to show that some signers were principals and some sureties, and yet, in these notes, all sign as joint and several promisors without any words of principals or sureties written opposite their names. This principle is abundantly settled now, though for a long time it was contested and resisted.

In the note in *Cummings* v. *Little*, the signers are all *principals* to all intents and purposes, since none of them have described themselves as sureties or as principals. By the contract itself, they are principals just as much as if the word principal had been written opposite each name. Yet parol evidence is admitted to prove that some of these principals are in fact sureties. This is just as nearly contradicting the written contract as it would be in the case at bar. It is a distinction without a difference. It would be a reproach to the law to admit parol proof in one case and not in another.

Now, as no case has been found that decides this point, nor any text book, the Court is at liberty to establish a rule which will work out justice among all the parties.

In *Robison* v. *Lyle*, 10 Barb., 515, Judge HARRIS says that, where one signs as surety, it may be proved by parol that he was principal.

The opinion of the Court was drawn by

WALTON, J. — This is an action upon a mortgage. After reading the mortgage and the note to secure which it was given, the plaintiffs rested their case. The note is as follows: —

"Waterville, June 25, 1856. — For value received, we jointly and severally promise to pay the President, Directors & Co. of the Waterville Bank, two thousand one hundred and eighty-two dollars, in two years, with interest annually.

"William Redington, *Principal.*
"Joseph O. Pearson, } *Sureties.*"
"Edmund Pearson, }

The defendant, William Redington, then offered to prove that he was only a surety upon the note, and that this fact was well known to the plaintiffs. This evidence was objected to by the plaintiffs, and the presiding Judge ruled that the note was conclusive evidence that the defendant was principal, and, for this reason, rejected the evidence. Thereupon the defendant was defaulted; and, if the ruling was right, the default is to stand; otherwise the default is to be taken off, and the action is to stand for trial, such being the agreement of the parties.

The defendant contends that the words "principal" and "sureties," added to the names of the signers of this note, form no part of the contract between these parties; that they are mere "*descriptio personae*," as much as the words, yeoman, esquire, or gentleman, added to their names, would be; or, at most, that they only show the relation which the signers sustain to each other, and not the relation which they sustain to the plaintiffs; that, in *Cummings* v. *Little*, 45 Maine, 183, the signers were all *principals*, and yet parol evidence was admitted to show that some of them were sureties only; and that the evidence offered in this case would no more contradict the written contract than the parol evidence admitted in *Cummings* v. *Little* contradicted the written contract in that case.

We cannot subscribe to this doctrine. We think the

words "principal" and "sureties" added to the names of the signers of the note constitute an important part of the contract. They not only show the relation which the signers held to each other, but they also show in what capacity they are holden to the promisees. To allow William Redington to prove that he was not principal upon this note, is to allow him to contradict what he has unmistakably stated upon the face of it. This the law will not allow him to do. The law places more reliance upon written than oral testimony; and hence it is an inflexible rule, that "parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a contract in writing." (2 Kent, L. & B.'s ed., 777.) If error has crept into a written contract, a court of equity, in a proper case, will reform it; but till this is done, courts of law must regard it as conclusive evidence of the terms of the agreement between the parties, and treat it accordingly.

It is true, that, in *Cummings* v. *Little*, 45 Maine, 183, parol evidence was admitted to show that some of the signers were sureties only. But in that case the note was silent upon the subject. There was nothing in the body of the note, or added to the names of the signers, to be contradicted by the evidence. Defendant's counsel contends that when a note is silent upon the subject, all are *principals;* and that parol evidence to show that some of the signers are sureties only, contradicts the written contract as much as if the word *principal* was added to each name. But this is not so. To say that all the parties liable on a note are principals is absurd. All may be original promisors, and equally liable upon it; but all cannot be principals, any more than all can be sureties. *Principal* and *surety*, like parent and child, master and servant, are *correlatives*, and one cannot exist without the other.

When a note is silent upon the subject, it is not contradicted by showing that some of the signers are sureties, and others principals. But when the note is not silent upon the subject, and, in a manner free from doubt, designates some,

of the signers as principals, and others as sureties, to show that one designated as a principal was in fact only a surety, or that one designated as a surety was in reality a principal, most clearly contradicts the note.

When a note has several signers, it is often of great importance to the holder to know who are principals and who are sureties; and when the note expresses this, we think it would open as wide a door to fraud, and be productive of as much mischief, to allow it to be contradicted in this as in any other particular.

It is not denied that the defendant signed the note in question, and that he deliberately and understandingly added to his name the word *principal;* and that he permitted the other two signers to add to theirs the word *sureties.* If, relying upon this designation of the capacity in which these several parties were holden, the plaintiff has dealt with them in a manner he otherwise would not, justice forbids that they should now be allowed to show, to his prejudice, that their liabilities are not as therein stated.

Default to stand.

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

APPLETON, C. J., concurred in the result, and submitted his views as follows:—

The defendant "offered to prove that the note described in the mortgage, and put into the case by the plaintiffs, was given to renew a former note in which Joseph O. Pearson was principal and had all the money obtained thereon, and the defendant was merely an accommodation surety thereon, and also for an acceptance of one McCann, of $500, on which the defendant was not liable, but it was for the debt of Joseph O. Pearson, alone, to the bank; that, in renewing the former note and including the acceptance, *at the request of the plaintiffs* the defendant signed his name opposite the word principal, as appears on said note, and the others as sureties, and that the plaintiffs had certain knowledge that defendant

was not principal and never had any of the avails of the note, but was merely an accommodation surety."

In other words, the bank requested the defendant that, as to it, he should assume the relation of principal on the note in suit — and he complied with such request and thereby became principal. Having assumed that relation at the instance of the bank, he cannot be permitted to change it without its consent. His then existing liability and the extension given, are a sufficient consideration.

The defendant was *prima facie* liable on the note. The evidence offered in no way changes or extinguishes that liability.

ELISHA COOLY *versus* JOSEPH W. PATTERSON.

A certificate from the law court, making a final disposition of a cause on its merits, is the final judgment of the Court.

A settlement of an action "in full for debt and costs," after the receipt of such certificate by the clerk, in vacation, in the county where the suit was pending, will not defeat the attorney's lien for his fees and disbursements upon the judgment, although an appeal from the decision of the clerk in relation to the taxation of cost were pending.

The attorney of the prevailing party may charge his client with the amount recovered for travel and attendance, and claim a lien on the judgment therefor.

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

DEBT on a judgment to secure an attorney's lien for his fees and disbursements.

Joseph Baker, for the plaintiff.

G. C. Vose, for the defendant.

The plaintiff employed Joseph Baker, an attorney of this Court legally admitted to practice, to bring a suit in his favor against the defendant as administrator on the estate of Elbridge Tyler. The writ was made November 8, 1858, and entered at the November term of this Court, and continued from term to term till November term, 1860, when

preparation for trial was made and the case opened to the jury; then it was referred to A. Libbey, Esq.; a hearing was had before him; several witnesses were examined, and the case was argued on both sides; the referee made his report in the alternative, in one event for the plaintiff, and in the other for the defendant, depending on the opinion of the Court on facts therein stated. The report was presented to the Court, and accepted, in favor of the plaintiff; exceptions were filed by the defendant; the case went to the full Court, was argued and decided in favor of the plaintiff. In all these proceedings and hearings said Baker was the plaintiff's counsel. The order from the law court was received from Portland, July 19, 1862, as follows:—"Exceptions overruled." The cost was soon after taxed up by plaintiff's attorney, filed in the clerk's office, allowed by him, and an appeal taken by defendant to a Judge of the Court. Pending this appeal, without the knowledge or consent of his attorney, the plaintiff made a settlement with defendant and gave him the following paper:—

"Augusta, Sept. 30, 1862.

"To Wm. M. Stratton, Clerk of the Courts for the county of Kennebec:—

"Sir:—Having settled with Joseph W. Patterson an action standing on your court docket in my favor, against him as administrator on the estate of Elbridge Tyler, and received full payment for the debt and costs in said action, you are hereby requested and directed not to issue any execution against him on the judgment not yet entered up therein, nor against the estate. "Elisha Cooly.

"Witness, William Studly."

The bill of costs was finally settled by a Judge of the Court, and an execution was issued, as of March term, 1862, against the defendant, as administrator, for the debt, and, in his individual capacity, for the costs, amounting to $119,80. Of this sum, $62,51, was for witness' fees in the Supreme Judicial Court, and only 99 cents of the $10,19, before the referee, was for travel and attendance, and $48,09, for other

taxable costs claimed by the attorney. All the disbursements included in said $48,09 were made by the plaintiff's attorney. The Court was to render judgment for the plaintiff for such sum as they find legally due the attorney in said former suit, or for the defendant, according to the law and facts herein stated.

The opinion of the Court was drawn by

WALTON, J.—The principal question presented for determination in this case is, whether a settlement by the parties, after a certificate from the law court, making a final disposition of the cause, had been received by the clerk in vacation, in the county where the suit was pending, and pending an appeal from the decision of the clerk in relation to the taxation of costs, defeated the attorney's lien upon the judgment, so that he cannot maintain an action thereon for his fees and disbursements.

We think not. It is true, that an attorney's lien does not attach till final judgment; but we think such a certificate is the final judgmeut of the Court. It ends the controversy, and determines with certainty which is the prevailing party. Time must be had to adjust the bill of costs before an execution can issue, but this is a delay incident to all judgments. Such a delay does not change or postpone the date of the judgment. When such a certificate is received in vacation, the judgment is to be recorded as of the preceding term; but, for all practical purposes, we think the true date of the judgment is the time when such certificate is received by the clerk of the county where the action is pending. In substance and in fact such certificate is the final judgment of the Court in relation to that suit.

In *Young* v. *Dearborn*, 7 Foster, (N. H.,) 324, the Court held that an order of the Superior Court, after verdict, that judgment be rendered on the verdict, would be deemed the judgment so far as to give the attorney a lien for his fees and disbursements. In that case the Court say that such an order is a final determination of the case, the end of all liti-

gation and controversy as to the merits of the case; that the time when the judgment is entered up in form is immaterial; that time must ordinarily elapse between the making of such orders and the actual entry of judgment; but that the delay ought not to affect the rights of the parties or their attorneys; that, for the purpose of ascertaining their rights in this respect, the order of the Court for judgment should be deemed the judgment itself.

The certificate of the law court, in the original suit between these parties, was received July 19, 1862. The plaintiff was the prevailing party. The cost was taxed by his attorney, allowed by the clerk, and an appeal taken by the defendant. Pending this appeal, namely, Sept. 30, 1862, without the knowledge or consent of his attorney, the plaintiff settled with the defendant, and gave him a receipt in full for debt and cost. This suit is brought by the plaintiff's attorney, upon the judgment rendered for the plaintiff in that suit, to enforce his lien for his fees and disbursements. It has been settled, by a series of decisions in this State, that an attorney has such a lien. It extends, however, only to the bill of costs, as taxed and allowed, and included in the judgment; and will include only so much of that as is justly due to the attorney.

The whole bill of costs included in the original judgment between these parties, was $119,80. The plaintiff's attorney claims judgment in this suit for $49,08. This latter sum includes the travel and attendance of the party, amounting to $38,99; and, it is contended in defence that the fees accruing for these items belong to the party and not to the attorney, and that the latter cannot rightfully claim a lien upon the judgment to secure them. In strictness all the items included in the bill of cost belong to the party; but when the party employs an attorney to attend to the case for him, and the attorney does attend to it, the party becomes indebted to the attorney for his services and disbursements in the suit; and, to insure his pay, the law gives the attorney, not any particular items of cost that may have

accrued in the case, but a lien upon the whole bill of costs for what may be justly due him for such services and disbursements; and when his client prevails in the suit, we think the attorney may justly charge him, among other items, with the amount recovered for travel and attendance, and may rightfully claim a lien upon the judgment to secure the amount thus charged. We think the attorney's lien, in the original suit between these parties, attached when the certificate of the final decision of the law court was received by the clerk in the county where the suit was pending, and that the subsequent settlement cannot be allowed to have the effect to defeat it.

Judgment for plaintiff for $49,08.

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

PETER CONNELL *versus* HIRAM BLISS, JR.

Where the plaintiff, as payee, indorsed and delivered a negotiable promissory note to an attorney, who sued it in the name of a third person with his consent; and, after default, the attorney, claiming to own the note, transferred the demand with the accruing costs to the defendant, for a valuable consideration, who thereupon collected the same; and thereupon the plaintiff sued the defendant in assumpsit for money had and received; — *Held*, that the presiding Judge properly refused to instruct the jury, at the plaintiff's request, that the transfer to the defendant, if actually made, did not divest plaintiff's title to the note or judgment, if defendant knew the note was not passed from plaintiff until after it became due and dishonored.

In such trial, it was not erroneous for the presiding Judge to instruct the jury that, if the defendant purchased said note of the attorney fairly, and for an adequate consideration, without notice of defect in his title thereto, the plaintiff could not recover; that the fact that the note was overdue and dishonored, would not be such notice to the defendant as to enable the plaintiff to assert his title against him.

Neither was it erroneous for the presiding Judge to instruct the jury, that the plaintiff was not liable for the amount of the costs in the action upon the note transferred to the defendant.

Connell *v.* Bliss.

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

ASSUMPSIT for money had and received.

The facts sufficiently appear in the opinion of the Court.

The verdict was for the defendant, and the plaintiff excepted to the rulings of the presiding Judge.

Ruggles, in support of the exceptions.

Gould, contra.

The opinion of the Court was drawn by

APPLETON, C. J.—The plaintiff having a note against one Hanly, indorsed and delivered the same to V. B. Oakes, an attorney, who commenced a suit thereon in the name of one Temple H. Emery, by his consent. After the action was defaulted, Oakes, claiming to be the owner of the note, transferred the demand with the accruing costs to the defendant for a valuable consideration, who thereupon took out execution and collected the same.

There was evidence tending to show that the plaintiff transferred and sold the note in question to Oakes, and likewise that it was left with the latter for the purposes of collection.

The plaintiff's counsel requested the Court to instruct the jury, "that the transfer to Bliss, if actually transferred to him, did not divest plaintiff's title to the note or judgment, if Bliss knew the note was not passed from plaintiff until long after the date of the note, or after it became due and by law dishonored."

This request was not relevant to the issue. This suit is not against the maker. If Oakes was the purchaser of the note, and had therefore the right to transfer the same, it is entirely immaterial whether the note was overdue or not when he purchased the same. He might as well purchase a note dishonored as one not dishonored, if he chose. And, accordingly, as he made the purchase, he might as well sell the one as the other.

This request was refused, and "the jury were instructed that, if Bliss, the defendant, purchased said note of Oakes fairly, and for an adequate consideration, without any notice of any defect in his title thereto, the plaintiff could not recover; that the fact that the note was overdue and dishonored, although it would be such notice as would let in any defence the promisor might have in an action against him, would not be such notice to defendant as to enable the plaintiff to assert his title against him."

The suit on the note was in the name of Temple H. Emery; had the present suit been brought in his name, he being the owner of the note, the instruction given might have been erroneous, — because the apparent title being in him, Oakes could not as against him, have transferred the demand unless he was the actual owner of the same. The plaintiff having indorsed the note, and the suit being in the name of his indorsee, the defendant might well presume that the plaintiff had parted with his ownership in the same, unless he had received notice to the contrary. The fact that the note was indorsed was nothing out of the usual course of business, — and *prima facie* it negatived the ownership of the plaintiff when the note was found in suit in the hands of his indorsee.

It has been already seen that the dishonor of the note had no tendency to affect the defendant with notice that the title was not in Oakes, when he sold and delivered the note thus indorsed and in suit in the name of the indorsee, or of some one who allowed it to be commenced and carried on for the benefit of the indorsee.

It is not perceived that the plaintiff had any interest in the costs. He was not liable for their payment. He had never paid them to Oakes. They were paid to the latter by the defendant, — so that the plaintiff has neither interest in nor liability for the same. *Exceptions overruled.*

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

WILLIAM BROWN *& als. versus* CHARLES W. FORD *& al.*

By R. S., c. 107, §§ 7 and 8, when a deposition is taken out of the State, and not under a commission, the adverse party or his attorney shall have due notice thereof; and no person, for the purposes of this chapter, shall be considered such attorney, unless his name is indorsed upon the writ, or the summons left with the defendant, or he has appeared for his principal in the cause, or given notice in writing that he is attorney of such adverse party.

By the 24th rule of the Court, no deposition taken without the State, without a commission, shall be admitted in evidence, "unless the adverse party was present, or was duly and seasonably notified but neglected to attend."

Depositions taken out of the State at the request of the plaintiffs, on notice to an attorney who was not *then* and *never* had been an attorney of record for the plaintiffs, but who, it appeared by other depositions in the case, had been employed to appear for them in the taking of sundry other depositions without the State, and who in one or more instances had signed an agreement that a deposition, taken in this case, might be used in another cause in which the plaintiffs where the same, are not admissible.

ON MOTION and EXCEPTIONS from *Nisi Prius*, DANFORTH, J., presiding.

ASSUMPSIT on a promissory note.

The defendants introduced several depositions, all taken at the same time, in Boston, on notice to Charles P. Curtis, jr., an attorney in that city, who was not then and never had been attorney of record for the plaintiffs. It did not appear that he ever acted in any respect as their attorney in this State; but it appeared, by other depositions taken in this case, that said Curtis had been employed to appear for them in the taking of sundry depositions, in Boston, and in one or more instances signed an agreement that a deposition taken in this case might be used in another case in which the plaintiffs were the same.

The depositions were read against the objections of the plaintiffs, and they excepted.

The plaintiffs also filed a motion to set aside the verdict, but the exceptions having been sustained, the motion was not considered by the Court.

Gould & Daveis, for the plaintiffs.

Ruggles, for the defendants.

The opinion of the Court was drawn by

APPLETON, C. J.—The defendants read in evidence, subject to the plaintiffs' objection, the depositions of John Williams and others, all taken at Boston at the same time on notice to C. P. Curtis, jr., an attorney of that city, who was not *then* and *never* had been an attorney of record for the plaintiffs, but who, it appeared by other depositions in this case, had been employed to appear for them in the taking of sundry depositions in Boston, and in one or more instances had signed an agreement that a deposition or depositions taken in this might be used in another cause in which the plaintiffs were the same.

By R. S., c. 107, § 7, in giving notice to take depositions, it is provided that no person shall be considered an attorney "unless his name is indorsed upon the writ, or the summons left with the defendant, or he has appeared for his principal in the cause, or given notice in writing that he is the attorney of such adverse party." Within this section Curtis cannot be regarded as the plaintiffs' attorney.

It is urged that by § 20 "the Court may admit or reject depositions taken out of the State by a justice, notary or other person lawfully empowered to take them."

But by § 8, it is provided that, "when a deposition is taken out of the State, and not under a commission, the adverse party, or his attorney, shall have due notice thereof." By the 24th Rule of Court, no deposition taken out of the State without a commission shall be admitted in evidence, "unless the adverse party was present, or was duly and seasonably notified but unreasonably neglected to attend."

The depositions objected to were equally inadmissible under the statute or the Rules of Court.

Exceptions sustained.

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

JACOB SIDENSPARKER *versus* JOHN SIDENSPARKER.

A person who is not a party or privy thereto may collaterally impeach a judgment contravening his rights, whenever it has been obtained by fraud or collusion, or when the Court rendering it had no jurisdiction, or when unlawfully entered up.

Where a judgment in a personal action, whether rendered on default or after contestation, is not liable to either of these objections, it is conclusive as to the relation of debtor and creditor between the parties and the amount of the indebtedness; and it cannot be collaterally impeached by third parties in a subsequent suit, when such relation and indebtedness are called in question.

In the trial of an action of ejectment, where the plaintiff's title depended upon the levy of an execution in favor of the plaintiff against the defendant's grantor, made subsequent to the conveyance: — *Held*,

1. That all testimony tending to show that the note constituting the foundation of the judgment satisfied by the levy, or the amount of costs in said judgment; and

2. All deeds of other land, in no wise connected with the demanded premises, given by other parties to the execution debtor, and by him to the defendant, were inadmissible.

Forbearance to collect a witnessed promissory note for the period of nineteen years will not constitute a waiver of the payee's right to satisfy a judgment founded upon said note, by a levy upon land fraudulently conveyed by the judgment debtor.

An instruction to a jury is to be regarded as an absolute rule of law only under the state of facts existing in the case and the other rulings reported and not reported, unless it otherwise appear from the instruction itself.

This Court will presume that, in other respects, proper instructions were given; and, if the party excepting desired more definite instructions, he should have made the request.

What will constitute a secret trust in a conveyance of real estate.

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

WRIT OF ENTRY.

The plaintiff claimed to recover a tract of land known as the homestead of George Sidensparker by virtue of a levy. That the original title was in the latter was not disputed.

The plaintiff introduced a note signed by George Sidensparker, for $162,50, payable to the plaintiff or order, on de-

mand, dated April 4, 1837. It appeared that this note was put in suit, January 6, 1856. Plaintiff introduced a copy of a judgment rendered thereon, May 20, 1858, for $370,90, debt, and $56,40, costs. In September following, that judgment was sued, another judgment rendered thereon for $471,96, debt, and $21,27, costs, execution issued March 13, 1860, which was extended on the demanded premises March 16, 1860. No question was raised as to the legality of the levy.

The defendant introduced a deed from his father, George Sidensparker, to himself, of the demanded premises, dated Nov. 16, 1852, reciting a consideration of $800; also a note, of same date, for that sum, with eleven indorsements of partial payments thereon, from Jan., 1853 to Jan. 10, 1857, when, as the defendant testified, the whole note was paid. He also testified that the several payments were made by him at the times indicated by the indorsements.

The execution and delivery of the deed and note were proved to have been made at the time of their date.

The defendant also introduced a deed of same date as the former deed, from said George to himself, of what was known as the Parkman lot, lying separate from the homestead, reciting a consideration of $600; but for which the defendant testified he paid said George $200. The two deeds were delivered at the same time.

It also appeared that said George and the plaintiff had, for many years, owned and occupied, as tenants in common, certain other lots of land, of which they made survey and partition, and exchanged deeds thereof, Nov. 11, 1852; that they owned a saw and stave mill for many years as tenants in common, in equal shares, and carried it on together up to 1852 or '3; that the same has never been divided between them; and that said mill was in fair repair, in 1852, and did good work, but has since been suffered to run down.

It was in evidence that said George had no title to the land on which the mill stood; that it run in the spring and fall of the year; that the defendant had the use of the mill

most of the time after he took his deeds, so long as it run; that when the plaintiff obtained judgment on his note, the mill was worthless, as a mill; and the old iron of one-half was worth but $50.

The defendant testified that his father, George Sidensparker, had no other property than that which he conveyed to the defendant Nov. 16, 1852, except the one-half of said mill; that his mother had none; that neither of them had any means of support except what they got from the farm; that his father was considerably in debt at the time, as much as $300 or $400, exclusive of the plaintiff's note.

It was in evidence that the defendant was twenty-two years of age when he took said conveyances; that he had no other property; that he gave no security for the $800 note; that the family had lived together since the conveyance; and that the father was very infirm at the time of the conveyances.

Much testimony introduced by the plaintiff tended to show that the homestead was worth $2000, and the Parkman lot $700, when conveyed to the defendant; but the defendant's testimony tended to show that the homestead was worth but $800, and the Parkman lot but $200.

The defendant offered evidence that said George and the plaintiff had, for several years prior to the conveyance of the demanded premises to the defendant, carried on business together in lumbering, building vessels, and milling; and that they had settlements together from time to time, and paid to each other considerable sums of money as balances; but the evidence was objected to and excluded.

In answer to the inquiries of the plaintiff's counsel, *Otis Sidensparker* testified, that he and his brother, the defendant, bought the "Storer lot," so called, (which was in no wise connected with either of the other lots,) in January or February, 1854, and paid for it; that defendant had no chance to cut much wood or timber other than that, except from the farm; that they had cut a good deal of wood from that in February and March preceding; that their father,

said George, bought it, and they, said Otis and John, paid Storer for it. This testimony was drawn out on cross-examination with reference to the defendant's testimony previously introduced as to the means he had of earning money to pay the $800 note, in which testimony he said he got it by cutting and hauling wood and lumber principally.

The defendant's counsel inquired of said Otis, how much he and John gave for said Storer lot, which being objected to, was excluded.

The defendant offered to put in the deed from William F. Storer to George Sidensparker, dated Feb. 5, 1854, which was duly recorded; and the deed of the same from said George to the defendant and Otis Sidensparker, dated April 29, 1854, and duly recorded, which were excluded as being immaterial.

The defendant's counsel inquired of said Otis, what was the price paid for, and the value of said "Storer lot," both of which were excluded.

The defendant's counsel argued that if the consideration for the homestead was adequate and in good faith, it was immaterial whether what was paid for the Parkman lot was adequate or not, the levy not having been made on that lot, and it having been purchased and conveyed as a separate and distinct lot for another consideration.

The presiding Judge instructed the jury, that the homestead and the Parkman lot, having been conveyed at the same time, though by separate deeds, must be considered as constituting one transaction.

The jury were also instructed that they could not go behind the original judgment to inquire into the validity of the note on which it was rendered; that that judgment was a final and conclusive determination of the subject matter on which it was founded. It was not suggested that the judgment was collusively obtained, but it appeared that there was a trial of the original action, in which the question whether the note was due, was determined by the jury,

the defendant and his father being witnesses for the defendant in that action, resisting it.

That a clear and material inadequacy of consideration was a badge of fraud.

