REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

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MAINE REPORTS,

VOLUME LIII.

HALLOWELL:
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1867.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

A. D. 1865.

HON. JOHN APPLETON, LL. D., CHIEF JUSTICE.

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,
HON. CHARLES DANFORTH,
} ASSOCIATE JUSTICES.

HON. RUFUS P. TAPLEY, in place of DAVIS, J., from Dec. 21, 1865.

A. D. 1866.

HON JOHN APPLETON, LL. D., CHIEF JUSTICE.

HON. JONAS CUTTING, LL. D.
HON. EDWARD KENT, LL. D.,
HON. CHARLES W. WALTON,
HON. JONATHAN G. DICKERSON,
HON. WILLIAM G. BARROWS,
HON. CHARLES DANFORTH,
HON. RUFUS P. TAPLEY,
} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.—HON. JOHN A. PETERS.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

SARAH S. BROWN, *Executrix*, *versus* JOHN HOLYOKE.

By R. S., c. 90, § 1, a deed appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time, or *as part of the same transaction*, constitutes a mortgage.

Parol evidence is admissible to prove that a bond and deed of different dates were delivered at the same time and as part of the same transaction.

Where the grantee in a deed, absolute in its terms, dated *March* 31, 1858, gave to the grantor a bond, dated *April* 1, 1858, stipulating therein to convey to the obligee, on certain conditions, a tract of land in Brewer, "containing eight and *eighty-six one-hundredths* acres, being a portion of lot No. 4, in the first division; being the same premises *this day* conveyed to said" obligor by said obligee; and the *general* description of the land in the deed is the same, except the fractional part of the acre, which is therein described as being "*sixty-eight* one-hundredths;" — *Held*,

1. That the clerical error in the fractional part of the acre is corrected by the boundaries;

2. That there can be no reasonable doubt but that the deed and bond refer to the same land; and,

3. In such case, there can be no need of compelling the parties to resort to equity to reform the error.

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

WRIT OF ENTRY.

The plaintiff put in a deed from one J. W. Jordan to the plaintiff's intestate, covering the premises mentioned in the writ, dated March 31, 1858.

The defendant put in a levy duly made upon said premises since said deed was given and before this suit was commenced, as the property of said Jordan.

The defendant also put in a bond, produced by said Jordan, signed by the plaintiff's intestate, Barzillia Brown, dated April 1, 1858.

The deed contained a description of the land by metes and bounds, concluding with a general description as follows:—"containing eight and *sixty-eight* one-hundredths acres of land in lot No. 4, in first division of lots east of Kenduskeag road in Brewer."

The bond contained no description by metes and bounds, but described the premises as follows:—"a certain tract of land situate in Brewer, containing eight and *eighty-six* one-hundredths acres, being a portion of lot No. 4, in the first division of lots on the east side of the Kenduskeag road, being the same premises *this day* conveyed to said Brown by said Jordan."

J. W. Jordan, called by the defendant, testified, against the plaintiff's objection, as follows:—That the deed and bond were delivered at the same time; that the arrangements were, to give the deed and take the bond back, and they were both written accordingly, and, in the first place, of the same date; that, at the time the papers were delivered, Brown took the bond and altered its date from 31st March, 1858, to 1st April, 1858, the said Jordan protesting against the alteration and Brown insisting upon it, so as not to make a mortgage of the transaction, and, in the altered shape, delivered it to Jordan, who took it.

Defendant, claiming that he can show that the conditions of said bond were fully paid and satisfied before the commencement of this suit, and plaintiff claiming, that, even in that event, the defendant would have neither a total or partial defence to the suit, the case is reported upon the foregoing, by the consent of parties, for the full Court to decide whether said action shall stand for trial or be defaulted.

Rowe, for the plaintiff, cited the following authorities as to the admissibility of Jordan's testimony. *Freeport* v. *Bartol*, 3 Greenl., 340; *Lincoln* v. *Avery*, 10 Maine, 418; *Whitney* v. *Slayton*, 40 Maine, 228.

J. A. Peters, for the defendant.

APPLETON, C. J. — A mortgage, in equity, is any conveyance of lands intended by the parties, at the time of making it, to be security for the payment of a debt or the performance of a contract. It is enough, then, that the conveyance is intended for security.

By R. S., 1857, c. 90, § 1, when the deed is absolute on its face, with a separate instrument of defeasance executed at the same time, or, as part of *the same* transaction, they constitute a mortgage. It has been held, though the bond of defeasance and deed have different dates, if delivered together, they constitute a mortgage.

Bonds and deeds take effect from their delivery. Parol evidence is admissible to show when the delivery is made. So, it must necessarily be received to prove that a bond and deed are delivered at the same time and as part of the same transaction.

The deed from Jordan to Brown describes the boundaries and position as well as quantity of the land conveyed. The bond back omits the specific boundaries, but describes the land as "situate in Brewer, containing eight and eighty-six one-hundredths acres, being a portion of lot No. 4, in the first division of lots on the east side of Kenduskeag road, so called, *being the same premises this day conveyed* to said Brown by said Jordan."

It is true there is a clerical error in describing the fractional part of the acre, by transposing the figures in the numerator, but that error is corrected by reference to the deed from Jordan to Brown, in which the boundaries of the land are particularly described. The bond and deed were delivered at the same time and as part of the same transaction. The bond refers to the deed and adopts the

boundaries therein set forth and makes them a part thereof. *Pierce* v. *Faunce*, 37 Maine, 63; *Field* v. *Houston*, 21 Maine, 69. The boundaries of a deed must govern and control the quantity. There can be no reasonable doubt that the deed and the bond refer to the same land. In such case, there can be no need of compelling the parties to resort to equity to reform the error in the bond. By comparing the deed and bond, this error is corrected by the boundaries, to which the mere quantity must yield.

Here was a debt to be secured, and that is the essence of a mortgage. The deed and bond refer to the same land, were delivered at the same time and as part of the same transaction, and, together, constitute a mortgage.

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

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

JOHN S. CHADWICK *versus* ENOS EASTMAN *& al.*

Any alteration which changes the legal effect of a written instrument, either in its terms or parties, or as an instrument of evidence, is material; and, if made by the holder without the consent of the maker, will invalidate it.

Where a promissory note, given for a partnership debt, uses the following words, "we, or either of us, promise jointly and severally to pay," &c., and it is signed by one of the partners alone; and, subsequently, and without the knowledge of either defendant, the payee altered the note by inserting, immediately above the signature, the words "for E. & W. E——," the names of the firm; in an action upon the note against both members of the firm; — *Held*, such alteration was material and would avail both defendants to avoid the note.

Inferences to be drawn from the face of such a note, as to intention and consent of the parties.

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

The facts fully appear in the opinion.

McCrillis, for the plaintiff, submitted an elaborate brief, and contended, among other things, that—

The alteration was immaterial, because, without it, upon the face of the note, it appears that Wm. L. Eastman is bound jointly with his co-partner.

If the addition was a material alteration, the payee had the implied consent of Wm. L. Eastman to make it.

The individual signature of one partner, made on partnership account, is the signature of himself and all of his co-partners, as the signature of an agent on account of his principal, and, in pursuance of his delegated authority, is the signature of the principal.

Each partner, dealing for the firm, acts for himself and as agent for his co-partners. 1 Parsons on Contracts, 163; 3 Kent's Com., 41; *S. F. Manufacturing Co.* v. *Goddard*, 14 How., 455; *Beckham* v. *Drake & als.*, 9 Meeson & Welsby, 79.

An agency is disclosed on the face of the note. W. L. Eastman undertakes to bind another person jointly with himself.

The intention of the parties was to bind the signer jointly with his partner; because, neither W. L. Eastman nor any other agent can, by his own signature, bind another person jointly with himself, unless he also sustain the relation of partner to such person.

The words, "we, or either of us," mean I and my partner. It was not necessary that Enos Eastman be named by his name on the face of the note. It was enough if W. L. Eastman described the person bound with him, as his partner. *Id certum est quod certum reddi potest.* Story on Promissory Notes, § 73.

Upon its face, the note is incomplete to bind any body but the signer, because of the omission of the name of the person intended to be bound; and the consent of the signer, that the omitted name may be supplied in order that the intention of the parties, as expressed on the face of the note, shall not be defeated, is implied.

An alteration, though in a material part, will not vitiate the instrument, if made to correct a mistake and in furtherance of the original intention of the parties. Byles on Bills, 389; 2 Parsons on Bills, 554, and cases there cited.

J. A. Peters, for the defendants.

WALTON, J.—This is an action of assumpsit, and, to support it, the plaintiff read in evidence a note of the following tenor:—

"Bangor, April 19, 1861.—At five days sight, value received of Charles O. Fanning, we, or either of us, promise, jointly and severally, to pay him or bearer, thirteen hundred and sixty-five dollars and thirty-five cents, with interest from date. "For Enos & Wm. Eastman,

"Wm. L. Eastman."

The defendants contended, and introduced evidence tending to prove, that the words, "*for Enos & Wm. Eastman*," were inserted in the note by the payee, after its execution, and without the knowledge or consent of either defendant, and that these facts constituted a valid defence to the action.

William Eastman and William L. Eastman, were admitted to be the same person. It was also admitted that the defendants were co-partners, and that the note was given for a co-partnership debt.

The presiding Judge instructed the jury that, if the words "*for Enos & Wm. Eastman*," were placed on the note by the payee, after its execution, and without the knowledge or consent of defendants, it would be such an alteration as would avail the defendants to avoid the note in this suit.

To this instruction the plaintiff excepted, and his counsel contends, in a very able and instructive argument, that the exceptions ought to be sustained and a new trial granted. He says that the defendants were co-partners, and that the note in suit was given for a co-partnership debt; that Wm. L. Eastman had the power, and that the language of the note, "we, or either of us, promise," &c., shows that he intended to bind his co-partner as well as himself; that the

law will give effect to this intention, by holding Enos as a joint promisor upon the note in its original form, or by giving the payee authority to add sufficient for the purpose; that, if the former be the correct view, then the alteration was immaterial, — if the latter, then the payee had authority to make it; that the intention to bind Enos, which he contends is apparent upon the face of the note, renders the alteration immaterial or impliedly authorized; and that, upon either view, the plaintiff is entitled to judgment against both defendants for the amount of the note.

1. Was the insertion of the words "*for Enos & Wm. Eastman*," a material alteration of the note? Of this we cannot entertain a doubt. Without these words the note would not be evidence that Enos Eastman was in any way holden upon it. We are not now asserting that he would not be holden upon it, — we are only asserting that the *note itself* would be no evidence of it, — that his liability, if established at all, would have to be made out by evidence *dehors* the note. But, with these words in, the note itself establishes his liability, *prima facie*. It is very clear, therefore, that the insertion of the words "for Enos & Wm. Eastman," changes the effect of the note as an instrument of evidence, and makes it prove more than it otherwise would. "*Any alteration which changes the evidence or mode of proof is material.*" 2 Parsons on Bills and Notes, 564.

2. Was the form of the note such as to authorize the payee to insert the words "for Enos & Wm. Eastman?" Was it apparent upon the face of the note that Wm. L. Eastman intended by his own signature to bind his co-partner? We think not. On the contrary, the form of the note excludes such an inference. It is in form a joint and several note, and a partner cannot bind his co-partner *severally*. The true inference to be drawn from the form of the note is, that it was made to be signed by two persons, not that two persons were to be bound by the signature of one; and that, for some cause, the signature of the second was not obtained. The note itself does not disclose a

partnership, the language being such, in one respect, as a partner could not properly use. We refer to the words implying a *several* liability. Nor does it disclose the fact that it was given for a partnership debt. Surely *consent* to make the alteration is not implied in the form or language of the note.

But we do not see that any point of law, arising out of this question of implied consent, is open to the plaintiff. *Consent*, whether express or implied, was a fact to be found by the jury; and the presiding Judge does not appear to have made any rulings unfavorable to the plaintiff in relation to it. He told the jury what the consequences would be if the alteration was made *without consent;* but, so far as appears, he left the question whether there was or was not consent, to the jury, unembarrassed by any rulings unfavorable to the plaintiff. It is unnecessary, therefore, to discuss this branch of the case further. 2 Parsons on Bills and Notes, 565.

3. If, then, the alteration was a material one, and was made by the payee after the execution of the note, and without the knowledge or consent of the defendants, was it such an alteration as would avail the defendants to avoid the note in this suit?

Tampering with documentary evidence is not to be encouraged. It is the right of every one to have his contracts remain as he has made them. If error has accidentally crept into a written contract, a court of equity, in proper cases, will correct it. But the law does not allow one of the parties, without the consent of the other, to do it.

It was held in *Pigot's case*, (11 Coke, 27,) that, when a deed is altered in a point material, without the privity of the obligor, it thereby becomes void. The reason of the rule is, that a man shall not take his chance of committing a fraud, and lose nothing by it in case he is detected. The rule was extended, in *Master* v. *Miller*, (4 T. R., 320,) to all written instruments; and affirmed in the same case on writ of error, (5 T. R., 367,) and ever since followed by

the English courts; and the rule is believed to be universally adopted in this country, wherever the common law prevails. To have this effect, the alteration must be material. The insertion of a word which the law itself would supply, though done without the consent of the other party, is immaterial, and will not invalidate the instrument, because its legal effect is not thereby changed.

It is said, in Chitty on Bills, 85, that an alteration to correct a mistake does not vitiate a bill of exchange; and this remark seems to have given rise to an erroneous belief in the minds of some. In all the reported cases on this point, it appears that the alterations were made by *consent*, and the remark, that such an alteration does not invalidate the instrument, had reference to the stamp law, and meant no more than that an alteration, *by consent*, to correct an error, would not require a new stamp. It is erroneous to suppose that one of the parties may lawfully alter an instrument, even to correct an error, without the consent of the other. The other may deny that there is any error, and the holder of the instrument cannot lawfully take upon himself the decision of that question. (2 N. H., 545.)

The correct doctrine is, that any alteration which changes the legal effect of the instrument, either in its terms, or the parties, or as an instrument of evidence, is material; and, if made by the holder, without the consent of the other party, will invalidate it. This is a wise rule of law, and sound policy requires its stringent enforcement.

The alteration of the note in suit was material, and, so far as appears, wholly unauthorized; and we think the presiding Judge did right in ruling that it was such an alteration as would avoid the note.

Exceptions overruled.
Judgment on the verdict.

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

THOMAS J. VANTASSEL *versus* GEORGE G. HATHAWAY, *Ex'r.*

Where the plaintiff, in consideration of $700, conveyed to the defendant's testator a house worth $1800, to which the grantee added an L; and, fifteen months after said conveyance, the grantee gave to the plaintiff a certificate that he "will let" the plaintiff "have" said house "by his paying him within $100 what it cost him;" and the grantee devised said house by will to the defendant; and the defendant, subsequent to the death of the testator, conveyed said house by his quitclaim deed to another; — *Held*, that, in an action against the executor of said grantee, to recover damages for not conveying said house in accordance with said certificate, the presiding Judge properly ordered a nonsuit.

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

ASSUMPSIT on the following memorandum: —

"Bangor, Sept. 2, 1858. — This is to certify, that I will let T. J. Vantassel have the house he built and formerly occupied, any time, by his paying me within $100 what it cost me." (Signed) "J. Hathaway."

The writ was dated May 1, 1863.

It was admitted that the premises were conveyed by the plaintiff to J. Hathaway, May 21, 1857, who thereupon took possession of the same, and that said Hathaway died in May, 1860.

The plaintiff introduced the foregoing paper; a copy of the last will and testament of the defendant's testator, in which the testator had devised the premises to the defendant and appointed him executor; and a copy of a quitclaim deed, dated Dec. 18, 1861, from the defendant, in his individual capacity, to one Abby Hathaway, conveying the same premises.

Charles Jennings, called by the plaintiff, testified — that he knew the lot on which plaintiff built the house in question; lot was 148 feet on Pond street, and 100 feet on Hayward street; knew J. Hathaway in his lifetime; plaintiff lived in the house; moved out and J. Hathaway moved in and occupied the same until his death; worth $1800. J.

Hathaway told witness he had let plaintiff have $700 and taken a deed of the premises, and would give plaintiff in $100, if he paid it back.

David Boynton, called by plaintiff, testified—he worked for plaintiff in finishing the house; well built; worth $1800 when plaintiff left it. Worked for Hathaway afterwards; put on L; house all finished.

George W. Maxim, called by plaintiff, testified—he had worked at building houses many years, helped finish house in question; worth $1800 to $2000.

On the foregoing testimony, the presiding Judge, on motion of defendant's counsel, ordered a nonsuit, to which the plaintiff excepted.

Knowles, for the plaintiff.

Blake & Garnsey, for the defendant.

APPLETON, C. J.—This is an action of assumpsit founded on the following memorandum.

"Bangor, Sept. 2, 1858.—This is to certify, that I will let T. J. Vantassel have the house he built and formerly occupied, any time, by his paying me within one hundred dollars what it cost me. "J. Hathaway."

It is obvious, that here is no mutuality. The plaintiff was under no obligation to take the house and pay for the same. The defendant, if ever so desirous of having the amount specified, could not enforce its collection. Nor does the case show that there was any consideration whatever for the alleged promise. Being without consideration, it could not be enforced. The case of *Bean* v. *Burbank*, 16 Maine, 458, is similar in all respects, and is directly in point against the maintenance of the action. To the same effect is that of *Burnet* v. *Bisco*, 4 Johns., 235.

The counsel for the plaintiff rely on *Atwood* v. *Cobb*, 16 Pick., 227. But, in that case, the contract was signed by *both* parties, and the plaintiff offered to show that he agreed to take the land in question. There was mutuality of con-

tract as well as consideration. Both these elements are wanting in the case at bar. *Nonsuit confirmed.*

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

THOMAS JENNESS *versus* MOUNT HOPE IRON COMPANY.

To constitute a contract, there must be a proposition by one party accepted by the other without any modification whatever.

Where the plaintiff wrote to the defendant — "what will you sell me 450 kegs of nails for, delivered at B, within one month, cash?" — to which he replied — "will sell you 450 kegs common assorted nails, delivered at time and place mentioned, at $3,62 per keg of 100lbs., each, cash;" and plaintiff rejoined — "nails have advanced so much, I am afraid to buy, but you will send me, as soon as possible, 303 kegs, (specifying the kinds,) and I will send you a check on Exchange Bank, Boston;" and, not hearing from the defendant, the plaintiff wrote again, asking the defendant to ship nails, as navigation would soon close; to which defendant replied — he could not get out the nails ordered by the plaintiff that month, on account of previous orders, but promising his order should receive attention when he got to it; — *Held*, the correspondence did not constitute a complete contract; the defendant's proposition to deliver 450 kegs, at $3,62 per keg, not having been accepted by the plaintiff, and the plaintiff's order for 303 kegs not having been accepted by the defendant.

An intention to accept a proposition is not an acceptance, unless communicated to the party making it.

A contract, required by the statute of frauds and perjuries to be in writing, in order to be binding, can receive no aid from parol evidence.

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

ASSUMPSIT for an alleged breach of contract.

The plaintiff put into the case several letters, the substance of which appear in the opinion of the Court. He offered to prove that he relied upon receiving the nails according to said correspondence, and was damaged by not receiving them; that defendants manufacture at Somerset, Mass., and a direct shipment would be from Somerset; that

defendants had often shipped nails to him before, from Boston; that, on Nov. 22, 1862, he saw Mr. Leonard, defendants' managing agent, in Boston; that he gave at that time, as a reason for not sending the nails, that there was no opportunity to ship direct; that plaintiff told him that was no excuse, as he had often sent them from Boston; then Leonard said nails had advanced, and that Bullard, Abbott & Co., his agents, had sold all he could get out. Leonard then declined to let plaintiff have nails under that contract, and he then bought of Bullard, Abbott & Co., defendants' agents, at an advanced price, forty kegs, as he had already sold that amount, relying on defendants to fulfil their contract. He paid for the same nails, as contracted for, $4,50 per keg, less five per cent. off, commissions. Nails had risen in value after his order, and before the twenty-second of November, spoken of. He never received any nails under the contract and never received any notice from defendants after Nov. 22, 1862. Would have been glad to have made the purchase any day, from that day to this.

If, upon so much of this statement as is legally admissible, a *prima facie* case for damages is made out, then the action was to stand for trial, otherwise the plaintiff was to be nonsuit.

J. A. Peters & J. F. Rawson, for the plaintiff.

C. P. Stetson, for the defendants.

WALTON, J.—This is an action for an alleged breach of contract, and is before us on report. If so much of the plaintiff's evidence as is admissible, is sufficient, *prima facie*, to entitle him to damages, the case is to stand for trial; otherwise a nonsuit is to be entered.

The plaintiff says that the defendants bargained and sold to him three hundred and three kegs of nails, to be delivered at Bangor, before the close of navigation, in the fall of 1862.

The defendants do not deny that there was a negotiation for the sale of nails; but they deny that the negotiation ever

ripened into a contract, by which the parties were bound; and the question is whether the evidence is sufficient, *prima facie*, to show such a contract; that is, a contract *completed*.

The negotiation was carried on by letter; and, omitting what is irrelevant and immaterial, amounts substantially to this:—

Plaintiff. (Oct. 20. 1862.) "What will you sell me 450 kegs of nails for, delivered at Bangor, in the course of a month, cash down?"

Defendants. (Oct. 23, 1862.) "We will sell you 450 casks common assorted nails, delivered on the dock at Bangor, at $3,62 per keg of 100lbs. each, cash."

Plaintiff. (Oct. 27, 1862:) "Nails have advanced so much I am almost afraid to buy; but you will send me as soon as possible, 303 kegs, (naming the kinds,) and I will send you a check on Exchange Bank, Boston."

Plaintiff. (Nov. 11, 1862.) "Not having heard whether you have shipped the nails ordered, I thought I would write you as we shall have but a few weeks more of navigation."

Defendants. (Nov. 14, 1862.) "It will not be possible for us to get out the nails you have ordered this month, as previous orders must take precedence. It is next to impossible for us to get out nails enough to supply our back orders, and we thought it best to write you, as navigation may be closed too soon for us to forward them this fall. We will, however, do our best to satisfy all our customers, and your order shall receive attention when we get to it."

This is the whole substance of the written correspondence between these parties, and we look in vain to find in it evidence of a contract *completed;*—a proposition by one party, accepted without modification, by the other.

The defendants offered to deliver *four hundred and fifty casks* at $3,62 per cask; but this offer was not accepted by the plaintiff; and his order for *three hundred and three casks* does not appear to have been accepted by the defendants.

We look in vain for a distinct proposition by either party, which is accepted without modification by the other.

To constitute a contract, there must be a proposition by one party, accepted by the other, without any modification whatever. If the acceptance modifies the proposition in any particular, however trifling, it amounts to no more than a counter proposition; it is not in law an acceptance which will complete the contract. The letters between these parties fail, therefore, to establish a *prima facie* case for the plaintiff.

The learned counsel for the plaintiff admit that the letters "do not probably of themselves constitute a contract;" but they insist that, under the circumstances, *slight evidence* would be sufficient to supply the defect, and show that in fact the plaintiff's modified order was accepted by the defendants. It is highly probable that when the defendants received the plaintiff's order of October 27, they *intended* to fill it; otherwise they should have notified him, and not by their silence left him to infer that the nails would be forwarded, when they had no intention of doing it. And if such an intention would be sufficient to complete the contract, and render it binding upon the parties, we might, perhaps, feel justified in inferring it from the defendants' silence, and other facts testified to by the plaintiff. But we are not satisfied that such an intention, locked up in the breast of a party, and not communicated to the other, is sufficient in any case to constitute such an acceptance of a proposition as to create a binding contract. We think it would not.

It would be unjust to the other party to hold him bound by such an acceptance; and, unless both parties would be bound by it, neither would be, for want of mutuality.