That, if there was any secret trust or understanding, not expressed in the deed and as part of the consideration therefor, that defendant was to support his father and mother for life, or for an indefinite period of time, that would invalidate the conveyance to the defendant, as to the plaintiff, and that it would have that effect, even though not expressed in the form of an agreement, if it was so understood by the parties at the time of making the conveyance, and that understanding was a part of the consideration of the deed.

That if, in making said conveyances to defendant, said George conveyed all his property without any consideration, and did not reserve enough to pay the debts he then owed, said deeds would be void as against such prior creditors; and the demandant being such prior creditor, as appears by the note on which his judgment was obtained, the levy of his execution on the premises would give him the superior title.

The verdict was for the plaintiff and the defendant excepted.

Gould, for the plaintiff.

Ruggles, for the defendant.

The opinion of the Court was drawn by

DICKERSON, J. — Writ of entry. Demandant claims the demanded premises under a levy made thereon in his favor, March 16, 1860, as the property of George Sidensparker. The original note from George Sidensparker to the demandant, which formed the basis of the levy, was given April 4, 1837.

Tenant claims by deed from said George to him, bearing date Nov. 16, 1852; other property was conveyed to the tenant by the said George on the same day, the latter being insolvent at the time.

The liability of George Sidensparker to the demandant on the original note was determined by a jury, and there was no proof or suggestion that the judgment thereon rendered was obtained by fraud, collusion, want of jurisdiction or error in law.

The case comes before us on exceptions, by the tenant, to the rulings and instructions of the presiding Judge. The counsel for the tenant contends that the instructions, with respect to the effect of the judgment on which the levy was made, were erroneous. Upon this point the jury were instructed that it was not competent for them to go behind that judgment, to inquire into the validity of the note on which it was predicated, but that such judgment was a final and conclusive determination of the subject matter on which it was founded. In support of the exceptions to this instruction, it is suggested that the tenant was not a party nor privy to that suit, and that persons bearing such relation *alone* are concluded by the judgment.

This instruction is to be considered with reference to the fact that there had been a trial of the original cause of action, and that there was no suggestion or pretence that the judgment was obtained by fraud or collusion, or error in law. The inquiry is not whether a judgment under *any* circumstances may be impeached by one not a party or privy to the record, but whether this may be done under the particular circumstances of this case. The effect to be given to the judgments of courts of common law, and the right of a party to be secure from undue prejudice on account of a judgment which he has no power to reverse, attach a high degree of importance to this inquiry. Under what circumstances can a person impeach a judgment in a suit to which he was not a party or privy?

1. When the Court rendering it had no jurisdiction of the case. In *Webster* v. *Reed*, 11 How., 437, the Supreme Court of the United States, in an opinion reversing the judgment of the Supreme Court of the Territory of Iowa, says that, " where a judgment is brought collaterally before

the Court as evidence, it may be shown to be void upon its face for want of notice to the person against whom judgment was entered, or for fraud."

In *Downs* v. *Fuller*, 2 Met., 136, it was held that a party who has recovered judgment contrary to the statutes of Massachusetts, against a defendant who was out of the State and had no notice of the suit, and levied execution on such defendant's right to redeem real estate which had been set off on execution to another creditor, could not maintain a bill in equity against such other creditor to redeem the estate from him, on the ground that the latter was neither a party nor privy to the plaintiff's judgment, and not entitled by the rules of law to reverse it by writ of error.

In *Vose* v. *Martin*, 4 Cush., 27, the tenant, in a real action brought to recover land levied on in execution of a judgment of the Circuit Court of the United States, in favor of the demandant against a third person, to which judgment such tenant was not a party or privy, was permitted to show by proof that such judgment was erroneous and void for want of jurisdiction of the parties. In this case the Court declare the rule of law to be, that where a party's right may be collaterally affected by a judgment which for any cause is erroneous and void, and which he cannot bring a writ of error to reverse, he may, without reversing, prove it so erroneous and void, in any suit in which its validity is brought in question. *Leflin* v. *Field*, 6 Met., 287; *Leonard* v. *Bryant*, 11 Met., 370; *Thomas* v. *Hubbell*, 1 Smith, 405, (15 N. Y.)

2. A judgment may be collaterally impeached when it has been obtained by fraud or collusion.

If a party, before any cause of action has accrued to him, commencing a suit to obtain security by attachment in preference to other creditors who have causes of action already accrued, and the debtor join in the fraud, either to defend the suit, or by releasing errors, this attempt is a fraud against prior creditors who may show the fraud in evidence

to impeach the judgment thus collusively obtained. *Pierce* v. *Jackson*, 6 Mass., 242.

In *Granger* v. *Cram*, 32 Maine, 130, Chief Justice WHITMAN, after maintaining the conclusiveness of judgments, as between the parties, until they are reversed, says,—"when judgments are collusively procured between the parties with a view to defraud some third person, not a party thereto, the latter is not estopped to show the fraud;" and, in *Caswell* v. *Caswell*, 28 Maine, 237, which was a suit in equity brought to avoid the conveyance of land by the deceased debtor, it was held competent for the grantee of such debtor to impeach the judgment which was the foundation of the suit, by plea and proof, on the ground that it had been unlawfully obtained, and he had no right to reverse it by writ of error. *Smith* v. *Knowlton*, 11 N. H., 191; *Wingate* v. *Haywood*, 40 N. H., 437.

3. A judgment may be collaterally impeached, when erroneously or unlawfully rendered to the prejudice of the rights of a third party. A foreign administrator has no authority to institute suits at law, in another State, for the collection of any debt due to the intestate he represents, and a judgment thus obtained by him, though resulting in execution and satisfaction by levy of the same, will not debar the creditors or heirs at law of an intestate estate of the right to recover the sum due upon any demand that may have been thus recovered and satisfied by the foreign administrator. *Pond, Adm'r*, v. *Makepeace*, 2 Met., 116; *Pierce* v. *Strickland*, 26 Maine, 276.

In *Sargent* v. *Salmond*, 27 Maine, 541, it was held that when a party recovers judgment against another, on default, for a sum exceeding the amount to which he is by law entitled, such judgment, though conclusive between the parties until reversed, may be impeached by the grantee of such debtor, who was not a party to the suit, in a bill in equity brought against him by the judgment plaintiff, to compel him to convey the land of the debtor held by him in alleged fraud of the plaintiff as a prior creditor.

While it is generally true that an erroneous judgment can only be avoided by writ of error, the books abound in cases where manifest injustice would be done to parties who have no right to reverse a judgment by writ of error, unless they had the right to impeach it collaterally. Hence this rule of law has been so far relaxed in such cases as to allow parties to impeach a judgment by plea and proof, where the Court had no jurisdiction, or it had been obtained by fraud or collusion, or erroneously and unlawfully entered up.

Beyond this, the rules and principles of law do not authorize parties to proceed in the collateral impeachment of judgments; and where a judgment in a personal action is not liable to either of these objections, whether rendered on default, or after contestation, it is conclusive as to the relation of debtor and creditor between the parties, and the amount of indebtedness, and cannot be collaterally impeached by third parties in a subsequent suit, where such relation and indebtedness are called in question.

In the case at bar, the defendant seeks to invalidate a judgment, rendered after trial before a jury, where no suggestion of fraud or collusion, or want of jurisdiction, or of error in law is made. His complaint is that the jury erred in determining the question of fact. The case differs from *Sargent* v. *Salmond*, where the objection was founded upon an error *in law*, the judgment plaintiff having recovered judgment on default for double the amount he was entitled to by law. It is an attempt of a stranger to re-try an issue already determined between the parties, in accordance with the forms and principles of law, and without fraud or collusion.

To sustain the exceptions upon this branch of the case would be to undermine the foundations of the highest judicial authority, and launch at once into the ocean of uncertainty, without chart, helm or compass. It would be to grant judicial license to one who should take a conveyance from a party sued for slander, trespass, malicious prosecu-

tion, or the like, with intent to protect the property from the impending judgment, to re-try such question on the issue of the legality of the conveyance. Reason and authority forbid such procedure. Upon this point the instructions were in strict accordance with the law of the land. *Candee* v. *Lord*, 2 Comstock, 269.

The argument that, from the forbearance of the plaintiff for so long a time to enforce his rights, he must be held to have waived, or is estopped to set up his claim, is more ingenious than sound. The statute of limitations has fixed the time during which the plaintiff might bring his action against George Sidensparker, and it is scarcely necessary to add that it is not competent for the defendant, a stranger to that suit, to change that period.

The instructions with respect to a *secret trust* are to be regarded as an *absolute rule of law* only under the state of facts existing in this case, and under the other rulings reported and not reported. This Court will assume that in other respects the presiding Judge gave the proper instructions. If the tenant desired more definite instruction he should have made the customary request. In determining the correctness of this ruling, regard must be had to the evidence touching the indebtedness of the grantor, the nonpayment of the full value, and the "understanding" that the father was to be supported by the son, "*as a part of the consideration of the deed.*" Whether or not this "understanding" assumed the form of an agreement is immaterial, so that at the time of the conveyance there was a reasonable expectation of the father that he should receive future support from the son, and of the son that he should furnish such support as a part of the consideration of the deed.

Nor is it material that the time, during which the support was to be furnished, be fixed and definite; it may be for life, or a shorter period, or it may be extended indefinitely. The gist of the objection to the validity of the conveyance, in this respect, consists not in the *amount* to be paid in future

support, but in the *fact* that the promise of such support formed part of the consideration, as an inducement to the sale. In such case, the grantor essays to put his property beyond the reach of creditors, and receives therefor an inadequate present consideration with which to satisfy their claims. When this fact is established, whatever be the amount so secured from attachment, instead of entering upon the task of determining what part of the consideration was paid in money, or other property, and what part was agreed to be paid in future support of the grantor, and of holding the grantee responsible to the grantor's creditors for the latter sum, the law treats the conveyance as a nullity, as between the grantee and the grantor's creditors, and holds the property liable for their claims. Such an arrangement between grantor and grantee is a *continuing* fraud, and has been held void not only as against *precedent*, but, also, against *subsequent* creditors. *Clark* v. *French*, 23 Maine, 221; *Smith* v. *Smith*, 11 N. H., 460; *Jackson* v. *Bush*, 20 Johns., 5.

It is unnecessary for us to determine what the rule of law would be, if the *money* consideration *alone* had been adequate, or if the grantor retained sufficient property to pay his debts, as these questions are not legitimately raised by the exceptions, and as we assume that the presiding Judge gave the necessary and proper instructions upon these points. Taken in connection with the facts and other instructions contained in the bill of exceptions, and the unreported instructions, which, we are bound to assume, were given; the instructions upon the subject of *a secret trust* state the rule of law applicable to this case with sufficient accuracy, though, taken independently as abstract legal propositions, they may admit of qualification and limitation.

We have examined the exceptions with reference to the admission and exclusion of evidence upon the various points suggested by the counsel for the defendant, and, without stating the reasons for our conclusion, we think it is very

clear that the rulings of the presiding Judge in this respect afford the defendant no ground of exception.

Exceptions overruled.—Judgment on the verdict.

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

ISAIAH LEWIS *versus* MONMOUTH MUTUAL FIRE INS. CO.

By c. 34, § 5, of the Public Laws of 1861, in case of loss, under a policy against fire, the insured shall notify the company or its agent, of the fire, and, within a reasonable time afterwards, shall deliver to the company or its agent, as particular an account of the loss and damage as the nature of the case will admit, stating therein his interest in the property, what other insurance, if any, existed thereon, in what manner the building insured was occupied at the time of the fire, and by whom, and when and how the fire occurred, so far as he knows or believes; which statement shall be sworn to before some disinterested magistrate, who shall certify that he has examined the circumstances attending the loss, and has reason to believe and does believe such statement is true.

The officers of a mutual insurance company against fire have power to waive any defects in the preliminary proof required by said section.

When the directors of an insurance company find the notice or preliminary proofs of a loss to be insufficient, it becomes their duty to notify the assured of the defect.

If the directors neither make objection to the notice and proofs, nor ask for any further information in this respect, but base their objections upon the ground of over valuation, and refer the matter to their secretary for adjustment, who offers to pay a certain amount, but less than the whole; the company thereby waives any defect in the notice or preliminary proofs.

Where, by the by-laws of a mutual insurance company, it is made the duty of its secretary to keep a record of the doings of the directors and of the company, as well as to receive notice of a loss; his letters addressed to the assured, so far as they admit a notice of the loss, or communicate the doings of the directors thereon, are admissible in an action upon the policy.

Where a writ upon a policy does not set out the statute notice, the Court may allow an amended count setting out such notice, on terms.

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

ASSUMPSIT on a policy of insurance against fire.

The writ contained a count on the policy, in which the only allegation of notice was in these words: "of which loss

the plaintiff within sixty days next after gave notice in writing to the defendants, to wit, to the secretary of said company."

The presiding Judge permitted the plaintiff on terms to amend his writ by adding another count, in which the notice as provided in c. 34, § 5 of the Public Laws of 1861, was duly set out.

Articles 3 and 6 of the by-laws of the company are as follows: —

"Art. 3. The president and directors shall cause their secretary to keep a fair account of all moneys received and disbursed, and to record all proceedings of the board and of the corporation; which accounts and records shall be kept in some convenient place, open, at all times, for the inspection of the members; and at each annual meeting they shall report to the corporation a full statement of their affairs, especially their funds and money concerns.

"Art. 6. When any member sustains a loss by fire, no alteration or repairs shall be made until the president or secretary shall have been notified in writing, and the directors shall have had an opportunity to examine the validity of the claim, and, if satisfied of its justice, to cause payment and satisfaction to be made. And in case of disagreement as to the amount, the directors and the assured may refer the question to arbitrators, whose decision shall be final."

No question was made as to the title of the plaintiff.

Thomas Thompson, called by the plaintiff, testified: —I drew the application and received it as agent of the defendants; am their agent to procure insurance and collect bills. I fixed upon the valuation of said property in said application. Buildings were burned 20th Dec., 1861; I mailed a notice at Bristol addressed to Washington Wilcox, secretary of the company. I received a letter dated Feb. 26, 1862, addressed to the plaintiff, under cover to me, with request that I should see it delivered to Lewis. Said letter was signed by Washington Wilcox as secretary of the company.

Isaiah Lewis, plaintiff, testified:—"I paid $913 for my half of the premises. No one occupied the house after it was insured. I go to sea for a living. Was not at sea at time of fire. Bought the house on speculation. Never tried to sell it, never had an offer for it."

The following letters were introduced against defendant's objections:—

[Notice.]

"Bristol, Dec. 23, 1861.

"Mr. Wilcox, Dear Sir:—I am requested, by Isaiah Lewis, to inform you that the buildings owned by him and Erinda Wells in Damariscotta, and insured in Monmouth Insurance Company, policies No. 7306 and 7307, were burned on the 20th inst., and request that you will take such action as the case may require in regard to the insurance. Buildings a total loss, cause of fire unknown.

"Respectfully yours,

"Thomas Thompson."

[Letter,—Wilcox to Lewis.]

"Mutual Insurance Office, Monmouth, Feb. 21, 1862.

"Dear Sir:—Your claim against our insurance company has been considered by the directors, and some matters relating to the claim need some explanation in their view of the case. We wish some delay in the settlement of the matter, but in the final adjustment of the claim, you will receive your due as early as if the case should receive our immediate attention. If you will consent to some delay, I will visit your place immediately after the adjournment of the Legislature, and will come prepared to make a final wind up of the whole case, if nothing shall appear which will clearly show that you should not receive anything. I will do the same thing with Mr. Wells. I hope you will consent to my proposal, and please show this letter to Mr. Wells. We desire nothing but what is honorable and fair. We will do the honest thing with you.

"Your ob't servant,

"Washington Wilcox, *Secretary*."

[Wilcox to Lewis & al.]

"Mr. Thompson, will you please see that Lewis and Wells get this letter. W. W."

"Mutual Insurance Office, Monmouth, Feb. 26, 1862.

"Gentlemen:—The present is to say to you that the directors think your house in Damariscotta, insured in our company, was somewhat over valued. We are willing to pay all you can justly claim, and if you will allow the claim to rest till near the last of March, I will come to your place prepared with money in hand to pay you for your loss, if we can settle upon some equitable terms, and I doubt not we shall be able to accomplish this end. Certainly we can if we are mutually disposed to do right. If any thing should appear previous to that time, showing that you have no equitable claim, we shall not be bound by this promise.

"Your ob't servant,

"Washington Wilcox, *Secretary*."

"Please answer and direct to Augusta."

[Wilcox to plaintiff.]

"Mutual Insurance Office, April 3, 1862.

"Dear Sir:—I reply to your note of the 28th inst., and say that I laid your matter of loss before the board of directors at their last meeting, and, after consultation, they referred the matter to me again for adjustment, and I can only renew my former proposal to you to refer or to give you $1000, for the whole claim. Please let me hear from you at your earliest convenience, and oblige,

"Your ob't servant,

"Washington Wilcox, *Secretary*."

[Wilcox to Kennedy & Farrington.]

"Mutual Insurance Office, Monmouth, June 7, 1862.

"Gents.:—I will be in Waldoboro' about the 20th of the present month, and will then call at your office. I hope to be able to satisfy you and your clients that we are willing to pay in the case you mention in your note, written some time since to this office, all that in justice can be claimed.

Please defer making a writ till I can see you in relation to the matter. "W. Wilcox, *Secretary*."

Gould, for the defendants, contended that the loss was fraudulent.

The requirements of c. 34, § 5, of the Public Laws of 1861, is a *condition precedent*, which cannot be waived by implication.

There has been no waiver.

The secretary had no *special* authority to act in the matter.

Nor by the charter or by-laws had he any *general* authority to act for the company in the adjustment of a loss, or to do anything pertaining to that subject.

It pertained to the duties of the directors *only*. Charter, §§ 4 and 7; By-laws, art. 6.

The action of the directors cannot be proved by the declarations of the secretary, either written or verbal. *Franklin Bank* v. *Cooper*, 36 Maine, 179; *Franklin Bank* v. *Cooper*, 39 Maine, 541.

No paper in the hands of the present Reporter indicates the name of the plaintiff's counsel.

The opinion of the Court was drawn by

DANFORTH, J.—The execution and delivery of the policy, which is the foundation of this action, are admitted. The defence is, that the provisions of the statute of 1861, c. 34, § 5, have not been complied with, and fraud in obtaining the policy. It is alleged on the part of the plaintiff, that whatever defects there may have been in the notice of the loss, and the preliminary proofs required by the statute, they were waived by the defendant company. There appears to be no proof in the case in regard to the preliminary proofs, and, as the burden is upon the defendant, we may fairly presume that there were deficiencies in this respect. And, in the outset, the power of the officers of the company to waive these deficiencies is denied. Instances of this kind have usually arisen under the provisions in the Act of incorporation, or by-laws, of different companies.

In some of the cases, a distinction has been made between stock companies and those which insure on the mutual principle.

It has been held that, in mutual companies, where the provisions relate to the formation of the contract, when they enter into and become a part of it, then the officers of the company cannot waive them even by express agreement. *Mowbrey* v. *Shawmut M. F. Ins. Co.*, 4 Allen, 116, and cases cited in the opinion of the Court.

On the other hand, when these provisions "do not touch the substance or essence of the contract, or affect its validity, but relate only to the form or mode, in which the liability of the company is to be ascertained and proved," then the proper officers may waive them. *Bartlett* v. *Union M. F. Ins. Co.*, 46 Maine, 500; *Clark* v. *N. E. M. F. Ins. Co.*, 6 Cush., 342; *Underhill* v. *Agawam M. F. Ins. Co.*, 6 Cush., 445; Angell on Ins., 301, and cases there cited.

In the case at bar, all things had been done by the parties, necessary to complete the contract of insurance. The validity of the contract, if obtained in good faith, is admitted, and the stipulation, a non-compliance with which is complained of, relates only to the manner in which the liability of the company is to be ascertained. This brings the case clearly within the decisions last referred to, and with these decisions we are entirely satisfied. The notice and preliminary proofs must necessarily be submitted to the officers of the company; it is for the express purpose of guiding their action; they must pass upon it, and it therefore comes within the scope of their authority to decide upon its sufficiency, and, if satisfactory to them, there is no cause for complaint.

This distinction is clearly stated in the case of *Brewer* v. *Chelsea M. F. Ins. Co.*, 14 Gray, 203.

It is, however, said, that the provisions under consideration are established by a public statute, alike applicable to all companies, and made for the protection of all. This is true, but how does it alter the case? A by-law, not repugnant to the laws of the land, and certainly an Act of incor-

poration, whenever applicable, has the same binding force as a public statute. Though the statute was made for all, it was also made for each, and, to such companies as are in a position to invoke its aid, it gives the same protection as a by-law; no more, no less. Its stipulations may then as well be waived by any particular company as though the same stipulations were embodied in a by-law of that company. Hence, it is not uncommon for an individual or corporation to waive the provisions of a public statute made for their benefit; as in the case of a writ not indorsed when required, or the want of a bond in a replevin suit. These defects, though violations of express statutes, may be waived, not only by express agreement, but also by implication. Upon both principle and authority, we hold it clear that the officers of the defendant company had the power to waive any defects there might have been in the preliminary proof required by the statute.

Have they done so? This depends upon the facts proved. As there is no proof that Woodbury was a director of, or in any way connected with the company, his acts are not to be considered. Aside from this, the proof comes mainly from the letters of Wilcox, which are objected to as inadmissible. It is admitted that he was the secretary of the defendant company. By the 3d article of their by-laws, it is made the duty of the secretary to keep a record of the doings of the directors, as well as of the company. The records, then, were properly in his possession, and it becomes his duty to notify those interested of their doings.

We find, also, by article 6th of the by-laws, that the secretary is a proper officer to receive notice of a loss. His letters, then, are admissible so far as they admit a notice of the loss, or communicate the doings of the directors thereon.

This authority of the secretary, for this purpose, is fully recognized in *Columbian Ins. Co.* v. *Lawrence*, 2 Peters, 51, 52; reported also in 8 Curtis, 17.

From these letters we learn that some notice of plaintiff's loss was received, and that the directors had action thereon.

It was the duty of the directors to pass upon the sufficiency of the notice and of all the preliminary proofs. Until these were satisfactory they had no occasion to go any further. Hence, when the directors find the notice or preliminary proofs insufficient, it becomes their duty to notify the assured of the defect. APPLETON, J., in *Bartlett* v. *Union M. F. Ins. Co.*, 46 Maine, 503, remarks:—"Having received notice of the loss, the defendants should have objected if it was not sufficiently formal, or was deficient in the information required by the by-laws." In the case last cited, this question was discussed, and it was there held to be the duty of the directors to make known any objection that might exist to the notice, or preliminary proofs. The same is held in the cases already cited from Massachusetts, and those from the New York Reports cited by Angell.

In the case under consideration, the directors not only make no objection to the notice and proofs, not only do not ask for any further information in this respect, but put their defence, so far as they claim to have any, upon entirely different grounds, and such as are inconsistent with the defence now set up. Their whole defence, then, seems to have been an over valuation. They refer the matter to their secretary, not to defend, but for adjustment. A certain amount is offered for settlement. All the way through a claim is admitted, promises to pay made. These circumstances, in the cases already cited, and in many others, are considered abundant proof of a waiver of any non-compliance with the requirements of the law in regard to the notice and preliminary proofs.

The case of *Clark* v. *N. E. M. F. Ins. Co.*, 6 Cush., 342, is stronger than this. There the notice was similar, and the requirements similar, and yet mere silence in regard to the notice, after an investigation, was considered a waiver, though the claim was wholly rejected.

We see no alternative under the authorities cited, but to convict the directors of bad faith, or come to the conclusion that they intended to and did waive all defects in the notice

and preliminary proofs, if any such they found. We choose the latter.

As to the question of fraud, there does not appear to be sufficient proof to connect the plaintiff with any. There may be suspicious circumstances, but nothing to show that the plaintiff even had any motive to set the fire. He may have bought on speculation, but it does not appear that he made anything by the loss. We have no proof that the house was over valued. Fraud is not to be presumed, and in this case it has not been proved.

The amendment, if necessary, was allowable. We have already seen that the requirements of the statute, which it is said have not been complied with, and which are set out in the amended count, are not of the essence or substance of the contract. Therefore the same contract and the same cause of action is set out in the amendment as in the original writ. *Defendants defaulted.*

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

JOSIAH TILTON *versus* LEVI KIMBALL.

By R. S., c. 82, § 73, if a party knows any objection to a juror in season to propose it before trial, and omits so to do, he shall not afterwards be allowed to make it, unless by leave of Court for special reasons.

If a party would set aside a verdict because of the relationship between one of the jurors and one of the parties, he must negative the fact of knowledge of such relationship on his part.

ON MOTION.

This case came up on motion by the plaintiff to set aside the verdict, which was in favor of the *defendant*, on the ground that one of the jurors was related within the sixth degree to himself.

The facts sufficiently appear in the opinion of the Court.

Coburn & Wyman, for the plaintiff.

J. H. Webster, for the defendant.

The opinion of the Court was drawn by

APPLETON, C. J.—This case comes before us on a report of the evidence on a motion for a new trial.

The verdict was rendered on the fourth day of the term, and, on the *same* day, the plaintiff filed a motion (without special leave first had and obtained) to set it aside, because "one of the jurors who tried the cause and rendered the verdict therein, was related to one of the parties within named, within the sixth degree, according to the rules of the civil law, and there was no consent, either verbal or in writing, by either party, as to said juror's trying said cause and rendering a verdict therein."

The juror in question was not disinterested or indifferent within R. S., 1857, c. 1, § 4, rule 22. Nor was the objection on that account waived in writing, signed by the parties.