But there is another difficulty in the way of allowing such an unexpressed intention to have the effect of a binding acceptance. The alleged contract was for the sale of goods for more than thirty dollars. The plaintiff does not pretend that he accepted any portion of them or that he gave anything in earnest to bind the bargain, or in part payment thereof; and, unless the defendants can be charged by virtue of some note or memorandum in writing, signed by them or

their agent, the contract will be void under the statute for the prevention of frauds and perjuries. (R. S., c. 111, § 5.) Such a memorandum may be contained in the written correspondence of a party, but the correspondence taken together must establish the contract plainly in all its terms, or it will not be sufficient. It can receive no aid from parol evidence. The policy of the law is to prevent perjury, by making it impossible for a party to profit by it. Cases falling within its operation, therefore, can receive no aid from parol evidence. (2 Greenl. on Ev., § 268.) We think the evidence legally admissible fails to establish a *prima facie* case for the plaintiff. *Plaintiff nonsuit.*

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

RUFUS DWINEL *versus* CHARLES SAWYER.

If the defendant receive the plaintiff's money as from the agent of the plaintiff, both of whom are his debtors, without having reason to believe it was sent by the latter, and appropriate it to the credit of the agent, the plaintiff cannot recover it back.

The distinction between money and other property.

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

ASSUMPSIT for money had and received.

This case has been before the Court once before.

The facts sufficiently appear in the opinion of the Court.

The case was taken from the jury and continued on report, for the Court to render judgment on nonsuit or default, according to the legal rights of the parties; the Court to draw any inferences of fact which a jury might.

J. A. Peters, for the plaintiff.

A. W. Paine, for the defendant.

BARROWS, J.—Assumpsit for money had and received.

In the winter of 1853–4, one Marsh was engaged in hauling logs by the M. for the plaintiff, and, while thus engaged, contracted a debt on his own account, with the defendant, for the board of his men. The following spring, said Marsh was employed by plaintiff, as his agent, to oversee the driving of these logs, and, while thus employed, contracted a debt to the defendant, on plaintiff's account, for the board of the men engaged in the driving. In the summer of 1854, plaintiff furnished his agent, Marsh, with money to pay this last bill, having previously settled with him for the hauling by the M. This money, according to the testimony of plaintiff and Marsh, was placed in Marsh's hands for the special purpose of paying plaintiff's debt to defendant, and with instructions to Marsh to carry or send it to defendant for that purpose, but without special directions as to how it should be sent. Marsh did send the money by Greenlief Hill, a stage driver, and he testifies that he sent with it, by Hill, a verbal message to defendant that it was to pay the plaintiff's bill, and that defendant was to return a receipt in full for the bill, the amount thus forwarded being some twelve dollars less than the amount of the original bill. Hill's testimony is not in the case, and the only evidence we have, as to the manner in which he did his errand, is from the defendant, who testifies that Hill stated, when he gave him the money, that it was sent by Marsh on his account, and that he wanted a receipt. Defendant gave a receipt accordingly, running to Marsh, and credited the amount on Marsh's bill. Hill carried the receipt to Marsh who looked at it and put it in his pocket, it would seem, without at that time notifying either plaintiff or defendant that there was any misappropriation of the money. Sawyer subsequently sued Dwinel for his bill, recovered and collected a judgment against him for the whole amount with costs, Dwinel being defaulted at the second term, after having appeared and answered to the suit.

Thus far there seems to be no material contradiction in

the testimony, and the foregoing facts may be considered as proved.

Did Sawyer know that the money, sent by Marsh through Hill, was Dwinel's money? If he did not know it, but received the money in good faith, as from Marsh, and appropriated it to the partial payment of his just claim against Marsh, then the plaintiff cannot recover in this action, although his agent, Marsh, may have misappropriated the money given him by the plaintiff to pay his debt to the defendant, or allowed it to be appropriated to the payment of his own debt instead of the debt of the plaintiff, which it was designed to pay, thereby subjecting his principal to loss. For Marsh was the plaintiff's agent, not the defendant's. Both alike appear to have been creditors of Marsh, but he whose *agent* he was must bear the loss occasioned by his misfeasance or neglect. And, for the purposes of this case, Marsh and his principal would be accountable for Hill's mistakes or neglects.

If Hill had delivered the message which Marsh says he sent with the money, then the defendant would have been bound to appropriate the money to the payment of Dwinel's bill, and even Marsh's subsequent or contemporaneous assent to have it appropriated to his own debt instead of Dwinel's could not have availed the defendant. *Reed* v. *Boardman*, 20 Pick., 446.

But it is equally certain that if Hill delivered the money as from Marsh, without other directions as to its appropriation than those which the defendant testifies to, the defendant might lawfully appropriate it to the payment of his claim against Marsh, and the plaintiff, or any other person who had trusted his money in Marsh's hands, must bear the loss if loss be occasioned thereby. For, while it is true that an agent cannot sell or dispose of property *other than money*, without authority, even to a *bona fide* purchaser, so that it would not be liable to be reclaimed by the owner, yet, *in regard to money, the law is different*, not merely on account of the difficulty of identifying, but because it would be an

insupportable burden upon the business community if they were obliged, at their own proper peril, to ascertain that every dollar they receive in the ordinary course of business is lawfully in the hands of him from whom they receive it, with power to dispose of it as he undertakes to do. *Lime Rock Bank* v. *Plimpton & al.*, 17 Pick., 159; *Gammon* v. *Butler*, 48 Maine, 344.

And we look in vain through the case for testimony which can countervail the positive statements of the defendant, that he supposed it was Marsh's money, and to be credited on *his* account; that he knew nothing about where the money came from except what Hill told him (as above stated); that he did not know that Dwinel claimed that it was to pay his bill until long afterwards. On the contrary, the fact that Marsh received the defendant's receipt for the money as appropriated to the payment of his own account, looked at it and put it in his pocket, and, according to his own testimony, did not inform the defendant that there was any mistake until some four weeks afterwards, strengthens the supposition that it was forwarded and received in the manner described by the defendant, and it is to be observed that Marsh's account of the conversation, which, he says, then took place between him and the defendant, (of which the defendant gives such a different account,) is entirely consistent with the hypothesis that he supposed himself then, for the first time, communicating to the defendant the fact that the money belonged to Dwinel, and ought to be credited to him. Such notice, if then first given, could not avail the plaintiff. *Lime Rock Bank* v. *Plimpton*, before cited.

It is true that Dwinel says that he learned that defendant had a bill against him for which he would take $65, and that he therefore gave Marsh that particular sum to pay the bill. If it were proved that Sawyer ever agreed to take that sum for his bill, the subsequent receipt of the precise amount might be considered as evidence that he must have known that it was Dwinel's money and ought to be appropriated to his account. But the defendant swears that he never of-

fered to take less than the $77,10, and was never asked to do so. Marsh nowhere testifies that there was any such arrangement. We can only infer that Dwinel's information came from Marsh, and that Marsh so confidently supposed that he could adjust the bill for that amount in cash, that he undertook to do it without consulting the creditor in the matter. If this were so, the particular amount forwarded would furnish no indication to Sawyer from whence the money came.

There is nothing in the case to justify the conclusion that the defendant knew that it was Dwinel's money, or that it was paid to, or received by him in any manner inconsistent with his lawfully appropriating it to the payment of Marsh's debt, as he seems to have done.

It is not necessary to determine whether, under the circumstances of this case, the plaintiff is estopped by the judgment in Sawyer's suit against him, for upon well settled principles pertaining to the law of agency as relating to the transmission of money, and the appropriation of payments, the plaintiff must be considered as having failed to make out a case. *Plaintiff nonsuit.*

WALTON, DICKERSON and DANFORTH, JJ., concurred.

CUTTING and KENT, JJ., concurred in the following opinion drawn by

APPLETON, C. J.—When this case was presented before for consideration, the facts were very briefly and imperfectly reported. The defendant, for aught then appearing, might have designedly misapplied the money of the plaintiff to the payment of the debt of Marsh. But such a misappropriation, with a knowledge on the part of the defendant of all the facts, would have been a fraud upon the plaintiff, who might, in such case, well sustain an action for money had and received.

But it now appears that the defendant received the money as the money of Marsh, and passed it in good faith to his credit. If there was a mistake, it was through the negli-

gence of the plaintiff's agent. The defendant is not shown to be in fault. A long time elapsed before he was advised that the money belonged to the plaintiff. The plaintiff, if his agent has misapplied his funds, must abide the result, especially in a case where the defendant is without blame. The distinction between money and specific articles is too well settled to be disturbed. *Plaintiff nonsuit.*

INHABITANTS OF VEAZIE *versus* INHABITANTS OF CHESTER.

The fact that a person is destitute and in need of immediate relief, authorizes and requires the overseers to provide such relief.

If supplies, furnished *bona fide* by overseers to a person destitute, are in fact used for the relief of his destitution, or are received for the purpose of such relief, his unwillingness to receive them as pauper supplies, or his protest against so regarding them, or his declaration that he shall not so regard them, cannot prevent them from being so regarded, and from drawing after them all of their legal consequences.

If, when supplies are furnished, the overseers distinctly agree that the supplies are not, and shall not be regarded as pauper supplies, but as a gift or loan to one in need, whether to be returned in kind or paid for, or not, and they are thus received, the party so receiving will not be legally affected thereby, nor will the town acquire any rights thereby in its relation to other towns.

Same results would not follow by reason solely of a protest or unwillingness on the part of the person furnished, to receive needed relief, or from any declaration that he does not or shall not regard the supplies in that character, but simply as a loan to be refunded.

If supplies are in fact furnished and received as pauper supplies, the statute is complied with, and their legal consequences follow.

The promise to repay and the actual repayment do not change the nature of the relief.

If supplies, when furnished came within the statute, their character could not be changed by a contingent matter depending upon the voluntary act of the pauper, even if the owners agreed that thereupon the charge should be blotted out, and the supplies should not be regarded as what they were when furnished.

Whether or not supplies were furnished and received as pauper relief is a mixed question of law and fact.

When such a question is submitted to a jury, it is the duty of the presiding Judge, if requested, to instruct the jury what would or would not constitute furnishing and receiving supplies within the statute.

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

ASSUMPSIT for supplies furnished under the pauper Act.

It was admitted that the settlement of the pauper was formerly in the defendant town, and that it so continued unless he obtained a new one in the plaintiff town, by having his home there five successive years without receiving, directly or indirectly, supplies as a pauper.

It was also admitted that he obtained a new settlement in the plaintiff town, unless the five years' residence was broken by certain alleged supplies furnished in the meantime.

Due notice and answer were admitted. No question was made as to the destitute circumstances of the pauper's family, or as to the kind or amount of supplies furnished.

It appeared that the town of Veazie kept articles necessary for the relief of persons destitute, and furnished the alleged paupers principally from these, charging them in the books kept for that purpose.

It also appeared that the father of the family paid for supplies first furnished, on his return from the woods where he was at work when they were furnished.

There was testimony introduced by the defendants, tending to show that the first necessaries were furnished and received, to be paid for soon after, and not to be considered as pauper supplies. And there was testimony, introduced by the plaintiffs, that no agreement was made by the overseers to furnish the supplies as a loan.

The counsel for the plaintiffs asked that the following instruction be given, to wit:—

"If Mrs. Babcock received, from the overseers, supplies furnished by the town, under an understanding that, if paid for soon, the charge to them should be stricken from the town books and not be considered a charge, otherwise should be a charge, that such furnishing would break the continuity, if she was in distress and in need of relief from the town."

This, the Judge refused to give as a matter of law, but

submitted it as a question for the jury to decide (without any direction or intimation from the Court) whether such furnishing was directly or indirectly furnishing supplies to her as a pauper, within the sense of the statute.

Verdict for defendants.

J. A. Peters, for the defendants.

A. W. Paine, for the plaintiffs.

No briefs came into the hands of the present Reporter.

KENT, J.—The question, on which this case seems to depend, is whether certain supplies, which were furnished by the plaintiffs to the family of the alleged pauper, prevented him from acquiring a settlement in Veazie, by five years uninterrupted residence. It is admitted unless these supplies were furnished and received as supplies to them as paupers, within the statute, that the residence for five years gave a legal settlement to the father.

When a town attempts to prevent the legal effect of a residence of five years therein, by proving that within that time the person, whose settlement is in question, has received supplies as a pauper, it is not enough to show that supplies have been furnished by the officers of the town.

It must also appear, to the satisfaction of the jury, that the person supplied or his family was in need of immediate relief, was so destitute of food, clothing, fuel, or other necessaries, that, without aid from some quarter, they would probably suffer from the want of such aid. When the rights and obligations of another town may be affected by the act, the law requires that a case of necessity and need should be established, before the supplies are furnished, and those rights or obligations changed. They must be furnished because the immediate wants of the family required them, to prevent suffering, and not because the town could thus prevent the acquisition of a settlement by the pauper. Relief furnished and accepted, when the family or person was not in fact in need of them, would not affect the settlement.

The first question, in such a case, for the jury to settle is, whether, at the time, the pauper was in fact in distress and in need of supplies. If he were, and the supplies were furnished by the officers of the town, in good faith, to relieve such distress, and were received for that purpose, they would be supplies *furnished* within the meaning of the statute.

When a case of necessity exists, and is brought to the knowledge of the overseers, it is their duty to examine into the facts, and to furnish the relief required by the immediate wants of the family. On the one hand, they have no right to force supplies upon a family where no such necessity exists, and, on the other, they have no right to withhold them where such necessity does exist, even if the pauper or his family are unwilling to receive them as pauper supplies, and protest against so accepting them. The overseers are not to allow a family of children to perish with hunger or cold, because the father's pride revolts from being placed in the position of a pauper, although, from misfortune or sickness, he is unable to provide for them. If the family stands in need of immediate relief, this fact authorizes and requires the overseers to provide such relief. However praiseworthy the feeling of independence, which shrinks from the thought of pauperism, it cannot be allowed to operate so far as to prevent supplies from being furnished by the town to the suffering family. We entirely concur in the views of the Court on this point, as expressed fully in *Corinna* v. *Exeter*, 13 Maine, 321. If the supplies are actually furnished in such a case of need, in good faith, as supplies to a pauper, and are in fact used for the relief of the wants of himself or family, or received for the purpose of relieving such wants, the unwillingness of the party to receive them as such supplies, or his protest against so regarding them, or his declaration that he shall not so regard them, cannot prevent them from being regarded in law as supplies furnished to a pauper, within the statute, and from drawing after them all the legal effects and consequences resulting from such furnishing. The question is, not what were the views

and wishes and intentions of the party, but was it a case of necessity and was it provided for by supplies furnished by the town. 13 Met., 197.

It is urged, on the part of the defendants, that the statute requires that the supplies should have been received as supplies to a pauper. This requirement, as we have seen, is fulfilled, when, in a case of need, they have been furnished by the town and received to relieve such distress.

But it is contended, in this case, that the supplies were not so "received" as to come within the statute. It is said that, admitting a case of necessity, and that the articles were furnished by the overseers from the stores kept by the town for such purpose, yet they were furnished under such circumstances, that they cannot be regarded as supplies, required by the language and intent of the pauper law.

It may be admitted, that if, at the time of reception, for any cause, the overseers distinctly agree or assent to the proposition, that the supplies are not, and shall not be regarded as furnished by the town for the relief of pauperism, but as a gift or loan to a party in need, whether to be returned in kind or paid for, or not, and they are thus received, under such distinct understanding by both parties, that they are not at any time, or in any event to be regarded as pauper supplies, they will not be so regarded. The party so receiving will not be legally affected so as to make him a pauper, nor will the town acquire any rights thereby in their relation to other towns. *Oakham* v. *Sutton*, 13 Met., 197.

It would be most manifestly unjust, to subject a party to the disabilities and consequences of pauperism, if he received the supplies under the distinct agreement that they were not so furnished or so received. Overseers would have no right to charge such supplies to the town, and might be liable to the town for the value of such articles, if taken from the stores belonging to the corporation.

But the same results would not follow by reason solely of a protest or unwillingness on the part of the pauper to re-

ceive needed relief, or from any declaration that he does not, or shall not regard the supplies in that character, but simply as a gift or loan to be restored or refunded, unless the town, by its officers, assent to such proposition, as before explained.

Another question, however, was raised at the trial, viz.— What would be the effect, if the supplies were furnished to the family, which was destitute, by the overseers in their official capacity to relieve their immediate wants, but with the understanding or agreement that, if paid for soon, or on the return of the husband, the charge should be stricken out and the supplies should not be regarded as articles furnished and received by the town as supplies to a pauper?

We think that the rights of all parties interested must be determined by the facts existing at the time of the reception of the supplies. If they were ever in fact furnished and received as pauper supplies, the statute is complied with and all the consequences of pauperism follow. It may well be doubted whether the overseers have any authority to affect the rights of their town or the rights of others by any such agreement. The promise to repay, and the actual repayment, does not change the nature of the relief. It is but performing a duty, whenever the pauper is able. *Hanover* v. *Turner*, 14 Mass., 227; 5 Gray, 28. There was a time, according to the proposition, when the family received, directly, supplies as paupers. This relation existed, certainly, up to the time of repayment, and would have remained permanently, if payment had not been made. If mere payment, afterwards, could wipe out the fact, as to its legal consequences, this payment might be made years afterwards, and, by means furnished by another town, interested to prevent the legal effect of the act on the question of the settlement of the pauper. And so, if the supplies, when furnished, came within the statute, their character could not be changed by a contingent matter, depending upon the voluntary act of the pauper, even if the overseers agreed

that thereupon the charge should be blotted out and the supplies should not be regarded as what they were in fact, when furnished. The question still returns, what was the legal character of the supplies on the day they were furnished?

It appears, by the exceptions, that the Judge declined to give some of the instructions requested by the parties, but "submitted it as a question for the jury to decide, (without any direction or intimation from the Court,) whether such furnishing was directly or indirectly furnishing supplies to her as a pauper, within the sense of the statute." The counsel for the plaintiffs requested a specific instruction on this point, as appears by the exceptions. We think a specific instruction should have been given.

It is undoubtedly true, that the jury must determine upon the evidence and upon the law applicable to the case, whether supplies were furnished and received as pauper relief. It is a mixed question of law and fact. We think that the Judge should have explained to the jury more fully the principles of law applicable to the facts, and to the various assumptions of the parties, as to the result of the evidence, and should have instructed them what would or would not be furnishing and receiving supplies within the statute. Without discussing the correctness of the rulings given, so far as they went, we think that the omission to give more full and definite explanations and instructions, as to the law bearing on the vital question in the case, is a good cause for exception.

The defendants contend that, if the whole question of law and fact was improperly or deficiently submitted to the jury, yet that the verdict has so manifestly determined the question correctly, that the Court will not set it aside. We express no opinion on the facts, except to say, that we do not think that the case is so perfectly clear on the proof, as reported, as to bring it within the rule invoked. We think that justice requires that the case should be submitted to

another jury, fully instructed according to the principles stated in this opinion. *Exceptions sustained.*
New trial granted.

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

JAMES M. ROBBINS *& al. versus* WALTER S. VOSE *& al.*

In assumpsit, by a holder against an indorser of a negotiable promissory note, what circumstances will amount to a waiver of demand and notice.

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

ASSUMPSIT.

The facts sufficiently appear in the opinion.

B. Bradbury, for the plaintiffs.

A. Hayden, for the defendants.

CUTTING, J. — *Assumpsit* brought to recover of the defendants, as co-partners, and in that capacity indorsers of three notes, dated May 26, 1855, given by one *Amaziah Nash*, and payable to their order at future times. It appearing that there was no legal demand and notice, the principal question, now presented, is, whether the evidence produced proves a waiver; in which event, according to the agreement of the parties, the action is to stand for trial, otherwise the plaintiffs are to become *nonsuit*.

The notes were given for stumpage of lumber cut on the plaintiffs' land by Nash, who was supplied in that operation by the defendants, under an agreement that the latter was to receive the lumber for all supplies advanced and liabilities assumed. *Thomas Brewer*, a witness called by the plaintiffs, testifies *that*, when the first note became due, he, as the agent of one of the plaintiffs, presented it to *Nash* and demanded payment; that *Nash* expressed surprise at being

called upon to pay the note, and said that the defendants had agreed to provide for it; and, a short time afterwards, told the witness, if the plaintiffs would wait for the payment of this first note until the second became due, the defendants would give a draft for both, which proposition was acted upon by the plaintiffs, but notice of its acceptance was not communicated to *Nash;* that, subsequently, the witness requested payment of the three notes of one of the defendants, which he declined to do, and also refused to accept a draft drawn on them by Nash, for the amount of the three notes, after they had become due, in favor of the plaintiffs.

The foregoing testimony, unless connected in some way with the defendants, was wholly inadmissible; but the plaintiffs' attempt so to do, and, for that purpose, introduce the deposition of *Nash*, who, after testifying to certain preliminaries as to the origin of the notes, and being called upon to pay the first, states that he subsequently had an interview with one of the defendants and informed him that the first note had been presented for payment; he replied, that it must be taken care of, but it "wan't best to be in a hurry." That it passed on until the second note became due, which he was requested to pay, as he had been the first; his reply was, that he "had no means of paying it, that the defendants would pay it, such was the understanding." Which fact was disclosed to the defendants, who then replied, "it is best to let it stand, they will not sue now; it is best to let it remain until the other note becomes due, and then we will give an acceptance to pay the three at one time—pay them altogether." Upon these facts being communicated to the plaintiffs, they replied, "if you can't do any better we shall have to submit." The facts, as thus presented, are somewhat similar to those disclosed in *Patterson* v. *Vose*, one of these same defendants, 43 Maine, 552; where the law relating to the subject of waiver of demand and notice is fully discussed, and the authorities cited. We think the case should have proceeded in the trial. As it is now presented by the plain-

tiffs' testimony, the presumption of waiver is in their favor, and they will be entitled to a verdict, unless that presumption is removed by the defendants.

Action to stand for trial.

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

INHABITANTS OF VEAZIE *versus* INHABITANTS OF HOWLAND.

Where supplies are furnished *occasionally* and not continuously, only one notice need be proved to enable the plaintiff town to recover for the supplies furnished three months before such notice down to the date of the writ; *provided* the action be commenced within two years next after the cause of action accrued.

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

ASSUMPSIT for supplies occasionally furnished to paupers having their settlement in the defendant town.

Writ dated Feb. 24, 1859.

The supplies commenced May 1, 1857, and were occasionally furnished until Feb. 8, 1859.

Notice dated June 22, 1857, answer June 27, 1857.

The defendants objected to a recovery because a new notice was not given of each instance of furnishing, when there was a lapse of time between the times of furnishing the same person.

The presiding Judge ruled that a new notice was unnecessary. Judgment was for the plaintiffs.

If the ruling was wrong, a new trial was to be granted on the question of damages.

J. A. Peters, for the plaintiffs.

WALTON, J.—Regarding the law as settled that when supplies are furnished a pauper continuously, one notice by the town furnishing them to the town chargeable is suffi-

cient, under certain circumstances, to authorize a recovery for a period of time commencing three months before the notice was given and ending at the date of the writ, provided the suit is commenced within two years from the time when the cause of action first accrues, the only question presented in this case is whether more than one notice is necessary when the supplies furnished during that time are not continuous, but only occasional. We think not. We think no inconvenience will result from holding that a single notice in such cases will be as effectual when the supplies are not continuous as when they are. This view of the law has been sustained by the Supreme Court of Massachusetts, and we think it is a reasonable one. *Attleborough* v. *Mansfield*, 15 Pick., 19. We must not be understood as determining that one notice will be sufficient in all cases. We only determine that one notice will be as effectual when the supplies are occasional as when they are continuous.

Judgment for plaintiffs.

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

INHABITANTS OF VEAZIE *versus* INHABITANTS OF HOWLAND.