But the right to object, so far as relates to jurors, may be lost by the neglect or omission of the parties. By R. S., 1857, c. 82, § 73, "if a party knows any objection to a juror in season to propose it before trial and omits so to do, he shall not afterwards be allowed to make it, unless by leave of Court and for special reasons." By this section a waiver in writing is not required; thus, to that extent, modifying the provisions of c. 1, § 4, rule 22.

All reasonable presumptions are to be made in favor of sustaining a verdict. Whether a party knows a particular exception to a juror or not may be a fact within his exclusive knowledge. "A party litigant," remarks SHAW, C. J., in *Hallock* v. *Franklin*, 2 Met., 558, "knowing of matter of personal exception to a juror, lies by, taking his chance for a favorable verdict. If, when the verdict is against him, he could go back and take the exception, it would work great injustice. By consenting to go on, with a knowledge of the exception, he consents to abide the result, whether favorable or unfavorable." Hence, a party, seeking to set

aside a verdict, has been required, and rightfully, to negative the fact of such knowledge on his part. *Hardy* v. *Sprowle*, 32 Maine, 310; *Lane* v. *Goodwin*, 47 Maine, 594; *Davis* v. *Allen*, 11 Pick., 466; *Woodruff* v. *Richardson*, 20 Conn., 237. Such a requirement is necessary for the protection of the public. In this case, neither the motion alleges nor does the proof show ignorance of the relationship existing on the part of the party seeking to avail himself thereof.

The relationship, as shown, was to the party by whom the motion is made. The relationship, in its tendency, was favorable to the party now taking exceptions to the juror therefor and adverse to his antagonist. It is not unreasonable to presume that one knows his own relations, — those, at any rate, whose relationship is so near as to afford a reasonable ground of partiality on that account. It seems that the plaintiff knew of this relationship immediately upon the rendition of the verdict against him. It is difficult to believe that he did not know it before. Neither the party nor his counsel negative such knowledge, by any evidence before us. Indeed, it is not even urged in the motion. The motion may be true, and yet no reason whatever may exist for disturbing the verdict. *Motion overruled.*

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

ISRAEL HUMPHRIES *& ux. versus* SAMUEL PARKER.

It is not objectionable for a witness, when testifying, to say, it is "*his impression*," or "he thinks," that the facts, concerning which he is testifying, were as he states them, when he means by the former expression that he has an *indistinct remembrance*, and, by the latter, that he *recollects*.

Under what circumstances the presiding Judge may be called upon to exclude the answer of a witness which is susceptible of two meanings, one admissible, and the other not.

Humphries *v.* Parker.

The question of probable cause, in an action for malicious prosecution, is a mixed proposition of law and fact.

What constitutes probable cause.

What constitutes reasonable grounds.

Malice necessary in an action for malicious prosecution.

In a case for slander, it is proper for the presiding Judge to instruct the jury, that, in the assessment of damages, they may take into consideration the wealth of the defendant.

Under what circumstances a verdict of $1400, in actions for malicious prosecution and slander, is not excessive.

ON MOTION and EXCEPTIONS from *Nisi Prius*, KENT, J., presiding.

CASE for malicious prosecution and slander.

The facts sufficiently appear in the opinion of the Court. Verdict for the plaintiffs for $1400.

Coburn & Wyman, in favor of the exceptions.

John S. Abbott, *contra*.

The opinion of the Court was drawn by

WALTON, J. — In examining and deciding upon a bill of exceptions, we must act upon the presumption that it presents the rulings of the presiding Judge correctly. And yet, every one knows, that they are prepared and allowed under circumstances not very well calculated to secure accuracy. They are drawn in the first instance by the losing party, and it is for his interest to make it appear that the presiding Judge has committed some error. The other party interferes and endeavors to have the exceptions so amended as to exclude all appearance of error. They are presented to the Judge after a considerable lapse of time, — usually at the very close of the term, when there is a crowd of other business pressing upon him, — and he is obliged to examine and correct them without much time for consideration. The corrections are usually made by erasing, interlining, making marks for transposition, or wafering on slips of paper, and it is not surprising that exceptions do not al-

ways present the rulings of the Judge in the most favorable light.

The exceptions in this case do not present the rulings of the presiding Judge in a very clear and intelligible form, and, at the time of the argument in the law court, we were impressed with the belief that the exceptions would have to be sustained. But a more full and careful examination satisfies us that they contain nothing of which the defendant can justly complain.

1. The first point taken in the argument of the defendant's counsel is that illegal testimony was admitted. It is a very common practice for witnesses, when testifying from recollection, to use the expressions "it is my *impression*," "I *think*," &c. One of the witnesses (Philander Coburn) used these expressions while testifying in this case; and it is to these answers that the defendant's counsel refers when he says that illegal testimony was admitted. Such answers are not objectionable. One of Webster's definitions of the word *impression* is as follows:—"Slight, indistinct remembrance. I have an *impression* that the fact was stated to me, but I cannot clearly recollect it." Webster says that one of the meanings of the word *think* is "to recollect, or call to mind. We have no doubt the witness used these terms in the sense here given, and, if so, his answers were unobjectionable. (16 Maine, 246.) When the answer of a witness is susceptible of two meanings, one of which would render it admissible and the other not, before asking the Judge to exclude it, the witness should be required to explain his meaning, and, if the explanation is such as to render the answer inadmissible, then, and not before, the Judge may rightfully be called upon to exclude it.

2. The defendant complains that the question of probable cause was left to the jury, when it should have been decided by the Court; and that the instruction as to what constitutes probable cause was erroneous. The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable are true and ex

isted, is a matter of fact for the jury. But whether, supposing them true, they amount to probable cause, is a question of law for the Court. The exceptions fail to satisfy us that anything more was left to the jury in this case than legitimately belonged to them. Nor are we able to discover any error in the instructions of the presiding Judge as to what constitutes probable cause. He told the jury that there is a want of probable cause, when a party institutes a prosecution without reasonable grounds for believing the party guilty. This was undoubtedly correct. He then defined reasonable grounds to be such as would warrant an impartial and candid mind, exercising ordinary care, caution and discrimination, in believing a party guilty. This we think was correct. He then told the jury that probable cause did not always depend upon the real and exact facts, but might depend upon the honest belief of the party prosecuting, but that it must be a belief honestly entertained, and derived from facts and evidence which in themselves were sufficient to justify a man who was calm, and not governed by passion, prejudice or want of ordinary caution and care, in believing the party guilty. This, also, we think correct. There is no doubt that actual belief, and reasonable grounds for that belief, are essential to constitute probable cause. However strong the evidence might be, yet, if the party prosecuting did not believe the party was guilty, *he* would not be justified in prosecuting him. Nor is mere *belief* enough; for, if this were so, the Court would never be required to judge of the sufficiency of the grounds for that belief, as the law now requires them to do. Belief, and reasonable grounds for that belief, are undoubtedly both essential elements in the justification of probable cause. We see nothing to disapprove of in the instructions of the presiding Judge, bearing upon the question of probable cause. They seem to be in accordance with the best and most approved authorities.

Either party, upon request, would have been entitled to a direct and specific instruction from the presiding Judge,

as to whether the alleged facts set up in defence, if proved, did or did not show want of probable cause; but no such request seems to have been made, and the omission, therefore, to give more specific instructions, furnishes no valid cause for exception.

3. The exceptions state that, "on the question of malice in the prosecution, the presiding Judge instructed the jury that there is a distinction between *legal malice and actual or express malice;* that legal malice means a wrongful act done intentionally, without sufficient cause or excuse; that it is not necessary to render an act legally malicious, that the party doing it is actuated by a feeling of ill-will or hatred; that, if the jury should find that the prosecution was commenced without probable cause, as before explained, *they were at liberty to infer malice, so far as proof of malice was required to sustain the action;* that express malice is something beyond this, and is shown by evidence of personal hatred, desire and determination to injure another, and other facts showing expressly active malice toward the other party; that this being shown, may enhance the damages beyond what may be given when only *legal malice* is shown."

The defendant contends that the term *legal malice* has a well established meaning, and is used to distinguish *constructive malice* from *actual malice*, or, in other words, *malice in law* from *malice in fact;* that, to support an action for malicious prosecution, malice in fact as distinguished from malice in law, must be proved; that, by using the term *legal malice*, the presiding Judge gave the jury to understand that malice in law is sufficient to maintain such an action, and that the only effect of malice in fact is to enhance the damages.

There is no doubt that malice in fact, as distinguished from malice in law, is essential to the maintenance of an action for malicious prosecution. Actions of slander are sometimes maintainable without proof of *actual* malice, *constructive* malice being sufficient. The reason for the distinction is this: Slander is always against public policy, and very rarely, if ever, springs from other than malicious motives;

but the prosecution of alleged criminals is not against public policy, and it is only occasionally that such a prosecution is commenced without probable cause. Hence, in actions of slander, the falsity of the charge being shown, *malice* is established by a legal presumption, and proof of *actual* malice is not required; but, in actions for malicious prosecution, the law allows of no such presumption, and requires proof of actual malice to sustain them. Actual malice may be inferred by the jury from the want of probable cause, or be proved by other circumstantial evidence, like any other fact; but it is a fact to be found by the jury, and not a fact to be established by a legal presumption.

It is true, as stated by the defendant's counsel, that the term "legal malice" has been used heretofore to distinguish malice in law from malice in fact, (36 Maine, 484; 7 Pick., 87;) and, if the first and concluding sentences of the charge upon this point stood alone, we should feel constrained to say that it gave the jury to understand that malice in law was alone sufficient to maintain the action, and that malice in fact would have no other effect than to enhance the damages, and the exceptions would have to be sustained. But these sentences do not stand alone; and the context shows that the presiding Judge did not use the term *legal malice* as synonymous with malice in law; that he used it to distinguish malice in its enlarged legal sense, from malice in its more restricted popular sense; and we think the whole charge, taken together, must have given the jury unmistakably to understand that malice in fact was essential to the maintenance of the action for malicious prosecution, and was therefore unexceptionable.

4. On the question of damages, the presiding Judge instructed the jury, among other things, that they might take into consideration the wealth of the defendant; and this the defendant contends is erroneous, or at least calculated to mislead the jury; but we think the instruction was right. This is an action for slander as well as for malicious prosecution; and in actions of slander we regard the law as well

settled that the defendant's wealth, as an element which goes to make up his rank and influence in society, and therefore his power to injure the plaintiff by his speech, is a fact not to be overlooked by the jury in estimating the damages, and that their attention may therefore be properly called to it by the Court.

5. In addition to the exceptions, the defendant moves that the verdict be set aside and a new trial granted, because, as he says, the verdict is against evidence or the weight of evidence; because the damages are grossly excessive; and because the charge of the presiding Judge, where it was not positively erroneous, was calculated to mislead the jury.

We cannot sustain this motion. The defendant charged the female plaintiff with the crime of larceny,—a charge that cannot be made without seriously wounding one's feelings and character. He commenced a criminal prosecution against her, and had her arrested for the same offence, and the evidence discloses the fact that he persisted in the prosecution after being advised by able and learned counsel to desist. We cannot doubt that the prosecution was commenced without probable cause and for unjustifiable motives; and we are not prepared to say that the damages are too high. The result will probably make the defendant wiser for the future, and have a good influence upon others who are tempted to gratify feelings of revenge at the expense of female character.

Some other points raised by the exceptions have been passed over in silence by the defendant's counsel, and will be no further noticed by us than to say that we have carefully examined them, and find nothing in them which in our judgment ought to disturb the verdict.

Exceptions and motion overruled.
Judgment on the verdict.

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

SKOWHEGAN BANK *versus* WILLIAM G. CUTLER.

R. S. of 1841, c. 76, § 12, provide that whenever the capital stock of any corporation is divided into shares, and certificates thereof issued, such shares may be transferred by indorsement and delivery of the certificate thereof; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered in the books of the corporation, as to show the *names of the parties*, the *number* and *designation* of the shares, and the *date* of the *transfer*.

Whether or not a particular book is the stock ledger of a bank and kept for that purpose, is a question of fact, which may be proved by the testimony of the cashier.

Such book need not bear the attestation of any officer of the bank.

A share in the capital stock of a corporation is merely some aliquot part, and not any particular part. Any "designation," except by stating the owner or owners, would be impossible, even if the shares were consecutively numbered.

When the stock ledger of a bank shows the name of the proprietor, the date of the transfer, the number of shares transferred, the name of the transferer, and the value of the shares, it is a sufficient "entry in the books of the bank," within the latter clause of R. S. of 1841, c. 76, § 12.

Where the proprietor of a certificate of five shares of capital stock indorsed upon it the transfer of the "within *share*," — using the singular number instead of the plural, — to the defendant, and, upon the certificate of one share, the transfer of the "within *shares*," — using the plural number instead of the singular; and the defendant thereafterwards surrendered the certificates and took one for six shares, which he transferred by indorsement and delivery to another without controversy, and no question has been raised between the parties; — *Held*, that in an action by a creditor of the original proprietor of said shares, against said defendant, for aiding said proprietor in a fraudulent transfer and concealment of his property in said shares, he will not be permitted to deny his own title.

A new trial will not be granted because of the admission of irrelevant testimony, if the facts thereby proved were such as could not have injured either party by misleading the jury.

The acts of a debtor in securing the transfer of the funds in a bank to himself, and from himself to the defendant, together with his written declarations accompanying such acts, are admissible on the question of the fraudulent intent of such *debtor*, in an action on the case, by a creditor against the defendant for aiding such debtor in the fraudulent transfer and concealment of his property.

In an action by a creditor against the defendant for aiding a debtor in the fraudulent transfer and concealment of his property, the jury are not authorized to give the plaintiff interest from the date of the writ.

On Exceptions and Motion.

Case.

This action was founded on R. S., c. 113, § 47, for aiding a debtor in the fraudulent transfer of his property, to secure it from creditors.

It was proved that Lysander Cutler, father of the defendant, on Sept. 29, 1856, procured two notes to be discounted by the plaintiffs, one for $2000, and the other for $3000, signed by Farrar & Cutler, Lysander Cutler being one of the members of the firm of Farrar & Cutler, payable to the order of Samuel Farrar, the other member of said firm, and indorsed by him and also by Lysander Cutler.

The plaintiffs obtained judgment on said notes, in Somerset county, Sept. term, 1861, against Farrar & Cutler, no part of which has been satisfied.

The plaintiffs introduced two certificates of bank shares in the People's Bank, Waterville, viz.:—

"No. 46 to 50, inclusive. "5 Shares.

"People's Bank, Waterville, Maine.—Be it known, that Lysander Cutler is the proprietor of *five* shares in the capital stock of the People's Bank," &c. * * * * * *

"[L. s.] Dated at Waterville this 8th day of Oct., 1855."

(Signed by the President.)

(Countersigned by the Cashier.)

On the back of this certificate was the following indorsement:—"I, L. Cutler, for a valuable consideration, hereby transfer the within *share* to Wm. G. Cutler.—Witness my hand, this 1st day of Dec., 1856."

"Attest, S. Percival." (Signed.) "L. Cutler."

"No. 629. "1 Share.

"People's Bank, Waterville, Me.—Be it known, that Lysander Cutler is the proprietor of one share in the capital stock of the People's Bank," &c. * * * * *

"[L. s.] Dated at Waterville, this 1st day of Oct. 1856."

Signed and countersigned like the other.

This certificate was indorsed as follows:—"I, L. Cutler, for a valuable consideration, hereby transfer the within *shares*

to Wm. G. Cutler. — Witness my hand, this 1st day of Dec., 1856." (Signed.) "L. Cutler."

"Attest, S. Percival."

The plaintiffs also introduced, against the defendant's objection, a book, purporting to be a ledger, exhibiting the debt and credit with the stockholders of the bank. The book bore no attestation by any officer of the bank, as being a book of record of the bank. The only evidence which this book contained, relating to the aforesaid bank stock, or its transfer, was as follows: —

"Dr. Lysander Cutler, Dexter. Cr.

1856,		1855,		
Dec. 1.	To transfer 6 shares to Wm. G. Cutler, $600	Aug. 9.	By paid for stock in part,	$250
		Oct. 5.	By paid for balance,	250
			By paid for new stock,	100
				$600

"Dr. William G. Cutler. Cr.

1857,		1856,		
Aug. 3.	To transfer 2 shares to C. P. Mason, $200	Dec. 1.	By transfer 6 shares from Lysander Cutler,	$600
Aug. 3.	To transfer 2 shares to S. Percival, 200			
Sept. 19.	To transfer 2 shares to Nathan Wyman, 200			
	$600"			

Sumner Percival, called by the plaintiffs, testified that the book produced was the stock ledger of the People's Bank; that he made the said transfer, on Dec. 1, 1856, and also made said entries at the times of their dates, at which time he was cashier of the bank; and that he issued a certificate to the defendant at the same time and delivered it to Lysander Cutler.

He also testified, that the certificates in the case were surrendered to him on Dec. 1, and that said Wm. G. Cutler

surrendered the certificate of the six shares when he transferred said shares as appears on the stock ledger.

Abner Coburn, called by the plaintiffs, testified that he was president of plaintiffs' bank, on Sept. 29, 1856, and for a long time before had been, and that he still is president.

He further testified, subject to the defendant's objection, that Lysander Cutler, on Sept. 29, when he obtained the money from the plaintiffs' bank, on the two notes discounted, made certain statements to him relative to his business, viz.: that he was doing well in all of his manufacturing; that he made a profit on everything he made; that there was no comparison between his mode of doing business and Mr. L.'s; that L. did not know what his goods cost; and that he had a very profitable navy contract. The defendant was not present when the said statements were made.

He further testified, that on Dec. 7, 1856, there were $172 in the plaintiffs' bank to the credit of Farrar & Cutler; that Farrar & Cutler also had two accounts in their favor, one, against A. & P. Coburn, for $218,61, and the other against Sweetser & Sanborn, for $367,08; and that on that day he received a letter, — which the defendant admitted was lost, — from Lysander Cutler. The defendant objected to the witness' stating the contents of said letter. The presiding Judge admitted the testimony as to its contents, which, (adopting the language of the report,) "tended to show that L. Cutler, in that letter, made false pretences in order to get said money ($172) from the bank, and to get A. & P. Coburn to give their notes for said two accounts."

He further testified that he did give the notes as requested, and sent the money ($172) and notes by the messenger who brought the letter, to said Cutler; that, at the maturity of said notes, he found them in the People's Bank, Waterville, indorsed as follows: — "Pay Wm. G. Cutler. — Farrar & Cutler;" that there was no indorsement on them by the defendant; that he paid the notes and destroyed them; and that they were the only notes given by A. & P. Coburn to said Farrar & Cutler.

It was admitted that the stock of the People's Bank was divided into shares, and certificates thereof issued, and that the bank was a regular banking corporation at the time of all of the aforesaid transactions.

The defendant requested the Court to give the following instructions to the jury, viz.:—

1st. That the indorsement on the certificate D was not sufficient in law to assign and transfer said shares to defendant; certificate D of the five shares having the word "share," in the indorsement, in the singular.

2d. That the indorsement on the certificate E., of one share, was not sufficient in law to assign and transfer that share to defendant; certificate E having the word "shares" in the plural.

3d. That if the jury, in examining the indorsements on the two certificates, were satisfied that the assignment and transfer on certificate E, (of the one share,) was put there by mistake, instead of being put on the other certificate, then the indorsement was not sufficient in law to assign and transfer that share, No. 629, to defendant.

4th. That, in order to prove a transfer of said shares to defendant, it was incumbent on plaintiff to show that certificates of said shares were issued to defendant. The Court instructed the jury that this was immaterial.

5th. That the evidence of the book, the stock ledger, did not show such a transfer to defendant as the law requires, to enable them to maintain this action.

6th. That the record in said ledger ought to be attested by the cashier or by some officer of the bank.

7th. That the number and designation of the shares transferred should appear on the book.

8th. That said book did not sufficiently show the number and designation of the shares transferred.

9th. That said book did not sufficiently show the designation of the shares transferred.

10th. That said book did not sufficiently show the date of the transfer.

The Court refused to give any of the first six requested instructions.

As to the 7th, 8th, 9th, and 10th requested instructions, the Court instructed the jury that it was necessary for the book to show the number and designation of the shares transferred, and further, in order to give progress to the trial, that the book did show all that the law required.

That, if the jury found a verdict for the plaintiffs, they should find for twice the value of the bank stock, (the value of each share was admitted to be $100) *and interest on that sum from the date of the writ*, and to indicate in their verdict, if for the plaintiffs, the amount of interest.

As to the testimony of Mr. Coburn, the Judge instructed the jury that, if Lysander Cutler obtained the money for the discounted notes, and the money and notes through the messenger sent Dec. 7, by false pretences and statements, they would have no tendency to establish the claim of these plaintiffs, in that view of the case, and that his testimony should have no influence upon their minds, except so far as it might tend to satisfy them, in connection with the other evidence, that he transferred the bank stock to the defendant for the fraudulent purpose of concealing the same and prevent its being attached on writ, or seized on execution, by his creditors.

The jury returned a verdict for the plaintiffs "for $1200 damages and $451,60 interest thereon, from date of writ."

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

Upon the return of the jury into Court, the clerk inquired:—"Mr. Foreman, have you agreed upon a verdict?"

The foreman replied:—"We have;" and thereupon passed a paper to the clerk, who read it aloud in presence of the Court and jury, as follows:—

"Somerset, ss.—Sup. Jud. Court, March term, 1864.—The jury find that the said defendant '*did promise*,' &c. and assess damages in the sum of twelve hundred dollars

debt, and four hundred and fifty-one dollars and sixty cents interest."

This paper was not signed by the foreman, neither did it have the word "foreman" on it.

The presiding Judge suggested that the verdict was not in proper form, and that the counsel for the plaintiffs should put it in form. Thereupon the counsel for the plaintiffs altered said paper, by striking out the words "*did promise*," and inserting, instead thereof, the words "*is guilty;*" and also, by striking out the word "*debt*," and inserting in its stead the word "*damage;*" and by adding at the right hand lower corner the word "*foreman.*"

Thereupon the clerk, by order of the presiding Judge, delivered said paper, so altered, to the foreman and requested him to read it, and, if he found it correct, to sign it.

The foreman read it, but not aloud, said it was correct, signed and redelivered it to the clerk.

Thereupon the clerk, addressing the jury, said,—"Gentlemen of the jury, hearken to your verdict as the Court have recorded it." He then read it aloud as signed, to the jury, and added; "so say you, Mr. Foreman, so say you all, gentlemen of the jury," to which the jury assented. All of this transpired in the presence of the defendant's counsel, who interposed no objection.

The defendant filed a motion to set aside the verdict for the reasons above stated.

Josiah Crosby, in support of the exceptions, submitted an elaborate written argument.

J. S. Abbott, for the plaintiffs.

The opinion of a majority of the Court was drawn by

DAVIS, J.—By the laws of this State, any one, who knowingly aids or assists a debtor in a fraudulent transfer or concealment of his property to secure it from creditors, is liable to any creditor in double the amount of the property transferred or concealed, not exceeding double the amount of such creditor's demand. R. S., c. 113, § 47.

In the case at bar, it is alleged in the writ that one Lysander Cutler, in 1856, was indebted to the Skowhegan Bank in the sum of five thousand dollars; that he was the owner of six shares of the capital stock in the People's Bank, of the value of six hundred dollars; that, in order to secure said stock from his creditors, he fraudulently transferred it to the defendant; and that the defendant knowingly aided and assisted him in so doing. Upon the trial of the case, certain questions of law were reserved, which are now presented for our determination.

In regard to the indebtment of Lysander Cutler, and the fact that he *owned* the bank stock, no question is raised. Did he *transfer* the stock to the defendant?

It is not denied that the defendant received the certificates, with indorsements purporting to be transfers to him, and that he has since that time transferred them to other parties. But he contends that the transfers to him were insufficient to give him the title, as against the *creditors* of Lysander Cutler, and that they were therefore not injured thereby.

Such a transfer may be made by an indorsement and delivery of the certificate of stock; but it is not valid, except between the parties thereto, "until it is entered on the books" of the bank.

The plaintiffs introduced the stock ledger of the People's Bank, as proved by the testimony of Percival. Whether it was the book of the bank, kept for that purpose, was a question of *fact*, properly proved in that way. No attestation by the cashier, or by any other officer, was necessary.

By that book, it appeared that Lysander Cutler purchased and paid for six shares of the original stock of the bank; and that he transferred them to the defendant, Dec. 1, 1856.

One of the shares was originally purchased by Lysander Cutler, a year after he purchased the others. He therefore held two certificates, — one for five shares, and the other for one share. In transferring them to the defendant, he indorsed upon the certificate of *five* shares a transfer of "the

within *share;*" and it is argued that the transfer was therefore invalid.

Although shares "*may* be transferred by the indorsement and delivery "of the certificates, it does not follow that they may not be transferred in other modes. Such indorsement and delivery is but the *evidence* of the transfer. The *fact* of the transfer appears, in this case, as well by other evidence, as by this. If there is any ambiguity in the indorsement arising from the use of the singular number instead of the plural, *as between the parties* it would be construed against the vendor. But when no question has been raised between the parties, and the vendee has taken and sold them all, without controversy, it would be absurd to allow him to deny his own title in any litigation with other persons.

It is said, however, that the stock ledger does not show "the number and *designation* of the shares" transferred to the defendant; and that the transfer was therefore invalid as to the creditors of Lysander Cutler.