By R. S., c. 24, § 24, expenses for the relief of paupers, "incurred within three months before notice given to the town chargeable, may be recovered by the town incurring the same, against the town liable, in an action commenced within two years after the cause of action accrued, and not otherwise."

When no answer is returned by the defendant town, the "cause of action" is deemed to "accrue" at the expiration of two months from the time the notice was given.

When an answer denying their liability is returned, the "cause of action" is deemed to "accrue" at the time the answer is received by the plaintiff town.

Cutler v. *Maker*, 41 Maine, 594, examined and overruled; *Robbinston* v. *Lisbon*, 40 Maine, 287; *Sanford* v. *Lebanon*, 26 Maine, 461; *Camden* v. *Lincolnville*, 16 Maine, 384; and *Belmont* v. *Pittston*, 3 Greenl., 453, reaffirmed.

Inhabitants of Veazie *v.* Inhabitants of Howland.

For every new action for supplies furnished by a town, a new notice must be given within two years and two months at most before the suit is commenced, even though a former action between the same parties for the support of the same pauper is still pending.

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

ASSUMPSIT for supplies furnished paupers having a settlement in the defendant town.

This is a second action between the same parties for supplies furnished the same paupers.

The writ is dated Dec. 2, 1862.

The items charged are of the following dates, viz.: March, May and Nov., 1860, and Nov., 1861, and Nov. 20, 1862.

Notices proved bore the following dates: April 6, 1860, Dec. 14, 1859, Feb. 24, 1859.

The plaintiffs proved that they commenced an action against the defendants, Feb. 24, 1859, for the support of the same paupers from May, 1857, to Feb. 8, 1859, which was duly entered and continued to the present term, when it was referred to the Court, who gave judgment for the plaintiffs for sum sued for; that the case was carried up, on report by the defendants, to settle the law; that the plaintiffs proved notices in that case of the following dates, which notices were by agreement to be considered as in proof in this case, viz.: June 25, 1857, Feb. 3, 1858, March 30, 1858, and Dec. 15, 1858.

That, on June 27, 1857, the defendant town answered the plaintiffs' notice of June 25, 1857, denying their liability, and contested the question of sttlement in the former action.

It was admitted that there were no supplies furnished from Feb. 8, 1859, — last item in former writ, — until March, 1860, — first item in the writ in this action.

The case was then continued on report, with the agreement that if upon the foregoing facts the action cannot be maintained for want of notice, plaintiffs were to become nonsuit, otherwise, the action to stand for trial.

J. A. Peters, for the plaintiffs.

Writ is dated, in this case, Dec. 2, 1862. The statute of limitations, where no answer was made, would be two years three months and sixty days. At all events, the four last items in the account are within the limitations. And these are supplies furnished *Melvin*, (Melvin Brawn.)

The notices given before the first suit are sufficient notice for the subsequent suit, the first call not having been responded to by *payment;* or by a *removal;* or *settled* by a judicial decision. *Augusta* v. *Vienna*, 21 Maine, 298.

There are two cases in *Massachusetts* which militate against this position. 4 Pick., 358; 14 Mass., 188.

But there *may* be this distinction between those cases and this case. From an examination of those cases, it is not clear that in the original actions the pauper's settlement was contested.

The reason given in the book discussions for the necessity of a notice would not seem to apply in this case. Because the defendant town may provide for the bill or remove the pauper. But what need of a notice to them for that purpose, when they have already refused to do either, and for the reason that they deny the settlement of the pauper in their town, and that question is in progress of contestation.

But the case at bar differs from the cases alluded to in another respect, which answers the objection upon which those cases were decided. It is said that the new notice was necessary, because the town would not know whether the pauper continued to be supplied after the suit was commenced. But here there is a *subsequent* as well as a *prior* notice. Here was notice in 1859 and in 1860. There was no need of continuing notices. The ones of 1859 and 1860, coupled with notices prior to the first suit, were all sufficient for all purposes till the question was settled.

The plaintiffs, therefore, having made out notice, they can recover so much of their bill as comes at least within three months and two years before date of writ.

WALTON, J. — Expenses for the relief of paupers, "incurred within three months before notice given to the town chargeable, may be recovered, by the town incurring the same against the town liable, in an action commenced within two years after the cause of action accrued, and not otherwise." R. S., c. 24, § 24. The cause of action is deemed to accrue, when no answer is returned by the defendant town, at the expiration of two months from the time the notice was given. If an answer is returned, denying their liability, the cause of action is deemed to accrue at the time the answer is received by the plaintiff town. If an action is commenced within two years after the cause of action thus accrues, the plaintiff town may recover, not only such expenses as were incurred before the notice was given, but such also as were incurred for the same paupers after the notice was given and before the date of the writ. This is allowed to avoid a multiplicity of suits and useless notices. But, if no suit is brought within the two years, the right to recover is barred, not only with respect to such items of expense as were incurred before the two years commenced running, but also with respect to such as were incurred within the two years.

These principles are decisive of the case now under consideration. The last notice to the defendant town was more than two years and a half before the action was commenced. It is clear, therefore, that it cannot be maintained. We are unable to distinguish it in principle from the case of *Robbinston* v. *Lisbon*, 40 Maine, 287. In that case the action was commenced more than two years after an answer was returned; and no new notice having been given, it was held that the action could not be maintained, although most of the expense sought to be recovered in that case, as in this, was incurred within two years after notice to the defendant town, and less than two years before the action was commenced. We regard this as a decisive authority against the right of the plaintiffs to recover in this action.

The case shows, that when this suit was commenced there

was a previous suit pending between the same parties for the support of the same paupers, in which the question of settlement was being litigated; but we do not think these facts ought to influence the decision in this case. Nor can the notices, on which that suit was based, nor the subsequent notices, none of them being within two years and two months before this suit was commenced, aid the plaintiffs' case. "The law is very explicit," says Chief Justice SHAW, "that, for every new action, a new notice must be given, even though a former action, between the same parties for the support of the same paupers, is still pending." (*Cummington* v. *Wareham*, 9 Cush., 591.) And, we may add, that such new notice must, in every case, be within two years and two months before the suit is commenced, or it will not be sufficient; and sooner, even, as we have already explained, if an answer, denying liability, is received in less than two months from the time the notice was given. In other words, the suit must be commenced within two years after an answer denying liability is returned, or, if no answer is returned, within two years after the expiration of the two months which the law allows the defendant town within which to return an answer, or it cannot be maintained. This suit was not commenced for more than two years and seven months after notice given, and consequently cannot be maintained.

We notice a discrepancy between the opinion in *Cutler* v. *Maker*, 41 Maine, 594, and several previous cases, in relation to the time when the two years limitation commences to run. In *Cutler* v. *Maker*, it is said to begin at the time of the delivery of notice that the expenses have been incurred, while, in *Belmont* v. *Pittston*, 3 Greenl., 453, and *Sanford* v. *Lebanon*, 26 Maine, 461, and *Robbinston* v. *Lisbon*, 40 Maine, 287, a different rule is laid down. The rule stated in *Cutler* v. *Maker*, appears to be the one adopted in Massachusetts, and is supported by the marginal notes of the reporter in *Camden* v. *Lincolnville*, 16 Maine, 384, and *Augusta* v. *Vienna*, 21 Maine, 298. But the marginal note

in *Camden* v. *Lincolnville*, is not only not supported by the opinion of the Court in the case, but is directly in conflict with it; and it seems surprising that such an error should have so long escaped detection. In *Augusta* v. *Vienna*, the Court remarked that a notice becomes inoperative after two years, which is undoubtedly true; but the Court were not then defining the time when the two years would commence running; that had been done in *Belmont* v. *Pittston* many years before, and the remark does not warrant the inference that the Court intended to overrule that decision and establish a new rule.

The correct rule, and the one by which the Court will be guided, is that stated in *Robbinston* v. *Lisbon*, 40 Maine, 287, supported by *Belmont* v. *Pittston*, 3 Greenl., 453, and *Sanford* v. *Lebanon*, 26 Maine, 461; namely, that when an answer denying liability is returned, the two years will commence running at that time; and when no such answer is returned, the two years will commence running at the expiration of two months from the time the notice was given.

The statement of a different rule in *Cutler* v. *Maker*, 41 Maine, 594, was undoubtedly an inadvertence, into which the learned Judge who drew the opinion was probably led by the erroneous notes of the reporter, before referred to, which are copied into Eastman's Digest without correction.

We have deemed it advisable to make this explanation to guard against any misunderstanding as to which rule the Court will be guided by in the future.

Plaintiffs nonsuit.

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

JOSEPH W. LOW *versus* BONAPART MARCO and LAURETTA MARCO, *his wife.*

(1.) By R. S., c. 61, § 1, when payment was made for property conveyed to a married woman from the property of her husband, or it was conveyed by him to her without a valuable consideration paid therefor, it may be *taken* as the property of her husband to pay his debts contracted before such purchase.

(2.) This section does not prescribe the *manner* in which "property, conveyed to a married woman from the property of her husband *may be taken* as the property of her husband.

(3.) It may be taken by levy or by process in equity, or by both.

(4.) By *levy*, when the title *has once been in the husband*, and he has conveyed it, directly or indirectly, to his wife without a valuable consideration, in fraud of his creditors.

(5.) By process in equity, without a levy, when the husband has never had any legal title, but it has been conveyed to the wife with a resulting trust for his benefit.

(6.) Or by levy *and* process in equity.

But where the husband never had any legal title, the creditor cannot acquire a legal title by a simple levy.

The maxim, — "*potior est conditio defendentis*," applies only where the plaintiff fails to establish any *legal* title.

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

WRIT OF ENTRY.

The action was referred to John Appleton, by rule of Court, with right to except.

The referee made the following special report: —

"I find that the title to the demanded premises was in Charles D. Gilmore and Calvin H. Whitney, who, on May 14, 1851, conveyed the same by deed to Abigail Hussey, wife of Franklin Hussey; that, on Dec. 8, 1863, said Abigail Hussey conveyed the same by deed of quitclaim to the demandant, both deeds being duly recorded.

"I find, therefore, the legal title to the demanded premises to be in the demandant.

"The tenant offered evidence, showing or tending to show,

that Franklin Hussey at the time of the conveyance to Abigail Hussey was insolvent; that the consideration for said conveyance moved from the husband, and that the conveyance was made to her to keep the same from the reach of the creditors of her husband; and that the facts were known to the demandant when he acquired the title of Abigail Hussey.

"It further appeared that Frederick A. Butman recovered judgment, at the Jan. term, D. C., 1851, against Franklin Hussey & als., for $57,69 debt, and $23,78 costs of suit, on a poor debtor's bond dated July 27, 1848, and signed by Hussey as surety. That, on March 23, 1853, levy was made on the premises in controversy as the estate of Franklin Hussey, on execution, *Butman* v. *Hussey & als.* That, on July 30, 1860, said Butman, by deed of quitclaim, conveyed to Calvin H. Whitney the title acquired by the levy, who, on May 4, 1863, conveyed the same to Lauretta, wife of Bonapart Marco, who entered with her husband into possession under said deed, and have since occupied the premises, all said deeds and levy being duly recorded.

"But, as I find the legal title in the demandant, I regard the facts proved, or offered to be proved, as constituting no legal defence. I therefore award, and this is my final award in the premises, that the demandant recover seizin and possession of the premises set forth in the writ, and costs of reference," &c.

To the acceptance of the report, the defendants objected; contending, as matter of law, that the facts set forth in the report constituted a defence to the action.

The presiding Judge overruled the objection and ordered the report to be accepted; to which the defendants excepted.

A. L. Simpson, for the defendants.

C. P. Stetson, for the plaintiff.

KENT, J.—The referee finds that the legal title to the premises demanded is in the demandant. This fact is clear

upon the case as stated in the report. He is, therefore, entitled to judgment, unless the defendant shows a better title, or some legal reason why the legal title should not prevail.

The evidence offered by the defendant, it is to be assumed in this hearing, establishes these facts, — that the conveyance to Abigail Hussey was made on the consideration of payment by her husband, who was insolvent at the time, and for the purpose of keeping the property out of the reach of the creditors of the husband, and that these facts were known by the demandant when he acquired the title from the wife.

These facts bring the case within the provisions of the R. S., c. 61, § 1, which declares that, in such a case, the land "may be *taken* as the property of the husband to pay his debts, contracted before such purchase." The case further shows that a creditor of the husband did, subsequently, levy on the land, so conveyed to the wife, as the property of the husband, and that these defendants are in holding and claiming under that levy, by regular conveyances.

The question, in this case, is, — can the defendants resist the legal title, or must they resort to a court of equity to enforce their equitable rights?

It is a well established principle that an equitable estate will not sustain a writ of entry. *Crane* v. *Crane*, 4 Gray, 323; *Chapin* v. *U. Society*, 8 Gray, 580.

But the defendants contend that, being in possession, they cannot be dispossessed, even by the holder of the legal title, in a suit at law, if the conveyance was in fraud of creditors or the property is held under a resulting trust in favor of the husband. The argument is, that although they might not be able to maintain a writ of entry, they may defend against one. But the question, as presented, is confined entirely to the legal rights of the parties, and the plaintiff shows a legal right. It is true that, in some cases, "*potior est conditio defendentis*," but that is where the plaintiff fails to establish any legal right. However defective the title or claim of the defendant, he cannot be ousted from his actual possession,

unless the demandant shows a legal title to the premises. But when he does show such title, the defendant cannot resist it, unless he, on his part, shows a legal right to retain it. It then becomes a question of the superiority of the titles at law, and we can see no such superiority in the defendant's title, simply because he is in possession, and is resisting the plaintiff's claim. His advantage is, that he may rest without offering any proof of his title or claim, until the plaintiff has, at least, made out a *prima facie* title. But when he is put upon his defence, by such proof, he must overcome his adversary by establishing, on his part, a better title or right. *Howe* v. *Bishop*, 3 Met., 28.

The defendants cite and rely upon the case of *Goodwin* v. *Hubbard*, 15 Mass., 210. This case has been much questioned. (See notes on that case in Rand's edition of Massachusetts Reports.) It is not confirmed, but manifestly questioned in *Howe* v. *Bishop*, above cited. It was decided before the equity powers of the Court had been enlarged, and was manifestly one of those cases, where the Court attempts to do what appears to be right and justice, by expanding the strict rules of common law in relation to real actions beyond their true limits. It has never been confirmed, but often doubted and denied. It is opposed to the whole current of authorities, and we have no doubt that, when the question distinctly arises, it will be overruled.

The extent of an execution upon the real estate of a wife, by a creditor of the husband, where the husband never had any legal title to the premises, although the legal title is held as a resulting trust for his benefit, does not vest the legal estate in the creditor. *Dockray* v. *Mason*, 48 Maine, 178; *Howe* v. *Bishop*, 3 Met., 28.

The defendants further say, that, however this may be at common law, by the express provision of the statute, before recited, the creditor may acquire a legal title, in a case like this, by a levy alone. The argument is, that this being a case where the payment was made by the husband, for the property conveyed to the wife, and the statute pro-

viding that in such a case the land may be "*taken*," as the property of the husband to pay his prior debts, it may be taken directly by a levy of an execution on the legal estate, which is thereby, without further proceedings, transferred to the creditor.

This would be so, *where the title had once been in the husband*, and he had conveyed it, directly or indirectly, to his wife, without a valuable consideration, in fraud of his creditors. In such a case, and in similar cases, the title has never legally passed from the debtor who held it, as against creditors, and therefore it may be levied upon, as still in the debtor. *Howe* v. *Bishop*, before cited.

But where the debtor never had any legal title, no legal title can be acquired simply by a levy. The creditor, however, is not without remedy. After such levy, a court of equity will aid the creditor to obtain the title, or the property, upon application. It will do this, after all legal measures have been taken to obtain the legal title by levy. *Webster* v. *Clark*, 25 Maine, 313; *Dockray* v. *Mason*, 48 Maine, 178, and several other cases. It has been held, also, that, where the legal title never was in the debtor, the judgment creditor may reach and secure the property in equity, without *any levy* on the premises. *Corey* v. *Green*, 51 Maine, 114.

The language of the statute is, that the land "may be taken as the property of her husband to pay his debts." How taken? The statute is silent as to the mode. If there were no other mode than by a levy, it might be argued, with great force, that the statute intended to give a certain and effectual remedy, and that this being the only one provided by law, however inconsistent with established principles in reference to the transfer of legal titles, it must be made to answer the end contemplated, or the object of the statute would be entirely defeated. But there is a remedy in equity, ample and practical. It was existing when the statute was passed, and the Legislature must have had it in view in its action. The statute, as it will be observed, does not declare that it may be taken *by levy on execution*, as his pro-

perty. It simply declares, as a principle of law, that it may be taken to pay his debts by his creditor, leaving the mode and manner of taking to be determined by the existing law and practice. It gave the right, but did not prescribe any particular remedy or process by which the right could be enforced.

This is the view taken of this statute by this Court, in the recent case of *Dockray* v. *Mason*, 48 Maine, 178, and we think it is correct.

If the defendants have equitable rights, they can be enforced by a bill in equity. *Exceptions overruled.*

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

SAMUEL VEAZIE *versus* CITY OF BANGOR.

Where the plaintiff agreed in writing with the defendants, to keep certain specified roads in good repair, for the term of three years, "to the acceptance and approval of the mayor and the joint standing committee on streets and highways for the time being:" — *Held*,

1. That such "acceptance and approval" was a condition precedent to any right to recover payment;

2. That the use of the roads by the public was no acceptance or waiver on the part of the city; and

3. That the plaintiff cannot recover, either under a count on the special contract, or on *quantum meruit*, without procuring, or attempting to procure, such acceptance and approval.

If there be any legal objection to the Court, it should be seasonably made; and proceeding to trial without objection, if known, is a waiver of it.

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

ASSUMPSIT.

The action was before this Court in 1863. *Vide* 51 Maine, 509.

The writ contained a count upon the contract, and also a *quantum meruit*.

Since the former trial, the plaintiff amended his count

upon the contract, in accordance with the opinion of the Court, as reported above. After the plaintiff's testimony was all in, there being no evidence that he ever procured or attempted to procure an acceptance and approval of the roads according to the contract, the presiding Judge, on motion, ordered a nonsuit, and the plaintiff excepted.

Knowles & McCrillis, for the plaintiff.

Rowe & A. L. Simpson, City Solicitor, for the defendants.

DAVIS, J. — Upon the plaintiff's evidence in this case a nonsuit was ordered by the Court. It is suggested in argument that the Judge presiding at the trial was interested, and was therefore incompetent to act. No question of that kind appears to have been raised, by plea, or motion. If there was any legal objection to the Court, it should have been seasonably stated; and proceeding to a trial without so doing, if it was known, was a waiver of it. Nothing is before us except what appears by the bill of exceptions; and no question of competency or jurisdiction is therein presented.

In our former opinion authorities were cited sustaining the position, that if a person wilfully or purposely neglects or fails to perform a contract made by him, he cannot recover anything for a partial performance. Nothing less than an intention, in good faith, to perform it, according to its terms, will enable him, in case of failure, to recover the value of what he has done, deducting the damages caused by any deviation on his part. *Bonesteel* v. *City of New York*, 6 Bosworth, 550. This question has recently been before the Supreme Court of the United States; and the doctrine stated was there sustained. *Dermott* v. *Jones*, 2 Wallace, 1.

The plaintiff agreed to keep certain specified roads in good repair for the term of three years, "to the acceptance and approval of the mayor and the joint standing committee

on streets and highways for the time being." This was a substantive part of his contract. The mayor and committee were not parties to the contract, but were persons agreed upon by the parties to decide whether the roads had been kept in good repair. Their acceptance and approval was a stipulated condition precedent to any right to recover payment. The use of the roads by the public was no acceptance or waiver on the part of *the city*. The plaintiff having never procured, nor attempted to procure, such acceptance and approval, the nonsuit was properly ordered.

Exceptions overruled.

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

THEODORE PAINE *versus* RUFUS DWINEL *& al.*

An acceptance payable to order is *prima facie* evidence of payment of the account for which it is given.

This may be rebutted.

As where the vendor of chattels ignorantly takes negotiable paper, not binding on all the vendees, for the price.

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

The facts sufficiently appear in the opinion.

Rowe, for the plaintiff.

J. A. Peters, for the defendant Dwinel.

APPLETON, C. J.—On Oct. 24, 1862, the defendants in the present suit entered into an agreement "to do business for the term of one year from the date hereof, at Port Norfolk, under the name of E. S. Howe, and to be jointly interested in the profit and loss."

One clause in said agreement was in these words:—"It is distinctly understood and agreed that neither party shall

sign, indorse or give any paper binding the other, without the mutual consent of the other in writing. The said Dwinel agrees to furnish lumber from time to time for the benefit of the company, and said Howe is to guaranty all sales. Said Howe is to collect and sell for cash or prompt pay, and to purchase from no source without his consent, *save from Theodore Paine, of Bangor, such shingles as he may need for retail trade.*"

The defendant Howe, under the agreement between him and his partner, purchased the shingles sued for in one of the counts in the plaintiff's writ, and gave the acceptances of E. S. Howe for the same. This action is for the shingles and the acceptances given by him therefor.

It is urged that the plaintiff cannot recover on the acceptances, because they were unauthorized by the agreement between the parties. It is, however, unnecessary to determine whether this be so or not.

By the express terms of the agreement, Howe was authorized to purchase shingles of the plaintiff on joint account. The case finds the purchase was made within the terms of this agreement. Dwinel was therefore bound thereby and is liable for the amount.

An acceptance or note, payable to order, is *prima facie* evidence of payment of the account for which it is given. But this may be rebutted. Upon the sale of the shingles sued for, both of the defendants were liable to the plaintiff for their price. If the acceptances are to be deemed as payment therefor and not binding on Dwinel, as his counsel contend, then the plaintiff will have inadvertently lost, in part, the security which he had when the shingles were sold. Of this he was ignorant when he received the acceptances in suit.

When negotiable paper is taken in ignorance of the facts, or under a misapprehension of the rights of the parties, as when the negotiable paper is not binding on all the parties previously liable, the presumption of payment is rebutted. *French* v. *Price*, 24 Pick., 13; *Fowler* v. *Ludwig*, 34

Maine, 455. It may be otherwise where a creditor, with full knowledge of all the facts, takes the security of a part of his debtors. In *Milledge* v. *Boston Iron Co.*, 5 Cush., 158, it was held, when a party gave his promissory negotiable note for a simple contract debt, that the legal presumption was that such note was accepted in discharge of the pre-existing debt, but this might be disproved by showing that it was not the obligation of all the parties originally liable, and that the party receiving the same was ignorant of such fact. To the same effect is the case of *Butts* v. *Dean*, 2 Met., 76. The general doctrine is, that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired. In all cases, the presumption of payment is liable to be rebutted. *Page* v. *Hubbard*, Sprague, 335. These positions are fully affirmed by this Court, in *Kidder* v. *Knox*, 48 Maine, 551.

It is unnecessary to consider the general liability of Dwinel under his contract of co-partnership, or whether Howe, in his purchases of the plaintiff, was specially limited to cash. The shingles were bought in accordance with the express terms of the agreement entered into by these defendants, and the plaintiff is entitled to recover their price.

Defendants defaulted.

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

INHABITANTS OF HOWLAND *versus* INHABITANTS OF BURLINGTON.

By R. S., c. 24, § 1, a married woman has the settlement of her husband, if he has any in the State.

Where a man, having his settlement in the defendant town, married a wife in 1844, and, in 1845, abandoned her and removed to Ohio, where he has since remained; and, in 1846, the wife married another man by whom she had several children, for whose support, as well as her own, this action was brought by the town in which, after the second marriage, the parties with

their children resided seven consecutive years; and, in 1849, the former husband obtained a divorce in Ohio; — *Held*,

1. That the former marriage established the settlement of the pauper mother in the defendant town;

2. That the second marriage being void, her settlement remained unchanged thereby;

3. That, notwithstanding the abandonment, she could neither by marriage or residence acquire a new settlement, while her former marriage relations remained unaltered;

4. That the children being illegitimate, had the settlement of their mother at the time of their birth: and

5. That the divorce would not affect the wife's previous settlement.

Where a wife married a second husband after being deserted by a former, who subsequently obtained a divorce, this Court will not presume that there was a remarriage of the second husband and wife, after the divorce of the former, in the absence of proof of knowledge of the divorce on their part, especially when all of the events are of recent date.