It may be difficult to determine what meaning, if any, to give to the word "designation," in the statute of 1841. It was regarded as tautological, and omitted in the subsequent revision. A share in the capital stock of a corporation is merely some aliquot part of it, and not any particular part. Any designation, therefore, except by stating the owner or owners, would seem to be impossible. Even if the shares were consecutively numbered, of which there is no evidence, this would be the same. For, as a share is not any particular part, but merely an intangible, undivided *proportion* of the whole, the number would but designate the successive owners.

The stock ledger, in this case, shows that Lysander Cutler purchased six shares of the original stock, receiving his title, or evidence of it, directly from the corporation; and that he transferred *those six shares* to the defendant. If any designation of the particular shares was necessary, it appears, so far as was possible, upon the record.

The transfer being proved, it was for the plaintiff to show

that it was fraudulent on the part of Lysander Cutler; that *he* did it *with an intention thereby to secure it from his creditors.*

In order to prove this, certain conversations of Lysander Cutler with Coburn, Sept. 29, 1856, were proved, against the objection of the defendant. It may be doubted if the statements of Cutler had any tendency to prove fraud on his part. The counsel for the defendant claims that they were irrelevant to the question in issue. If they were so, and might have been excluded, we cannot perceive that the defendant could have been injured by their admission. It often happens that some facts not relevant are proved during a trial; and, though this should be carefully guarded against, lest the jury be confused by it, a new trial will not be granted on account of it, if the facts proved are such as could not have injured either party by misleading the jury.

In regard to the transaction of Dec. 7, 1856, the evidence was not admissible to prove "false pretences" on the part of Lysander Cutler, as stated by the Court. But, if it was admissible on any ground, it is immaterial what reason was given for it. This was but a few days after the transfer of the bank stock. And proof of other transfers made by the debtor, about the same time, has always been admitted in this class of cases. The exceptions do not show the contents of Cutler's letter; and there is nothing reported from which we can conclude that any evidence was admitted except of the *acts* of Cutler, and his written declarations accompanying his acts, in securing the transfer of the funds in the Skowhegan Bank to himself, and from him to the defendant. What other transfers of property from him to the defendant were proved at the trial, the case does not show. But that this kind of evidence is admissible on the question of the fraudulent intent of the *debtor*, there can be no doubt. *Warren* v. *Williams*, *ante*, p. 343.

When the verdict was returned into Court by the jury, it was not signed by the foreman. Whether it is really necessary, in any case, when the verdict is returned, an-

nounced, affirmed, and recorded, that it should be thus signed, we need not determine. In criminal cases no written verdict is returned. The foreman announces it verbally, and it is entered upon the record. But if a written verdict is necessary, signed by the foreman, the fact that the signature was written in open Court, instead of the jury room, is no objection to it.

The plaintiff was not entitled to interest. This was given by the jury, under the instructions of the Court. But it was stated in a distinct and separate sum in the verdict. If the plaintiffs will remit the amount of interest, the verdict will be allowed to stand, and judgment will be rendered upon it. If the amount of interest shall not be remitted, the verdict will be set aside, and a new trial will be granted.

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

KENT, J., dissenting. — I am not satisfied as to one point. I think I should concur on all the other points decided, except as to interest, which is not fully considered in the opinion. The point I allude to as unsatisfactory, is the admission of the testimony of Coburn, as to the declarations of Lysander Cutler on Sept. 29, 1856. They were clearly inadmissible, even to prove an intentional fraud on the part of the *father* in reference to the case on trial. They were made long before, — were in relation to a matter *entirely* distinct from the one in question, — were not connected with any act, or, if by a great stretch they may be so connected, that act was obtaining and receiving money on other notes, by means of these statements. The *defendant* had no connection with this money or these notes. As well might you introduce evidence, in case Lysander Cutler was on trial on an indictment for fraudulently obtaining this money from the bank on the 29th of September, that about the same time he stole money from another, or committed an assault and battery, or forged a note passed to another bank. To make evidence of other transactions at and about same time ad-

missible, they must in some way be connected with the fraud in question, or as a part of its history, or showing a connection between the parties in reference to that outside matter, and a like fraud between same parties in such other transaction, or they must be similar frauds of same nature and kind. The evidence in relation to the transactions of the 7th of Dec., may be admissible on one or more of these grounds. It may be correct to allow such evidence, to show the history of a *like* transaction *between the parties*, near the time of this one; and to fix fraud on Lysander, the fact that he made fraudulent and false pretences to get negotiable notes into his possession, and that he immediately indorsed them to his son, the defendant, may be pertinent. The false pretences and earnestness to get notes, instead of accounts, are facts in the history, tending to show a fraudulent purpose on his part.

The testimony as to the declarations on 29th of Sept., it is admitted in the opinion are clearly inadmissible, but it is determined that they are *immaterial*, and do not in themselves show any fraudulent intent. I am not satisfied with this view. I think that the Court should be slow to consider statements as immaterial, or as of no force, in favor of a party who insists upon putting them in, after objection, and after, as we know, the same question as to their admissibility had been before the Court, and their admissibility strongly and earnestly urged and objected to by the parties. It is easy now to say that they were immaterial strictly to the issue. But one can hardly "wink hard enough" not to see that they were deemed important by the plaintiffs' counsel, and that they might be, and no doubt were pressed upon the attention of the jury, to fix on Lysander Cutler, if not on the defendant, a gigantic scheme of fraud. If of no use, why pressed in? I am for holding counsel responsible when they foist in, against right and law, and well settled principles, proof of facts which they have no legal right to put in; and this, after full warning and abundant caution. There may be cases, I admit,

where it is so clear and palpable that no possible use could be made of the facts, either legitimately or illegitimately, and that, in no way could they possibly prejudice or mislead or confuse a jury, they may be deemed immaterial. But I think it should be so clear "that he may run that readeth it." There should be no question in any mind.

The ground of the opinion is, that these declarations of Lysander Cutler were explicit assertions of honest intentions, and that no fraud could be extracted from them. It is true, that there is no direct evidence reported, as introduced by plaintiff, to show the falsity of these declarations. But there was evidence that *these notes* of the 29th of September were not paid at maturity; that the plaintiffs sued the signers, Farrar & Cutler, and obtained judgment, and that no part of the judgment had been satisfied. Even if we lay out of the case the fact, notorious through all the State, that Farrar & Cutler failed for a large amount, we have enough in the case to show that there can be no reasonable doubt that the fact of such failure was before the jury. If so, there can be no doubt that this illegal testimony, so pertinaciously insisted upon, was used to satisfy the jury that all these statements were false, and that Lysander Cutler, then in failing circumstances, used them for the fraudulent purpose of getting the money, and that this was evidence of a general fraudulent scheme, on *his* part at least, to cheat the public generally and this corporation in particular. I do not think that we have a right to assume that this testimony was put into the case, by the able counsel for the *plaintiffs*, merely to satisfy the jury that Lysander Cutler was an honest man, and told the honest truth in every case but the one on trial.

Nor can we assume that the jury could not possibly have been misled or prejudiced, or confused by its introduction. If in,—then it could be used and commented on, in connection with all the facts proved, and we must all have forgotten the lessons of our professional experience, if we cannot see how these facts and declarations could be used to satisfy

a jury of the bad character, falsehood and fraud of the party implicated. In short, I say, that when a party will put in clearly illegal testimony, after being fairly cautioned, he must show clearly, and beyond all possible question, that it could not in anyway prejudice the case of his opponent.

It does not appear that the presiding Judge made any allusion to this testimony in relation to the declarations on the 29th of Sept., as *irrelevant* or *immaterial*, but spoke of it as tending to prove that Lysander Cutler "obtained the money *for the discounted notes* by false pretences and statements." This clearly shows that the whole matter had been argued before the jury, on the ground that these statements, on the 29th, were *false* and fraudulent, and not explicit assertions of honesty. No one, it seems to me, can doubt this, or that they were attacked and denounced as false and fraudulent. All this was wrong. The Judge allowed the jury to consider them, so far as they did influence their minds, in connection with other testimony, to show fraud as to the bank shares. The case of *Lincoln* v. *Fitch*, 42 Maine, 468, is in point. The Court states "that the evidence introduced for one purpose, was suited to mislead the jury in the consideration of other matters before them, wherein, it was stated by the Judge, to be inadmissible." I am therefore in favor of sustaining the exceptions, on the ground of the admission of improper testimony.

ALBERT C. COLLINS *versus* INHABITANTS OF SCHOOL DISTRICT NO. 7, IN LIBERTY.

By c. 193, art. 2, § 2, of the Public Laws of 1850, every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchise and privileges of a district for the term of one year.

What acts are sufficient evidence of the exercise of the franchise and privileges of a district to authorize the presumption that it has been legally organized.

The fact that an attempt to establish the district, confessedly abortive, was made in 1853, is not sufficient to rebut the presumption arising from the

exercise of the franchise and privileges of a district by the defendants for more than a year prior to 1856.

In assumpsit, by the builder against a school district, to recover pay for building a school house and finding materials therefor, the defendants cannot object to the absence of proof of a legal meeting to determine upon the building and the raising of the money therefor, unless they have raised such objection by their specifications of defence.

Where an order, drawn by the building committee upon the town treasurer, is indorsed to a third person, and an action is brought thereon in the name of the payee for the benefit of the holder, the plaintiff may strike off the indorsement and have judgment in his favor.

ON FACTS AGREED.

The facts sufficiently appear in the opinion of the Court.

The case was reported with an agreement, that, if the Court should be of opinion that the plaintiff is entitled to recover, judgment was to be rendered in his favor for the amount due on the orders and costs; if not, for the defendants for their costs.

W. G. Crosby, for the plaintiff.

Knowlton, for the defendants.

The opinion of the Court was drawn by

BARROWS, J. — Assumpsit. Writ dated Nov. 26, 1860. The case is submitted upon a statement of facts agreed to by the respective counsel.

What the issue presented for determination is must be ascertained by an inspection of the writ and specifications of defence, which are made part of the case. The writ contains a count on an account annexed, (in which the defendants are charged for labor done, and materials furnished and used in building a school house in said District No. 7, and for interest on the balance after crediting about $90, as a partial payment,) and a general count for labor, services and materials, — also a count for money had and received, under which plaintiff claims to recover the amount of two orders with interest thereon, drawn by Aaron Collins, Elbridge Davis and Horace Collins, styling themselves a "building committee," upon Albert D. Mathews, treasurer of the town

of Liberty, requiring him to pay to the plaintiff or order, the sums therein named, "out of the treasury of the town, on account of building a school house in District No. 7, in Liberty." The specifications of defence are :—1. That plaintiff never furnished the materials and performed the labor specified in this writ to and for the defendants. 2. That plaintiff has been paid for all the labor done and all the materials furnished for or to said defendants by him, by orders on the treasurer of the town of Liberty, which orders have been duly presented to said treasurer, and by him accepted. 3. That there is no such school district in said town of Liberty, as School District No. 7.

By the agreed statement of facts, it appears that plaintiff did build a school house in 1856, and furnished the materials for the same, under a contract with the aforesaid Aaron Collins, Elbridge Davis and Horace Collins, ("who then were and are now residents of said district, and who claimed to be, styled themselves, and *were* building committee in said district,") whereby they agreed to pay plaintiff $225 therefor, in orders on the town treasurer, drawn by them in their official capacity as building committee; that they did give him the orders, which were received by plaintiff in payment for what he had done under the contract; that a part of them were paid, and the remainder accepted, but when they were presented for payment, it was refused because the treasurer had no funds in his hands belonging to said district.

The town treasurer has the same powers and is subject to the same duties and obligations relating to district taxes as relating to town taxes. R. S., c. 11, § 40, reënacted from similar provisions in art. 3, c. 193, laws of 1850.

He is, *quoad hoc,* the treasurer of the district.

The facts thus far stated dispose of the first and second specifications, and no defence is shown to the plaintiff's claim to recover the balance of the orders.

The defendants rely upon the third specification, viz. : that there is no such school district in the town of Liberty, as School District No. 7. Whether there is or not seems to

be the only question about which a real controversy can exist under this statement and these specifications.

It is conceded in the outset, on the part of the plaintiff, that "there is no evidence of the legal organization of said district, or of any legal meetings held therein, for the transaction of any business relating to matters that may be acted upon by school districts, *except* so far as the Court may legally infer the same from the facts herein agreed," and, that, "prior to 1853, what is now styled District No. 7 was part of District No. 1; that an attempt was then made to organize District No. 7, but the proceedings were illegal; that *nearly one third* part of the inhabitants residing in what is termed District No. 7 have never acknowledged the legality of the organization of said district, were always opposed to the same, have never attended any school meeting therein, have never sent any scholars to any school kept in said district or in said school house, have never accepted or used said house in any way or manner whatever, and have always claimed to belong to the old District No. 1, and have sent their scholars there to school, and that plaintiff was for a long time before and after he built the school house a resident of said supposed District No. 7."

Per contra, it is admitted that, since 1853, "the existence of District No. 7 has been recognized by the officers of the town; that there has been a summer and winter school kept in said district every year since then, and in said school house since it was built; that the expenses of said schools have been paid for by money drawn from the treasury of the town on town orders drawn in the usual manner; that every year since said date they have had a clerk and agent in said district; that, in 1856, before said school house was built, the clerk of said district certified to the assessors of said town that the district had raised the sum of $225, for defraying the expenses of building a school house therein, and that said assessors within thirty days thereafter assessed that amount on the polls and estates in said district, and duly certified the same to the treasurer of the town, and

committed proper lists thereof to the collector of taxes of said town for collection; that he collected about $90 of the same, which was paid over to the town treasurer, and by him paid out upon the orders of the building committee aforesaid, and that the balance of the tax has never been collected.

Chap. 193, article 2, section 2, of the laws of 1850, provides "that every school district shall, in all cases, be presumed to have been legally organized when it shall have exercised the franchise and privileges of a district for the term of one year."

The defendants' counsel contends that the admission on the part of the plaintiff, that there is no evidence of the original organization except the acts and facts set forth in the agreed statement, is equivalent to an admission that there was no organization, and that, in the face of such an admission, it is absurd for the plaintiff to ask us to infer its existence. But the presumption authorized, and, in the absence of fraudulent and corrupt practices to procure the establishment of the district, *required* by the statute above cited, applies and was intended to apply in cases where there was no evidence of legal organization. Elsewhere it is needless. It was designed for the protection of those who, finding a body of men exercising the functions of a school district, have dealt with them under the belief that they exercised such franchise and privileges rightfully. Such individuals might suffer wrongfully if the party were permitted to rely upon informalities or illegalities in the proceedings by which they took upon themselves the corporate powers of a district. The counsel further argues that it is only the *legality* of the organization, not the organization itself, that can be presumed. The discrimination cannot be sustained. The organization, unless legal, is a nullity. The body derives vitality only from a legal organization. The legality is essential to the fact, and the presumption called for by the statute includes both.

The counsel for the defendants carefully enumerates many

things that a district might do, which do not by this statement appear to have been done by this district, but the acts before recited are sufficient evidence of the exercise of the franchise and privileges of a district, by the defendants, to authorize the presumption which the plaintiff asks us to make, and, with the establishment of the existence of the district, disappears the last matter specified in defence of the suit. The bare fact that an attempt to establish the district, confessedly abortive, was made in 1853, is not sufficient to rebut the presumption arising from the exercise of the franchise and privileges of a district by the defendants for more than a year prior to 1856.

It is further argued on the part of the defence *that*, even if the legal organization of the district is to be inferred, in the absence of any distinct proof of a legal meeting to determine upon the building of a school house, raise the money, &c., such as is necessary to the making of a valid contract with the district to build the school house, the plaintiff cannot recover.

The want of appropriate specifications would preclude the defendants from urging this and other objections, suggested in argument, to the plaintiff's right to recover the amount of these orders drawn in his favor by those who, it is admitted, not only claimed to be, but *were* the building committee of the defendant district.

But the plaintiff is not obliged to resort to the pleadings to enable him to recover. No one can doubt the identity of this building committee, with the "committee to superintend the laying out and expending of the moneys raised by the district," authorized by § 9, art. 2, c. 193, laws of 1850. And verbal accuracy is not to be expected or required in the transactions of a school district. See *Soper* v. *School District No.* 9, *in Livermore*, 28 Maine, 193.

The clerk certified to the assessors the raising of the money, and the assessors duly assessed it upon the district; the plaintiff built the school house under a contract with the committee, and the case finds that the district

has had its clerk and agent every year, and that every summer and winter since the school house was built a school has been maintained in it, the expenses of which were defrayed in the usual manner. It cannot be successfully argued that this was not an acceptance on the part of the district, binding the district to pay the reasonable value of the building, quite as strongly as in the case of *Abbot* v. *School District No.* 3, *in Hermon*, 7 Greenl., 118, in which case the individuals assuming to act as district committee had no authority. That the sum claimed by the plaintiff is a reasonable one is not controverted, and plaintiff would be entitled to recover under his general count had he not received the orders which he seeks to collect in this suit as payment. It seems, then, that the orders were drawn by those who "*were*" the committee of the district to superintend the expenditures of its moneys, for a valuable consideration, payable to the plaintiff, and that they were accepted by the treasurer of the town acting herein as the treasurer of the district, and that they remain unpaid.

It is further objected that plaintiff cannot have judgment upon the orders because he has sold and indorsed them to Lewis Sturtevant; but it seems that the suit is prosecuted for the benefit of Sturtevant in the plaintiff's name with his consent. He has the right to strike off his indorsement, amount of the same, with interest from the date of the and, upon filing the orders, may have judgment for the acceptance. *Judgment for plaintiff.*

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

Inhabitants of Belfast, Appellants from decision of County Commissioners of Waldo County.

By c. 296 of the special laws of 1864, the city of Belfast is hereby authorized to erect and maintain a free bridge across the Passaggassawakeag river in said city, on or near the site of the toll bridge formerly erected across said river, called the Nickerson or upper bridge; said bridge to be built of suitable materials, and so constructed as to be safe and convenient for public travel, and to be provided with a draw of sufficient width for vessels to pass and repass.

This Act, neither in terms nor by implication, confers authority upon the County Commissioners to act in the premises.

Hence, where, upon refusal of the municipal officers of the city of Belfast to lay out a way under said Act, a petition was presented to the County Commissioners for Waldo county, under the general statute on ways, to lay out said way, who thereupon laid out the way prayed for and made their report thereon, from which an appeal was taken, a committee appointed, and the judgment of the County Commissioners affirmed in part, by the report of said committee: — *Held*, the County Commissioners had no jurisdiction, and the report of the committee should, for that reason, be rejected.

On Report from *Nisi Prius*, Dickerson, J., presiding.

Certain inhabitants of the city of Belfast petitioned the municipal officers of the city to "lay out and construct a bridge, or public town way, across the Passaggassawakeag river, on the site of the Nickerson or upper bridge, so called, agreeable to the charter or Act of the Legislature." The municipal officers refused to grant the prayer of the petition. Thereupon the petitioners presented a similar petition to the County Commissioners for Waldo county, alleging an unreasonable refusal on the part of the municipal officers in the premises, and claiming to be aggrieved thereby.

After due preliminary proceedings had, the Commissioners laid out the bridge and way prayed for, and duly made their report. From this decision of the Commissioners, the city of Belfast appealed, when a committee was agreed upon, which, after proper proceedings, heard the parties and returned their report to the Supreme Judicial Court, thereby

affirming in part the decision of the Commissioners. To the acceptance of this report, the city filed several written objections, one of which was the want of jurisdiction in the County Commissioners.

N. Abbott, for the appellants.

W. G. Crosby, for the respondents.

The opinion of the Court was drawn by

APPLETON, C. J.—The powers and duties of the County Commissioners are derived from and imposed by the statute conferring jurisdiction upon them. By the general law upon the subject, they have no authority to lay out roads over the tide waters of the State.

By a special Act, approved Jan. 27, 1864, c. 296, "the city of Belfast is hereby authorized to erect and maintain a free bridge across the Passaggassawakeag river in said city, on or near the site of the toll bridge formerly erected across said river, called the Nickerson or upper bridge; said bridge to be built of suitable materials, and so constructed as to be safe and convenient for public travel, and to be provided with a draw of sufficient width for vessels to pass and repass."

The Act is special and is not to be extended beyond its terms. It empowers the city of Belfast to do what, without it, would have been unauthorized and illegal. It imposes no duty. It gives simply a license to do an act. It is not compulsory. The city may erect a bridge in compliance with its terms or decline so to do. It is left to their option.

Neither does the Act in its language, or by implication, confer an authority upon the County Commissioners to act in the premises; and, as they have none under the general law of the State, their proceedings must be adjudged void.

Report of committee rejected.

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

LIME ROCK BANK *versus* JOSEPH HEWETT.

Exceptions by a party, because the law was ruled too strongly in his favor, cannot be sustained.

The Court cannot presume that the jury were influenced by what they might suppose would be the effect of their verdict on public opinion.

Requested instructions upon a point not pertinent to the issue are rightly refused.

A note taken by a bank, in payment of a pre-existing debt, is not *discounted* within the meaning of the prohibition in § 14, c. 47 of the Revised Statutes.

Declarations of the president of a bank, in relation to past transactions, are not admissible in evidence.

In an action by a bank upon a note, alleged by the defendant to have been given without consideration, it is not admissible to show in defence that a former cashier of the plaintiffs fraudulently failed to enter, on the books of the bank, deposits of the defendant, to a large amount.

The testimony of a deceased witness, on a former trial of the same action, may be given in evidence, if the *substance* of it can be proved, although the *exact language* of the witness cannot be.

ON EXCEPTIONS, by defendant, to the ruling of DANFORTH, J.

ASSUMPSIT. The case is stated in the opinion.

Ruggles, for defendant.

Gould, for plaintiffs.

The defendant also filed a motion to set aside the verdict, as being against evidence, but it was waived at the argument.

The opinion of the Court was drawn by

WALTON, J. — This is an action upon a promissory note. The defence is want of consideration and illegality, it being alleged that the note in suit was given in renewal of a former note which was made to swell or improve the apparent assets of the bank. It is before us on exceptions.

1. The presiding Judge instructed the jury that the taking of a note, for the purpose of increasing the apparent assets of the bank and deceiving the bank commissioners, would

be a fraud of the highest character; and that a note given for such a purpose would be void. The defendant complains of this instruction, not because the Judge told the jury that a note given for such a purpose would be fraudulent and void, for that was what he contended for, but because he told the jury it would be a fraud of the highest character. He thinks the jury may have been willing to find the parties guilty of a *small* fraud, but not a fraud of the highest character; and therefore returned a verdict in favor of the validity of the note. The position is certainly a novel one, that a party may complain and file exceptions, because a point of law is ruled too strongly in his favor. But the argument assumes that the jury were influenced by what they might suppose would be the effect of their verdict upon public opinion, for in no other sense would it have the effect of convicting any of the parties of a fraud of the highest character. To allow themselves to be thus influenced would have been a violation of duty, which we must not presume. If the note was given for a purpose so fraudulent in law as to render it void, the degree of fraud beyond that was unimportant, and we do not think the defendant is in a condition to complain because the Judge characterized it as a fraud of the highest character.

2. The defendant requested the presiding Judge to instruct the jury as follows:—"That, if the first note had but one signer with no indorsers, and was without security, and this note at the time of its being made and accepted was in the same condition, and they were discounted, the bank could not maintain an action on the one in suit. That, if the former note was given to take the place of other notes given for the loan of money, and this note had no other consideration than the former note, and being discounted and without security when made and discounted, no action could be maintained upon it by the plaintiffs." The presiding Judge declined to give these instructions. Neither of them appears to be pertinent to the issue. We have not been furnished with a copy of the pleadings, but the exceptions state

that "the defence set up was, that there was no valuable consideration for the note of April 1, 1854; that it was made to swell or improve the apparent assets of the bank, and that the note in suit partook of the same infirmity." These requested instructions relate to another ground of defence, and may have been withheld because, under the pleadings, the point was not open to the defendant. If so, (and the exceptions show nothing to the contrary,) the presiding Judge did right in withholding them. Besides, the requested instructions are objectionable upon another ground. They assume, or at least imply, that when a note is given for an existing debt, or in renewal of another note, it is *discounted* within the meaning of the law forbidding banks to discount notes, bills of exchange, drafts or other security for the payment of money, without at least two responsible names thereon, or adequate personal pledges, or collateral security. (R. S., c. 47, § 14.) This Court has decided that a note taken by a bank for an existing debt or liability, is not *discounted* within the meaning of the law above referred to; that, while banks are prohibited from making loans without the security named, they are under no such restrictions in collecting or securing existing debts, but may take the best security they can get, although it be a note with a single name only, and no collateral security.

3. The defendant offered, but was not permitted to prove, certain declarations of the president of the bank, to the effect that the note in suit, or the note to renew which the note in suit was given, was without consideration. These declarations related to past transactions, and were clearly inadmissible. *Bank* v. *Cooper*, 39 Maine, 542.

4. The defendant offered to prove that Pitts, a former cashier of the bank, was a defaulter, and had failed to enter on the books of the bank the defendant's deposits to a large amount — several thousand dollars. The presiding Judge ruled the evidence inadmissible, and we think correctly, upon the ground of irrelevancy. As a circumstance, it was

too remote to authorize a legitimate inference favorable to the defendant upon the matters in issue.

5. The plaintiff was permitted to prove by Mr. Gould, his attorney, (the defendant objecting,) what a deceased witness had testified to at a former trial of the case. Mr. Gould stated that he could, by refreshing his memory with his minutes, state what the deceased witness's testimony was substantially, but not the language used, nor the questions put, except in some instances. In support of his objection to the admissibility of this evidence, the defendant's counsel has urged upon our consideration many arguments that might with propriety have been, and probably were, addressed to the jury, as so many reasons why they ought to attach but little, if any, weight to the evidence; but neither his argument nor the exceptions disclose any ground on which the presiding Judge could have legally excluded the evidence. "It was formerly held," says Professor Geenleaf, "that the person called to prove what a deceased witness testified on a former trial, must be required to repeat his *precise words*, and that testimony merely to the effect of them was inadmissible. But this strictness is not now insisted upon, in proof of the crime of perjury; and it has been well remarked, that to insist upon it in other cases goes in effect to exclude this sort of evidence altogether, or to admit it only where, in most cases, the particularity and minuteness of the witness's narrative, and the exactness with which he undertakes to repeat every word of the deceased's testimony, ought to excite just doubts of his own honesty, and of the truth of his evidence. It seems, therefore, to be generally considered sufficient, if the witness is able to state the *substance* of what was sworn on the former trial." 2 Greenl. on Ev., § 165. The rule, as stated by Mr. Greenleaf, has been recognized in this State, (*Emery* v. *Fowler*, 39 Maine, 326,) and we think is supported by reason and the weight of authority. See *Young* v. *Dearborn*, 2 Foster, (N. H.,) 372, where the rule is very fully and ably discussed. In *Doe* v. *Passingham*, 2 Car. & Payne,

440, a witness was allowed to testify to what a deceased witness had sworn after a lapse of more than thirty years; in *Todd* v. *Earl of Winchelsea*, 3 Car. & Payne, 387, the testimony of a deceased witness was read from the notes of a shorthand writer; and, in *The King* v. *Whitehead*, 1 Car. & Payne, 67, the notes of the Chief Justice were read. Neither the lapse of time between the first and second trial in this case, nor the fact that Mr. Gould could not swear to the precise language of the deceased witness, nor the fact that he used his minutes to refresh his recollection, and appeared to read from them, were sufficient to exclude the evidence. He swore that he could state the testimony of the deceased witness *substantially*, and that is all that the law requires.

Our conclusion is that the exceptions must be overruled. There is a motion to set aside the verdict as against evidence, but it was waived at the hearing. The entry therefore should be, *Exception and motion overruled.*

Judgment on the verdict.

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

SAMUEL W. POPE *& al. versus* THE MACHIAS WATER POWER AND MILL COMPANY.

Parol evidence is admissible to identify the subject matter of a recorded vote of a corporation.

Exceptions cannot be sustained to the erroneous admission of testimony upon questions, which afterwards, on the trial, became immaterial.

If a witness can give the substance of a conversation in relation to the matter in issue, his testimony is not to be excluded because he cannot give all the conversation which took place at the same time, in relation to other matters.

Where evidence upon a particular point has been introduced without objection, and commented on by counsel, and instructions in relation to it are given

without objection, it is too late after verdict to object to the instructions on the ground that the testimony was inadmissible.

Where the question is whether a party has waived certain rights, the instruction that, "if he, in the conversation testified to, intended and so expressed himself as to be understood by the other party, in the exercise of common understanding, and was understood as waiving his right, he did waive his right," is unobjectionable.

Erroneous instructions on the question of *amount* of damages are no ground for setting aside the verdict, if the jury find the plaintiff is not *entitled* to damages.

Assumpsit cannot be maintained for breach of covenants in an instrument under seal.

ON EXCEPTIONS by the plaintiffs to the rulings of CUTTING, J., and on MOTION to set aside the verdict.

ASSUMPSIT for breach of certain stipulations in a lease under seal.

The case is stated in the opinion.

Granger, for plaintiffs, in support of exceptions.

G. F. Talbot, for defendants, *contra*.

The *motion* was not argued.

The opinion of the Court was drawn by

CUTTING, J.—It appears that, on Oct. 15, 1853, the defendants were the owners of township numbered thirty, in the middle division, and certain mills, wharf and other real estate situated in Machias, in the county of Washington; that, on that day, they leased to the plaintiffs their mills and wharf at a certain stipulated rent for a certain number of years, with the privilege of taking lumber from the township upon permits, on conditions therein to be specified. In that lease was the following stipulation:—

"And it is further agreed that the party of the second part (these plaintiffs) shall have the refusal of the mills, wharf and township herein referred to, whenever they shall be offered for sale together."

Although there were other breaches of the lease alleged

in the writ, yet the only one which becomes material in this case, is the following, viz. : —

"Nor did said defendants give the plaintiffs the refusal of the mills, wharf and township referred to in said contract when they were offered for sale together, and did sell the same long before the purchase of this writ to other parties."

The defendants' specifications of defence negative all the allegations in the writ; but, during the progress of the trial, all the rulings were favorable to the plaintiffs upon the various issues presented to the jury, except as to the question of their right of preëmption, which established their claim for damages, unless the defendants, taking upon themselves the burden of proof, should show under their specification a waiver of such right of preëmption. That such were the rulings is to be inferred from the nature of the exceptions, taken as to the admissibility of certain questions and answers contained in the deposition of *Daniel Harwood*, touching that issue; many or most of which become immaterial to *the* issue, which was subsequently presented to the jury; for, although the whole instructions are not reported, and none such as were the most favorable of those to the plaintiffs, yet the plaintiffs' counsel at the close of his opening argument very justly admits, that "the Judge instructed the jury that the plaintiffs were entitled to a distinct offer of the property at the price it was finally concluded to be sold for, unless they found that the plaintiffs had waived this right." And there was no pretence that such offer was ever made, but it was alleged that it was waived by the plaintiffs in advance of the sale.

All evidence, then, of the defendants' offer to sell to the plaintiffs, by vote or otherwise, at a price more than they actually sold for, was unavailing. The defendants' last resort was to the *waiver*, except as to the question of damages, which will be considered hereafter.

Objection was first made to the admission of *Harwood's* deposition, because he declined to annex certain letters received by him from one of the defendants, which objection

is waived in the argument; and, consequently, it requires no particular consideration, further than to say, that a party cannot thus manufacture testimony in his own favor by communications not responsive to the calls of the adverse party.

Question 19th, in the same deposition, was objected to, and the answer, "as incompetent." Interrogatory. "To what subject matter does the vote on the records, in reference to $85,000 as a minimum price, refer? Answer. It refers to the offer made in the schedule A, and to nothing else." It appeared that schedule A was not incorporated into the record, and, without parol evidence as to what property was referred to, the vote would become, not null, but ambiguous and obscure; therefore, to explain it, the answer was admissible. Besides, we have seen that under the instructions all the defendants' offers become immaterial; that the property was never offered to the plaintiffs at the price for which it was sold, and consequently the defendants must in that particular rely upon the waiver.

Without enumerating, it is sufficient to say, that all the objections to the questions and answers in that deposition, fall within the same category, except the evidence as to the declarations of William Pope, the father of the plaintiffs, which it seems were first admitted *de bene esse*, to be subsequently excluded, unless it should be made to appear that he was jointly interested in the purchase with his sons, which being subsequently shown, no further question was raised at the trial.

Again, exception is taken to the admissibility of *Ignatius Sargent's* testimony as to *S. W. Pope's* conversation with him, because he could not recollect all that was said during a period of two or three hours' conversation, most of which was in relation to matters and things in general, but who swore that he did recollect the substance of what was said in relation to the purchase of the property. To exclude testimony under such circumstances would be in direct violation of all modern rules of evidence; for a witness can seldom be found, and if so, unworthy of belief, who should

swear that he recollected and could repeat *verbatim* all such conversations, and, even if he could, the irrelevant part would be excluded. Such an inquiry may properly be made in order to test the recollection of a witness, but not to exclude him, when he can give the substance of what was said touching the issue. The same remarks are, also, applicable to the exception taken to *Edward Pearson, jr's*, evidence.

Having thus disposed of the exceptions as to the admissibility of the evidence, the remaining questions arise as to the correctness of the Judge's instructions to the jury; and the first is, whether he erred in permitting them, if they found for the plaintiffs, to deduct any damages, which the defendants had sustained, by a breach of the same contract on the part of the plaintiffs. Upon general principles, whether there be error or otherwise in this particular, it is too late after verdict for counsel to be more astute than during the trial; for it appears that evidence was introduced without objection relative to such damages, and commented upon by counsel. It was not then the province of the Court, without previous objection or subsequent request, to withdraw such evidence from the consideration of the jury. New trials would be greatly multiplied if they should be granted under such circumstances. The position taken by the counsel, that there was no evidence upon which to base such instruction, is not sustained by the testimony, as reported.

Secondly. Exception is taken to the following instructions, viz.: —"On the point of waiver made by the defendants' counsel, the presiding Judge instructed the jury, that, if they were satisfied, that *S. W. Pope* in any of the conversations testified to by the witnesses prior to the corporation fixing the price of forty-four thousand dollars for the property sold to *E. Pearson, jr.*, and others, intended, and so expressed himself as to be understood by the defendants in the exercise of common understanding, and was understood as waiving his right of preëmption under the contract of October 15, 1853, to have the refusal of the property,

then the corporation were at liberty to sell the property to any applicant without any notice to the plaintiffs of such intention to sell, or offer of the property to them."

There is no controversy as to the character and force of the testimony upon which this instruction was based, and it may be difficult to perceive how any person, even of an uncommon and superior understanding of all the nicer technicalities of the law, can have any confidence in such an exception.

Thirdly. Exception is also taken to the instruction, that—"On the subject of damages the presiding Judge instructed the jury, with other instructions, to which no exception is taken, that if they believed that the plaintiffs, by their intentional depreciation of the property of the defendants, thereby induced them to estimate their property at less value than they otherwise would have done, the jury might take such fact into consideration in their estimate of the damages, and they might find for the plaintiffs, less such amount as the jury find the defendants sold their property for, less than they otherwise would but for such depreciation of the plaintiffs."

It is apparent that this instruction was given upon the possible, however improbable contingency, that the jury should not find a waiver of the right of preëmption, in which event the jury were authorized to take into consideration any loss which the defendants might have sustained by the conduct of the plaintiffs in the reduction of damages. This exception would seem to manifest an urgent attempt on the part of the plaintiffs to secure an advantage from their own wrong, which the rules of law never permit. The arguments of counsel upon this point fail to induce us to overrule so salutary a principle. But this question has, by the waiver as found by the jury, become immaterial. In the arguments of plaintiffs' counsel, no allusion appears to have been made to their motion to set aside the verdict as being against evidence.

In conclusion, we would remark that the case finds that

this is an action of *assumpsit* to recover damages for the breach of a covenant contained in a *sealed instrument*. But, notwithstanding, the defendants have seen fit to try the case upon its merits, having waived, at the trial, an otherwise insuperable objection.

Motion and exception overruled.
Judgment on the verdict.

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

KENT, J., concurred in the result.

BENJAMIN F. MUDGETT, *in Eq.*, *versus* ISAAC B. GAGER.

A bill in equity, seeking an adjustment of the accounts between the part owners of a vessel, some of whom reside without the jurisdiction of the Court, cannot be sustained, unless such non-residents are summoned to answer, or it appears from the allegations in the bill that not only *their* interests will not be prejudiced by the decree, but also that they were not necessary to the just ascertainment of the merits of the case.

It is not enough that the bill allege that "the complainant does not claim there is anything due to him from said non-residents; or that he does not seek thereby to recover anything from them."

BILL IN EQUITY.

The case was heard on demurrer.

The bill, omitting the formal parts, was as follows:—

"That from on, or about, the first day of January, 1860, until the first day of September, 1863, or thereabouts, Frederick Swift and George H. Blanchard, both of the city of New York aforesaid, co-partners, under the style of F. Swift & Co., Isaac B. Gager, of said city, Osborn Howes and Nathan Crowell, both of Boston, in the Commonwealth of Massachusetts, co-partners, under the style of Howes & Crowell, were part owners of the brig or vessel called the "Caroline E. Kelley," and that, during all, or a portion of

that time, your orator was also a part owner in said vessel; and that, during this time, no other person was interested as an owner in said vessel; that the parties abovenamed, except the said Gager, have no longer any interest in said vessel; that, during the time aforesaid, said vessel was employed in navigating the high seas, and has made several voyages thereon, and therein contracted debts, which the owners thereof became, and were and are liable to pay; that this complainant has paid more than his proportional part of said indebtedness, and has not received more than his proportional part of her earnings; within the time named, there has been no settlement between the owners aforesaid of the accounts of said vessel, or of their respective receipts and disbursements in respect thereto; that, upon a settlement of said accounts, there would be found due the complainant, from said Gager and Blanchard and Swift, respectively, a large sum of money. The complainant does not claim that there is anything due to him from said Howes and Crowell; nor does he seek hereby to recover anything from them. He alleges that he has often requested the other defendants to come to an adjustment and settlement of the accounts of said vessel — offering, as he hereby offers, to pay any sum that might be found due from him on such accounting and settlement. And your orator well hoped the said defendants would come to a settlement, but they refuse. Wherefore," &c.

The respondent, Gager, demurred on the ground that the part owners, alleged to be inhabitants of some other than this State, have not been summoned to appear to answer to said bill.

Shepley & Dana, for the complainant.

Drummond, for the respondent.

The opinion of the Court was drawn by

Barrows, J. — This bill seeks an adjustment of the accounts between the part owners of the brig Caroline E.

Kelley. Isaac B. Gager, one of the defendants, whose property is attached, demurs to the bill for want of proper parties, because Howes & Crowell of Boston, Mass., also part owners, have not been summoned as parties, and do not appear. The bill contains no allegation that Howes & Crowell have received their share of the earnings of the vessel. It may be that *they are creditors* to such an amount as might seriously affect the decree to be made in this case. It is not easy to see how, in the present condition of the bill, any decree could be made which would be certain to do justice among the remaining part owners, or constitute a final adjustment of their affairs.

How can it be ascertained what just claim any one of the part owners may have against any one or more of the others without making parties of all those members of the concern who may be supposed to have claims against it?

Howes & Crowell being out of the jurisdiction, if it appeared not only that their interests would not be prejudiced by the decree, but also that they were not necessary to the just ascertainment of the merits of the case before the Court, they might be dispensed with.

In *Towle* v. *Pierce*, 12 Met., 329, cited for the plaintiff, WILDE, J., in overruling the demurrer, remarks, "the bill avers that all the absent partners have received their full share of the partnership effects; and, if so, they cannot be prejudiced by any decree which may be obtained in the present case."

The doctrine of our own Court, in *Fuller* v. *Benjamin*, 23 Maine, 255, is applicable to the present case, and the consequence is that the demurrer must be allowed, and the bill dismissed unless the plaintiff obtains leave to amend at *Nisi Prius*, or the defect of parties is cured by the appearance of the other part owners.

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

JOSEPH H. LAMBERT, *in Eq.*, *versus* JOHN L. LAMBERT.

In a bill in equity to redeem a mortgage, an assignment by the complainant, after answer filed, of all his interest in the premises mortgaged, can be made available to the respondent by a cross bill.

Such an assignment, thus brought to the knowledge of the Court, constitutes a valid defence to the original bill.

Want of equity is no defence to a cross bill brought forward by way of defence.

The complainant in the original bill, should answer rather than demur to the cross bill.

BILL IN EQUITY.

The case was heard on demurrer to the cross bill. The complainant, as mortgager, brought a bill in equity against the respondent, as assignee of the mortgage, to redeem it. The respondent appeared, and filed his answer, and upon the hearing a master was appointed, who subsequently made a partial report.

After the answer was filed, the complainant assigned all his interest in the mortgaged premises to his solicitor. Thereupon the respondent filed a cross bill setting forth the facts of said assignment, praying that the complainant make answer, and that he be enjoined from the further prosecution of the original bill. To the cross bill, the complainant demurred, alleging a want of equity.

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

Fessenden & Butler, for the respondent.

The opinion of the Court was drawn by

WALTON, J. — It sometimes happens that a defendant in equity suits has matter of defence which can be made available only by a cross bill. Matter of defence arising *after* the cause is at issue, and which, in suits at law, would furnish matter for a plea *puis darrein continuance*, can be made available in this way only. The cross bill in this case is of this description. It sets up a ground of defence happening

after the former pleadings were filed; namely, an assignment by the plaintiff of all his interest in the subject matter of the suit. Such an assignment, although brought to the knowledge of the Court by a cross bill, is a valid defence to the original bill. Instead of answering this bill as he ought, the plaintiff demurs, assigning for cause of demurrer *want of equity*. But want of equity is no defence to a cross bill *brought forward by way of defence*. (Story's Equity Pleadings, § 628.) The demurrer, therefore, should be overruled. But, in equity, the overruling of a demurrer is never followed by a decree making a final disposition of the case; the order is that the party demurring answer further. The entry in this case should be: —

"*Demurrer to cross bill overruled — further answer required.*"

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

MECHANICS' BANK *versus* ABNER R. HALLOWELL *& al.*

In an action by the indorsee against the makers of a negotiable promissory note given by the defendants to B. D. P., — who was State Treasurer, — and, after being indorsed by him, was presented to the plaintiffs' bank, with which said B. D. P., as said treasurer, had an account, for discount; and discount was refused until indorsed by B. D. P. as "State Treasurer," whereupon that indorsement was added, the note discounted and its proceeds, by his direction, placed to the credit of his said account, thereby making a balance in favor of the State of more than $1100; and the plaintiffs, about the time the note became due, learning that B. D. P. was a defaulter to the State, received from him a check for $1100, signed by B. D. P., "State Treasurer," and the amount indorsed on said note; and the plaintiffs thereafterward paid the said amount of $1100 to the State, and erased the indorsement of said amount from said note; — *Held*, —

1. That the proceeds of said note, thus passed to the credit of the State, are to be regarded as its funds;

2. That the attempted payment of the $1100 to the plaintiffs, was against the statute, and did not constitute a payment *pro tanto* of the note;

3. That, if the transaction were fraudulent on the part of B. D. P. and the

bank, it was so as against the State alone, and not as against the defendants, whether principals or sureties;

4. That the plaintiffs lost no rights by voluntarily paying over the amount indorsed to the State; and

5. That the defendants must be deemed as principals to the bank, having no defence in law or equity.

Essentials of a payment.

ON FACTS AGREED.

ASSUMPSIT.

The note declared on was as follows:—

"Bangor, August 24, 1859.

"For value received, we jointly and severally promise to pay B. D. Peck, or order, two thousand dollars, in four months, at Suffolk Bank, Boston. "A. R. Hallowell,

"$2000. "Geo. R. Smith."

"P. N. P. Dec. 27th, 1859.

"5912. "B. B. N. P. fee and postage, $2,03."

Indorsed by "B. D. Peck, and B. D. Peck, S. Tr."

The note was in fact given for accommodation of B. D. Peck, of which the plaintiffs were not conusant. It was discounted by the plaintiffs, Sept. 24, 1859, at the request of Peck, who was Treasurer of the State of Maine, until January, 1860, and had, at the plaintiffs' bank, during most of the time he was Treasurer, an account, made up of cash and checks purporting to be official, and of the discount of notes of said Peck, signed by him and others.

The account on the plaintiffs' books was headed as follows:

"Dr. B. D. Peck, State Treasurer, in account with Mechanics' Bank. Cr."

The note in suit amounting, less the discount, to $1,969,00, was passed directly to the credit of this account, and is the last credit, excepting two deposits of cash, amounting together to $625,00, made a few days after.

When said note was first offered for discount it was indorsed "B. D. Peck" only. Discount was refused unless also indorsed by said Peck as State Treasurer, and that indorsement was thereupon added. Peck was not authorized

by any legislation of the State to indorse or negotiate said note as State Treasurer or in behalf of the State on its credit.

When said note fell due, namely, Dec. 28, 1859, not being paid, it was protested. About this time, it was ascertained that Peck was a defaulter to the State. Dec. 29, Dow, one of Peck's bondsmen to the State, called on the president of the bank and requested him, as Peck was in trouble, not to honor any more of Peck's checks against said account. In the evening of the same day of this interview with Dow, said president, with the cashier, called on Peck with the note and urged payment. There was then a balance to said account of $1,168,70. Peck gave them a check against said account, signed "B. D. Peck, State Treasurer," for eleven hundred dollars, which was duly cancelled at the bank, as is usual with checks when paid, and the amount indorsed as a partial payment on said note in suit.

The $1,100,00 was at once passed on the bank's books to the debit of said account, and has ever so remained.

The said B. D. Peck, during the year 1859, was in the habit of using the money of the State in his own private business, and, to replace in whole or in part the money thus used, was in the habit of obtaining discounts of notes of individuals, sometimes indorsed by himself as Treasurer, and sometimes not so indorsed. At the time of the discount of the note in suit, the said Peck was largely a defaulter to the State, and has ever since remained a defaulter. But the plaintiffs had no knowledge until a long time after the discount of this note, that said Peck was a defaulter, or that he was using the money of the State in his own private business.

The following joint order was passed by the Senate and House of Representatives:—

"STATE OF MAINE.

"In Senate, March 10, 1860.

"Ordered,—That the Treasurer of State be directed to demand of the Mechanics' Bank, Portland, the sum of eleven hundred dollars, being the amount of the money of the State

paid to said bank, on the twenty-ninth of December, A. D. 1859, by B. D. Peck, late State Treasurer, without authority of law; and the payment thereof to be made on or before Wednesday next."

In compliance therewith, the bank subsequently paid the State the sum of eleven hundred dollars, but without defendants' consent; and also, without their consent, the indorsement of partial payment of said sum on the note was erased by said *Peck at plaintiffs' suggestion.*"

It was agreed that the said cause shall be submitted to the Law Court on the above statement of facts, the Court to order such judgment as the law and facts require.

Evans & Putnam, for the defendants.

Allen Haynes, for the plaintiffs.

The controversy in this case is solely about the $1100. The defendants admit the balance of the note to be due and unpaid. But the plaintiffs claim the whole amount of the note and are entitled to recover it, unless the $1100 transaction operated as a payment of so much.

It will not be claimed that Peck had any authority to bind the State by his indorsement of this note as State Treasurer. That indorsement added nothing legally to the note. Although this did not occur to the plaintiffs, at the time of the indorsement and discount, as a matter of law, they will be held to have known it. This fact of the indorsement by Peck, as State Treasurer, may therefore be laid out of the case.

The next point to be considered is, that all moneys which went into Peck's hands as State Treasurer, were and remained the property of the State, and did not become the private property or moneys of Peck. And money deposited in bank to the credit of Peck, as State Treasurer, was the money of the State. The statutes recognize this principle. R. S., c. 2, § 28.

"The Treasurer shall not in any way receive for his own

use any interest, &c., by reason of any money belonging to the State," &c.

"No greater amount of money of the State than twenty thousand dollars shall be deposited in a bank," &c. R. S., c. 2, § 30.

The Treasurer is required to make an exhibit showing the banks or places in which such moneys of the State are kept and deposited, the amount, &c. R. S., c. 2, § 31.

The Treasurer shall not loan, use in his own business, or for his own benefit, any such money, or permit any other person to do so. R. S., c. 2, § 28.

The statute thus makes it his duty to treat this money not as his own; but as that of the State, and to keep it separate and distinct from his own. In fact, B. D. Peck, State Treasurer, and B. D. Peck, in his private capacity, are, in contemplation of law, two distinct persons. Their accounts at the bank should be as distinct as the accounts of the Treasurer, as such, and the accounts of any other man. Money in bank to the credit of B. D. Peck, State Treasurer, is money of the State, to its own credit, and money in bank to the credit of B. D. Peck, is money to his individual credit. The latter has legally no more connection with the former than it has with the account of any other citizen of the State.

Keeping this distinctly in view, there is no difficulty in the case.

In 1859, Peck had used money of the State to a large amount. To repay the State, he was in the habit of obtaining discounts of notes of individuals. When the note in suit was discounted, he was a defaulter, and the inference is reasonable that he had this note discounted for the purpose of replacing, in part, his deficit. These defendants lent their note to Peck for that purpose—or, at any rate, to raise money upon, and no agreement is suggested that the proceeds were to be applied to any other purpose. When the note was discounted the proceeds were the property of Peck. He had them passed to the credit of the State Treas-

urer. This was so much payment towards his deficit to the State; and the moment this money was thus credited on the books of the bank, it became the property of the State, and all the incidents of money of the State attached to it.

It will not be pretended that, if things had remained in this condition, the defendants could have any defence to this note, or had any claim on the State, or on the plaintiffs, for the avails of it, which had been passed to the credit of the State. It was as much the property of the State as any other money in the treasury.

After it became known that Peck was a defaulter, $1100 of this money was checked out by Peck and indorsed upon this note. The State reclaimed this $1100 and the plaintiffs paid it.

Could the plaintiffs have withheld this money from the State? It needs no argument to show that, if a man receives from one party money belonging to another, he may be compelled to repay it in an action for money had and received. Greenl. Ev., §§ 117, 119, 120, 121, and authorities there cited.

It follows, then, as a matter of course, that the plaintiffs could not hold this money as against the State. And, as the State did demand and receive this $1100 of the plaintiffs, there has been no payment on the note and the defendants can take no advantage of the indorsement.

The opinion of a majority of the Court was drawn by

APPLETON, C. J.—The note in suit is payable to B. D. Peck or order, and by him indorsed. The fact that, after his individual indorsement, is to be found on the note an indorsement by him, as Treasurer, in no way affects the right of the plaintiffs to recover. The bank may have failed to obtain the security of the State by such indorsement, but that affords no defence to the makers of the note, or prevents the title thereto vesting in the plaintiffs.

"The moneys of the State" are entrusted to its Treasurer for safe keeping, but, though he misapply them, they none

the less belong to the State. It is a misapplication of the funds of the State by him, not an appropriation of his own.