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

ASSUMPSIT for supplies furnished mother and children.

The facts appear in the opinion.

McCrillis, for the plaintiffs.

J. A. Peters, for the defendants.

If the woman was not legally married in the second attempt, then she gained a settlement in her own right by five years residence in Howland.

The *general* doctrine that a married woman can gain no settlement, during coverture, where the husband gains none, is founded on a presumption that the one actually belongs where the other is living; that such place is the *home* of both. But, in this case, the presumption is overcome. There was a complete actual separation, and the home of the one was not the home of the other.

It is also held that minor children cannot have a settlement distinct from the father. *Hallowell* v. *Gardiner*, 1 Maine, 93. But this is rather the statement of a *presumption* that a child belongs where the parent does.

But a father can sever the parental tie so that a minor child can acquire a separate residence. And why cannot, upon the same principle, the marital tie be severed by an

abandonment, so as to allow a wife to acquire an independent settlement?

A husband can acquire a residence in a place where his wife does not unite with him. 11 Maine, 190, and cases cited.

At common law an abandonment of a married woman by a husband, removing from the State, restores her to many rights, duties and obligations of a *feme sole.* 4 Met., 478. But, if his abandonment would not leave her to acquire a new settlement, then it is because an abandonment *in fact* is not one *in law;* and, in such case, her residence would be his, and *thereby* a settlement was acquired.

The residence of the wife is evidence of the domicil of the husband. 11 Maine, 190; 13 Maine, 225.

There are cases where it has been decided that a woman cannot control the domicil of a husband, when he has abandoned her, and lives apart from her, *in this State.* But how is it when the deserting party lives out of the State? No question thereby arises of two residences here. Must he not be considered as having some domicil here? Is not that where his legal wife may be? Is not *all* the domicil he has here; is not *such* as he has, in the town where his wife lives?

It would seem inconsistent that she cannot acquire a residence in his absence, either for herself or for him. If he cannot be separated from her, nor she from him, and he has no residence in this State independent of her, then it must, in the eye of the law, be *with* her; and, while *she* lived in Howland *he* lived there. He was nowhere else in this State.

It may be doubted if the divorce in Ohio was a good divorce here, the cause not existing there. In such case her residence would still longer be his in Howland.

But, having been married to Kimball, the moment her first husband became divorced the second marriage became a valid one.

Marriages are *usually* consummated *after* formal ceremonies of contract. This was celebrated and consummated

before. It would be public policy to uphold the second marriage, after the impediment of the first marriage has been removed. This construction would defeat the plaintiffs' claim. This is like the case of a woman who married upon information that her husband is dead, who was not dead at the date of the second marriage, but dies soon after, making her marriage good.

But, if this is not so, then arises the question whether, upon the divorce in 1849, she was not remitted back to the residence which she had in *Lowell*, at the time of her first marriage. The statute reads, "a married woman has the settlement of her husband." But she can no longer have it after he ceases to be her husband. The relation upon which the settlement subsists has been destroyed. The effect of a divorce is to *dissolve* the marital tie and all its consequences. During the marriage relation she has his settlement, because "*they are one in law, and he is that one*," her own settlement is in abeyance. A "married" woman has, &c. But she is not married to him.

Upon the point, that the second marriage was good from the divorce and dissolution of the first one, there are some analogies and authorities.

A second marriage in New York, by a woman whose husband has been absent and unheard of for five years, is not legal, although it is purged of the crime of bigamy, under their statute. *Fenton* v. *Reed*, 4 Johns., 52. But, from a continued cohabitation, *after* the death of the former husband, a subsequent marriage may be inferred. Same case, 4 Johns., 52; *Jackson* v. *Claw*, 18 Johns., 346; *Rose* v. *Clark*, 8 Paige, 574. And this though no formal ceremony or regular solemnization. *Hyde* v. *Hyde*, 3 Bradford, 509; N. Y. Surrogate Court, Abbott's N. Y. Digest, vol. 3, p. 772, item 32, under title of marriage; *Hicks* v. *Cochran*, 4 Edw. Ch., 107; 11 U. S. Dig., 260, article on item 106.

A second marriage is void *during the lifetime* of a first husband. *Kenley* v. *Kenley*, 2 Yeates, 207; 2 U. S. Dig., p. 510, item 353.

Where a person marries under the age of consent, at common law, the marriage is void, but valid, by cohabitation continued after that age. 2 Kent's Com., 78.

In all civil cases, (save crim. con.,) marriage may be inferred from circumstances. Cohabitation is enough. Believing themselves man and wife, and living as such, may be sufficient. *Taylor* v. *Robinson*, 29 Maine, 323.

In this case, Kimball and Mrs. Neal were openly married; have ever since cohabited together; have numerous children; this day believe that they are lawfully married; and, so notorious has been this cohabitation, that Howland once paid a pauper bill on their account, without even knowing that she had another husband.

But, further, if their children are illegitimates of Mrs. Neal, they follow her own settlement and not her husband's. That is, such settlement as she has and did have, and would have, if there was no relation of husband and wife; otherwise they are thrown virtually on the husband's settlement. And especially should this be so as far as concerns the children born after the divorce.

But may not all these children be the legitimate children of the second husband, Kimball? Are they not "acknowledged" and "adopted" into the father's family? See § 3, c. 75, R. S.

APPLETON, C. J.—This suit is for supplies furnished Mary Jane Neal, *alias* Kimball, and her minor children.

It is admitted that the pauper mother, in 1844, married David B. Neal, who had his settlement in the defendant town. By this marriage the wife, by the express provisions of R. S., c. 24, § 1, acquired the settlement of her husband. This settlement remains until a new one is gained.

In 1845, Neal deserted his wife and removed to Ohio, where he has since remained. In 1846, Mrs. Neal married one Abram T. Kimball, by whom she had the children for whose support, as well as her own, this action is brought.

After their marriage, Kimball and wife resided for more than seven years in the plaintiff town.

The second marriage being illegal and void, the settlement of the mother remained unchanged thereby. It still continued that of her first and legal husband. Notwithstanding his abandonment, his wife could neither by marriage nor by residence acquire a new settlement, while those relations remained unaltered. *Pittston* v. *Wiscasset*, 4 Greenl., 293; *Augusta* v. *Kingfield*, 36 Maine, 235.

The children, being illegitimate, "have the settlement of their mother at the time of birth." R. S., c. 24, § 1.

In 1849, Neal obtained a divorce from his wife, on the ground of adultery with Kimball. This divorce was granted in Ohio, of which State he was a resident. But this would not affect the wife's previous settlement.

It is insisted that, after this divorce of Neal, it may be presumed that a new marriage has taken place and, consequently, that the children of the pauper mother, born since the divorce, are legitimate.

It does not appear that Kimball, or his so called wife, were aware of the divorce obtained by Neal. If not, no reason would exist for a second performance of the marriage ceremony. The parties had been once married, and a repetition could not reasonably be presumed without proof of knowledge on their part of the fact of a divorce, which alone would lead to such second marriage. Without such knowledge, a second marriage would not be more likely to take place at one time than another—after than before the divorce. The paupers are residents of the county. The facts are recent. The fact of a second marriage is easily susceptible of proof. The parties to it are readily accessible. The fact is important for the defence. The entire absence of any evidence tending to show a second marriage, or of a knowledge on the part of Kimball and his, so called, wife, of the facts which would induce such marriage, are no slight proofs of its non-existence. The original cohabitation is shown to have had an illicit origin. No proof is offered to

show that a cohabitation, unlawful at its commencement, has ceased to be so. After a long lapse of time and the death of witnesses, courts from necessity may indulge in presumptions. But it would hardly be deemed reasonable to resort to presumption when the events to be proved are of recent occurrence, and the witnesses, by whom the truth could be established, are present in Court, or, if not present, when by reasonable diligence their presence could be obtained, and the facts be ascertained by the simple and obvious process of asking for them. *Defendants defaulted.*

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

JAMES G. HALL *versus* INHABITANTS OF CLIFTON.

By R. S., c. 24, § 32, towns are to pay expenses *necessarily* incurred for the relief of paupers, by an inhabitant *not liable* for their support, after notice and request to the overseers, until provision is made for them.

By § 9, the father and mother, grandfather and grandmother, children and grandchildren, by consanguinity, living within the State, and of sufficient ability, are to support persons chargeable in proportion to their respective ability.

A grandfather not of sufficient ability to support his grandchild, in whole or in part, stands in the same position as other inhabitants of the town in which he resides.

If otherwise within § 32, he may recover of the town for the expenses necessarily incurred in relieving his grandchild; and, if he has hired him kept, the expenses *actually* paid out.

If of sufficient ability to contribute partial support, he can recover only that part of the support which he cannot supply.

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

ASSUMPSIT for supplies furnished a pauper of the defendant town by an inhabitant thereof.

The alleged pauper was a grandchild of the plaintiff, about four years of age, residing with him.

The pauper's father was dead, and the plaintiff hired the

pauper to be kept by the pauper's mother, who was remarried and lived in another place. A portion of the sum sued for included the expense paid the mother.

The defendants contended that the plaintiff could not maintain this action, because he was a person liable for said child's support by virtue of R. S., c. 24, § 9, whether he was of sufficient ability to support the child or not; but, if he could maintain it, he could not recover for hiring him kept by his mother.

The presiding Judge instructed the jury, that the grandfather might maintain the action if they were satisfied he was not of sufficient ability within § 9; that, if he was of sufficient ability to contribute partially only, he could recover only for that part of the support which they found he had not sufficient ability to supply; and that he might recover for the amount actually paid his mother, if he was entitled to recover otherwise.

The verdict was for the plaintiff, and the defendants excepted.

J. A. Peters, for the defendants.

Mace, for the plaintiff.

APPLETON, C. J. — By R. S., c. 24, § 32, "towns are to pay expenses *necessarily* incurred for the relief of paupers by an inhabitant *not liable* for their support, after notice and request to the overseers, until provision is made for them."

By § 9, "the father and mother, grandfather and grandmother, children and grandchildren, by consanguinity, living within the State and of *sufficient ability*, are to support persons chargeable, in proportion to their respective ability."

The plaintiff is an inhabitant of the defendant town, and grandfather of the pauper whom he relieved. If of *sufficient ability* he would be liable in whole or in part for the support of his grandchild. If not, but in all other respects within the provisions of § 32, he may well maintain this

action notwithstanding his relationship. It could never have been the intention of the Legislature to prevent kindred from aiding each other; nor, if they were not of sufficient ability, to prohibit their recovering for such supplies as they might furnish.

If not of sufficient ability, they stand in the same position as other inhabitants of the town in which they reside. If, being of sufficient ability, they furnish aid to those whom they are bound in law to support, and seek to recover compensation for the same, such facts will constitute a good defence in whole or in part.

Whether there was fraud or collusion on the part of the plaintiff was a question for the jury. As there has been no motion for a new trial, their decision is final.

Exceptions overruled.

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

JOSHUA DOWNES, JR., *versus* MICHAEL REILY.

In an action of debt against the surety of a bond given by the principal to procure his release from arrest on mesne process, under R. S., c. 113, § 16, evidence of the insolvency of the principal is admissible.

Such bond is a "civil obligation," within R. S., c. 77, § 8, clause 2.

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

DEBT.

The case was referred, under the statute, to the presiding Judge, with right to except.

The presiding Judge admitted evidence of the insolvency of the principal and rendered judgment for nominal damages, and plaintiff excepted.

The facts appear in the opinion.

Mace, for the plaintiff.

Sanborn, for the defendant.

KENT, J.—The facts in this case are, that the bond in suit was given for the release of Cates, the principal, from arrest on *mesne process*, as authorized by § 16, c. 113, R. S. Judgment for debt and cost was obtained, but there was no attempt on the part of the debtor to make a disclosure, at any time. The plaintiff is clearly entitled to judgment. The presiding Judge, to whom the case was referred, allowed evidence to be given of the insolvency of Cates, and thereupon gave judgment for one cent damages. To the ruling, admitting the evidence, the plaintiff excepts.

Is this one of the bonds from the penalty of which this Court can give relief under c. 77, § 8? It is a "civil contract and obligation;" and there is no statute provision requiring a judgment in such a bond to be for a specified sum. There is such a requirement in actions on bonds given *on execution*, and in which it appears that the debtor has failed to fulfil the conditions. The judgment, in those cases, *must* be for the amount of the execution and certain fees and interest. c. 113, § 38. In such cases there is no chancery power in this Court, unless the case is brought within § 48, which authorizes the Court or jury to assess only the actual damage, if the oath has been taken before competent magistrates, although there may have been irregularities and deficiencies in some of the proceedings.

It is not contended that this case comes within the provisions of § 48. It clearly does not. Neither does it come within § 38, for it is not "such bond" as is therein specified. It stands, then, as a bond given with conditions, that the principal debtor shall do certain acts within a specified time. He has failed to do them. There is no provision in the statute which fixes any certain judgment, if he fails to do them. The case therefore stands within the general provision giv-

ing power to this Court "to relieve from forfeiture, in civil contracts and obligations."

It has been so held in numerous cases in this State. *Goodwin* v. *Huntington*, 17 Maine, 74; *Wilson* v. *Gilles*, 15 Maine, 55; *Burbank* v. *Berry*, 22 Maine, 483, in which the Court consider the effect of the provision in the statute, that like proceedings shall be had, and like consequences shall result therefrom as provided in case of a debtor after *arrest* on execution. The words in the Revised Statutes of 1857, "as in *disclosures* on bonds given on execution," are still more definite. § 17, c. 113; *Waldron* v. *Berry*, 22 Maine, 486; *Sargent* v. *Pomroy*, 33 Maine, 388.

Woodward v. *Herbert*, 24 Maine, 362. In this case the Court recognizes the distinction between a bond on execution and one on *mesne process*. Of the latter it is said, that "it only obliges the surety to cause the principal to do a personal act, and, in case of failure, to make compensation in damages, wholly unliquidated and incapable of estimation before the effect produced by the failure of performance of the personal act can be perceived."

Whether any further provisions are required to give a creditor a practically effective right to compel a disclosure, after a bond is given on mesne process, is for the Legislature to determine. *Exceptions overruled.*

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

ISAAC M. BRAGG *& al. versus* GEORGE A. PIERCE.

By R. S., c. 90, § 20, if any person, to whom a sum of money is tendered to redeem mortgaged lands, receive a larger sum than he is entitled to retain, he shall refund the excess.

An agreement or accord which is to operate as a satisfaction of an existing liability, must, before it can have that effect, be fully *executed*.

It is merely *executory*, so long as by its terms something remains to be done in the future.

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

ASSUMPSIT, to recover back excess of money tendered on a mortgage debt more than was due.

The plaintiff offered to prove that, on August 10, 1856, plaintiff Bragg took a deed of an undivided parcel of real estate from Waldo T. Pierce, and gave back his mortgage to secure two notes, one for $586, on 15 months; and one for $600, on 27 months, payable to said Pierce or order, and dated April 10, 1856; that Pierce urged as an inducement, that, if Bragg would make the purchase, the advance payment of $1000 should be used to take up prior paper on which Bragg was liable, and that he would offset and take in payment of the mortgage notes given, any demands which said Bragg could buy against him, alleging that he could probably purchase at a discount; that, relying on this, the conveyance was made; that Bragg got the $1000 of the other plaintiff, to make the advance payment, with the knowledge and acquiescence of Pierce, that he would be interested in a half purchase; that the $600 note was negotiated before maturity, to a *bona fide* holder, by Pierce, and Bragg paid it to the holder; that, in the summer or fall of 1857, Bragg having an opportunity to buy, at a discount, a demand of Charles Buck, against said Pierce, he named it to said Pierce, who assented to the purchase and promised that the note should be paid by an equal amount to be indorsed on said demand; that, after Bragg had made the purchase, relying on the agreement, he

went to said Pierce with the demand, and requested the arrangement agreed upon to be made and the note given up; that Pierce *said he would do so*, but deferred doing it then, because of sickness; that the note and mortgage were in said Pierce's hands till after the maturity of the note; that, after that, and after the interview before named, the note was negotiated by said Pierce to the defendant as collateral to an antecedent debt; that Pierce died, and his administrator, on April 23, 1860, assigned said mortgage to said defendant; that said defendant had commenced a foreclosure of the same, which was about expiring; that plaintiffs demanded a release of defendant, and tendered one to be signed, which was refused; that plaintiffs then demanded an account, which defendant seasonably rendered on July 21, 1864, claiming amount of said note and no more, to wit, $879; that, on August 19, 1864, the plaintiffs tendered the defendant $883,50, with notice that the same was done under protest and belief that nothing was due or collectable; that it was tendered only to redeem the mortgage and save the risk of a forfeiture; that plaintiffs would sue to recover back whatever sum he should receive; reciting to the defendant, substantially, the facts as herein before set forth, and told him, under such circumstances, he could, at his peril, take what he pleased. Defendant replied, that he should take all that was offered, and took the $883,50, and, afterward, gave up the note and discharged the mortgage.

The defendant, without admitting the correctness of the plaintiffs' statement, objected to the evidence and contended that the facts offered would not support the action.

The parties thereupon agreed that, if proof of these facts would not entitle the plaintiffs to maintain the action, a nonsuit was to be entered; otherwise the action to stand for trial.

J. A. Peters, for the plaintiffs.

A. W. Paine, for the defendant.

WALTON, J. — The Revised Statutes of 1857, (chap. 90, sect. 20,) provide that, if any person to whom a sum of money is tendered to redeem mortgaged lands, receives a larger sum than he is entitled to retain, he shall refund the excess. The plaintiffs tendered to the defendant a sum of money to redeem certain mortgaged lands, protesting at the time that nothing was due, and notifying the defendant that the tender was made to save the risk of a forfeiture, and that an action would be commenced to recover back whatever sum he should receive, and that he could take at his peril so much of the sum tendered as he pleased. The sum tendered was $883,50, and the defendant took the whole of it. This action is to recover back this money, in whole or in part, upon the ground that nothing was due upon the mortgage; or, if anything was due, that the defendant took more than he is entitled to retain.

The case is this: — The plaintiffs offer to prove that one W. T. Pierce, the then owner of the note, to secure which, the mortgage was given, promised one of the plaintiffs, (Bragg,) that if he would purchase a certain demand against him, the note should be paid by an equal amount to be indorsed on the demand, and that Bragg, relying upon this promise, purchased the demand, and requested Pierce to have the indorsement made and the note given up; that Pierce said he would do so at some future time, but declined to do it then because he was sick; that Pierce afterwards, in violation of his promise, negotiated the note to the defendant, it then being over due. The plaintiffs claim that the agreement between Pierce and Bragg, and what was done in pursuance of it, was a payment or satisfaction of the note, — not an accord *executory*, but an accord *executed;* and the question is whether this view of such an agreement is correct. We think it is not.

The law is well settled, that an agreement or accord which is to operate as a satisfaction of an existing liability, must, before it can have that effect, be fully executed. If it is

merely executory, (which it must be, so long as by the terms of the agreement something remains to be done in the future,) it will not be sufficient. *Cushing* v. *Wyman*, 44 Maine, 121, and authorities there cited.

The agreement between Pierce and Bragg was never fully executed. The note was not surrendered by Pierce, nor was the amount due upon it indorsed upon the demand purchased by Bragg. Both demands remained in full force, and in the possession of each party, neither being cancelled in whole or in part by the other. The note being transferred to the defendant before the agreement for an accord and satisfaction was fully executed, (no notice to him of the agreement being shown) he was entitled to receive and retain the amount due upon it.

But the plaintiffs claim that, if the note was not satisfied, the defendant took a larger sum than was due upon it, and that they are entitled to recover back this excess, if no more. The note was for $586, and was dated April 10, 1856. Interest from that date to Aug. 19, 1864, when the tender was made and accepted, would amount to $293,88; which sum added to the principal would make the whole amount due, $879,88. The defendant took $883,50, and therefore has an excess in his hands of $3,62, which, by virtue of the statute already referred to, the plaintiffs are entitled to recover, — a sum in itself insignificant, but of some importance in its influence upon the question of costs. The action therefore must stand for trial.

Action to stand for trial.

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

BARROWS and TAPLEY, JJ., concurred in the result and expressed their views in the following opinion drawn by

TAPLEY, J. — I concur in so much of the opinion as concludes in ordering the action to stand for trial. The case,

as now presented, I regard as exhibiting strong equitable claims, and one which ought to be sustained if it can be upon legal grounds. The proof offered, we must consider actually existing; if true, it exhibits on the part of Waldo T. Pierce gross fraud upon this plaintiff, and such as finds no support in courts of law or equity.

The case finds that the note and mortgage were in the hands of Waldo T. Pierce "*till after it was due*," and was then negotiated to the defendant, not in the usual course of trade, but as collateral security.

The defendant, then, can stand in no better position than Waldo T. Pierce would, if he was living and a party to the suit.

Waldo T. Pierce agrees with Bragg, as an inducement to him to enter into the purchase, "*that he would offset and take in payment of the mortgage notes given, any demands which Bragg could buy against him.*" Bragg found an opportunity to purchase a demand and went and named it to Pierce, "who assented to the purchase, and promised, *that the notes should be paid by an equal amount* to be indorsed on said demand." In pursuance of this arrangement Bragg made the purchase, and brought the demand and tendered it to Pierce. This, as between Bragg and Pierce, operated as a *payment* to the amount of the demand purchased, and, in a suit between them, would have been so treated.

Payment was in no wise dependent upon the *indorsement* of the *payment*, upon the note, nor upon the *surrender* of the note.

Neither the indorsement or the surrender makes the payment. They are the mere evidence of payment.

The indorsement or surrender, if made, are made because a payment *has already* taken place. When Bragg paid for the demand he did it in pursuance of the *assent and direction* of Pierce; that direction was to buy the demand, and "*the note should be paid by an equal amount.*" The parties then agreed to the application. This proceeding relates to

a particular demand and stands upon the agreement made with reference to that, which is substantially, "purchase the demand and the notes shall be paid by an equal amount."

If this were not sufficient, it appears to me there has been a clear and distinct recognition of it as a payment subsequent to its purchase.

Bragg having purchased the demand in accordance with this agreement, goes with it to Pierce and requests the note to be given up. Pierce does not deny it is a payment, but distinctly recognizes it as such, by saying he will give up the note, but defers doing it then on account of his illness. He deferred *giving up the note*, not deferred *allowing it as payment*. This he distinctly allowed by saying he *would* give up the note. There was no dispute or difference of opinion between the parties as to the effect of that purchase on the note. Both seem to have understood it as a payment of so much. Whether its amount was sufficient to extinguish the note, might have required calculation, which, on account of the illness of Pierce, was deferred.

Here was a distinct application of payment by Bragg, and assent and recognition by Pierce, and neither could change it afterward without the consent of the other, and, if Waldo T. Pierce had brought an action upon his note, upon the facts here reported, there is no principle of law or equity, that would have allowed him to avoid this payment, made by his *express assent and procurement*. It should be borne in mind that it was all done at his suggestion, and by his procurement. This plaintiff would not have parted with his property but upon the condition it should operate as payment. In giving construction to the proceedings, if they are of doubtful import, such construction should be given as best comports with justice to both parties, if it can consistently be done. As before remarked, this defendant can stand in no better position than his assignor, having taken the note when overdue.