By R. S., 1857, c. 2, § 26, the Treasurer is required to give bond to the State.

By § 27, "the condition of the bond shall be for the faithful discharge of all the duties of his office, the fidelity of all persons by him intrusted with any of the concerns thereof, and that during his continuance in office he will not engage in trade or commerce, or as a broker, agent or factor for any merchant or trader," &c.

By § 28, "the Treasurer shall not in any way receive for *his own use* any interest, gratuity or benefit by reason of any money *belonging to the State*, or of any loan obtained for the State, &c. He shall not loan, use in his own business or for his own benefit any such money, or permit any other person to do it, unless authorized by law, upon pain of forfeiting a sum equal to the amount so used or loaned, to be recovered by indictment."

By § 30, "no greater amount of '*the money of the State*' than twenty thousand dollars shall be on deposit in a bank unless it is necessary for the payment of bonds of the State and interest, becoming payable at such bank."

By § 31, the Treasurer is required to make monthly exhibits, showing the places or banks in which "the moneys of the State" have been kept and deposited during the past month, &c.

It is apparent from these provisions that "the moneys of the State" intrusted to its Treasurer, while under his care and supervision, ever remain its moneys. The bond required is not so much for "the moneys" as for the faithful discharge of his duties in reference thereto. For the one it would be entirely inadequate, while for the other it might be amply sufficient.

The statute authorized Peck, as State Treasurer, to make a deposit with the plaintiff bank. His deposit with the bank, the case finds, was made of "cash and checks purporting to be official," and of the discount of notes signed by

Peck and other individuals. It was headed thus,—"Dr. B. D. Peck, State Treasurer, in account with Mechanics' Bank. Cr."

The moneys thus deposited and passed to the credit of the State Treasurer belong to the State, and are a part of its funds or they are not. If they are not the funds of the State, they would, on his death, descend to the heirs of the Treasurer, if solvent. If insolvent, they would be divided among his various creditors, of whom the State would be one, and would be thus entitled to a fractional share, greater or lesser, according to the insolvency of the estate. If not the moneys of the State, the funds in the different banks might have been trusteed as the funds of Peck in suits against him, — a view of the law which might have been gratifying to his creditors. But such is not the law. The consequences would be too monstrous to allow one for a moment to assent to such a proposition. Moneys of the State thus deposited remain its property and cannot rightfully be appropriated save to its use.

But it is urged that the proceeds of notes discounted for Peck, and passed by his direction to the credit of the State, are not to be regarded as its funds. But such is not the law. Peck was a defaulter. The money belonging to him and arising from notes discounted at his request was by his order passed to the credit of the State. It remains to its credit. No mistake is pretended. He is estopped to deny that the funds thus credited belong to the State. They should remain there until withdrawn in the due course of business, or until the final adjustment of his account. The bank has received these funds as the money of the State, and is bound by such reception so to recognize it. They have been understandingly appropriated to the credit of the State. They are mingled with its other moneys. Who is authorized without the consent of the State to separate and withdraw it? The State forbids it. Is this Court to sanction and approve the robbery of its treasury?

Nor is the conclusion different if the discounts obtained

by Peck and passed to the credit of the State are to be regarded merely as *prima facie* its money. This presumption is not rebutted, but the reverse. Peck was a defaulter. He procured the loan to enable him, by replacing thus far the amount misappropriated, to conceal, if possible, his defalcations. The money loaned was his. He directed it to be credited to the State. If Peck ordered this appropriation of his funds and the bank assented thereto, it cannot be changed against and contrary to the will of the State. The funds in controversy belong then to the State.

The payment to the plaintiff with the funds of the State was illegal and against the express commands of the statute. As the bank received them with a full knowledge of all the facts, the State might have maintained an action to recover back the money thus wrongfully and fraudulently misapplied in payment of the individual indebtedness of its Treasurer. Such being the law, the bank lost no rights by voluntarily doing what, by law, it would have been compelled to do. *Scranton, Ex.*, v. *Bank of Rochester*, 24 N. Y., 424.

As against Peck, whether the note was for his accommodation or not, the bank is entitled to recover the full amount. The payment became unavoidable to the bank, as the State recalled the money thus illegally paid. The bank has received no benefit therefrom. The indorsement on the note in suit, of the amount of the check given by Peck, was erased by him. It cannot be doubted that the claim of the bank against them remains unaffected by what has been done. No part of his indebtedness has been discharged.

The proof shows that the officers of the bank had no knowledge that the note in suit was given for the accommodation of Peck. They might well regard the defendants as principals. Indeed, as to the bank, they must be deemed principals, and as having no defence in law or in equity. No payment has been made by them, or for, and on their account, which has enured to the advantage of the plaintiffs. Their indebtedness is not to be discharged because the indorser of the note, in which they are principals, attempted

with other people's money to make a payment, which he had no right to make and which the payee could not legally retain, and, being unable to retain, surrendered to the lawful owner. These facts would not establish the plea of payment in whole or in part. If all the facts, upon which the defendants rely, were duly pleaded, they would constitute no bar to the maintenance of this action, to the whole extent claimed by the plaintiffs.

If there had been no indorsement upon the note in suit of the money of the State, wrongfully paid by Peck and received by the bank, there would hardly have been the pretence of a defence. But an indorsement is at best but evidence of payment and is open to explanation. It is not conclusive. The evidence entirely negatives any presumption of a valid payment.

As Peck could not defend against the note, so neither could these defendants, if they were to be regarded as his sureties. The alleged payment was an illegal one on the part of Peck. If the transaction was fraudulent on his part and on that of the bank, it was so as against the State alone and not as against these defendants, whether they be principals or sureties. It was for their benefit that the State should not intervene. If the State should interfere, they would lose nothing which belonged to them. Assuredly, they had no claim to the money of the State. If the bank had surrendered security, or in any way injuriously affected their condition, the case would be different. The bank could not do otherwise than it did. It simply paid over to the true owner, what did not belong to it.

The wrong attempted, was the injury *of the State*. But these defendants cannot invoke, by way of defence, a fraud on third parties, which did not in the slightest degree injure them, but which, if consummated, would have been beneficial to them to the extent of its consummation. The bank has received nothing the law authorizes it to retain. Peck has made no valid payment. These defendants have paid nothing. The attempt of Peck to pay with the money of

the State proved unsuccessful. If Peck and the officers of the bank attempted to misapply the funds of the State to the payment of the note in suit, and to the consequent benefit of these defendants, if the State should not interfere, they are not to be released from any legal liability, by reason of the failure of such attempt, unless their condition has thereby been made worse. This is neither alleged nor proved.

It is essential to a payment, that the title to the money or other property transferred for that purpose, pass to and vest in the creditor without the right of reclamation by the owner, if other than the person making such payment. "When the obligation is to give anything, the payment consists in an *absolute transfer* of the property. It follows, that it is essential to the validity of a payment, that it be made by a person who is able to make such transfer. Whence it also follows that the payment cannot be valid unless made by the *proprietor of the thing*, or with his consent; for otherwise, the person who makes the payment cannot transfer the property to his creditor; *Nemo plus juris in alium transferre potest quam ipse habet.*" 1 Evans' Pothier, p. 3, c. 1, art. 1.

Though a payment, where no title to the thing passes to the creditor, would not be valid, it seems the creditor, while retaining possession, cannot claim any other payment; he must suffer an eviction, or offer to restore what he has received to the debtor. 1 Evans' Pothier, p. 3, c. 1, art. 1.

When the payment is with the money of a third person, and the creditor receives the same in good faith, and there is no right of reclamation, such payment would be valid. But, if the circumstances are such that the creditor cannot legally retain the money and, upon demand, he restores it to the owner, the debt cannot be regarded as paid. The person making the payment should in all cases be able to transfer a good title to that with which he makes his payment, whether it be money or specific articles.

Whether the defendants are principals, as the bank insists they are, or sureties, as they claim to be, the result is

the same. In neither event can they set that up as a payment, which, being made with the money of the State and without right, the payor had no right to make nor the payee, knowing all the facts, to retain, and which was not retained. They have sustained no loss. They have no right to insist upon a misapplication of the funds of the State, whether the result of fraud, of ignorance of the law, or of mistake, however much it might relieve them. Their debt remains unpaid. Their liability continues unchanged.

Defendants defaulted for the whole amount of the note in suit.

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

CUTTING, J., dissenting.—On August 24, 1859, *B. D. Peck*, then Treasurer of the State, having in his individual and official capacity opened an account with the plaintiffs, in which his private and public funds were credited to him as Treasurer, procured the accommodation note now in suit and transferred the same to the bank by whom the proceeds were thus credited.

The note was made payable to *Peck* or his order, and indorsed by him, both in his individual and official capacity, the latter, although at the request of the plaintiffs, was without official authority.

When the note became payable it was duly protested for non-payment; at which time the Treasurer had a credit in the bank over and above his liabilities of $1168,70, and, at the special instance and request of the bank, drew his official check for $1100, which was received, charged to him and indorsed on the note. Prior to this time, however, the bank had become aware of Peck's official defalcation, and, with full knowledge of that fact, obtained the check in part payment of the note and made the indorsement thereon.

Subsequently, the Legislature, who had granted, and still retained the power to nullify the charter of the bank,—

"*Ordered*,—That the Treasurer of the State be directed

to demand of the Mechanics' Bank, Portland, the sum of eleven hundred dollars, being the amount of the money of the State paid to said bank, on the twenty-ninth of December, A. D. 1859, by *B. D. Peck*, late State Treasurer, without authority of law; and the payment thereof to be made on or before Wednesday next."

On that day the demand was made, to wit, on March 10, 1860, and the amount claimed was paid to the then State Treasurer by the bank, who, without the knowledge or consent of the defendants, erased their previous indorsement, and in this suit claim to recover the note with the indorsement thus erased.

Whether, or not, the Legislature acted wisely in their peremptory demand, or the bank in its ready compliance, we are not now called upon judicially to determine. It has, however, been suggested that the resolve was *in terrorem*. But, *Tantaene animis coelestibus irae!*

It may be very questionable whether that part of the resolve, which embraces an *ex parte* adjudication, that the payment was made "without authority of law" is correct. It has been otherwise decided in New York, in the case of *Swartwout* v. *Mechanics' Bank*, 5 Denio, 555, where the Court held that "a mere deposit by a collector in his own name, with his official addition, is no accounting for the money received by him in his official capacity. A county treasurer, sheriff, surrogate, or other officer, opens an account with a bank with his addition, and keeps a separate account in such capacity; most clearly he can collect such deposit in his own name, and the bank would not be permitted to show that the money belonged to the county."

But in the same State, in a subsequent decision, in the case of *Scranton, Ex'r*, v. *The Farmers' and Mechanics' Bank of Rochester*, 10 Smith, 424, a contrary opinion was pronounced by a majority of the Court, (two members thereof dissenting.) In that case it was held that an insolvent executor by depositing funds derived *exclusively from the proceeds of his testator's estate*, in his official capacity, thereby

transferred them to the testato'rs heirs, and beyond the reach of his own private creditors. The law, therefore, upon this point, seems to be unsettled. It may, perhaps, be contended with a degree of plausibility, that the Court, in the first, and the dissenting Judges in the second opinion, advanced the sounder reason and the better logic. In the case at bar, however, the funds deposited never belonged to the State.

Our statute, c. 2, § 30, provides that,—"No greater amount of money of the State than twenty thousand dollars shall be on deposit in any bank, unless it is necessary for the purpose of paying bonds of the State and interest, becoming payable at such bank." It is, therefore, urged that money so deposited is *ipso facto* a transfer to the State. But, under that section, the Treasurer is not obliged to deposit in any particular place. He may keep the money in his actual possession. What safety to the State would it be against a fraudulent Treasurer to have the money so deposited? His official checks would soon restore it to himself or disseminate it in various ways. But money so deposited may be an excuse for the Treasurer in case of the subsequent insolvency of the bank. Practically, that section can produce no other result. The security of the State, then, is principally the official bond, the moral worth and integrity of the incumbent, stimulated to duty by the executive officers, and the threatenings contained in § 28.

But, whether the foregoing views be correct or otherwise, it may not be very material in this case. I base my opinion principally upon other and distinct grounds. There may be instances when the depositor, acting in *bad* faith, may suffer the funds to be misappropriated, for which he may become accountable to the true owner. There is another class of cases where it is said, "that ignorance of the law, with the full knowledge of the facts, furnishes no ground to rescind agreements, or to set aside solemn acts of the parties." *Jones* v. *Mathews*, 31 Maine, 318, and authorities there cited. Had the plaintiffs, under the former, become ac-

countable to the State; still, under the latter contingency, they may be wholly without remedy.

At the time of the disclosure of *Peck's* insolvency three parties were interested in the legal appropriation of his bank assets; viz., his sureties on his official bond, the bank and the signers of accommodation paper. It was known to the bank that the note in suit was payable to *Peck* in his individual capacity, but was discounted solely on the strength of his official indorsement, and so credited to him in his account current, at a time when the balance was largely in his favor. The attorney for the bank now admits that the official indorsement was without authority, or, in other words, that it was perfected by parties ignorant of the law, which ignorance caused the negotiation that otherwise would not have been accomplished. Thus far there was no ignorance of any material *facts*. How was it in relation to subsequent proceedings? This is disclosed in an extract from the agreed statement. "When said note fell due, namely, Dec. 28, 1859, not being paid, it was protested. About this time it was ascertained that Peck was a defaulter to the State. Dec. 29, Dow, one of Peck's bondsmen to the State, called on the president of the bank and requested him, as Peck was in trouble, not to honor any more of Peck's checks against said account. In the evening of the same day with this interview with Dow, said president, with the cashier, called on Peck with the note and urged payment. There was then a balance to said account of $1,168,70. Peck gave them a check against said account, signed B. D. Peck, State Treasurer, for eleven hundred dollars, which was duly cancelled at the bank, as is usual with checks when paid, and the amount indorsed as a partial payment on said note in suit."

That indorsement, by well settled rules of law, cannot be cancelled except on proof of an ignorance of *facts*. None such is pretended, but, on the contrary, it was made with full knowledge of the antecedent and subsequent history of the note and of Peck's individual and official relations.

The plaintiffs may recover the amount for which the defendants offered to be defaulted and costs up to that time, and the defendants their costs since the offer.

THOMAS B. RICHARDS, *in Eq.*, *versus* SAMUEL A. PIERCE *& al.*

Whether or not a complainant in equity, who has made a tender before commencing his suit to redeem a mortgage, must bring the tender into Court, *quere.*

In equity, where the complainant claims under an officer's sale, *in invitum*, he is justified, in asserting his right against other persons, in making the execution debtor a party.

Where a creditor caused his debtor's right to redeem a prior mortgage to be sold on execution, and, after the time for redemption had expired, he commenced a suit in equity against the assignee of said mortgage to redeem it, making the execution debtor also a party respondent; and alleged, among other things, that a certain other mortgage therein described, given by said debtor to the other respondent was fraudulent and void as to the complainant, and prayed for permission to redeem the former mortgage, that the latter might be declared void, &c.; — *Held*, that on demurrer, the bill would not be dismissed on the ground of multifariousness, or misjoinder of parties.

Where, in such a suit, both respondents testify that the amount purporting to be secured by the second mortgage was actually due to the mortgagee when it was given, and explain the several items constituting the amount; and, on the other hand, the complainant proves that said mortgagee had declared that said amount was not due; and it appeared that the mortgager had subsequently used the mortgage for his own benefit, with the assignment of the mortgagee for that purpose; — *Held*, that although these facts threw doubt upon the *bona fides* of the transaction, the evidence is insufficient to overcome the testimony of the respondents.

ON REPORT.

BILL IN EQUITY.

The case came up to be heard on bill, demurrer, answer and proof.

The material facts sufficiently appear in the opinion of the Court.

Shepley & Dana, for the complainant.

Fessenden & Butler, for the respondents, contended that,

The bill was multifarious, seeking to redeem two distinct mortgages, of different dates, originally between different parties, founded on different transactions, in no wise dependent on each other, — and seeking to redeem upon distinct and independent grounds, raising distinct and separate issues.

There was a misjoinder of parties, — respondent Richards' interest in the property having ceased when his right to redeem the officer's sale of his right in equity expired.

Counsel elaborately argued the question of bringing tender into Court; but the view taken by the Court renders a report of the argument unnecessary.

The opinion of the Court was drawn by

DAVIS, J. — The premises in controversy were mortgaged by Stephen M. Richards, one of the defendants, to James H. Baker, August 30, 1850, to secure the sum of six hundred dollars, ($600.) April 25, 1859, this mortgage was assigned by Baker to Pierce, the other defendant. But, before that time, Feb. 5, 1858, the plaintiff had recovered a judgment against the mortgager, and had caused his right of redemption to be sold upon the execution. This right was purchased by Elias Lunt, who transferred it to the plaintiff; and he, thereupon, tendered the amount supposed to be due, and commenced this suit to redeem the premises from the mortgage.

The money tendered has not been brought into Court. Whether the same rule applies to cases in which the *plaintiff* must make a tender *before* commencing a suit, as to those cases in which the *defendant* makes a tender in a suit already commenced, may be doubtful. But it will not be necessary for us to express any opinion in regard to the sufficiency of the tender in this respect.

For the plaintiff alleges in his bill that the defendant Rich-

ards, March 20, 1855, gave to Pierce, the other defendant, another mortgage, to secure a pretended claim of twenty-three hundred dollars, ($2300;) that Pierce had no such claim; and that the mortgage, so given, was designed to defraud the creditors of said Richards, of whom the plaintiff was one. And the prayer of this part of the bill is, that that mortgage be declared void, and that Pierce be required to cancel and discharge it.

Both of the defendants have demurred to the bill, on the ground that it is multifarious, and that there is a misjoinder of parties.

When a bill contains a joint claim against several defendants, and also a separate and distinct claim against one of the defendants only, it is multifarious, and will be dismissed on demurrer. *Boyd* v. *Hoyt*, 5 Paige, 65; *Swift* v. *Eckford*, 6 Paige, 22. But, if either of the claims, upon its own allegations, is insufficient to entitle the plaintiff to relief, then, upon demurrer, there being but one sufficient claim, that will not fail because another, which is insufficient, is joined with it. *Pleasants* v. *Glasscock*, 1 Sm. & Marsh., 17. And one claim, for one and the same subject matter, may be made against several parties, though their interests are distinct and different. *Bugbee* v. *Sargent*, 23 Maine, 269; *Fellows* v. *Fellows*, 4 Cow., 682.

In the case at bar, the plaintiff seeks to have the second mortgage cancelled, on the ground that, as to him, it is fraudulent and void. If the first mortgage had been paid and discharged, he might contest the validity of the second in an action at law. But until then, his only remedy is in equity. And his suit is well brought against both of the parties to the alleged fraud.

He also seeks, in the same bill, to redeem the premises from the first mortgage. Such distinct claims may be joined, if the parties interested are all the same. Has the defendant *Richards* any interest in this claim to redeem, so that he was properly made a party?

If the plaintiff's claim is good, then he holds the entire

right of redemption, and the defendant Richards has no interest whatever in the premises. But if he had not been made a party, he would not have been concluded by a decree for redemption. As it is, notwithstanding his demurrer, he denies in argument the plaintiff's title to the equity, under the officer's sale of it. It is often the case, in equity, that one is made a party defendant, with good reason, simply for the purpose of barring any subsequent claim of title. Where one claims under an officer's sale, *in invitum*, though not bound to do it, he is certainly justified, in asserting his right against other persons, in making the execution debtor a party. If, in his answer, he disclaims all right and interest, and he has made no such claim since the sale, then, while he is bound by the decree against the others, he will be entitled to a decree in his favor for costs. But the bill will not be dismissed for the reason that he is a party; nor will it be held multifarious if there is another claim in which he admits that he has an interest with the other defendants. The defendant Richards was properly made a party to the bill, in both of the claims embraced in it.

Richards has made no answer to the bill. But Pierce has answered; and the case is presented upon the testimony.

Both of the defendants testify that the amount purporting to be secured by the second mortgage was actually due to Pierce when it was given. This, with the explanation of the items, is the substance of the evidence on one side.

On the other side there is testimony that Pierce had declared that the amount was not due. And it appears that Richards, the other defendant, subsequently used the mortgage for his own benefit, with the assignment of Pierce for that purpose. These facts throw some doubt upon the good faith of the transaction. But the burden of proof is upon the plaintiff; and we cannot say that the evidence is sufficient to overcome the testimony of the defendants. The circumstances lead us to suspect fraud; but, aside from the declarations of Pierce, they are not necessarily inconsistent with good faith. And the evidence of declarations is too

uncertain in its nature to be entirely satisfactory. We must therefore dismiss the bill, with single costs for the defendants.

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

DANIEL HOLLAND *versus* LEWISTON FALLS BANK.

The law raises no implied promise to pay the president of a bank for his official services; nor can he recover pay for such services upon a *quantum meruit.*

His compensation is to be fixed by the directors; and is to be such compensation as they think reasonable.

Whether the directors can make a contract for his services for future years, as long as he should be elected, which shall be binding on their sucessors, *quaere.*

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

ASSUMPSIT to recover pay for services as president of the defendants for the year ending Oct. 1, 1860.

The case is stated in the opinion.

Drummond, for plaintiff.

Fessenden & Frye, for defendants.

The opinion of the Court was drawn by

APPLETON, C. J.—The plaintiff was president of the defendant corporation for three successive years, for which he received six hundred dollars a year, by vote of the directors.

This suit is brought to recover pay for his services during the fourth year of his presidency. He shows no agreement with, nor vote of the directors of that year, by which he was to receive compensation.

As a general rule, the directors of corporations are not entitled to pay for the services they may render officially.

The law raises no implied promise to pay for the faithful performance of official duty. It is otherwise with *extra official* labors. These principles seem fully established by the entire concurrence of authorities on the subject. *Dunstan* v. *Imperial Gas Light Co.*, 2 B. & Ad., 125; *Hall* v. *Vermont & M. Railroad Co.*, 28 Vt., 401; *N. Y. & N. H. Railroad Co.* v. *Ketchum*, 27 Conn., 170; *Sawyer* v. *Pawners' Bank*, 6 Allen, 207.

The president of a bank must be chosen from the number of its directors. By R. S., 1857, c. 47, § 5, "they (directors) shall choose one of their number president, and make him such compensation *as they think reasonable*." The right to and the amount of compensation is dependent upon and is limited by the will of the directors. This compensation is greater or lesser as they shall "think reasonable," or none may be granted. No action can be maintained upon a *quantum meruit* for such services. If it could be, the compensation would depend, not upon what the directors might in their discretion "think reasonable," but upon what the jury or some other tribunal might think reasonable.

The plaintiff accepted his position well knowing that he was entitled only to such compensation as his associates in the direction should "think reasonable." His acceptance was voluntary. He was to abide their judgment as to the reasonable compensation for his services. The statute does not authorize any other tribunal to make him such compensation as the directors shall think unreasonable.

No recorded vote of the directors fixing the compensation of the president for future years is to be found upon the records of the defendant corporation. The failure to record so important a vote is no slight evidence to disprove its existence.

The president and directors hold office by annual election. Their future reëlection would always be a matter of uncertainty. The evidence fails to satisfy us that any contract was in fact made with the then president for his compensation for future years, contingent upon his future election.

It becomes, therefore, unnecessary to determine whether the directors had a legal right to make such contract and thus withdraw the fixing of the amount of compensation from the directors for the time during which the services were rendered, and who would best know what sum was fairly earned and would be reasonable.

Plaintiff nonsuit.

CUTTING, KENT, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

JOHN G. TEBBETTS *& als. versus* ISRAEL K. ESTES.

Where a road was located in 1798, and, prior to 1814, it was changed by user to a place three rods northerly of the location; and deeds, subsequent to the change, describe land as bounded "*on the road;*" there is no rule of law that applies such words of description in the deeds to *the road as located.*

The question as to the location of the boundary is one of fact.

Where, in the trial of a writ of entry, the plaintiffs' title to the land in question depends upon a levy, a valid judgment must be proved, if the defendant be not a party or privy to it.

And where, in such case, all of the deeds, under or through which, the plaintiffs claim, are merely releases of the interest which releasors had in the land, and it does not appear that any of them were ever in possession, the defendant must prevail, it being alleged in the writ that the defendant is in possession.

Where an administrator obtained a judgment upon a demand belonging to his intestate, and extended the execution upon the land of the judgment debtor, he held the land, under the Public Laws of 1821, c. 52, *in trust*, during the time he was administering.

But it may well be doubted whether his right was not *ad rem*, rather than *in re*, being more in the nature of a lien, than a legal title.

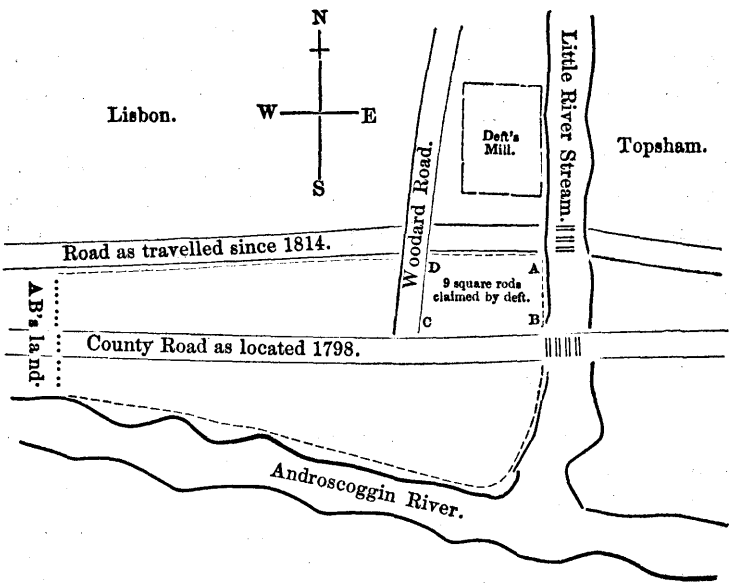
ON REPORT from *Nisi Prius*, WALTON, J., presiding.