The case is one proper to be submitted to a jury under proper instructions, and, should the evidence appear as here

presented, they would be authorized to find a payment, equal in amount to the demand purchased under the second agreement, and tendered immediately after its purchase in fulfillment of the agreement.

WEBSTER TREAT, *Administrator of Robert Treat, versus* WALDO T. PIERCE.

The unauthorized signing and publishing of a notice of foreclosure, cannot, by a subsequent ratification by the mortgagee, be rendered operative from the time of its first publication.

When the first publication of a notice is invalid, the foreclosure is void.

By R. S., c. 90, § 7, a mortgagee may declare on his own seizen, in a writ of entry, without naming the mortgage; and in all cases, where the tenant is not the mortgagee or a person claiming under him, judgment may be entered as at common law, unless the plaintiff consents to the entry of a conditional judgment.

If it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to possession for breach of the condition of the mortgage, the Court shall, on motion of either party, and not otherwise, award the conditional judgment.

If *neither* party desires such judgment, then the plaintiff may have judgment for possession on his own seizin, as at common law.

Possession may be restored after redemption under a bill in equity.

If judgment be given as on mortgage, no judgment for mesne profits can be rendered.

Aliter, if judgment be rendered as at common law.

When a mortgagee, in possession of a part only of the premises mortgaged, declares on his own seizin of the remainder, in a writ of entry against the mortgager, without naming the mortgage or claiming a judgment as on mortgage; and the defendant moves that the plaintiff be restricted to such judgment, the former cannot object that such action was an attempt to foreclose a part only of the premises mortgaged.

It seems that if a conditional judgment be rendered in such action, the defendant must pay the whole mortgage in order to redeem.

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

WRIT OF ENTRY.

Treat *v.* Pierce.

This action was brought to recover a store and lot in Bangor. Writ was dated March 2, 1864.

The general issue was pleaded with brief statement, that if judgment shall be rendered for the plaintiff it should be as of mortgage only.

The plaintiff put in a mortgage deed from W. T. & H. Pierce to Robert Treat, the plaintiff's intestate, dated Oct. 8, 1852, and recorded October 21, 1852, which mortgage described three-quarters undivided of four lots of land, one of which alone was demanded in this suit, all adjoining each other and forming one estate; the note thereby secured; and a record copy of a notice of foreclosure, signed "Robert Treat, by John A. Peters, Attorney;" and of the certificate of publication in the "Bangor Jeffersonian," a public newspaper, printed in Bangor, declaring that said notice was published three weeks successively in said paper, to wit, in the issues of Dec. 7, 14, and 21, 1858.

No question was raised as to the form of notice or certificate.

It was admitted that the plaintiff was administrator of the estate of said mortgagee; that administration of said estate was not closed; that the estate was possessed of personal estate, beside said mortgage, sufficient to pay all debts and expenses of administration; that the mortgage was not necessary for that purpose; and that the plaintiff was in possession of all the mortgaged premises, except the part demanded.

The defendant put in a deed from Robert Treat to said W. T. & H. Pierce, of the same premises as are included in said mortgage, and of same date, recorded Dec. 15, 1852; also a deed from H. Pierce, one of said grantees, to the defendant, of all his interest in the premises mortgaged, dated Feb. 6, 1856, and recorded Feb. 8, 1856.

John A. Peters, called by the tenant, testified—he was the attorney of Peters & Co., of Boston, who had an interest in the right of redemption, and expected to purchase the mortgage, and thereupon desired to have a foreclosure

commence; that he sent word, or wrote to Treat, asking authority to foreclose the mortgage, but received no reply; that thereupon he wrote the notice and had it published, charging the expenses to his clients; that, some months afterwards, Treat called at witness' office and expressed his satisfaction in what he had done in foreclosing the mortgage; that he never before had anything to do for said Treat, as his attorney; that he did not know him before that time; and that he had not then and never had the possession of the mortgage or the note secured thereby. It also appeared that Robert Treat died Oct., 1859, leaving six children, all of whom were alive and of age at the commencement of this suit.

The plaintiff claimed mesne profits of the estate.

The whole case was submitted to the full Court who were to render such judgment as the legal rights of the parties require.

N. H. Hubbard and *Rowe*, for the plaintiff.

A. W. Paine, for the defendant.

KENT, J.—The principal question presented by the parties is, whether the mortgage given to the demandant's intestate has been legally foreclosed. The case shows that a notice, sufficient in form, was published and recorded in Dec., 1858, as authorized by statute. This notice was signed "Robert Treat, by John A. Peters, Attorney." Mr. Peters was not at that time the attorney of Mr. Treat. He had sent word or had written to him asking for authority to foreclose, but had received no reply. Mr. Peters was acting for another party, who had an interest in the right of redemption. Sometime afterward, Treat called at Mr. Peters' office and expressed his satisfaction in what had been done in foreclosing the mortgage.

It is clear that, without the subsequent assent or ratification, the notice would not have been sufficient to foreclose the mortgage. Did this subsequent assent render it good

and effectual as the act of the mortgagee? It must be his act, as the statute gives this form of foreclosure to a party who, in the exercise of his own judgment, determines that he does not desire to take and hold possession of the premises pending the time of redemption. R. S., c. 90, § 5. The holder of the mortgage must determine in the first place that he will foreclose, and, in the second place, the mode, whether by entry, publication, or by suit, to obtain actual possession. No third party can, without authority, determine these questions for him, and thereupon proceed to foreclose in any form, in his name. Mere silence on his part would not be a ratification of such proceedings by a stranger, because the law would not presume an assent on his part to acts which he might or might not deem advantageous or "desirable" to have done. Story on Agency, §§ 245, 258.

But in this case, sometime after the publication of the notice and the recording of the same, the mortgagee "expressed his satisfaction in what he (Peters) had done in foreclosing the mortgage." Assuming that this was a sufficient recognition and ratification of his acts in signing the notice and the publication and recording, the question is, whether the foreclosure became perfected at the end of three years.

This mode of foreclosure is one given by statute and rests for its validity on the statute alone. In the foreclosure other parties are directly interested. By § 6, if the mortgager, or those claiming under him, do not redeem within three years *next after the first* publication, the right of redemption is forever foreclosed. The time for redemption being thus fixed, to commence from the date of the first publication, the notice must, to be effectual, be binding on all parties at and from that time. If, therefore, a subsequent ratification can be made effectual, it must relate back to, and be operative from the date of publication. There cannot be any time when the notice is not legally binding on all parties. It cannot be conditional or uncertain, de-

pending upon contingencies. Otherwise a mortgagee, who had ascertained that an unauthorized person had assumed to act for him, might lie by, until the last day of the three years, and then ratify or not, as his will or wishes might dictate. If the three years would only commence at the date of the assent, then the foreclosure would be kept open six years instead of three. There may be cases where the mortgager, or those claiming under him, would be desirous to have the mortgage foreclosed and the property thus taken in payment of the debt, for which it was security. They have a right to regard the published notice as conclusive as to time, as the statute makes it. Was this notice, when published and for sometime after, binding and effectual? It is admitted that it was not, until the subsequent assent. If no such assent had been given, it is not pretended that the foreclosure would have been perfected at the end of three years. There was a time, between the publication and the assent, when it was inoperative, unless the subsequent ratification can be held to relate back and take effect from the first publication. And this is the question on which the case depends.

The general principle is well settled that, where no rights of third parties are in question, a party may ratify the unauthorized act of another, and such ratification may relate back to the time of the act. But this is not generally so, when third parties are interested.

The precise question here is, whether the unauthorized publication of notice of foreclosure can be made good and operative *from its date*, by a subsequent assent. It is not a case of contract between parties but an attempt to enforce a legal right by a proceeding partaking of the nature of a judicial proceeding, requiring certain public acts, and a record thereof in the public registry. The rights and interests of other parties are involved. The date of the first publication is the essential thing to determine the future rights of all interested. In *Clark* v. *Peabody*, 22 Maine, 500, it was held that the ratification, by the payee of a note, of an

indorsement thereof, made by one assuming to act as his agent, without authority from him, can operate only as an indorsement made *at the time of the ratification*. The indorsement in that case was made before suit, but the ratification was after the commencement of the suit. The Court held that, " when a certain thing must be done by one having power to do it, as a pre-requisite to constitute a liability of a party who had no agency in the act, the ratification of the performance thereof, by one unauthorized, cannot create a liability where none existed before."

A subsequent assent does not relate back so as to prejudice a party whose conduct has been guided by the transaction as it actually occurred. *Fiske* v. *Holmes*, 41 Maine, 441.

The distinction is, that where an act is beneficial to the principal and does not create a right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, the subsequent ratification will relate back to the time of the act. But if such act would, if authorized, create a right or duty to have some act done by a third party, the subsequent ratification or adoption of the unauthorized act by the principal, will not give validity to it so as to bind such third party to the consequences. A variety of cases illustrating this doctrine may be found in the books. If a lease may be determined by six months notice, such notice given by an unauthorized person will not be effectual, although subsequently ratified. *Baron* v. *Denman*, 2 Exchr. Reports, 167.

A notice to quit must be such that the tenant may safely act *on it at the time of receiving it*, therefore a notice by an unauthorized agent cannot be made good by the adoption of it by the principal afterwards. *Doe* v. *Goldwin*, 2 Ad. & Ellis, N. S., 143. The same doctrine is found in *Doe* v. *Walters*, 10 B. & Cr., 626; 21 E. C. Law, 139.

The same rule applies to a demand in trover. *Soloman* v. *Dawes*, 1 Esp. R. 83. So a demand of payment of a note,

although ratified afterwards. *Stanton* v. *Blossom*, 14 Mass., 116.

We have seen that the foreclosure must begin at the date of publication, by the express words of the statute. No other time can be substituted, and it must continue to run from that date. There was a time, several months, when it did not run. Other parties were interested and their rights and interests were affected by the act. Therefore the subsequent ratification could not reach back and make effectual what was not so when the act was done. The mortgage has not been legally foreclosed.

The defendant contends that, if the mortgage is not foreclosed, this action cannot be sustained, because the mortgage is of three-fourths of four adjacent lots of land, one only of which is demanded in this writ, all said lots adjoining each other and forming one estate. The defendant is in possession only of the lot declared for. The argument is, that an action cannot be sustained for a portion only of the premises covered by the mortgage. Assuming this to be a correct doctrine, as a general principle, although this is doubted or denied by eminent judges, the answer is, that the demandant does not declare as on mortgage, but counts generally on his own seizin. He does not admit that the mortgage is open, but maintains that it has been foreclosed, and brings his action accordingly. We hold that in this he is mistaken. But he is not obliged to ask for a conditional judgment.

A mortgagee, as well before as after condition broken, may have judgment for possession at common law, when he does not refer to or declare on his mortgage, and when the object of the suit is not foreclosure: *Green* v. *Kemp*, 13 Mass., 515. And this against the mortgager himself, unless by plea or motion he sets forth the fact, and prays for the conditional judgment. *Partridge* v. *Gordon*, 15 Mass., 486. *Randall* v. *Norton*, 19 Maine, 274; *Porter* v. *Reed*, 19 Maine, 363.

This is expressly provided in R. S., c. 90, § 7. The right

is given, in that section, to the mortgagee, to declare on his own seizin, without naming the mortgage, and, in all cases, where the tenant is not the mortgager, or a person claiming under him, judgment may be entered as at common law, unless the plaintiff consents to the entry of a conditional judgment. If it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to possession for breach of the condition of the mortgage, the Court shall, *on motion of either* party, award the conditional judgment. But this is to be done only on motion. If *neither* party desires such conditional judgment, then the demandant may rely upon his general count, as it stands, and have judgment for possession on his own seizin, at common law. Such possession does not affect the right of redemption. It merely gives possession, which may be restored after redemption, under a bill in equity or otherwise. It may be conclusive as to the legal title at the time of suit, as between the mortgager and mortgagee, but the equitable rights are not thereby concluded. A court of equity will protect them, although the legal title and possession may be in the mortgagee. The statute clearly recognizes this, in its provisions.

The demandant in this case has not asked for any judgment as on mortgage. If he had, and the defendant had objected thereto, on the ground above stated, viz., that it was an attempt to foreclose a part only, the question now raised would have been before us. But the case finds that the *defendant* asks, as he has a right to do, that the demandant should be restricted to a conditional judgment. He can hardly object if his motion is granted. If he withdraws it, and the demandant does not renew it, then, as neither party would have moved for a conditional judgment, the first provision of the section before referred to would stand in force, and, on that, the demandant may have judgment for possession at common law.

It will be for both parties to consider whether such a judgment would effectuate the purposes they have in view. That it would not operate to foreclose the mortgage is quite

clear. And, if the defendant insists upon the conditional judgment, he must, of course, pay the whole mortgage debt and hold the other portions to compel them to contribute. The respective parties must determine for themselves, in view of the points decided, as to further action.

In the case stated, the demandant submits a claim for mesne profits, if such judgment is rendered as entitles him to them. This question has not been argued by counsel. It seems to us, that if judgment is given as on mortgage, no judgment for mesne profits can be rendered. But, if at common law, for possession, mesne profits may be recovered, it being then only the common writ of ejectment. The demandant, of course, must account for all such profits received, if the mortgage is redeemed.

As the case now stands, the entry must be,—

Judgment for demandant, and, on motion of defendant, the conditional judgment as on mortgage.

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

MOSES WOODMAN *versus* WILLIAM H. SMITH.

Where the premises in a deed were described as the "north half of the double dwellinghouse, situate," &c., "together with the land under the same, and the *land used with it* and belonging thereto, and all out buildings and fences thereon and thereto belonging, being the same premises *heretofore* occupied by me as a dwellinghouse; and there was a barn connected with the house, which had previously been occupied by the grantor; *Held*, —

1. That the words "belonging thereto" refer to the house and not to the grantor.
2. That the words "out buildings thereon," mean the out buildings on "the land used with" the house;
3. That the barn was one of the out buildings; and
4. That the deed conveyed the barn and the land on which it stood.

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

The facts sufficiently appear in the opinion.

George P. Sewall, for the plaintiff.

J. A. Peters, for the defendant.

APPLETON, C. J.,—On the 9th Jan. 1858, the defendant conveyed by deed of warranty "the north half of the double dwellinghouse erected by S. & W. H. Smith, and situated on the west side of Church street, in the village of Oldtown, together with the land under the same, *and the land used with it* and belonging thereto, and *all out buildings and fences thereon and thereto belonging* being the *same* premises *heretofore occupied* by me as a dwellinghouse."

At the date of this deed there was a barn connected with the house, which had previously been used and occupied by the grantor. The plaintiff, upon receiving his deed, entered into the possession and occupation of the barn, from a portion of which he has been evicted by due process of law by one having an elder and better title.

The question is whether the deed of the defendant conveyed the *out buildings*, if so, as the plaintiff has been evicted of part of the barn, the former would be liable upon his covenants.

The barn was one of the out buildings. It had been used with and belonged to the house, with which it was connected. It had been previously occupied by the defendant. "The land used with it and *belonging thereto*," refers to the house, not to the defendant. The out buildings *thereon* are out buildings on "the land *used with* it, i. e. the house. If the phrase "belonging thereto," meant land belonging to the defendant, then, if he had no title and the covenant was as to what he owned, and not as to what he did *not*, the warranty would be useless and unavailing, just precisely where it was needed for the protection of the grantee. A warranty of land of what a man owns does no good. The title being good is enough. The need of the warranty is when the grantor does not own the land conveyed.

The words "belonging thereto" do not refer to an indi-

vidual to whom the land belongs, but to the house to which it belongs.

A conveyance of a dwellinghouse and out buildings "belonging thereto" conveys the out buildings upon precisely the same principles by which it is held to convey the dwellinghouse. In *Davis* v. *Handy*, 37 N. H., 65, it was held that, under a description of a "ropewalk" in a deed, such land of the grantor will pass as is exclusively devoted to the use of the ropewalk. In *Wooley* v. *Groton*, 2 Cush., 305, it was decided that, by the grant of a town pound, the land on which the same stood was conveyed, not as appurtenant but as part of the subject matter. In *Johnson* v. *Rayner*, 6 Gray, 107, the conveyance was of a house and land and "also a well of water, with the curbs, pumps," &c., It was held to pass a fee in the land occupied by the well. "In this respect," observes BIGELOW, J., "it (the well) does not differ from the term 'house,' or 'barn,' or 'mill,' or 'cottage,' or 'wharf,' all of which are familiar instances of a conveyance of a fee in land by a general term of description, applicable only to the purpose for which the land is used at the time of the grant." So, by the grant of a mill, the land under it passes. *Whitney* v. *Olney*, 3 Mason, 284. "The grant of a messuage, or house, and all lands thereunto appertaining, will pass all lands usually occupied therewith." 2 Washburn on Real Property, B. 3, c. v, § 34.

The conclusion to which we have arrived is, that the defendant, by his deed, conveyed the barn and the land on which it stood, and, not having a title to but part of the land, he is liable on his covenants. Such, too, seems to have been the view of the defendant in this respect, for he testifies that he supposed he owned the land under the barn and intended to sell the same.

Defendant defaulted, and to be held in damages, according to the agreement of the parties.

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

EUGENE SANBORN *versus* INHABITANTS OF MACHIAS PORT.

By c. 170, § 1, of the Public Laws of 1863, the doings of all cities, towns and plantations, in offering and paying bounties and presenting pecuniary inducements respecting volunteers, &c., are hereby made valid in as full and ample manner as though all the proceedings had been authorized by law.

This statute contemplates only the "*doings*" of meetings legally notified and held.

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

ASSUMPSIT for bounty voted by the defendants.

The writ was dated Dec. 5, 1863.

The action was for the sum of twenty dollars, and for a town order of eighty dollars, payable in two years, which the plaintiff claimed as a drafted militia man for the defendant town, under the order of the President of the United States, calling for 300,000 men for the military service.

The return of the constable on the back of the warrant calling the town meeting, at which the vote authorizing the payment of the amount sued for was passed, showed, that it was posted only *six* days before the time of said meeting.

Several questions were raised; but whether or not c. 170, § 1, of the Public Laws of 1863, legalized the *doings of towns* at meetings not notified in accordance with the general statute, being the only question decided, a report of the other questions is rendered unnecessary.

George F. Talbot, for the plaintiff.

J. A. Lowell, for the defendants.

CUTTING, J.—The warrant calling the town meeting was not duly served; and, consequently, as admitted by the plaintiff's counsel, the meeting was illegally held, and its proceedings were inoperative and void, unless they were ratified and confirmed by the statute, approved Feb. 21, 1863.

Section 1 of that statute provides—"that the doings of

all such cities, towns and plantations, &c., are hereby made valid in as full and ample manner as though all the proceedings had been authorized by law."

Cities, towns and plantations cannot be said to have any doings, except such as are authorized to be done in their corporate capacity. That capacity can be exercised only at a legal meeting. Consequently the statute neither by its letter or spirit can afford any aid in enforcing the plaintiff's claim.

The statute contemplates the doings of meetings legally held, where the voice of the majority was *duly* ascertained, and to make valid their proceeding according to *their* expressed will in raising and appropriating money at the time authorized. If otherwise, towns might be compelled, without their consent, to pay such bounties as an illegal and informal meeting might be pleased to dictate.

Plaintiff nonsuit.

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

ALBERT HARRIMAN *& al., pet'rs for writ of prohibition, versus* COUNTY COMMISSIONERS OF WALDO COUNTY.

By c. 103, § 36, of the Public Laws of 1859, if the judgment of the committee, appointed in cases of appeal from the decisions of County Commissioners, is wholly against the prayer of the original petition, the Commissioners shall proceed no further thereon; but, if the judgment is otherwise, they shall carry it into effect as if made by them.

By R. S., c. 77, §§ 5 and 6, the Supreme Judicial Court has the general superintendance of all courts of inferior jurisdiction for the prevention and correction of errors and abuses, where the laws do not *expressly* provide any remedy. It may issue writs of error, *certiorari*, *mandamus*, prohibition, *quo warranto*, and all writs and processes necessary for the furtherance of justice, or the execution of the laws.

Where County Commissioners refuse to carry into effect a judgment of the Supreme Judicial Court, rendered upon the report of a committee appointed in case of appeal from their decision, refusing to lay out and establish a

highway, this Court may issue a writ of *mandamus* on petition by the injured party.

And where they not only refuse to carry into effect such judgment, but proceed to appoint an agent to open the way laid out by them on the original petition, contrary to the judgment of the Supreme Judicial Court, a writ of prohibition will be issued by this Court, enjoining such proceedings.

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

Petition for Writ of Prohibition.

The petitioners, selectmen of the town of Prospect, in the county of Waldo, in behalf of themselves and the inhabitants of said town, substantially allege:—

That there was a certain highway—[described]—laid out and established by the County Commissioners for said county, not built, a part of which was within said town; that these petitioners and others, inhabitants of said town, petitioned the Commissioners, at their April term, 1860, to make a certain alteration—[described]—in a portion of said highway; that the Commissioners, after due proceedings had, made their report at their August term following, wherein they adjudged and determined that common convenience and necessity did *not* require the alteration prayed for; that the petitioners appealed from that decision, entered their appeal, and a committee was duly appointed; that said committee, after due preliminaries, made their report at the May term, 1861, of the Supreme Judicial Court, *wholly reversing* the decision of the Commissioners; that said report was accepted, and their judgment duly certified to said Commissioners; that said Commissioners, disregarding that report and the adjudication of the Supreme Judicial Court thereon, proceeded to appoint an agent to open the highway as by them *originally* located, &c.

The petition further alleges, that the inhabitants of said Prospect were in danger of suffering great wrong and injury by means of the premises; that they are without any adequate remedy by any common or ordinary process of law; and they pray for a writ prohibiting and restraining

said Commissioners from issuing their warrant appointing an agent as aforesaid, as well as from issuing any warrant of distress against said town for money expended by said agent, until their right by law to make such appointment and issue such warrant can be heard and determined by this Court.

The petition further prayed for a writ commanding said petitioners to appear at the next term to show cause why they should not carry into effect the judgment of the Court rendered on the report of said committee, and why they should not be prohibited as prayed for, &c.

Upon the petition, Judge DAVIS ordered notice to be served by copy of petition and order upon the chairman of the Commissioners seven days before said next term.

At the hearing at *Nisi Prius*, the presiding Judge ruled that the prayer of the petition should be granted, and a writ issue prohibiting said Commissioners from appointing an agent or issuing a warrant of distress as set forth in the petition; to which the respondents excepted.

E. K. Boyle, for the respondents.

W. G. Crosby, for the petitioners.

CUTTING, J.—We assume, that, sometime prior to the year 1860, the Commissioners had laid out and established a public highway leading from town to town, a part of which was located within the town of Prospect.

If appears that the selectmen of Prospect, for themselves and the inhabitants of that town, presented a petition to the Commissioners at their April term, 1860, representing that the public good required an alteration in the highway so located in their town, between certain *termini*, and requested such alteration. Whereupon the Commissioners, after due notice to all parties interested, and other due proceedings had, refused to make the alteration prayed for. Thereupon an appeal was taken to this Court, and entered at the October term, 1860, when, in pursuance of the statute, a committee was appointed, who, in the legal discharge of their

duties, and, after performing the same, at the May term, 1861, reported "that the judgment of the Commissioners should be *in whole reversed*, and that the prayer of said petitioners should be granted." This report was then accepted and duly certified to the Commissioners.

Under such circumstances, what duties was it incumbent on the Commissioners subsequently to perform? By R. S. of 1857, c. 18, § 36, it is provided that—"If the judgment of the Commissioners *is wholly reversed*, they shall proceed no further,—if their judgment is affirmed in whole or in part, they shall carry into effect the judgment of the appellate court, as if made by them."