WRIT OF ENTRY.

The plaintiffs demanded three-fourths of an acre of land bounded on the north by the "*county road leading from Little River Village, in Lisbon, to Topsham*, &c.; on the east by "Little River;" on the south by Androscoggin River;

and on the west by A B's land, &c. (Vide dotted lines on diagram.)

The defendant disclaimed all of the land demanded excepting nine square rods,—A, B, C, D, as represented on the diagram,—his land being bounded on the south by the "*county road leading from Little River*," &c.



It was proved that the "county road leading from Little River Village to Topsham" was located as indicated on the diagram in 1798, and that prior to 1814, the bridge across Little River was carried away by a freshet, and a new one built three rods above the former, "to which the travel gradually accommodated itself."

The plaintiffs' land was bounded northerly by the "county road," and the defendant's southerly by the "county road."

It was agreed that, if the Court found that the plaintiffs are entitled to recover, or that the defendant has occupied the land disclaimed by him, the clerk should assess the damages for rents and profits since June 13, 1862.

All of the remaining material facts sufficiently appear in the opinion of the Court.

May & May, for the plaintiffs.

Luce, for the defendant.

The opinion of the Court was drawn by

DAVIS, J.—The plaintiffs claim title to the premises in controversy, through mesne conveyances, under a deed from Charles Potter and Parsons Smith, executors of the will of Hezekiah Wyman, dated August 9, 1828. Wyman's title in himself was derived by a partition of the estate of Nathan Wyman, of whom he was one of the heirs, made Dec. 8, 1826. But, it should be noticed here, that if, for any reason, the *partition* was void, Hezekiah Wyman did not thereby lose his *previous* title, if he had any, *as tenant in common with the other heirs*. Did *they* have any title? If so, and the plaintiffs have acquired the title of *one* of them, that is sufficient to enable them to maintain this action, as the defendant does not claim under any of the heirs, and shows no title.

Nathan Wyman, in his lifetime, did not own the premises. The case does not show when he died; but Hezekiah Wyman administered upon his estate, and, as such administrator, obtained an execution against one Ezekiel Thompson, and extended it upon the premises in satisfaction of the judgment, Oct. 2, 1821. The levy appears to have embraced more than the land sued for; but in the levy, as in all the deeds subsequently given, the land is described as bounded at one point "on the road leading to Little River."

It seems that several years before that time the road at this place had been changed, and was not on the line of its location. And it is claimed that the words in the conveyances are to be applied to the road *as located*, and not to the road *as existing*. But there is no such rule of law. The question is one of *intention*. And it is far more reasonable to suppose that the appraisers, in viewing the premises upon

which the execution was to be extended, intended the road as they saw it, then existing, rather than any other road, of which it does not appear that they had any knowledge. And whatever title, if any, passed by the levy, was conveyed in the subsequent deeds. The *location* of the boundary is a question of *fact;* but the evidence leaves no room for doubt in regard to it.

We have already stated that, if the *heirs* of Nathan Wyman acquired a title to the premises, the validity of the *partition* between them is immaterial. For the grantee of any one of them is entitled to possession, as against a stranger, though there was no valid partition.

It is claimed that the levy of the administrator, Hezekiah Wyman, vested the title in *him*, and not in the heirs. Laws of 1821, c. 52, § 16. That he held it, *in trust*, during the time he was administering upon the estate, there is no doubt. But it may well be doubted whether his right was not *ad rem*, rather than *in re*, being more in the nature of a *lien*, than a legal title. In prosecuting the suit, and obtaining satisfaction of the judgment, he was merely *agent* of the *estate*, or of the parties interested in it. Such was the view taken of the statute in *Webber* v. *Webber*, 6 Greenl., 127. If this view is correct, the administrator's *right* expired when his *trust* expired, of which the statute made it an incident.

But a different interpretation appears to have been given in *Furlong* v. *Soule*, 39 Maine, 122. And, as the statute has since been changed, it is not important for us to express any opinion. For there is no evidence that the administrator ever had any valid judgment against Ezekiel Thompson, upon whose estate the execution was extended. And the present defendant, not being a party or privy to that execution, is not bound by it without proof of the judgment. 2 Greenl. Ev., § 316, and cases cited.

If any one of the deeds under or through which the plaintiffs claim had been actual grants of the land, with, or without covenants of warranty, the result might have been dif-

ferent. But they are all merely *releases* of the *interest which Hezekiah Wyman had in the property*. It does not appear that any of the parties, under whom the plaintiffs claim, were ever in possession. They allege in their writ that the defendant was in possession. Such possession being *prima facie* evidence of title, the plaintiffs must prove a better one, or they cannot recover. A mere release of the *interest* of one who himself was never in possession, is weaker, instead of being stronger, than the possession of the defendant, and is not sufficient for the maintenance of the action. According to the agreement of the parties, judgment must be rendered for the defendant.

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

MARIA FARNUM *versus* MARTHA H. BARTLETT, *Adm'x.*

A bond, given for her support, to a married woman, by a person other than her husband, cannot be considered invalid as being in contravention of good morals and tending to impair the obligations of the marriage covenant, unless it appear that it was given, or had a tendency, to induce a separation between husband and wife.

Where a bond stipulated that the obligor "shall fully and completely maintain the obligee, as her comfort and convenience may require, during her natural life, and shall permit the said obligee to occupy for her own sole use and benefit, the east chamber in the dwellinghouse of the obligor, —*provided* she shall always, when requested, and able, eat at the table of the said obligor, and personally occupy said chamber;" — *Held*, —

1. That the plaintiff might waive her right to support under the bond;
2. That, so long as she lived away from the obligor's house, without making any claim for support, she thereby waived her right to support;
3. That a neglect to fulfil, after claim made, and a denial of the validity of the bond, constitute a breach thereof;
4. If the administratrix would avail herself of the proviso in the bond, she must "*make the request*" when a fulfilment of the bond is demanded.

ON REPORT.

DEBT on a bond dated Aug. 30, 1839, given by Stephen

Bartlett, the defendant's intestate, to the plaintiff. The condition of the bond appears in the opinion of the Court.

The defendant was admitted to be administratrix upon the estate of the intestate, who died Aug. 29, 1861.

The plaintiff was introduced and testified:—I am the sister of Stephen Bartlett, and made his house my home for several years after the date of the bond; did not stay there long after Stephen was married; made Stephen's my home until 1850, when I went to Louisiana; returned in 1851; on my return went to Stephen's, staid a week, then left; have lived there none since to speak of. I called on the defendant in the winter of 1862; told her I had come to live with her; she replied that she was going away to-morrow, that she had sent her girl away; was going to leave her boys alone; and that the bond was not good, as Stephen's property had been transferred since the bond was given by Stephen; nothing further said by her; I then left; returned with Mr. Bean; she has sent me no word since.

Cross-examined.—I have not been there since, nor seen her to speak to her since; was not present when the bond was executed; was a married woman at the date of the bond; did not then, and have not since, lived with my husband, who is still living; got divorced from him on my return from the South; did not live much at Stephen's after 1851; went there and staid a short time on my return from the South; visited there, not very frequently, until his decease; staid there one night and ate at his table; always on good terms with Stephen.

Marina Bartlett, called by the plaintiff, testified:—I am sister of the plaintiff; Stephen was our brother; Maria went to Louisiana in 1850, and returned in 1851, when she came to our house and stopped awhile. I told Stephen that Maria was going to his house to make it her home. Said he was sorry; that, if he was willing, his wife would not be. Told Maria of this. She did not go.

Eliphas Bean, introduced by plaintiff, testified:—the plaintiff is my wife's mother; went with plaintiff, Jan. 18,

or 19, 1862, to see defendant; gave defendant a copy of the bond, and told her my mother had come over to live with her according to the bond; she replied, she was going away, had sent her girl away to stay while she was gone to Probate Court; defendant said, you know the bond is good for nothing on account of his property having been transferred; this paper, marked A, is in my handwriting; I presented and read it to her, Sept. 9th, 1862; would give me no reply or direct answer, paid me no money, made me no offer, and made no talk with me.

Defendant, introduced as a witness, and testified:—plaintiff is my sister-in-law, is sister to my husband, Stephen Bartlett; he died Aug. 29, 1861; I am administratrix on his estate; was appointed Sept. 10, 1861; have closed up the administration; I settled my last account of administration, Sept. 10, 1862. In January, 1862, Bean called with the plaintiff at my house, said he had brought his mother over to live with me awhile; he threw a copy of the bond into my lap; I said, I suppose you know this bond is good for nothing. Bean then said to me, you have rejected her. I said no; Mr. Bean, I have not, I know not but that the bond is worth the dollars and cents.

Bean came again, in Jan. 1862, in about a week after I returned from Probate Court. He came again in Sept., 1862, and Adam Willis came with him. Bean said he wanted to compromise, that he would leave it out to the appraisers. I told him I would not leave it out; that I would fulfil the obligations of the law as far as I was obliged to; not a word was said about charging for her board at that time.

Eliphas Bean, recalled by the plaintiff. I called on the defendant, Nov., 1861, and told her I saw her advertisement in the paper as administratrix, and it was her request to have all who had demands to exhibit them. I took the bond out, and told her of it; read bond to her. She asked who made it out. I told her I thought it was Esq. Frye, it was his handwriting. She asked me if I thought the bond could

not be picked to pieces. I told her that I could not tell that; I did not see anything in it that looked so; that Frye was a man who generally did business pretty correct. I believe she said she should look round and see; and if it was so ordered that she should take care of her, God would bless her.

(A.)

"Mrs. Martha H. Bartlett, administratrix on the estate of Stephen Bartlett. Please pay E. C. Bean, sixty-eight dollars, being for my board thirty-four weeks, from Jan. 20, 1862, to Sept. 9, 1862, and I will allow the same on the bond for my maintenance which I hold against your late husband's estate. "Maria Farnum."

"Bethel, Sept. 8, 1862."

The case was reported with the following agreement: —

If, in the opinion of the Court, there has been no breach of the bond, the plaintiff was to become nonsuit and judgment rendered for costs for defendant.

But, if there has been a breach, the defendant was to be defaulted, — judgment to be entered for the penalty of the bond with costs.

Hammons, for the plaintiff.

Howard & Gibson, for the defendant.

The opinion of the Court was drawn by

Barrows, J. — This is an action of debt on a bond in the sum of $200, dated Aug. 30, 1839, and given by Stephen Bartlett, the defendant's intestate, to his sister, the plaintiff, a married woman, at that time living separate from her husband, from whom she has since obtained a divorce.

"The condition of this obligation is such that if the said Stephen, his heirs or assigns, shall fully and completely provide for, maintain and support the said Maria in sickness and health, as her comfort and convenience may require, for, and during her natural life, and shall permit the said Maria to occupy for her own sole use and benefit, the east chamber in the dwellinghouse now occupied by the said

Stephen, with the right of passing to and from the said chamber by the usual and ordinary means and passageways, so long as she shall live,—provided she shall always, when requested and able, eat at the table of the said Stephen, and personally occupy the said chamber,—then this obligation to be void, otherwise," &c.

The first objection to the plaintiff's right to recover, that is relied upon in argument, is that the bond is invalid as being in contravention of good morals and tending to impair the sacred obligations of the marriage covenant, because it is given to a married woman and provides for her separate maintenance. Such a bond, given to induce a separation between husband and wife, might be liable to that objection, but the single fact, that the plaintiff was a married woman at the time of the giving of the bond, is not a sufficient foundation for the assumption that such was the intention or effect. On the contrary it appears that, at the time of the giving of the bond in suit, the plaintiff was living separate from her husband, and that she subsequently procured a divorce from him, indicating that the separation was not by her fault. The objection cannot prevail. Has there been a breach of the bond?

The true construction of this obligation would seem to be, that the obligor, while binding himself fully and completely to provide for, maintain and support the obligee as her comfort and convenience might require during life, and to permit her to occupy a certain room in his house, reserved to himself an option whether to afford that support to her at his own table as one of his family, or in some other manner. In other words, she was to have the use of the east chamber if she chose to occupy it personally, and he was not to be bound to supply her at a separate table, but she, if able, *and he requested it*, was to eat at the table of the said Stephen, and personally occupy the said chamber.

He seems to have contemplated the possibility, that circumstances might arise which would render it more agreeable to him to afford the required support elsewhere than at

his own board, but he took care to stipulate that she should not be at liberty to claim it elsewhere if he chose to have her there. What were the reciprocal rights and duties of the parties as to notice and request?

The holder of such a bond might or might not choose to rely on it for her support. She might have other means to which she would prefer to resort. While health and strength remained to her, she might prefer to exercise body and mind in some useful and profitable occupation, rather than to eat the bread of idleness. When she chose, or in the language of the bond, "as her comfort and convenience might require," she might call on the obligor.

This right to a support was a privilege which she might waive by words or acts, whenever and so long as she chose. It appears, that, after making her home in the obligor's family for some years next succeeding the date of the bond, she made a journey to Louisiana, and, after remaining there some time, returned to this State and lived with her son-in-law for some years, and subsequently visited Missouri in the lifetime of the obligor, and as it would seem without making any claim upon him for her support in any form. Thus doing, she must be considered as waiving for the time her claim for support, and his failure to furnish it under those circumstances, would constitute no breach of the bond. A reasonable construction of the instrument would not require him to follow her out of the State, when she voluntarily removed herself from her previous home, nor to tender to her a maintenance to which she made no claim.

But when the bond was presented to this defendant, as administratrix of the obligor, by the plaintiff's agent, the case assumed a different aspect. He testifies, and she does not deny, *that* he called upon her in November, 1861, after her appointment as administratrix, informed her that he had seen her published request for all who had demands to exhibit them; *that* he produced this bond and read it to her. The conversation that ensued shows that she understood that a call was made upon the estate for the support of the

obligee, a support which she indicated no readiness to afford unless she should find herself legally compelled to do it. On the contrary, both at that time and when the plaintiff subsequently presented herself with her agent, the defendant, to say the least, expressed doubts about her liability or the validity of the bond, and plainly showed a disposition and intention to test the question legally.

If she would have availed herself of the proviso in the bond that the obligee should, "*when requested*, and able, eat at the table of the said Stephen, and personally occupy the said chamber," she should have made the *request*. She has never made such request, and she refused to pay the subsequent order given for the payment of the individual who furnished board, after the support had been thus claimed. There has been a manifest breach of the bond. Upon the whole, it is probable that it will be for the comfort and advantage of both parties, as it certainly is in accordance with the legal rights of the plaintiff, that there should be, according to the stipulations in the report by which the case is submitted to us for decision,

Judgment for the plaintiff for $200 *and costs.*

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

STEPHEN FARNUM, *Adm'r*, *versus* CHARLES E. VIRGIN.

By c. 79, of the Public Laws of 1859, if the representative party, mentioned in R. S., c. 82, § 83, be only nominally such, the interest being in another or others, in whose name, or names, the action might have been brought, or defended, the five sections mentioned in said chapter 82 shall apply, and such nominal party and the adverse party may be examined as witnesses.

If the intestate were owner of the note in suit, the administrator of the intestate could not be regarded as a nominal party.

In an action by an administrator of a deceased party, against the maker of a note, the defendant will not be permitted to testify that he paid the plaintiff's intestate the contents of the note before the latter's death.

Farnum *v.* Virgin.

If the maker of a note, payable in part in specific articles, expressly promise to pay its contents to the assignee of the same, the latter may maintain an action in his own name.

A verdict will not be set aside as being against evidence, unless it is manifestly so.

ON EXCEPTIONS to the ruling of BARROWS, J., at *Nisi Prius*, and a MOTION TO SET ASIDE THE VERDICT, as being against evidence.

ASSUMPSIT on one negotiable promissory note, and two notes payable, in part, in specific articles. The notes were indorsed by the payee, (who was a *femme sole*, when they were given, but since married,) and her husband.

There was testimony tending to show that the defendant, the maker of the notes, made an express promise to pay the notes to the intestate, in her lifetime, and also to the administrator, since her death.

The defendant, called by his counsel as a witness, was asked "whether or not he had fully paid each of said notes to the payee, long before the decease of the plaintiff's intestate?" The presiding Judge excluded the answer. To which ruling the defendant excepted.

The verdict was for the plaintiff.

D. Hammons, for the defendant.

Bolster & Richardson, for the plaintiff.

The opinion of the Court was drawn by

APPLETON, C. J. — As the plaintiff sues as administrator, the parties would not be admissible under R. S., 1857, c. 82, § 83.

By the Act of 1862, c. 109, they would be competent witnesses as to facts happening *after* the decease of the plaintiff's intestate. But the defendant was asked if he had not paid the notes in controversy *before* the decease of Nancy Virgin, upon whose estate the plaintiff is administrator. The answer to this inquiry was properly excluded.

The plaintiff is no more a nominal party than any other

administrator or executor, who is prosecuting the claims of the estate of his intestate. The statute of 1859, c. 79, does not declare administrators or executors, *as such*, to be nominal parties. If it were to be held that all administrators and executors were nominal parties, it would operate as a repeal of R. S., 1857, c. 82, § 83, which certainly was not the intention of the Legislature. The general rule as established by R. S., 1857, is only modified so far as relates to the executors or administrators of nominal parties and not otherwise. Nancy Virgin, if the owner of the notes, could not be regarded as a nominal party. The plaintiff, therefore, is not the administrator of a nominal party. *Drew* v. *Roberts*, 48 Maine, 35.

Two of the notes in suit were payable in part in specific articles and, consequently, were not negotiable. But, when an express promise to pay the assignee is proved, an action may be maintained in his name. *Smith* v. *Berry*, 18 Maine, 122. The jury must have found there was such promise.

The evidence is not so clear for the defendant as to require us, upon legal principles, to set aside the verdict rendered against him. *Motion and exceptions overruled.*

Judgment on the verdict.

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

DAVID BROWN *versus* ISAAC P. HAYNES.

Where the plaintiff made a conditional sale of a pair of oxen in February, for $120, to be paid for in September following, "the oxen to remain the property of the plaintiff until paid for;" and the vendee thereafterwards sent to the plaintiff $60 in part payment, and then sold the oxen to the defendant, who converted them to his own use; — *Held*, that, in trover for the value of the cattle, the measure of damages was the value of them at the time and place of conversion, with interest from that date, without any deduction for the partial payment.

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

TROVER.

The plaintiff testified:—"The cattle were mine. I had them in use of one Williams in the woods; one Chatterly was teamster. Chatterly asked me if I would sell the cattle and take orders on Black, Brothers. I told him I would for the sum of $120 and interest. This was in February. The next I heard, Chatterly had taken the oxen to his home.

"In May, his father came up and paid me from his son, $60 towards the cattle. I told the father they might keep the cattle till September following; then, if they did not pay for them, I should go and take the oxen, and that the oxen shall be mine until paid for.

"Chatterly sold the cattle to the defendant between May and September. After September, I demanded them of the defendant and he refused to deliver them."

The presiding Judge instructed the jury that, if they found for the plaintiff, he would be entitled to recover the value of the oxen at the time and place of conversion, with interest from such time, without any deduction for the partial payment of $60.

The verdict was for the plaintiff, for the full value of the oxen, and the defendant excepted.

J. A. Peters, for the defendant, contended,—

The rule of law as to the damages, if correct, is unjust. Defendant is perfectly responsible—and, although plaintiff has been more than half paid by one quarter, he is allowed to recover the whole value over again. The law should avoid this if possible.

But Brown, by his own statements, was only to have a lien till *paid for*. There was to be *no forfeiture*. Now if Brown collects $120 when his lien is but $60, he must pay over the $60 to whom? why, to defendant. Because, when Brown's lien is paid, the balance in the cattle belongs to defendant. Then he should recover of defendant only the amount of that lien.

If Brown's suit had been against a stranger to the title, the rule was given right; but, as against the vendee of

Brown's vendee, the rule is wrong. 20 Conn., 204; 2 Cush., 237.

The plaintiff relies on 1 Gray, 621. I doubt that case. The Court had not in mind the distinction raised in the cases before cited.

That case differs from this.

1. Court say that was not *a sale*, but an *agreement to sell.* Here was a sale with a condition — a conditional sale.

2. In that case the Court evidently regarded a *forfeiture;* that all right of vendee was gone; the case finds "no evidence was given of a waiver of the non-payment."

But here there was no forfeiture, on plaintiff's own story. The title was to be plaintiff's *till paid for; whenever* paid for; and he could never get more than his pay.

For a little matter, this rule operates as unjustly and inequitably as possible.

S. W. Matthews, for the plaintiff.

The opinion of the Court was drawn by

APPLETON, C. J. —It is not questioned that the sale by the plaintiff to one Chatterly, under whom the defendant derives his title, was made on condition. The cattle sold were to remain the property of the plaintiff "until paid for." No payment having been made within the time in which, by the agreement of parties, it was to have been made, no title vested in Chatterly. It was his fault or neglect that it did not so vest.

A sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price, passes no title until the condition is performed; and the vender, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee. *Coggel* v. *Hartford & N. H. R. R. Co.*, 3 Gray, 544. By the very terms of the contract, the entire payment of the purchase money is a condition precedent to the vesting of the title.

The condition upon which the title was to vest in the purchaser not having been performed, the plaintiff had a right to resume the possession of the property conditionally sold. He might sell the same and the purchaser would acquire a perfect title. The oxen might be attached as his, and the attachment would be held valid. The plaintiff might replevy them from any person in whose possession they might be found. The condition being unperformed, the title of the conditional vendor was as perfect as if there had never been a sale. Replevin would lie for the oxen equally as trover for their value.

The measure of damages in trover, is the value of the property converted at the time and place of conversion, with interest from that date. Brown, then, having never parted with his title, is entitled to recover the full value of his property. It is as much his as any property he may own. His rights are not impaired by an attempt on the part of some one to purchase on conditions, which have never been complied with. The measure of damage is the whole value of the property conditionally sold. *Angier* v. *Taunton Paper Manuf. Co.*, 1 Gray, 621. When personal property is sold, upon condition that the title shall not vest in the vendee, unless he pay the price agreed upon by a specified time, the vendee has no attachable interest in the property or its increase, until performance of the condition. If, after the time for payment of the price has elapsed, the price not being paid, a creditor of the vendee attach the property, he cannot defeat the vendor's right to sustain an action of trover against him for the property, by tendering him the amount which the vendee agreed to pay and the interest thereon. *Buckmaster* v. *Smith*, 22 Vt., 203. The plaintiff is entitled to recover the full value. *Smith* v. *Foster*, 18 Vt., 182.

If the plaintiff had resumed possession of the oxen for non-performance of the conditions of their sale, he would have been under no legal obligation to repay the sums received in part payment. The purchaser, failing to perform

his agreement, derives no benefit from a partial performance of his contract, nor can he confer any by reason thereof. The same principles are applicable as in case of a bond for the sale of real estate, where there is no compliance on the part of the purchaser with the terms of the sale, and the seller resumes possession on account of such non-compliance. *Rounds* v. *Baxter*, 4 Greenl., 454.

The numerous cases to be found in the Reports do not sustain the propositions which the defendant's counsel seeks to establish. In *Pierce* v. *Benjamin*, 14 Pick., 357, MORTON, J., says, "the general rule of damages in actions of trover is unquestionably *the value of the property taken*, at the time of its conversion. But there are exceptions and qualifications of this rule, as plain and well established as the rule itself. Whenever the property is returned, and received by the plaintiff, the rule does not apply. And when the property itself has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases and justice forbids its application." But the defendant, upon the principles of this decision, is liable for the value of the property converted, for his case is not within the exceptions or qualifications of the rule.

In *Chamberlain* v. *Shaw*, 18 Pick., 279, SHAW, C. J., remarks as follows:—"In an action of trover, though the plaintiff's possession has been violated, he waives all claims to damages on account of that violation, and seeks an indemnity only for the loss of his property. Hence it is, that *the value of the property at the time of conversion* is *prima facie* the measure of damages. Now, if the case is so situated that the plaintiff can be indemnified by a sum of money less than the full value, there seems to be no reason why it should not be done, *as* where the plaintiff has a *special* property subject to which the defendant is entitled to the goods. For instance, a factor has a lien on goods to half their value. The principal becomes bankrupt and the property vests in his assignees, subject, of course, to all legal

liens. The assignees, denying and intending to contest the factor's lien, get possession of the goods and convert them. The factor brings trover. How shall damages be assessed?" The Court held the plaintiff was only entitled to damages to the extent of his lien. But, in the case at bar, the defendant had no title to the property. He had no lien upon it or interest in it, and, as to the plaintiff, was a mere stranger.

In *Fowler* v. *Gilman*, 13 Met., 267, SHAW, C. J., says: "The true general rule of damages in trover is the value of the goods at the time of conversion, with interest. This rule applies when the plaintiff, is the general owner, or is answerable over to others. But when the plaintiff admits that the defendant has a lien on the property to a certain amount, that amount may be deducted by the jury, in assessing damages." Here the plaintiff is the general owner, and, as such, is entitled to compensation. The defendant has no lien and never had, and cannot, within the principles of this case, claim any deduction.

There was no conditional sale in *Hyde* v. *Cookson*, 21 Barb. 92. The plaintiff in that case had contracted with one Osborne to tan a quantity of hides for him on certain specified terms. Before the tanning was completed, Osborne failed and assigned his property, the hides included, to the defendant, against whom an action was brought for their conversion. The Court held that the proper measure of damages in such action was the value of the plaintiff's interest in the hides, and not the enhanced value thereof when manufactured into leather. In other words, they allowed deduction for the labor and money expended by Osborne upon the hides, under his contract. The case, therefore, when examined, has no bearing upon the present discussion.

If a mortgagee of personal property, after a foreclosure, brings trover for the value of the property mortgaged, he recovers in damages its whole value. The mortgagee is never allowed to claim deductions for part payments. So

when there is a conditional sale, the purchaser gains no rights by a partial performance of his contract.

Exceptions overruled.

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

JOSHUA K. ABBOTT, *Pet'r, versus* COUNTY OF PENOBSCOT.

By R. S., c. 18, § 13, in case of a petition for increase of damages, caused by laying out or discontinuing a way, the party prevailing shall recover costs, to be taxed and allowed by the Court to which the verdict or report is returned and certified with it to the commissioners; and said Court shall determine the compensation of the committee and of the persons presiding at the trial by jury.

He is the prevailing party who obtains a verdict for damages, when the Commissioners had allowed him none.

The statute covers all legal costs, and is not restricted to costs in the Supreme Judicial Court.

In cases of petition for increase of damages, the petitioner, if the prevailing party, may recover costs as follows:—

1. Before the County Commissioners, for the petition, entry, travel and attendance at the term of entry, and travel and attendance at the term when the verdict is certified from the Supreme Judicial Court;

2. Before the jury, for travel and actual attendance, witness' fees, and all copies and other matters which would be legally taxable in a case before the Supreme Judicial Court; and,

3. Before the Supreme Judicial Court, for the usual fees of entry, travel and attendance for one term only, unless the acceptance of the verdict is resisted; when, such costs may be recovered beyond the first term, as the discretion of the presiding Judge may dictate.

ON FACTS AGREED.

In 1855, the County Commissioners for Penobscot county, duly laid and established a way, extending from the "brick factory in Dexter to Allen Young's in Corinna, and passing over land owned by the petitioner."

In August, 1861, the County Commissioners, after due proceedings had, discontinued said way, and, as appeared by their report, "adjudged that no individual was damaged

by reason of said discontinuance to an amount exceeding the advantages derived therefrom."

At the following December term of the Commissioners' Court, the petitioner presented a petition representing himself to be aggrieved in the estimate of damages, praying for an increase and for a jury to be summoned to hear and decide upon the matter according to the statute.

In June, 1862, a warrant was duly issued, and, in July, 1863, a jury duly summoned, who found damages for the petitioner in the sum of $16,20.

The warrant, with the doings of the jury thereon, was returned to the term of the S. J. Court, begun and holden in and for the county of Penobscot, October, 1863, and continued to the following January term, when the verdict of the jury was accepted and confirmed without objection.

All of the proceedings were admitted to be regular, and the only question presented to this Court was that of costs.

J. Crosby, for the petitioner.

C. P. Stetson, County Attorney, for the County of Penobscot, contended:—

There is no provision of statute giving costs to a party prevailing before the County Commissioners. In petitions for alteration, establishing and discontinuing ways, the party prevailing before the County Commissioners is not entitled to costs; also on appeal from the decision of the County Commissioners, as provided in c. 18, §§ 34, 35, 36, when the judgment of the Commissioners is reversed and the petitioner prevails, the Supreme Judicial Court cannot allow the petitioner costs of travel and attendance before the County Commissioners; and so it has been held by the Judge, at *Nisi Prius*, in this county.

On an appeal to the Supreme Judicial Court from Police Court and Justice of the Peace, the party prevailing recovers costs in Police Court or Justice Court, because costs would be taxed there if he had prevailed there. This proceeding (in this case) is in nature of appeal from the County Com-

missioners, and this Court cannot allow travel and attendance before the County Commissioners, because costs are not allowed to any party prevailing before that Court.

There is no statute authorizing costs for copies of papers before the jury, and travel and attendance before the jury.

The opinion of the Court was drawn by

KENT, J. — The only questions presented in this case are whether the petitioner is entitled to costs, and if so, how the same is to be taxed. The petitioner's case is within the provisions of c. 18, § 13, which provides that, in a case like this, "the prevailing party shall recover costs, to be taxed and allowed by the Court to which the verdict or report is returned, to be certified with it to the Commissioners." He is the prevailing party — having obtained a verdict for damages — when the Commissioners had allowed him none. The language of the statute is general and covers all legal costs, and is not restricted to costs in this Court. The Legislature intended to mulct the petitioner who fails in his application or appeal, by requiring a judgment by the County Commissioners against him, "for all expenses incurred on account of it." § 3.

In other sections of the same statute in reference to the same subject matter, the word "expenses" is altered to the word "costs." §§ 6, 9. That costs for the petitioners before County Commissioners may be allowed seems to be admitted in *Woodman* v. *Somerset*, 24 Maine, 152; *Morse, Pet.*, 18 Pick., 443. If he may be compelled to pay costs or expenses, he is fairly entitled to costs where he is the prevailing party; and this the statute gives to him.

We see no reason why costs for the prevailing party should not be allowed in the hearing before the jury; in the same manner and to same extent as if the trial had been in this Court; i. e., for travel and actual attendance, fees for witnesses, and all copies and other matters which would be legally taxable if the case had been heard in Court.

The petitioner is also entitled to costs in the Court of County Commissioners for entry, petition, travel and attendance; but for no more than one term before the warrant for a jury is issued, unless some satisfactory reason is given for the delay in issuing it beyond the term when the petition is entered. None such is stated in this case. No costs in that Court should be taxed, after the issuing of the warrant for a jury, except travel and one day's attendance at the term when the verdict is certified from this Court. After the warrant for a jury is issued, there can probably be no action in the Commissioners' Court on the matter of the petition until the certificate is sent from this Court; and, of course, there is no necessity for any attendance by the party in that Court, until that time.

In this Court, the petitioner is entitled to the usual fees for entry and travel and attendance. But, as this is not a common case of the entry of an action between parties, it does not follow that full costs are to be taxed for the whole time the matter may remain on the docket of the Court. It is the duty of the petitioner, who has obtained a verdict in his favor, to enter his petition for its acceptance, &c., according to the provisions of the statute, and to move its acceptance during the term at which it is entered. If this is resisted by the county attorney, and the questions raised cannot be, or are not determined at that term, costs may be allowed in such action, in the discretion of the Court, beyond the first term.

In this case, the facts stated show that the petitioner did not move for the acceptance of the verdict until the second term, and that, when offered, the county attorney at once consented to its acceptance. No objection seems to have been made at any time to the acceptance. It was accepted by the Court, and no reasons are assigned why it has remained in this Court, without a certificate being made to the Court of County Commissioners. Under these circumstances, we think the petitioner is entitled only to costs for travel and attendance until accepted at the term when the

report or verdict was accepted. In addition he may charge for entry in this Court, and the usual charge for continuances. After the confirmation of the verdict, the case was like one continued for judgment, at the request of the prevailing party, and no costs, except for continuance, is taxable for the subsequent terms. The petitioners may tax for the two terms in the law court. The county should not be compelled to pay costs, arising from mere delay of the other party.

The costs are to be taxed and allowed in accordance with this opinion, and certified to the County Commissioners with the verdict and its acceptance.

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

THOMAS LOWE, JR., *versus* CHARLES S. WELD, *Appellant.*

By R. S., c. 6, § 56, the assessors shall assess upon the polls and estates in their town all town taxes and their due proportion of any State or county tax, according to the rules in the then last Act for raising a State tax and in this chapter; make perfect lists thereof under their hands; and commit the same to the constable or collector of their town, with a warrant under their hands.

A commitment prefixed to, and specifically referring to the lists of assessments, and signed by a majority of the assessors, is a sufficient authentication, and compliance with the statute.

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

The facts sufficiently appear in the opinion of the Court.

G. P. Sewall, for the plaintiff.

J. A. Peters, for the defendant.

The opinion of the Court was drawn by

CUTTING, J.—Trespass for taking and conversion of the plaintiff's cow, on Dec. 5, 1863. The defendant justifies the

taking and sale as collector for the town of Greenbush, for the non-payment of the plaintiff's personal tax. The only question presented is the sufficiency of the lists committed by the assessors to the collector.

It appears that the tax lists were contained in a book in which were inserted the names of each taxable inhabitant, and their respective assessment, including the plaintiff, with the sum total of the tax at the foot of the last page; that, in the first part of the same book, was inserted the commitment and warrant to the collector, duly signed by a majority of the assessors, the former of which is as follows, viz.:—

"To C. S. Weld, collector of taxes for the town of Greenbush:—Herewith are committed to you true lists of the assessments of the polls and estates of the persons therein named. You are to levy and collect the same of each one his respective proportion therein set down, of the sum total, being the amount of the lists contained herein, according to the exigency of any lawful warrant, touching the same, to you committed. Given under our hands, at Greenbush, this first day of July, 1863.

"J. C. Scott, } *Assessors of*
"Cyrus Sprague, } *Greenbush.*"

Was not this commitment, prefixed to and incorporated in the lists, and specifically referring to them, a sufficient authentication and compliance with the requirements of the statute in that particular? That it was, we need only to refer to *Johnson* v. *Goodridge*, 15 Maine, 29, and *Bangor* v. *Lancey*, 21 Maine, 472, where the law upon this subject is fully examined and a repetition here becomes unnecessary.

Plaintiff nonsuit.

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

DANIEL SARGENT *& al. versus* CHARLES W. ROBERTS.

By R. S., c. 113, § 2, any person may be arrested and held to bail on mesne process on contract express or implied, when he is about to depart and reside beyond the limits of this State, with property or means of his own exceeding the amount required for his immediate support, if the creditor, his agent or attorney, makes oath before a justice of the peace, to be certified by such justice on said process, that he has reason to believe and does believe that such debtor is about so to depart, reside, *and take with him* property or means as aforesaid, and that the demand, or principal part thereof, amounting to at least ten dollars, is due to him.

An arrest under this statute will be illegal, if the certificate omit to declare that the person to be arrested is to "*take with him* property," &c.

A bond given by a person arrested by virtue of a defective certificate, is void.

ON FACTS AGREED.

DEBT.

This action was on a bond given by one Simpson as principal, and the defendant as surety, to procure the release of the former from arrest on mesne process on contract.

The certificate on the process, omitting the date and justice's signature, was as follows:—

"Personally appeared Daniel Sargent, 2d, one of the creditors named in the annexed writ, and made oath that he has reason to believe, and does believe, that John A. Simpson, one of the debtors named in said writ, is about to depart, and reside beyond the limits of this State, with property or means of his own exceeding the amount required for his own immediate support; and that the demand in the writ, or the principal part thereof, amounting at least to ten dollars, is due to the plaintiff. Before me," &c.

Rowe, for the plaintiffs, contended that—

The certificate need not contain the affirmation that the person to be arrested is to "*take with him* property," &c. *French* v. *McAllister*, 20 Maine, 465. This is an authoritative construction of the Act of 1835, c. 195, § 3, which is the same in its terms, so far as this point is concerned, as R. S., c. 113, § 2.

Bramhall v. *Seavey*, 28 Maine, 45, contains a *dictum* of Judge SHEPLEY which conflicts with *French* v. *McAllister*. The point was not raised in the former, but was in the latter.

J. A. Peters, for the defendant.

The opinion of the Court was drawn by

APPLETON, C. J.—To authorize the arrest of a debtor under the provisions of R. S., 1857, c. 113, § 2, the creditor, his agent or attorney, must make oath before a justice of the peace, "to be certified by such justice on said process, that he has reason to believe, and does believe, that such debtor is about so to depart, reside *and take with him* property or means as aforesaid, and that the demand or principal part thereof, amounting to at least ten dollars, is due him." In the oath, as administered and certified, the important words "*and take with him*" are omitted.

It is for the Legislature to fix the conditions under which an arrest may be made, and to prescribe any and what oath is to be taken as an indispensible preliminary to such arrest. It is for the party making the arrest to comply in all respects with the requirements of the Legislature.

In *French* v. *McAllister*, 20 Maine, 465, the words "*to take with him*" were omitted, and the Court sustained the sufficiency of the oath as certified by the magistrate. But in *Bramhall* v. *Seavey*, 28 Maine, 45, the sufficiency of an oath when these words were omitted, was discussed and considered by the Court, and their necessity was affirmed. Not having been used in that case, the arrest was held unlawful, and the bond void as obtained by duress. In *Shaw* v. *Usher*, 41 Maine, 102, the case of *Bramhall* v. *Seavey* was referred to and affirmed.

The last revision of the statutes, in 1857, was made by the learned Judge by whom the opinion in *Bramhall* v. *Seavey*, had been drawn. It cannot be doubted that, in retaining the language of the previous statute, he did it with the expectation and intention that it should receive the construc-

tion he had given it in the case to which reference has just been had. The Legislature, reënacting a statute without change of language, must be regarded as adopting and affirming the judicial construction previously given thereto.

The arrest having been unauthorized, the oath not being in conformity with the requirements of the statute, the bond given to procure a discharge therefrom, was obtained by duress, and is not binding. The action cannot be maintained. *Plaintiff nonsuit.*

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

CALEB C. SPRAGUE *versus* STEAM NAV. COMPANY, AND M. T. STICKNEY, *Trustee.*

A cashier of a bank, in which are deposited the funds of a corporation, cannot be holden as trustee of said corporation, although he is also treasurer of said corporation, and deposited the funds in the bank as such treasurer.

ON EXCEPTIONS to the ruling of KENT, J., at *Nisi Prius*, discharging the alleged trustee on the following disclosure:

"At the time of the service of the writ upon me in this action, I had not, in my individual capacity, any goods, effects or credits of the defendant corporation deposited with me. Said corporation had funds, at the time of said service, deposited in the Merchants' Bank, of the funds of which bank I had the charge as cashier; said funds then stood on the books of said bank to the credit of defendant corporation; and that otherwise, personally, or as cashier, I had no goods, effects or credits of said defendant corporation in my hands or possession. I made the deposit of said funds in said bank as treasurer of said defendant corporation.

"I draw the funds of said defendant corporation, signing officially as "Treasurer," under the direction of the directors. I am treasurer, and act as such. All the money earn-

ed by the boats of the defendants, or otherwise, are paid to me as treasurer, and deposited by me from time to time in the bank under the head of "M. T. Stickney, Treasurer," by which I meant to designate the Maine Steam Navigation Company."

The writ described the alleged trustee as cashier.

The presiding Judge discharged the trustee and the plaintiff excepted.

J. A. Peters, for the plaintiff.

The opinion of the Court was drawn by

APPLETON, C. J. — The supposed trustee, as treasurer of the defendant corporation, received its funds and deposited the same to its credit with the Merchants' Bank, of which he is cashier.

The writ in this case describes the trustee as cashier. But, as cashier, he holds no funds of the principal debtor. They are deposited with the bank. The bank is responsible for their safe keeping. The contract arising from their deposit is between the defendant corporation and the bank — not between the defendant corporation and the cashier of the bank. As cashier the trustee is not chargeable.

Neither can the supposed trustee be held by virtue of his being treasurer of the defendant corporation, and, as such, officially having its funds in his custody. A corporation can act only by and through its officers. A payment to its treasurer is a payment to the corporation. The funds paid are with the corporation and belong to the same. The treasurer holds them only as an officer of the corporation. He holds no funds in his individual right. If he did he would cease to hold them as an officer of the corporation. To charge the treasurer of a corporation for its funds in his hands officially, would imply that, when holding such funds, he was its debtor and not its official agent. A corporation could hardly be summoned as trustee of itself. But to charge its officer, while holding its funds as such, would be

to charge it as trustee of itself. It would be to determine that the trustee held the funds as an individual and not as an officer, which is not the fact.

The supposed trustee, individually, has no goods, effects or credits of the defendant corporation entrusted to, or deposited with him. As its treasurer, he holds the funds as an officer of the corporation. They are funds held by the corporation through its treasurer. It is the only mode by which a corporation can hold its funds. Such funds, so held, are not goods, effects, nor credits of the principal debtor entrusted to or deposited with the supposed trustee, but are the funds of the corporation in its own custody, and in charge of its appropriate officer. *Pettingill* v. *And. R. R. Co., & Trustee*, 51 Maine, 370.

Exceptions overruled.

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

APPENDIX.

STATE OF MAINE.

EXECUTIVE DEPARTMENT, AUGUSTA, June 27, 1863.

To the Honorable Chief Justice and Associate Justices of the Supreme Judicial Court.

Various towns in this State are voting in public meetings three hundred dollars as a commutation in money for each of their citizens that may be drafted into the military service of the United States, under the law passed by the last Congress, and approved March 3, 1863, entitled "*An Act for enrolling and calling out the national forces and for other purposes.*"

It is feared by many good citizens that serious complications and embarrassments may result to the towns which pledge their credit to raise money to supply these commutations as well as to individuals who advance the money therefor.

The constitution of this State authorizes the Governor to require the "opinions" of the Justices of the Supreme Judicial Court "upon important questions of law and upon solemn occasions."

Under this power I deem it my duty to ask the opinion of the Court upon the legal questions involved in the following interrogatives, viz. : —

1. Has a city or town any legal right to pledge its credit to raise money for the purpose of paying the commutations of such of its citizens as may be drafted into the military service of the United States, under the law aforesaid?

2. Has a city or town any legal right to raise money by taxation to provide commutations for such of its citizens as may be thus drafted?

I have the honor to remain

Yours, very respectfully,

ABNER COBURN, *Governor of Maine.*

Opinion of the Justices of the Supreme Judicial Court.

Augusta, July 2, 1863.

Sir:—The undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answers to the interrogatories proposed in your communication of 27th June last.

By the express terms of the constitution, Congress has power "to declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulations of the land and naval forces," "to provide for calling forth the militia *to execute the laws of the Union, suppress insurrection* and repel invasion," "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," &c. The power of Congress in the premises is supreme. In a great national emergency, when the national unity and republican institutions are in peril, whether from foreign foes, or, worse still, from domestic enemies treasonably endeavoring to overthrow the Union and subvert our institutions, it has the right to command all the resources of the nation, and the lives of its citizens, to prevent by any and all proper means that fearful anarchy, which would be so imminent, if its dissolution should become an accomplished fact.

In pursuance of the powers thus briefly indicated, and to meet the present crisis, the Act of Congress, approved March 3, 1863, c. 75, entitled "An Act for enrolling and calling out the national forces and for other purposes," was passed.

By § 13, it was enacted, "that any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft; or he may pay, to such person as the Secretary of War may authorize to receive it, such sum, not exceeding three hundred dollars, as the Secretary may determine, for the procuration of such substitute;

which sum shall be fixed at a uniform rate by a general order made at the time of ordering a draft for any State or Territory, and thereupon *such person so furnishing the substitute*, or paying the money, shall be discharged from further liability under that draft," &c.

As Congress has the power to require and command the services of each citizen, so it may prescribe the mode and manner of obtaining such services. The obligation of obedience rests upon the citizen. It is part of the duty he owes the government which protects his rights. The duty is personal,—that of each citizen. If drafted, the service must be his personal service. If a substitute is procured, "the procuration of such substitute" is to be made by the person drafted. If commutation money be paid, he is to make such payment. True, a friend may volunteer as a substitute, or may aid him in procuring the money to pay whatever sum may be determined upon by the Secretary of War as the price of exemption, as he may aid him in discharging any other personal liability. But the liabilities, whether to serve, to procure a substitute who shall be accepted, or pay the sum fixed as a commutation, are all none the less personal duties and obligations. They are as much personal liabilities as the obligation to pay a tax duly assessed; to discharge a debt due; or to perform any act, the performance of which is imposed by contract or by statute. It will be perceived, then, that the question amounts to this: whether a town can legally raise money gratuitously to discharge the pecuniary obligations of its citizens, or to procure their exemption from military or other service. Is such a power conferred upon the municipal corporations of this State?

The general power of towns to raise money is given by R. S., 1857, c. 3, § 26, in these words: "the qualified voters of a town 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." By subsequent Acts, further powers have been conferred upon towns, and the exercise of doubtful powers has been confirmed by legislative authority. But the raising of money under statutory provisions to coöperate with the general government is manifestly to be distinguished from raising money for purposes unauthorized by any existing law.

The words "other necessary town charges," do not constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever, at the will and pleasure of a majority. They only embrace all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by statute.

While towns may raise money to discharge all liabilities in the performance of their multiplied municipal duties, they cannot (unless new powers are conferred, or an excess of power receives a subsequent legal ratification) transcend their authority and incur expenses in no way arising in its exercise. Thus it has been held by this Court, that the raising a tax for the discharge of a contract entered into by a town with the corporation of a toll bridge for the passage of its citizens over it was illegal. It has likewise been held under similar statutes in other States, that a town has no right to raise money for the celebration of any great national event, as the capture of Cornwallis, or the declaration of Independence. So it was decided in *Emery* v. *Hooper*, 14 Maine, 375, in the very clear and conclusive opinion of Mr. Justice SHEPLEY, that a town had no authority to raise money for the purpose of re-distributing it among its citizens. Much less, then, have they a right to raise money to give as a mere gratuity to one or more citizens to enable them to escape the performance of services which every citizen should cheerfully render, as due to a government upon

the prosperity and perpetuity of which the future hopes of humanity must rest.

Were a town to raise money to be distributed by way of gift to favored individuals, the tax assessed for such a purpose could not for a moment be upheld. Still less can it be sustained when the obvious and inevitable tendency of it would be to defeat the objects for which the Act of Congress before referred to was passed. That is an Act to raise soldiers, not to raise money. Its primary and especial purpose is to suppress insurrection by means of an armed force to be raised in pursuance of its provisions. If one town may assess taxes to pay the commutation money of those who may be drafted, so may all, and the Government would thus be left without a soldier for its protection, and the nation surrendered into the power of those who are warring for its destruction; the wealth and taxable property of the community would be diverted from the defence of government, and the resources of the State would be turned to its destruction, by thus depriving it of the means necessary for its preservation.

We therefore answer each of the interrogatories propounded in the negative.

JOHN APPLETON,
RICHARD D. RICE,
JONAS CUTTING,
WOODBURY DAVIS,
EDWARD KENT,
C. W. WALTON,
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Governor of Maine,
Augusta.

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POOR DEBTORS.

PRACTICE.

PROBATE COURT.

RAILROAD.

1. A railroad corporation made a contract with M. for the construction of their road, and gave him a conveyance of their property containing the following conditions and provisions: — "*Provided, nevertheless*, that if said corporation or their agents or assigns, pay to the said M. or his assigns, who shall become the holder or holders thereof, the amounts specified in the several bonds and coupons for interest pertaining thereto, that shall be issued concurrently with these presents, and such also as shall hereafter be issued by the directors of said corporation, according to and to satisfy the terms of the contract existing between said corporation and said M., bearing date, &c., for the construction and equipment of said railroad, as by reference to said contract and the records of said company will fully appear; each of said bonds being numbered consecutively, from one to the sum total thereof, requisite for the completion of said road, according to said contract, and each being issued only by the previous specific vote thereof of the said directors, at their meeting duly notified; and if said payments shall be made, as the same shall respectively become due, according to the terms of said bonds and coupons; and if said contract shall also be fully performed by said corporation, in all other respects, then this deed shall be null and void thereafter, otherwise the same shall remain good and in full force. And it is further provided and a condition of this deed, that the possession and uses of said premises shall at all times remain in the said grantors, so long as payment shall be made promptly and in good faith by said grantors, of said several bonds and of the coupons pertaining thereto as the same shall become due or payable, but upon failure thereof for the term of sixty days, the holder of said bonds or of any one or more thereof, shall be and hereby is authorized and empowered to take full and complete possession of said premises and mortgaged property, personal and real, rights of way and corporate franchise, without hindrance or process of law, for the common and joint benefit and the use of the holders of all the bonds so previously issued, and whether payment then be due or not, and in satisfaction thereof, and such holders shall share and share alike in the disposition and sale of the same for that purpose by public vendue, on reasonable public notice given thereof, to the grantors aforesaid, first deducting from such proceeds all costs and expenses incident to such possession and sale." — *Held*: —

1. That the conveyance was not a deed in trust, but a mortgage;
2. That after a transfer by M. of any bonds of the corporation, he held the legal title as mortgagee for his remaining interest, and in trust for the other bondholders;
3. That the contract was secured by the mortgage;
4. That the bonds have priority in payment from the avails of the mortgaged property, over the contract;
5. That the conveyance contains no valid power of sale of the mortgaged property;
6. That a sale by the mortgagee of all his "right, title and interest" in the mortgage, and a judgment recovered by him against the corporation, for non-fulfilment of the contract, is an assignment of the mortgage; and the assignees hold the estate in the same manner as he held it;

REAL ACTION.

RECEIVER.

REFERENCES.

REPLEVIN.

ROCKLAND WATER POWER COMPANY.

SALE.

See TROVER, 4.

SCHOOL DISTRICT.

SEIZIN AND DISSEIZIN.

See Real Action.

SHIPPING.

STATUTES CITED.

Public Laws of Maine.

TAXES.

TOWN.

See TAXES.

TRESPASS.

TROVER.

TRUST.

TRUSTEE PROCESS.

VENDORS AND PURCHASERS.

WAIVER.

WASTE.

WAYS.

WIDOW'S ALLOWANCE.

WILLS.

WITNESS.