Here we see that the Committee wholly reversed the judgment of the Commissioners, after which they were prohibited from proceeding further. Under the section cited, their further proceeding was a nullity, and the Commissioners were legally justified in disregarding it; for it is only when their judgment is *affirmed*, in whole or in part, that they shall carry into effect the judgment of the appellate court, as if made by them. Such a contingency has not occurred. The Commissioners' judgment in this new petition has only been reversed, and there the matter stands. The old highway as originally established remains intact, and the appellants under the section cited would be without remedy.

But the Legislature of 1859, perceiving the defect in the prior law, by a statute of that year, c. 103, amended § 36 of c. 18, so as to read as follows:—

"If such judgment is wholly against the prayer of the original petition, the Commissioners shall proceed no further thereon; but, if the judgment is otherwise, they shall carry it into effect as if made by them."

It is to be presumed that the Commissioners have overlooked this change in the law of 1857, otherwise they are without excuse for disregarding it. The judgment of this Court, based upon the report of the committee, was not wholly against the prayer of the original petition, but whol-

ly otherwise, and the Commissioners were bound by their oath of office to carry that judgment into effect, as if made by them, which would be to grant the prayer of the petitioners, but they have neglected to do it, and may have subjected themselves to our writ of *mandamus* upon the petition of the injured party.

In the petition now before us, and with which we are more immediately concerned, it is alleged that the Commissioners are about proceeding to appoint an agent to open and make that portion of the highway embraced in the original petition for the alteration, and the prayer is, that they be restrained from so doing, and also from issuing their warrant of distress against the inhabitants of Prospect, in whose town that part of the way was originally located, "until their right by law to make such appointment and issue such warrant, can be heard, and shall be determined by this Court."

At the hearing before the Judge at *Nisi Prius*, at the January term, for the county of Waldo, the parties appearing agreed that "the facts in this case are fully stated in the petition." The respondents filed no answer and offered no evidence. Whereupon the Judge granted the prayer of the petitioners and ordered the writ of injunction to be issued. To which ruling exception was taken. The case has been fully argued by the counsel for the petitioners and submitted without argument by the counsel for the respondents, but the exceptions show that, before the Judge, he contended that, on the facts disclosed and on legal principles, the prayer should not be granted.

His propositions may be considered in the nature of a general demurrer to a bill in equity, and the petition certainly appears to embrace some of its elements. The question then arises, has this Court jurisdiction? If it has, it would have the right to grant a temporary injunction (and none other is prayed for) either in term time or in vacation, and to which no exceptions would lie. It would be liable to be dissolved at any subsequent time for good cause shown,

or continued from term to term until the whole subject matter was disposed of, and then either dismissed or made perpetual.

We have seen that the Commissioners, (these respondents,) have disregarded the judgment of this Court, which directed a material alteration, and are attempting to enforce their own judgment as paramount to the laws of the State. Such a proceeding might be exceedingly hazardous for all parties concerned; to the respondents, for issuing a warrant of distress not authorized by law, to the agent, in expending money which he might never collect, and, unless there be some remedy, those contingencies may happen; whereas, if we temporarily suspend proceedings, the error on the part of the respondents may hereafter be corrected by their making the alteration and these petitioners making the road, either voluntarily or by *legal* compulsion.

This Court "has the general superintendence of all courts of inferior jurisdiction, for the prevention and correction of errors and abuses, where the laws do not *expressly* provide a remedy. It may issue writs of error *certiorari*, *mandamus*, prohibition, *quo warranto*, and all writs and processes necessary for the furtherance of justice or the execution of the laws." R. S., c. 77, §§ 5, 6.

We have jurisdiction, then, unless the laws expressly provide a remedy. They do not, for no Legislature ever contemplated such a state of facts. The writ of *mandamus* might have prevented the evil, but now, before such writ could be issued, the old highway may have been made. The only remedy for the time being is the writ of prohibition.

Exceptions not sustained.

Temporary injunction to be issued.

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

INHABITANTS OF SOUTH BERWICK *versus* WILLIAM HUNTRESS *& als.*

A party executing a deed, bond or other instrument, and delivering the same to another, as his deed, knowing that there are blanks in it to be filled, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it.

And this principle includes the insertion of the penal sum of a collector's bond.

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

DEBT on a collector's bond. Plea *non est factum.*

The main facts sufficiently appear in the opinion.

The verdict was for the defendants, and the plaintiffs excepted.

Tapley & Smith, for the plaintiffs.

Howard & Cleaves, for the defendants.

KENT, J.—The exceptions present a single question for our determination. The counsel for the plaintiffs requested this instruction, which the facts of the case made pertinent and applicable, "that a party executing a bond, knowing that there are blanks in it to be filled up, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed the bond." The presiding Judge, in his instructions, assented to this as correct, when limited "to such matters appearing on the face of the instrument to be certain, such as the names of the sureties, who had signed, but that this rule would not apply to the *penal sum* in the bond; that being uncertain in its amount." He further instructed the jury, in substance, that they must be satisfied, from all the evidence, that Huntress was authorized by the defendants to insert the penal sum; and, if not so proved, that the insertion would be a material alteration, and render the bond "in-

valid." The jury must have understood that something more than the facts assumed in the request must be established by proof.

It seems to be now well settled, that where a party executes a deed, or bond, or other instrument, and delivers the same to another, in an imperfect state, and gives authority to that person to fill up the blanks, and thus perfect the instrument—and he does so—its validity cannot be controverted. This authority may be by parol. It may be implied from the facts proved, when those facts, fairly considered, justify the inference. When the authority is established, either by evidence of express authority, or by implication, the power will extend as far as such express or implied authority is given. The law on this subject has recently been stated by the Supreme Court of the United States, in *Drury* v. *Foster*, 2 Wallace, 24.

There is a class of cases where it is held that it is not a material alteration to insert a word or words that the law would itself supply, as the word "hundred" before "pounds," where the condition of the bond first stated that the full sum of one hundred pounds shall be paid by instalments specified, and then added the words "until the sum of one ——— pounds shall be paid." The Court held that it was plain, what the meaning of the parties was, and what the party signing intended to be bound for. *Waugh* v. *Bussel*, 5 Taunton, 707.

In the case of *Hunt* v. *Adams*, 6 Mass., 519, the same rule was applied to the case where the word "year" had been inserted before the words "of our Lord." In this case, C. J. PARSONS discusses somewhat the general doctrine, and says that the consent of the obligor may as well be implied from the nature of the alteration, as when expressed. He cites several cases, where, without any evidence of assent beyond the instrument itself, alterations had been made by filling blanks. To the same point is the case of *Brown* v. *Pinkham*, 18 Pick., 172.

In the case at bar, the requested instruction assumes that

there was no direct evidence of authority to fill the blanks, beyond the fact that the party executed the bond, knowing that there were blanks to be filled up. The question, then, is one as to the implied authority of the person, for whose use the bond was made, to fill any or all the blanks, before delivering the bond to the town.

It may be likened to a case of an accommodation note, indorsed when imperfect, and left with the maker, for whose use it was made, to be negotiated by him. In numerous cases of this kind, it has been held that an indorsement on a paper without sum, or date, or time of payment, will hold the indorser for any sum, payable at any time which the person to whom the indorser entrusts it, chooses to insert. *Violett* v. *Patten*, 5 Cranch, 142; *Russel* v. *Longstaff*, Dougl., 514. Or, where the name of the payee is left blank. *Crachly* v. *Clarance*, 2 Maule & Sel., 90. Or, where indorsements on blank pieces of paper were left with a clerk, the party indorsing expecting and intending that promissory notes would be written on them. *Putnam* v. *Sullivan*, 4 Mass., 45.

Where the indorsers commit a promissory note to the maker, with a blank for the date, they authorize him to fill it up with what date he pleases, even a date prior to the day of the actual making of the note, which was payable in 60 days from date. *Mitchel* v. *Culver*, 7 Cowen, 336. So, if the sum be left in blank, it may be filled up. *M. & F. Bank* v. *Schuyler*, 7 Cowen, 337, in note.

Where it appears that the parties *intended* that the note should be for $800, and it read, pay "eight," with a blank space, the maker, without the assent of the indorser, may insert the words "hundred dollars," and the indorser will be holden. *Boyd* v. *Brotherson*, 10 Wendell, 93.

Where a party intended to give a note for the amount of a debt, which amount he minuted in figures on the margin, but wrote the note for $300 instead of $334, (the sum on margin,) it was held that the creditor may, without express

authority, insert the words and sum omitted. *Clute* v. *Small*, 17 Wendell, 238.

In each of these cases, the decision seems to rest upon the fact that the filling up, or insertions, were in accordance with the intention of the parties, and to carry out and fix the liabilities actually agreed upon or assented to.

There are numerous cases, analogous in principle to the one before us. They are cases, where the Court has, in effect, made the insertions itself, to carry out the obvious intentions of the parties. In all such cases, it is fair to infer, that if they had been made by a party, they would have been sanctioned by the Court. The Court, in this matter, would seem to have no greater legal right than an individual.

Thus, in the case of *Coles* v. *Hulme*, 8 B. & C., 568, (15 E. C. L., 299,) where the penal sum was stated as 7700, it was held that the word "pounds" must be inserted by the Court.

Green v. *Walker*, 37 Maine, 27, where a replevin bond bound the plaintiff to pay to himself costs, damages, &c., it was held that it should be read as if defendant's name was inserted in place of plaintiff's. In this case will be found citations of numerous authorities on this subject. *Coolbroth* v. *Purrington*, 29 Maine, 469.

It may, perhaps, be doubtful, whether some of these cases do not go beyond the true limit; particularly the one cited from 17 Wendell, where the party was allowed to insert an additional sum into the body of a note, *which was a perfect instrument before.* The amendment and interlineation would seem to make a new contract, and to vary and alter essentially the one written and signed, without the assent of the maker, on the single ground that, by evidence *aliunde*, it appeared probable, or reasonably certain, that the party intended to give a note for the larger sum inserted afterwards.

There seems to be a manifest distinction between the addition of new words, or the erasure of words and the substitution of others, changing the liability, in an instrument

perfect when signed, and the insertion of words to fill up blanks, which the party signing knew must be filled up to make the bond or contract perfect in form or substance. In the one case, it is, in effect, making a new contract; in the other, it is but finishing and making perfect the contract agreed upon.

The law on this subject in Massachusetts, before the separation, is stated by C. J. PARSONS, in *Smith* v. *Crooker*, 5 Mass., 538. That was a case on a collector's bond, in which, after the surety had signed, a blank had been filled. The Judge, after stating the general principle, that it would not be an alteration, which would avoid the bond, to fill up blank spaces left, if the party executing the bond agrees that it may be afterwards filled up, says, — "And the party executing the bond, knowing that there are blanks in it, to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled, after he has executed the bond." This decision is cited and accepted by the counsel on both sides, as the rule to be applied to the case at bar.

It was adopted by the presiding Judge, but he ruled that the filling of the blank space, left for the insertion of the penal sum, did not come within the rule. The correctness of that ruling is the question now presented by the exceptions.

It is evident that the implied authority is limited, but it clearly may extend beyond mere matters of form, or the mere insertion of words, which the law itself would supply. It may, as it has been shown, extend to those matters which are required to make it a binding and perfect instrument.

We think that when a party signs a bond, and delivers it to another, not stipulating or expecting that the paper will be returned or afterwards exhibited to him, but be delivered to the obligee when perfected, and, when he so delivers it, there are blanks in it to be filled up, before it can be perfected, and he knows the fact, those blanks may be filled up, without any further knowledge or assent on his part, — pro-

vided that the insertions thus made do not change the relations of the parties, or alter, or vary the actual agreement made, or create any new liability, or enlarge any responsibility embraced in the contract between the parties, but only make perfect in writing what was actually agreed upon. It cannot be controverted when thus completed. In the case at bar, the whole contract or agreement is manifest from the *condition*, which was a part of the bond when signed. How far the rule may apply to cases where the whole proof of the agreement is found in extraneous evidence, we are not now called upon to decide. It is clear, that, at all events, the evidence must be of a plenary and conclusive character, and leave no doubt of the exact character and terms of the bargain or understanding between the parties.

We are aware that a distinction has been taken between parol contracts and those under seal, and that, in some cases, it has been held that the rule cannot be applied to bonds or deeds. A recent case in Massachusetts, *Burns* v. *Lynde*, 6 Allen, 305, seems to favor this view. That, however, was a case where, when the seal and signature were affixed to the paper, it was a printed form of a deed, in which *none* of the blanks had been filled up. As the Court say, "when the paper was delivered, it had no validity or *meaning*. The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing or sealing." The defendant filled the blanks, after it was given to him by the signer, in her absence, by entering the names of the parties, the description of the land, and the *agreement* of release of dower on her part, and the date, and other words necessary to complete it. The defendant offered to prove that, when she signed it, she authorized him to fill it up as he did, and that, after it was filled up and the husband had executed it, the defendant informed her of the facts, and she thereupon verbally assented to what had been done, and agreed that it should be taken to be her deed, duly executed. This evidence was excluded; and the Court held, that

the prior authority did not give a right to make this entire deed, and that the subsequent assent did not amount to a new delivery.

That case differs from the one before us in several particulars; especially in the point that the paper or deed, when signed, contained nothing expressive of the intentions of the parties, or a description of the property to be conveyed. Nothing could be gathered from it.

The examination of various cases in this country and in England shows that, whilst in some of them the strict rule has been recognized, yet there are none that deny the proposition that in some cases blanks may be filled in sealed instruments by a third person, who is not authorized by power under seal. The only distinction taken between parol contracts and those under seal is a purely technical one, viz., that an authority to make a deed or execute a sealed instrument for another, must be of as high a character as the instrument, — i. e., be under seal. It is an unquestioned doctrine of the common law that a person, not authorized by power under seal, cannot *execute* a sealed instrument for another, or change a parol contract into a specialty. Now, if it is the absence of the seal on the authority that prevents the validity of the execution, it would seem that nothing could supply it, not even consent by parol. And yet, as before stated, all the cases seem to recognize the validity of such filling up, if done in the presence of the grantor or obligor. A distinction is taken between express consent inferred from the act being done in the presence of the grantor, and consent given before or after, or implied consent. *Warring* v. *Williams*, 8 Pick., 322; and *Warring* v. *Williams*, 8 Pick., 325; *Hudson* v. *Revett*, 5 Bingham, 368, (15 E. C. L., 467.)

In these cases it is assumed that the act is done by the assent and authority of the grantor, because he is *present* when it is done by another. And, yet, if the authority *must be* under seal, where is the evidence of it? The whole evidence is parol; the fact of the presence and the assent is

proved by parol. The act derives its efficacy only from authority dependant on other sources than a seal. It is *consent* that gives it vitality, and that consent, it is proved by parol, was given by parol. Why may not consent be established by proof that the authority was directly given before the act was done, and when the paper was not before him? There is no clearer parol authority in one case than in the other. It is, after all, a mere question of assent. Now, consent may be implied as well as expressed, and, when fairly and legally inferred, it is actual and effective consent, as much so as when direct authority is shown by parol. It would seem to follow that the rule, requiring authority under seal, should either be strictly enforced in all cases of bonds or deeds, so that no interlineations or insertions can be legally made without such power, or the rule should be, that such filling up may be made when authority or consent is clearly established by parol. And this on the ground that, if necessary, the act may be considered as having been done, in substance, by the grantor himself. When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the *execution* of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond. This is the view taken by the English Court, in *Hudson* v. *Revett*, 5 Bingham, before cited. The Court say, (by GUSSELEE, J.,) "The way in which I consider that this deed is good, is this—that it was an imperfect execution, with an *agreement* at the time that it should take effect when the blanks were filled up." On this point, see *Knapp* v. *Malby*, 13 Wendell, 587.

In one of the most recent cases, in England, that of *Eagleton* v. *Gutteridge*, 11 M. & W., 466, it was held, that the filling in of a blank in a power of attorney under seal, which was sent from a foreign country, did not invalidate it, on the ground that consent might be inferred.

The Court in Massachusetts, in the learned opinion before cited of *Burns* v. *Lynde*, admit that the American decisions are generally against the strict views taken by them. This is undoubtedly so. In Pennsylvania, in the case of *Wiley* v. *Moor*, 17 S. & R., 438. In numerous cases, in New York, *Bank* v. *Kostright*, 22 Wend., 364; *Wooley* v. *Constant*, 4 Johns., 54; *Exparte Decker*, 6 Cowen, 60; *Exparte Kerwin*, 8 Cowen, 118; *Humphreys* v. *Guellow*, 13 N. H., 385. These cases, and numerous others in different States, recognize *consent* as the essential fact, and do not give any greater effect to consent, when express or implied from the presence and presumed knowledge of the signer, than when fairly implied from his acts or declarations. Nor do they distinguish between prior and subsequent assent.

The Supreme Court of the United States had, in several cases, indicated the same general views. (*Speake* v. *United States*, 9 Cranch, 28; *White* v. *Vermont R. R.*, 21 How., 575.) And the same Court, in the recent case of *Drury* v. *Foster*, 2 Wallace, 24, has distinctly and unqualifiedly settled the question. The Court say,—"We agree that, by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is, that the power is sufficient."

The rule invoked is purely technical. Practically, there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond, than there is in allowing them in a promissory note or bill of exchange. Both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should

be extended beyond its necessary limits, viz.,—that a sealed instrument cannot be *executed*, by another, so far as its distinguishing characteristic as a *sealed* instrument is in question, unless by an authority under seal.

It remains to apply the principles before stated to the case before us. The ruling of the Judge was in favor of the plaintiffs so far as the insertion of the names of the sureties who had signed, and all other matters appearing on the face of the instrument to be certain. The only question is as to the insertion of the penalty. The case, as stated in the report, sets out various questions of fact which were in dispute, and recites that there was evidence *tending* to show that the bond was in a certain condition, when signed, as to blanks and seals. We, however, can only look to the rulings and the request, when the facts are not stated as agreed upon or settled. The request assumes that the party had signed and *executed* the bond, before parting with it. This could only be done by sealing it himself. The ruling, on the point of the insertion of the penal sum, assumes that, if Huntress was authorized by the defendants to insert the penal sum, he might do so. But that this authority must be distinctly proved, and required other evidence to sustain it, than was required to authorize the insertion of other matters, appearing on the face of the paper to be certain. The reason given is that the penal sum of the bond is uncertain.

At first view, the penalty seems to be a vital and controlling part of the bond. But, in truth, in a bond with a condition, subject to chancery, the *condition* is the essential portion. The penal sum is almost a matter of form. In this case, the parties intended to execute a bond to secure the town from loss by the defaults of the collector. This was the whole substance of the agreement. This was what the parties understood and assented to. This is the whole of the condition, as expressed in the bond. Now, no penal sum, however large, could extend this liability. If large enough to cover the possible deficiencies, any increase of

that amount would be simply nugatory, and of no avail to charge the signers. If a less sum is inserted, it may save the signers from a portion of their assumed liability, and therefore could not be objected to by them, on the ground that it enlarged the responsibility assumed by them in the condition. So that, "*quacunque via data*," the insertion of *any sum* as the penalty cannot charge the obligors beyond the actual liability secured in the condition, which was in the bond when signed. The insertion of a penal sum, therefore, operated simply to perfect the bond according to the original understanding, without injuriously affecting the signers. In a bond like this, it is one of those things, which PARSONS, C. J., says, may be inserted without thereby avoiding the bond. The principle was correctly stated by the Judge, but we think he erred in distinguishing between the penal sum and the other insertions. The case must go back for a new trial on the principles stated in this opinion.

Exceptions sustained.

New trial granted.

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

PAMELIA BRADBURY *versus* THOMAS GILFORD.

Where there has been no statutory assignment of a partition fence, between two adjoining lots of land owned by different parties, or between those from whom they respectively derive their title, each is bound to keep his cattle on his own land at his peril.

ON MOTION from *Nisi Prius*, DANFORTH, J., presiding.

TRESPASS *quare clausum fregit.*

The verdict was for the defendant, which the plaintiff moved to set aside as being manifestly against the weight of evidence.

The facts appear in the opinion.

Howard & Cleaves & Chisholm, for the plaintiff.

Drew & Dennett, for the defendant.

APPLETON, C. J.—This is not a writ of entry, but an action of trespass *quare clausum fregit* for trespasses committed by the cattle of the defendant upon the land of the plaintiff.

The evidence on each side clearly shows the commission of the trespasses, as set forth in the plaintiff's declaration, and on his land, whether the line claimed by the plaintiff or defendant be the true one.

There has been no statutory assignment of the partition fences between these parties or between those from whom they respectively derive their titles. The defendant was bound to keep his cattle on his own land at his peril. This he has failed to do. He is therefore liable in damages. *Sturtevant* v. *Merrill*, 33 Maine, 62; *Webber* v. *Closson*, 35 Maine, 26.

It is unnecessary, therefore, to consider whether the line claimed by the defendant be the true line or not, as, if it be, his cattle have trespassed by passing over it.

Motion sustained.

New trial granted.

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

JOHN LYNCH *versus* SAMUEL SWANTON, 2d, *& als.*

When the question, whether or not a defendant was a member of a certain firm, has been once judicially determined, the judgment is conclusive in any further action on the same issue between the same parties.

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

ASSUMPSIT.

The presiding Judge ruled a former judgment between

the parties, put into this case, conclusive, and the defendant Swanton, having denied that he was a member of the firm, under the rule, excepted.

The remaining facts appear in the opinion.

M. M. Butler, for the defendant Swanton.

The exception of the defendant is to the ruling that the former judgment was conclusive as to the existence of the partnership on the 14th day of May, 1856.

It may have been very material, "very persuading evidence" on that point, but the defendant should have had opportunity to offer evidence in rebuttal, to convince the jury to the contrary, if he could. *Dutton & al.* v. *Woodman*, 9 Cush., 256, 261; *Eastman* v. *Cooper*, 15 Pick., 276, 279, 285, 289; *Standish* v. *Arnold*, 2 Pick., 20; *Parker* v. *Standish*, 3 Pick., 288; *Outram* v. *Morewood*, 3 East, 351.

It is to be noticed that the judgment was not offered by way of plea in bar, but only as *evidence*.

The general issue alone was pleaded in the former action. There was no plea or denial under the Rules of Court, bringing *directly* in issue the question of partnership, on the above date. It arose *collaterally* during the progress of the trial. Nothing was conclusively determined by the verdict, except the liability of defendant on the particular note declared on in that action. The finding of the jury, on the question submitted to them by the Judge, forms no part of the record. That finding is simply evidence, in better and more authentic form, it may be, of what might be proved by parol, to wit, a fact in controversy between the parties in the former suit and submitted to the jury. But, when thus submitted and passed upon by the jury, when not directly put in issue by the pleadings, it is strong, "persuading" evidence in a subsequent suit, but not conclusive.

E. & F. Fox, for the plaintiff.

APPLETON, C. J.—This action is against the defendants, as co-partners, doing business under the name and style of A. H. Gerrish & Co. The defendant Swanton contests, that he is not a member of such firm. The other defendants have submitted to a default, thereby admitting the existence of such firm and that they are members of the same.

The plaintiff, to prove that Swanton was a member of the firm of A. H. Gerrish & Co., introduced the record of a judgment in his favor, against said Swanton, in which his right to recover depended upon his establishing the fact of his being such partner on the day of the date of the note then in suit. On the trial of that action the following question was proposed to the jury;—"Was the defendant (Swanton) a partner and member of the firm of A. H. Gerrish & Co., in the business at Bethel, from 1854 to 1857?" To this the jury answered—"He was."

The same question is in issue between the same parties in the present case. In the first suit, the rights of the parties depended upon the fact whether the defendant Swanton was a member of the firm of A. H. Gerrish & Co. That question has been once clearly and distinctly presented to the jury by these parties. "It is not necessary, in order to make a judgment conclusive, that the cause of action should be the same in the first suit as in that in which the judgment is pleaded or relied upon in bar. But it is essential that the issue should be the same." *Merriam* v. *Whitmore*, 5 Gray, 317. The finding of the jury must be regarded as settling, as between these parties, the fact specially submitted to and found by them. And such seems to be the entire weight of judicial authority. *Chace* v. *Walker*, 26 Maine, 555; *Gardner* v. *Buckbee*, 3 Cow., 120; *Sawyer* v. *Woodbury*, 7 Gray, 499; *Jennison* v. *West Springfield*, 13 Gray, 544; *Perkins* v. *Walker*, 19 Verm., 144; *Chapman* v. *Smith*, 16 How. U. S., 133. *Exceptions overruled.*

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

Casco Bank *versus* Sprague Keene.

Instructions to a jury are to be construed in connection with the evidence in the case.

Thus, in an action by a bank, upon a promissory note, purporting to have been signed by the defendant, the instruction that, — if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security from him who actually wrote the defendant's signature to the note, by his arrest, or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature, is correct when taken in connection with the fact proved, that the defendant knew that the president of the bank went to him for the express purpose of ascertaining whether or not the signature was genuine, and that he thereupon admitted it was.

So, also, is the instruction, that if the defendant, knowing that the signature was not genuine, told the president that it was his signature, it was such an adoption of it as would render him liable upon the note, when predicated upon the same facts.

A person will be barred by his adoption of a signature, if made with the knowledge that it was a forgery.

When a defendant has adopted the signature of the note in suit, knowing it to be a forgery, the rule of damages will be the whole amount of the note.

And the same rule applies when the defendant is estopped from denying the signature.

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

Assumpsit.

The facts sufficiently appear in the opinion.

E. & F. Fox, for the defendant.

Howard & Cleaves, for the plaintiffs.

Davis, J. — The Casco Bank held a promissory note purporting to have been signed by the defendant. The president, having heard that the signature was forged, went to the defendant to ascertain whether he signed it. He examined the note, and acknowledged the signature to be genuine. The officers of the Bank thereupon refrained from commencing any proceedings against the person from whom they received the note, to secure the payment by him.

The jury were instructed "that, if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security of Jordan, by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature."

This instruction is in harmony with the principles applicable to estoppels *in pais*. *Wood* v. *Pennel*, 51 Maine, 52, and cases cited.

It is said that the defendant ought not to be held liable unless he *intended* that the officers of the bank should rely and act upon his admission. It is true that he ought not to be held liable on this ground, unless he had reason to suppose that they were making inquiries *for the purpose* of acting or relying upon the information received. But no question was raised on this point at the trial. Exceptions are not intended to present questions of law not brought to the attention of the Court at the trial. Instructions given are to be construed in connection with the evidence in the case. The defendant must be presumed to have intended the natural consequences of his own acts. The testimony on both sides is the same on this point, and leaves no room for doubt that he understood that the president of the bank came to him *for the express purpose* of ascertaining whether the signature to the note was genuine. No question, therefore, was raised in regard to it. It was assumed and conceded in argument, as it was in the instructions given by the Court.

The jury were also instructed that, if the defendant, *knowing that the signature was not genuine*, told the president of the bank that it was his signature, it was such an adoption of it as would render him liable upon the note. This instruction is also predicated upon the circumstances proved, and not denied, that the president of the bank was making inquiries for the purpose of ascertaining the genuineness of the signature, and that this was known to the defendant. The jury were instructed that, if the admission was made under

any *mistake*, he would not be bound by it. That he would be bound by his adoption of the signature, if made with the *knowledge* that it was a forgery, there can be no doubt. *Greenfield Bank* v. *Crafts*, 4 Allen, 447.

The instruction given upon the question of damages was correct. If the jury found that the defendant *adopted* the signature, knowing it to be a forgery, his liability for the whole amount of the note is not denied. And the result would have been the same if they found that he was estopped from denying the signature. There are some cases in which one may be liable only for the damages caused by his representations. But the general rule applicable to estoppels *in pais*, is not, that one *may deny* the truth of representations made by himself, upon which another has been induced to rely, *and pay the damages caused thereby;* but that he *shall not be permitted to deny their truth.* If the estoppel applies to a disclaimer by any person, of title to property, he cannot assert any title; if it applies to an admission of partnership, he is bound as a partner, *in fact.* An estoppel may be limited to the *person* acting upon it and to the *subject matter* to which it relates; but it cannot be apportioned. It is applied, primarily, not to settle questions of *damages*, but other questions of *fact.* If the fact is one of title or of partnership, or the genuineness of a signature, the liability is the same as if the fact had been established by any other kind of evidence.

Exceptions overruled.

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

BARROWS, J., concurred in the result.

Inhabitants of Bridgton *versus* Parker Lakin and Fred. A. Lakin, *Trustee.*

By c. 106, § 2, of the Public Laws of 1862, personal property to the amount of one thousand dollars * * in addition to that already exempted by law, shall be exempt from attachment, or seizure upon execution, from and after the time a volunteer shall enlist in the service of the United States, and during his term of service, to be designated by the debtor, or his agent or attorney.

If the personal property of a debtor exceed one thousand dollars in value, he must designate what shall be exempted.

If it be less, there is no occasion for his making any designation.

Bounty money of a volunteer, in the hands of a person summoned as trustee, cannot be attached by trustee process, when the principal debtor's personal property is less than a thousand dollars.

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

The facts sufficiently appear in the opinion.

N. S. & F. J. Littlefield, for the plaintiffs.

A. A. Strout, for the trustee.

Appleton, C. J. — The alleged trustee sets forth in his disclosure that the principal debtor enlisted as a volunteer in the army of the United States, and continued therein; that the sum of $275, being the money deposited, was the bounty received on such enlistment; that said debtor had no other personal property; and that, after the service of the writ in the present suit, he designated this amount to be exempt from attachment and seizure on execution.

Upon a disclosure of these facts, the presiding Justice charged the supposed trustee, to which ruling exceptions were duly filed and allowed.

It is provided by an Act approved March 15, 1862, c. 106, § 2, that "personal property to the amount of one thousand dollars, other than that held in partnership, * * in addition to that already exempted by law, shall be exempt from attachment, or seizure upon execution, from and after

the time such volunteer shall enlist in the service aforesaid, and during his term of service, to be designated by the debtor or his agent or attorney."

The object of the Legislature was to protect the property of the volunteer in the service of the United States, from attachment on the writ or seizure and sale on execution. One thousand dollars is thus exempt. If there be personal property exceeding this sum in value, it is for the debtor to "designate" what shall be exempted. If there be less than this amount belonging to the debtor, there is no occasion for his making any designation. It will be exempt by force of the statute. *Everett* v. *Herrin*, 46 Maine, 357.

Personal property, exempted from execution by statute, is not liable to attachment by the trustee process. If turned out to the officer having an execution against the principal debtor, such officer would not be justified in appropriating it to the discharge of the same. *Staniels* v. *Raymond*, 4 Cush., 314. *Exceptions sustained.*

Trustee discharged.

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

EDWARD FOX *& als., Ex'rs, versus* CONWAY FIRE INS. CO.

By the 9th rule of the Supreme Judicial Court, parties filing specifications of the nature and grounds of defence with the clerk, * * shall, in all cases, be confined, on the trial of the action, to the grounds of defence therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial.

This rule is not repugnant to law; and the Supreme Judicial Court had not only statute, but inherent authority to establish it.

Specifications of defence may be amended at the discretion of the presiding Judge.

When the declaration on a policy of insurance alleges due notice and proof of the loss, according to the conditions of the policy, and the specifications

of defence do not deny such allegations, the plaintiffs need not show that they had notified the defendants of the fire, or that they had furnished them with any proofs or statements of loss or damage, verified by oath or affirmation.

If the specifications of defence contain no reference to the notice required by c. 34, § 5, of the Public Laws of 1861, and no question in relation thereto is made at the trial at *nisi prius*, the objection cannot be made before the Court *in banc*.

It may well be doubted whether more was intended by said section than that the preliminary proof therein set forth, should, in all cases, be deemed sufficient to authorize the plaintiff to maintain his suit.

It does not interdict the maintenance of a suit, where the notice required by the conditions of the policy has been given.

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

ASSUMPSIT on a policy of insurance against fire, dated Oct. 5, 1862.

The presiding Justice instructed the jury: — That, under the writ and pleadings and defendants' specifications of defence in this action, it was not necessary for the plaintiffs, to entitle them to recover in this action, to show that they had notified the defendants of the fire, or that they had furnished them with any proofs or statements of loss or damage, verified by defendants' oath or affirmation, (or any statement whatever.)

To which instruction the defendants excepted. The defendants also filed a motion to set aside the verdict as being against the weight of evidence; but the proposition upon which this was based involved the same principles as the exceptions.

The remaining facts appear in the opinion.

T. M. Hayes, for the defendants.

E. & F. Fox, for the plaintiffs.

APPLETON, C. J. — This is an action on a policy of insurance by the defendants. The writ sets forth a loss within the terms of the policy, and that the defendants, "on the sixteenth day of November, had due notice and proof thereof, according to the conditions of the policy."

The defendants seasonably filed specifications of defence, but there was no denial of the allegation of due notice and proof of the loss, according to the conditions of the policy.

By the 9th Rule of Court, 37 Maine, 570, "parties filing specifications of the nature and grounds of defence with the clerk, * * shall, in all cases, be confined, on the trial of the action, to the grounds of defence therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial."

When the cause came on for trial, the plaintiff had not been legally notified that he would be expected to prove notice of the loss. Indeed, he was entirely justified in regarding the allegations in the writ, in reference thereto, as admitted. *Stevens* v. *Adams*, 45 Maine, 611.

Specifications are amendable. If requested, it was within the discretion of the presiding Judge to have allowed their amendment. But the question of such allowance was for him and not for this Court.

The learned counsel for the defendants refers us to the requirements, as to notice, under the Act of 1861, c. 34, § 5. But the specifications do not refer to this section. No question in reference thereto was made at the trial.

By R. S., 1857, c. 82, § 26, no motion in arrest of judgment can be entertained after verdict. The objection now raised was not taken at *nisi prius* and is not properly before us.

It may well be doubted whether more was intended by c. 34, § 5, than that the preliminary proof therein set forth should, in all cases, be deemed sufficient to authorize the plaintiff to maintain his suit,—for the language is—"no other preliminary proof of any kind shall be required before commencing an action," &c. In other words this shall suffice. But it does not interdict the maintenance of the suit, when the notice required by the conditions of the policy has been given.

The Supreme Court has the inherent right to establish rules for the orderly conduct of business before it. But, if this were questionable, the authority is expressly conferred by statute, R. S., 1857, c. 77, § 13, provided they are not repugnant to law. The rule in question is not. It was established within the legitimate and unquestioned powers of the Court. When thus established "it has the force of law, and is binding upon the Court, as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case." *Thompson* v. *Hatch*, 3 Pick., 512. *Exceptions overruled.*

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

GEO. W. LAWRENCE, *in Eq.*, *versus* EMERSON ROKES *& als.*

As a general rule, when by a fair construction of the bill, or at any stage of the proceedings, it becomes certain that the judgment or decree must necessarily be directly against such of the respondents named as reside without the jurisdiction; and, that no judgment or decree can be rendered or made against the respondent before the Court, without embracing and being binding on them or the estate in which they have an interest; the hearing cannot ordinarily proceed without them.

But, if the bill only seeks a remedy and decree against the respondent who appears or is within the jurisdiction, and such judgment or decree will not bind, and cannot be enforced here or elsewhere against, but leaves all questions open as to those residing without the jurisdiction; then, although they would, if before the Court, have an interest in the question, and a decree might be made against them, yet, not being before the Court, the cause may be heard and a decree made affecting, legally or equitably, only the party before the Court, even if it might be apparent that if within the jurisdiction their joinder would be required.

It seems, that where persons, not within the jurisdiction, are named as parties, the Court *may*, before a hearing on the merits, require *satisfactory* evidence that such parties have actual knowledge of the pendency of the bill against them, and that they can, if they see fit, appear and answer..

Fuller v. *Benjamin*, 23 Maine, 255, questioned.

Lawrence *v.* Rokes.

BILL IN EQUITY.

The case was heard on demurrer.

The allegations of the bill and demurrer sufficiently appear in the opinion.

Evans & Putnam, for the complainant.

Gould, for the respondent Rokes, contended that —

The bill cannot be maintained for want of proper parties, and demurrer is the proper mode of taking advantage of the defect. Story's Equity Plead., §§ 541—543; *Fuller* v. *Benjamin*, 23 Maine, 255; *White* v. *Curtis*, 2 Gray, 467—472.

The bill exhibits the names of several persons who should have been made defendants; and it is no excuse that they are out of the State.

That the Court will not proceed to a decree, until all whose rights are to be affected by it, are before the Court, is the general rule. *Evans* v. *Chism*, 18 Maine, 222, 223; Story's Equity Plead., §§ 77, 81, 82, 83, 162, 166, 218.

This bill sets out in legal effect a *partnership*; and, whether anything is due to the plaintiff cannot be ascertained until a settlement. To that settlement *all must be parties*. The interests of all are involved.

If some of the plaintiff's associates are beyond the jurisdiction of the Court, that is his misfortune, resulting from his voluntary act of association. The rules of law cannot be safely strained to cover every case of *misfortune*.

This case is, in its facts and circumstances, *identical* with the case of *Fuller* v. *Benjamin*, 23 Maine, 255.

KENT J. — The bill sets out a partnership in lumbering transactions between the plaintiff and the four defendants, on equal terms. It further charges, that the business has been finished, that all the joint property has been sold or disposed of, that all the debts due to or from the co-partnership have been adjusted and discharged, that the other members of the firm are justly indebted to him severally and individual-

ly in a large sum, for advances and payments made by him, beyond his fair share of such advances. He further sets out in his bill, that all the defendants named, except Rokes, now reside out of the limits of this State and out of the jurisdiction of this Court. The prayer is, that said Rokes forthwith, and the other defendants, whenever they come within the jurisdiction of this Court, may answer the bill and come to a full account, and pay whatever may be found due from all and singular of the said defendants, to him, the complainant. He also prays that process may issue against the three absent defendants, if they should come within the limits of the State. The respondent Rokes demurs to the bill, and assigns, as the causes of the demurrer, the non-joinder as parties of the three absent defendants, and that by the bill the complainant has not made a case that entitles him to discovery or relief.

The first answer to this is, that the absent partners *are* made parties to the bill, and process is prayed for against them. They are so far parties to the bill, that they may appear if they see fit, and have their rights protected and adjudicated upon. They are parties on whom subpœnas may be served, if they come into the State. In this respect, the case differs from some of the cases cited.

The question is, must the bill be dismissed because the three absent defendants have not been served with process, to compel them to come in?

This question is one that has perplexed courts of equity, as well as courts of law. On the one hand it is urged that there are many cases, where to dimiss a bill or suit, because a part of the defendants are out of the jurisdiction, and cannot be compelled to come in, is a practical denial of justice, and enables dishonest or reluctant debtors to escape from any judgment or recovery against them by separating and having their domicil in different States or in a foreign country. On the other hand, it is urged, that the general rule in equity is, that all persons legally or equitably interested in the subject matter of the suit and the object of the

bill, should be made parties, and that, unless this is done, the rights of the absent may be sacrificed or injuriously affected.

We have examined the text books and the various cases referred to, and find no certain and inflexible rule on the subject. All agree that there are exceptions to the rule requiring that all parties, who may be interested in the matter, must be parties before the Court. And this exception is recognized to the extent, that, *if the absent parties were within the jurisdiction of the Court*, it would not proceed without them, yet, it not being in its power to compel their appearance, it would not dismiss the bill for this cause, but "do what it can" to administer justice to the parties before it. *Cockburn* v. *Thompson*, 16 Ves., 326.

Mr. Justice STORY, in the case of *Vose* v. *Philbrook*, 3 Story, 347, in a case by a third party against a partnership, says,—"It is true, that where, as in the present case, the other partners are out of the jurisdiction, a court of equity may dispense with their being made parties, but then it is a matter in the *sound judgment* of the Court, whether, under all the circumstances, it ought to do so or not." The principles laid down by the same learned Judge, in his "Equity Pleadings," do not state the rule quite so broadly, but leave it in some uncertainty, after comparing one section with another. §§ 77, 78, 79, 82.

On a consideration and comparison of authorities and of the reasons on which they are based, we can find no better rule, as a general one, subject, of course, to exceptions in peculiar cases, than the following:—When it is certain, by the fair construction of the bill itself, or becomes so at the hearing, or in any stage of the proceedings, that the judgment or decree must necessarily be directly against the absent defendants, and that no judgment or decree can be made against the party before the Court, without embracing the absent, and binding them or property in which they have an interest, the hearing cannot ordinarily proceed without them. As where the bill seeks for a decree for the sale

or disposition of property in which all have a certain interest or ownership, or where it seeks for a dissolution of a co-partnership, or the specific performance of a contract, which can only be performed jointly by all; and other similar cases.

But if the bill only seeks a remedy and decree against the defendant who appears, or is within the jurisdiction, and such judgment or decree will not bind the absent, and cannot be enforced here or elsewhere against them or their property or rights, but leaves, as to them, all questions open, then, although they would have an interest in the question, if before the Court, and a decree might be made against them, yet, not being, the cause may be heard and a decree may be made, affecting, legally or equitably, only the party before the Court. And we think this may be done, although it is apparent that it would be more satisfactory to the Court to have all the parties connected with the matter before them, and their joinder would be required, if they were within the jurisdiction of the Court. The Court will not deny justice to a party seeking it, unless it is compelled to give a judgment or issue a decree which must bind others who are not before the Court, and have not been heard, or had an opportunity to be heard.

The question arises—under which class does the case before us fall?

This is not a bill against a partnership by a creditor of the firm seeking a decree against all or one of the members. But it is a suit by one member of a firm seeking to recover a sum from each of his co-partners, on the ground that he has advanced more than his proportion. It does not ask for a dissolution of the firm, but sets out that the business of the firm was concluded several years since, that its business relations with others are all settled and adjusted, and that nothing remains but an adjustment *inter partes*. Now, in the bill before us, they are not asserting or defending as a co-partnership, but as individuals, each for himself, and each, in fact, with an interest, to some extent, adverse

to each and all the others. This bill asserts that each of the four named owes individually to the plaintiff a certain sum. It does not ask for a joint judgment. It is true, that, in order to ascertain what that sum should be, it may be necessary to examine and adjust the partnership matters and to determine what is due on such settlement to the plaintiff from each of his co-partners. But, when this is settled, the decree asked for is against the defendant Rokes alone, unless the others named come in. And why should he not have such decree? It is said, however, that it is not so much that such a *final* decree may be made, as the fact that, in order to determine what sum is due, it is necessary that all the partners should be heard by answer and proof.

The plaintiff replies that he does not seek any decree against the absent, and that any decree he may obtain here cannot bind those not appearing; that, as to them, the whole matter must be left open, and, as he cannot invoke a decree or judgment in this case in any proceedings he may institute here or elsewhere against them, they cannot be affected by such decree in their persons or estate. This being so, the objection stands only as one touching the *proof* to be produced by the parties, and the nature and extent of the evidence to sustain the claim on settlement of the co-partnership.

It is to be observed that, now, either party and all interested witnesses, by our law, can give testimony in the case between them. There is no legal objection to the testimony of any or all these absent defendants, and either party may take and use it. The burden is on the plaintiff to show satisfactorily that, on a full and fair settlement of all matters, he is a creditor of the defendants summoned. If he fails to do this, his bill must be dismissed. On the other hand, the defendant Rokes may rebut all claim against him, by proving, by himself or partners, or otherwise, that, on such adjustment, nothing is due from him to the plaintiff.

This case seems to fall clearly within the class of cases where a bill will not be dismissed on the ground of absent

defendants,—certainly not on demurrer, or before it is made manifest that a decree against one cannot be made, without a decree against the others, who have not been heard; or, until it is certain, in the progress of the case, that it is impossible to determine the case and the rights of the parties before the Court, without the answers of the absent defendants.

In a case like this, where persons not within the jurisdiction are named as parties, it may be required, before a hearing on the merits, that the Court should be satisfied that the absent parties have actual knowledge of the pendency of the bill against them, and that they can, if they see fit, appear and answer, if such notice, formal or informal, can be reasonably given. But this is not absolutely essential to authorize the Court to proceed with the parties before them. It is a matter in the discretion of the Court in each case, depending upon its character.

We are aware that the rule before stated seems to conflict somewhat with the decision in *Fuller* v. *Benjamin*, 23 Maine, 255. That decision was made before the change in the law allowing parties and interested witnesses to testify. It would also seem that, in that case, the absent partners were *not* named as parties to the bill. Yet the Court assumes, as one ground for its opinion, that the absent members' rights might be affected by a decree. The principal reason given by the Court is, that the *evidence* of facts within the knowledge of all the partners is essential, before a decree can be made understandingly, and that that evidence could only be had by answer to the bill.

On the other hand, the case of *Towle* v. *Pierce*, 12 Met., 329, fully sustains the views we have taken and is directly in point.

The Supreme Court of the United States has often considered this question of necessary parties, and has gone great lengths in sustaining bills, where all the parties could not be reached. Thus, in *Mallow* v. *Hinde*, 12 Wheat. 193, it was held that, where an equity cause may be finally decided as

between the *parties litigant*, without bringing others, who would, *generally speaking*, *be necessary parties*, such parties may be dispensed with, if process cannot reach them. But not if a final decree cannot be made without affecting the *rights* of absent parties. To the same effect, *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Van Reimsdyke* v. *Kane*, 1 Gallison, 371; *West* v. *Randall*, 2 Mason, 181. In New York, *Bailey* v. *Inglee*, 2 Paige, 278. It is not to be overlooked that, even under the strict rules of the common law, a similar doctrine prevails, and is often applied. It has long been settled, in this State and Massachusetts, that if a suit is instituted on a joint contract against several, and some of them are out of the jurisdiction of the Court, the plaintiff may proceed against those on whom service has been made, and recover a judgment against them only. *Tappan* v. *Brewer*, 5 Mass., 193; *Dennett* v. *Chick*, 2 Greenl., 191; *Hall* v. *Williams*, 8 Greenl., 434. The reason given is one of necessity. It is held that any other rule would be a denial of justice. MELLEN, C. J., in the case last cited, says that, "according to the doctrine relied upon by the defendant, no action on a joint contract can ever be maintained, when the debtors choose to reside in different States and are not amenable to the same tribunal."

Demurrer overruled.—Defendant to answer.

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

BARROWS, J., concurred in the result.

Isaac Dyer *versus* Piscataqua Fire and Marine Ins. Co.

In an action on a policy of insurance, the defendants cannot, by way of defence, avail themselves of the condition in the policy, that "no holder of a policy shall be entitled to maintain any action thereon against the company, until he shall have offered to submit his claim to a reference," unless that defence has been set up in their specifications.

To render an insurer liable, the peril insured against must be the sole proximate cause of the loss, so causing it and so connected with it that it could not have been otherwise produced.

And the loss must be so dependent upon the peril, that it is not only the natural result, but is the necessary and inevitable effect of it.

Where a vessel runs upon a reef and is obliged to put into an intermediate port for repairs, and, for want of funds or credit, the master is obliged to sell a portion of the cargo to pay expenses of such repairs, such sale is not the necessary result of the peril at sea.

To render property a subject of general average, it must have been sacrificed to avoid an impending peril, and for the benefit of all concerned.

A part of a cargo sold by the master at an intermediate port, to make *permanent* repairs of damage, caused by a peril passed, and not for the benefit of all parties, is excluded from general average.

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

Assumpsit on a policy of insurance against the perils of the sea.

One of the conditions in the policy was as follows:—

"No holder of a policy shall be entitled to maintain any action thereon against the company, until he shall have offered to submit his claim to reference. In case any suit shall be commenced without such offer of reference having been made, the claim of the party so commencing such suit shall be released and discharged, and the company be exempted from all liability under it."

The declaration contained no averment of a compliance with this condition; and the specifications of defence did not allege a non-compliance therewith.

After the evidence was all put in, the case was withdrawn from the jury, and submitted to the full Court to be decided according to the legal rights of the parties; and, if

the plaintiff was entitled to recover, the damages were to be assessed by the Court.

The remaining facts sufficiently appear in the opinion.

E. & F. Fox, for the plaintiff.

J. & E. M. Rand, for the defendants.

DANFORTH, J.—The objection to the maintenance of this suit, before an offer of reference, cannot be sustained. No suggestion of such defence appears in the specifications; it is not, therefore, now open to the defendants.

January 17th, 1862, the defendants insured the plaintiff $4000, on a cargo of molasses on board the "Benjamin Cushing," from Cardenas to Portland, as per policy. The vessel sailed from Cardenas on the 8th of January, 1862, and, on the same day struck upon a reef, in consequence of which, the master was obliged to put into Havana for repairs. Here the vessel was repaired by recaulking, putting in some new planks, and some repairs upon the mainmast. To pay for these repairs, the master was obliged to sell a part of the cargo, as he had no other means of raising the funds. After making the repairs, the master sailed for Portland with the remainder of the cargo on board, but soon after, striking upon "French reef," the cargo became a total loss. On the part of the plaintiff, it is claimed that the insurers are liable for that portion of the cargo sold at Havana to raise money to pay for the repairs there made. This is denied by the defendants. And the whole question depends upon whether this was a loss caused by a peril of the sea. If it was, it was covered by the policy, otherwise it was not. It is very clear that the act of selling was not a peril of the sea, neither was the fact that the vessel needed repairs; for this might have happened from ordinary wear and tear, or from other perils attendant upon a sailing vessel, not insured against. It may however be admitted that striking upon the reef, by which the injury was done, was a peril of the sea. It may also be admitted, that, under the cir-

cumstances, the master was authorized to sell so much of the cargo as was necessary to pay the expenses. Here, then, was a peril of the sea within the contract of insurance followed by a loss. Was the peril the proximate cause of the loss? For it is well settled that the rule "*causa proxima non remota spectatur*," is the one by which the insurer's liability must be ascertained. The difficulty lies, not so much in the principle involved, as in its application. In *Peters* v. *The Warren Ins. Co.*, 14 Peters, 99, (13 Curtis, 370,) it is recognized as the correct rule.

In that case, to bring the loss within the policy, it was deemed necessary that it should be the "natural or necessary consequence of the peril insured against," that the peril was the sole proximate cause of the loss. So, in *United States* v. *Hall*, 6 Cranch, 171, (2 Curtis, 357,) it was said that "an effect, which proceeds inevitably, and of absolute necessity, from a specified cause, must be ascribed to that cause." The inference is that, if otherwise, it would not be so ascribed. It would seem to follow that, to render the insurers liable, the peril insured against must be the sole proximate cause of the loss, so causing it, and so connected with it, that it could not have been otherwise produced. And the loss must be so dependent upon the peril, that it is not only the natural result but is the necessary and inevitable effect of it. No authority has been cited, and we have seen none, which does not fully sustain this view. In the case at bar, the repairs made were such as the owner under his contract as common carrier was bound to make, and although, in this case, the damage was caused by a peril insured against, yet the result would have been the same if caused in any other way, and, under the circumstances, the master would have had the same right to sell the cargo. It would seem to be very clear then that the sale was not the necessary result of the peril at sea, but rather of the want of funds or credit, in port. It grew out of the contract of the plaintiff with the master or owner, and did not attach to his contract with the insurer. The sale was not imme-

diately connected with, or the inevitable result of the peril, but it was necessarily connected with, and the unavoidable result of a want of funds or credit. The peril and consequent damage might have taken place without giving the master authority to sell, while that authority can only come from an absolute want of funds. The defendants did not insure against a want of funds, and therefore are not liable. A similar application of the principle of proximate cause appears to have been made by the Supreme Court in Massachusetts, in *Paddock* v. *Franklin Insurance Co.*, 11 Pick., 235, where it was held that, if an insured ship was injured after the commencement of the voyage, it is the duty of the owner to make the necessary repairs, if possible, and, if the vessel should be afterwards lost for the want of repairs, the insurers would not be liable, as the want of repairs would be the proximate cause of the loss, and not the peril insured against. SHAW, C. J., in commenting upon this case, in *Copeland* v. *New England Marine Ins. Co.*, 2 Met., 437, says, "it being settled to be the duty of the owners, even after a damage done to their vessel by one of the perils insured against, to put their vessel in a seaworthy condition, * * * * * as soon and as fully as it is in their power to do so; if they fail to do so, and if the vessel is afterwards lost under such circumstances, that the loss might be reasonably attributed, in whole or in part, to such want of repairs, then the actual cause of loss is the want of repairs, for which the assured are responsible, and not the sea damage, which caused the want of repairs, for which it is admitted the underwriters are responsible. For, in determining what losses are within the perils insured against, "*causa proxima non remota spectatur.*"

The case of *Hale* v. *Washington Insurance Co.*, 2 Story, 189, cited for the plaintiff, might, perhaps, lead to a different conclusion. But this case has been distinctly overruled by the Supreme Court of the United States, in *General Mutual Insurance Co.* v. *Sherwood*, 14 How., 351, (20 Curtis, 221.) This latter case we consider to be sustained by the

sounder reasoning, and, so far as it applies, sustains the view we have taken of the case at bar. The result is, that, for his loss, by the sale of his goods, the plaintiff must rely upon his contract with the carrier, and not upon that with his insurer. The cases of *Powell* v. *Cudgeon*, 5 Maule & Sel., 431, and *Sargery* v. *Hobson*, 4 Bing., 131, are in point, and, though foreign authorities, seem to be well founded in principle and are cited with approbation by Chancellor KENT, in his Commentaries, vol. 3, (4th. ed.,) p. 302.

The conclusion to which we come upon the first point is more fully illustrated and confirmed, by the principles applicable to the second point raised by counsel; by which it is claimed that, if the defendants are not liable as for a total loss, for the full value of the property sold at Havana, they are at least responsible for the proportion of the general average, which the whole cargo would be subjected to, if an average had been made up at Havana. This depends, of course, upon whether the goods sold were chargeable to general or particular average. If to the former, it would seem to follow that the underwriters would be liable; if to the latter, the party for whose benefit they were sold, would alone be liable. And here, again, arises the question already considered, was the sale caused by a peril of the sea? It should be remembered, that the peril of the sea was passed, the damage had been done, and still the cargo was safe. Now, to make property a subject of general average, it must have been sacrificed to avoid an impending peril, and for the benefit of all concerned. In this case it was sold to repair damage caused by a peril passed, and not for the benefit of all parties, but of one only. As we have already seen, it was the duty of the ship owner to make these repairs, and, what is quite as important in its bearing upon the question under consideration, the repairs made were permanent, such as were needful to the vessel, and of which the owner finally had the sole benefit. If the repairs had, from the necessities of the case, been merely temporary in their nature, made for the sole purpose of enabling the vessel to proceed

to a place of safety, or where repairs could be made to better advantage, or, if the money had been raised to pay the expenses caused by detention on account of a peril insured against, such as wages and provisions of seamen, loading and unloading of the cargo, or any other things from which the owners of the vessel received no particular advantage, but which were alike beneficial to all, and contracted to avoid threatening danger, such repairs and expenses, and the cargo necessarily sold to pay for such, would undoubtedly be the subject of general average. This distinction properly applied, it is believed, will reconcile all the authorities upon this question, although they are apparently somewhat contradictory.

Abbott, in his work on shipping, (4th ed.,) p. 349, recognizes this distinction, and remarks that, "expense incurred in port, in which the ship may have taken refuge during the voyage, by repairing the damage done to the ship by tempest alone, seems with more propriety to fall upon the owners, and is so held in the civil law, and by many foreign writers."

In *Plummer* v. *Wildeman*, 3 M. & S., 482, in speaking of the expenses necessary to enable a ship to proceed on her voyage, as being chargeable to general average, Lord ELLENBOROUGH remarks, "but if any benefit *ultra* the removal of this incapacity should have accrued to the ship by repairs alone, inasmuch as that will redound to the particular benefit of the ship owner only, it will not come under the head of general average."

In *Padelford* v. *Boardman*, 4 Mass., 548, the same distinction is made, and distinctly settled. Also, in *Bedford Commercial Ins. Co.* v. *Parker*, 2 Pick., 8—9; *Brooks* v. *Oriental Ins. Co.*, 7 Pick., 268; Arnould on Insurance, 894, 895; *Thornton* v. *The United States Ins. Co.*, 12 Maine, 150, the allowance of general average is confined to the "expenses necessarily incurred during the detention for the benefit of all concerned," and does not include repairs to the vessel.

From the testimony in the case under consideration, it appears that all the expenses were for permanent repairs to the vessel and were ultimately for the benefit of the owner, and him alone. As such repairs, both from principle and authority, are excluded from general average, so must that part of the cargo sold to raise money to pay for them be excluded. The result is, that the defendants are not responsible for that part of the cargo sold at Havana, either as for a total loss, or in general average, but, for that part subsequently lost on French reef, they are responsible, and judgment must be rendered for the plaintiff for the value of his cargo, exclusive of the amount sold at Havana, which, from the evidence in the case, we determine to be the sum of two thousand and seventy-five dollars and seventy-nine cents, ($2075,79,) and interest thereon from Sept. 3d, 1862.

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

STATE *versus* JAMES POLLAND.

A complaint alleging the larceny to have been of "one sheep, of the value of five dollars, the property of another person, unknown to the complainant," &c., is sufficient.

And if the allegations be proved, the defendant will be deemed guilty of larceny.

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

COMPLAINT FOR LARCENY.

The facts appear in the opinion.

The defendant excepted to the ruling of the presiding Judge.

E. G. Harlow, for the defendant.

J. A. Peters, Attorney General, contra.

APPLETON, C. J. — The principal exception taken is, that the owner of the property stolen is not stated in the complaint, which alleges the larceny to have been of "one sheep of the value of five dollars, the property of another person, who is unknown to your complainant," &c.

The presiding Judge ruled the complaint sufficient in law, and that, if the allegations therein were proved, the defendant was guilty of larceny, and so instructed the jury.

The instructions given were correct. But "certainty in an indictment to a general intent is sufficient." Co. Lit., 303, a; 5 Co., 121, a. And, therefore, "an indictment for felony, *quod cepit bona cujusdam ignoti*, is sufficient." 4 Com. Dig., Indictment, G 5. This seems to be recognized as well settled law in Massachusetts, in *Com.* v. *Morse*, 14 Mass., 247, and in this State, in *State* v. *McAloon*, 40 Maine, 133. "The indictment," remarks JOHNSON, J., in *State* v. *Haddock*, 2 Hayw., (N. C.,) 162, "should state in whom the property was, or that it was the property of some persons unknown, otherwise he, (the defendant,) could not plead in bar to another indictment for the same cause."

Exceptions overruled.

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

STATE *versus* JOSHUA YEATON *& als.*

Requested instructions should be pertinent to the issue.

Therefore, in the trial of an indictment for an unlawful assembly and violently assaulting a member of a lyceum, at the door of a common school house, because he refused to let the defendants enter, the presiding Judge properly refused to instruct the jury that such member had no legal right to exclude the defendants from attending the lyceum, even though they were inhabitants of the district in which the school house was situate.

Also, the instruction, that the defendants had a legal right to use sufficient force to enter said school house for the purpose of attending the lyceum, when they attempted it, was properly refused.

State *v.* Yeaton.

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

Indictment.

The facts sufficiently appear in the opinion.

J. J. Perry, for the defendants.

Peters, Attorney General, contra.

Barrows, J. — The defendants were indicted for an unlawful assembly and riotous assault. There was no material conflict of testimony. The facts were these. In the spring of 1864, a private school was in progress in the district school house at Norway village, under the tuition of G. F. Leonard, one of the principal witnesses for the prosecution, who, for some three years, had had the exclusive charge and control of the building which was used in spring and fall for private schools — in the winter for a common town school, and in the summer for both. The school had an accompaniment, common enough in New England, and eminently useful when conducted in an orderly manner, — a lyceum for public debates and discussions, in which both scholars and citizens participated, and which held its meetings in one of the rooms in the school house. Disorderly persons, two of the respondents being of the number, had created a disturbance at some of their meetings, and, thereafterwards, the lyceum voted to admit none to its meetings except the scholars and holders of tickets of admission. The managers of the lyceum issued tickets, and Joseph P. Packard and Wm. E. Frost, under their direction, were acting as doorkeepers at a regular meeting of the lyceum. The respondents, with their comrades, in all, six in number, went to the door for the alleged purpose of attending the lyceum. On being informed of the vote by Packard and Frost, they attempted to enter by force, one of them declaring with an oath that they wanted no tickets. Packard placed his hand against him for the purpose of holding him out, whereupon the party fell upon Packard and Frost and wounded both

severely by heavy blows upon the head with slungshots and stones, fracturing the skull of the former. Upon these uncontroverted facts, the defendants not even offering themselves to vary in the least the statements made by the government witnesses, their counsel contends *that*, inasmuch as they were inhabitants of the school district to which the school house belonged, the jury ought to have been instructed—1, *that* Packard and Frost had no legal right to exclude them from attending a lyceum held in the house, and 2d, *that* they had a legal right to use sufficient force to enter said school house for the purpose of attending the meeting of the lyceum at the time they attempted to enter, or, more briefly, that the doorkeepers of the lyceum were in the wrong, and that defendants were justified in doing what they did; for, with all this violence, they did not succeed in effecting an entrance. They did create a great tumult. To the number of half a dozen, they, and their comrades, with loud oaths, dealt heavy blows with dangerous weapons, inflicting ghastly and terrible wounds—the provocation being a hand extended to oppose their entrance into a lawful and peaceable gathering, which, by formal vote, previously made known to them, had excluded all who had not received tickets of admission. Were they guilty of the offence charged? "If three or more persons assemble in a violent or tumultuous manner to do an unlawful act, or, being together, make any attempt or motion towards doing *a lawful* or unlawful *act in a violent, unlawful or tumultuous manner*, to the terror or disturbance of others, they shall be deemed guilty of an unlawful assembly." R. S. c. 123, § 2.

"It is not every assault that will justify every battery." 3 Greenl. Ev., § 64.

It is true that a man may justify the use of so much force as is necessary to defend the possession of his house, lands or goods, or his person from threatened violence, but it does not follow that he may lead a riot to dispossess those who are peaceably, even if unlawfully, in possession of his tenements or goods under a claim of right. If one of the defendants

had been the owner in fee simple and in severalty of the building occupied by the lyceum, all that Packard did in opposing the entrance of this party would not have justified the acts of the defendants. The substitution of law for brute force, in the maintenance of the rights of property, is one of the greatest triumphs of civilized society and good government.

The positions assumed by the defendants' counsel in argument are not only plainly in contravention of the first principles of christian morality, but utterly subversive of law, order and the peace of the community. If the first requested instruction had been correct as matter of law, it had no pertinency to the question at issue between the State and the defendants upon the facts proved, and the second is not law, but the essence of anarchy. *Exceptions overruled.*

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

INHABITANTS OF JAY *versus* INHABITANTS OF CARTHAGE.

By R. S., c. 143, § 20, no person shall suffer any of the disabilities incident to pauperism, nor be thereafter deemed a pauper, by reason of being supported in the insane hospital.

By R. S., c. 24, § 25, a recovery against a town, for supplies furnished to a pauper, estops such town from disputing the settlement of the pauper with the town recovering, in any future action brought for the support of the same pauper.

In an action by one town against another for supplies furnished a pauper, whose settlement is alleged to be in the defendant town, the plaintiffs are estopped by the record of a default in a former suit by the plaintiff against the defendant town, containing a count for the expenses of commitment and support of the alleged pauper at the insane hospital, and also a count in common form for supplies to the same pauper.

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

ASSUMPSIT for pauper supplies.

The facts appear in the opinion.

S. Belcher, for the defendants.

R. Goodenow, for the plaintiffs.

BARROWS, J.—The only question in controversy between the parties was as to the settlement of a pauper whose wants had been supplied by the plaintiffs. That she once had a settlement in Carthage was admitted, but the defendants claimed that she had acquired a settlement in Jay, by five years continuous residence there, from 1854 to 1859, and offered evidence to establish the fact. Plaintiffs objected, insisting that the defendants were estopped from disputing the settlement of the pauper, by a judgment recovered at the April term, 1862, by the plaintiffs, against the defendants for the support of the same person. The presiding Judge sustained the objection, held that the defendants were estopped, and excluded the evidence offered to show the five years continuous residence.

The writ, upon which the former judgment was founded, contains a count for the expenses of the commitment and support of the alleged pauper, at the insane hospital, and, if this were the only count, though the plaintiffs might have been entitled to recover by virtue of chap. 143, section 20, R. S. of 1857, it would, perhaps, work no estoppel, inasmuch as it is specially provided in that section, that "no insane person shall suffer any of the disabilities incident to pauperism, nor be hereafter deemed a pauper, by reason of such support."

But the writ contains also a count in common form for pauper supplies, alleging a settlement in the defendant town, a falling into distress in the plaintiff town, the furnishing of the needed supplies, according to an account annexed and the notice required by statute. The case was submitted to the full Court upon report, and the decision, as set forth in the record, was rendered in the following terms:—"Defendants

defaulted for amount of account, exclusive of interest, except from the date of writ."

The judgment is not rendered upon the first count exclusively. The default ordered covers all the matters that are well alleged in the writ. An insane person may also be a pauper, although one, not otherwise in need of relief, incurs no pauper disabilities by reason of being committed to the hospital.

The record of the judgment offered by the plaintiffs brings the case within the provisions of section 25, chapter 24, of the Revised Statutes, and the defendants are precluded thereby from contesting the settlement of the alleged pauper in this suit.

Exceptions overruled.

Judgment for plaintiffs.

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

MARY HOWE *versus* JOHN CLANCEY.

When money, or specific articles which have since been converted into money, have been stolen, the owner may maintain assumpsit for money had and received against the thief.

The law, as declared in *Foster* v. *Tucker*, 3 Maine, 458, was changed by c. 102, of the Public Laws of 1844, incorporated into R. S., c. 120, § 12.

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

ASSUMPSIT for money had and received.

The specification under the money count was as follows:

"For specification of the claim to be proved under the money count, the plaintiff says that, on the sixteenth day of November, 1862, she owned and was possessed of $630 in gold coin, which she had in a tin box, buried in the earth, in the cellar of her dwellinghouse, in Lewiston, in the said county of Androscoggin; and that, between that day and the fourteenth of February, 1863, the said Clancey took

said money and carried it away, and converted it to his own use."

After the plaintiff's evidence had all been put in, the defendant moved for a nonsuit, upon the ground that the plaintiff's evidence proved a felonious taking, in which case the law would not imply a promise on the part of the defendant.

The presiding Judge overruled the motion, and instructed the jury that the action was maintainable, even if the evidence satisfied them that the taking was felonious.

Other questions raised are rendered immaterial by the decision sustaining the foregoing ruling.

The verdict was for the plaintiff and the defendant excepted.

Record, for the defendant, contended—

That, in larceny, the *intent* must be to deprive the owner, not temporarily but *permanently*, of his property. 3 Greenl. on Ev., § 150.

The law cannot be said to *imply a promise* to restore the property, or its value, when the *intent* was to deprive the owner *permanently*. *Foster* v. *Tucker*, 3 Maine, 458.

A tort may be waived, and assumpsit brought. But a tort is a *private* or *civil wrong* or *injury*. 1 Hilliard on Torts, 1 and 2.

All acts or omissions, which the law recognizes as subjects of its provisions and application, are either contracts, *torts* or *crimes;* the first being *agreements*, express or *implied;* the second, *injuries* of commission or omission, done to individuals; and the third, *injuries* done to the public or State. *Ibid.* Bouvier gives same definitions.

Wrongs are divided into public and private.

1. A public wrong is an act which is injurious to the public generally. *Ibid.*

2. Private wrongs are injuries to individuals, unaffecting the public, and are redressed by actions for damages. *Ibid.*

The question is not whether the plaintiff can waive a *tort*, but whether she can waive a *crime* and bring assumpsit; for,

by waiving torts and suing in assumpsit, the plaintiff confirms and ratifies the tortious act, and treats the defendant as a bailee, or agent, or otherwise contracting party. *Jones* v. *Hoar*, 5 Pick., 285.

If the law implies a *promise* to refund stolen property, it is no felony; and the party who takes it cannot be convicted of larceny. The law would treat him as a contractor and not as a felon.

An *intent* to deprive one of his property *permanently* and a *promise* to pay for it, cannot exist at same time.

H. C. Goodenow, for the plaintiff.

DAVIS, J.—By chapter 102 of the laws of 1844, incorporated into the Revised Statutes, chapter 120, section 12, it is provided that "an action for the recovery of property stolen may be maintained by the owner against the person liable therefor, although the thief is not convicted."

If the law was ever different, as seems to have been supposed in the case of *Foster* v. *Tucker*, 3 Maine, 458, it was changed by this statute.

When specific articles have been stolen, and have not been converted into money, it may be that the remedy is by an action of trespass, or case, instead of by an action of assumpsit.

But if the stolen property was money, or has been converted into money, an action of assumpsit, for money had and received, is maintainable, according to the established doctrine that when one man has money in his hands that in equity and good conscience belongs to another, it may be recovered in this form of action. The plaintiff may waive the tort in this case, as well as in any other case of wrongful taking. *B. & W. R. R. Co.* v. *Dana*, 1 Gray, 83.

The question proposed, and to which objection was taken, became immaterial by reason of the answer given.

Exceptions overruled.

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

GRANITE STATE BANK *versus* ENSIGN OTIS *& als.*

By R. S., c. 82, § 18, in all civil actions, if the defendant appears, he shall, at least fourteen days before the next term after his appearance, file with the clerk a brief specification of the grounds of his defence, with a declaration, signed by him or his attorney, that he believes there is a good defence to all or a part of the plaintiff's claim, and that he intends to make it.

This statute does not require that the several grounds of defence specified shall be consistent with each other.

The defendant may specify as many grounds of defence as he chooses.

It is not necessary that each several ground of defence should constitute a valid and sufficient answer to the declaration.

If there be one valid ground of defence specified, the defendant cannot be deprived of his right to a jury trial.

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

ASSUMPSIT on two promissory notes, brought by the plaintiffs, as indorsees, against the defendants, as makers thereof.

The facts sufficiently appear in the opinion.

Fessenden & Frye, for the defendants.

P. Barnes, for the plaintiffs.

APPLETON, C. J. — The defendants filed brief specifications of the grounds of their defence, in which they allege that they never executed the notes described in the plaintiffs' writ, — that, if they did, said notes were without consideration, — that usurious interest was included in their amount, — that they were received in payment of an amount less than their face, — that this amount has been paid according to the agreement of the parties, — that the makers were not to be called on for payment, and that the plaintiffs were to rely on the indorsers, &c.

The presiding Judge, deeming these specifications "insufficient in law," ordered a default, to which order exceptions were seasonably alleged and allowed.

At common law, but one plea was permitted. The statute of Anne, c. 16, § 4, which is a part of the common law

of this State, enacts, that it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any Court of record, *with leave of the Court*, to plead as many several matters thereto as he shall think necessary for his defence. *Little* v. *Blunt*, 13 Pick, 473. Under this statute, inconsistent pleas were allowed. An opinion was formerly entertained, that mere inconsistency between two given pleas was a decisive objection to their being pleaded together under the statute. But, if such a rule should prevail, the statute would, in a great measure, be practically repealed. "The object of the statute was *to enable the defendant to plead as many pleas* as he *chooses*. * * At this day, however, it appears to be generally understood, as a sound rule in the construction of the statute, that mere inconsistency, between two or more pleas in bar, is no objection to their being pleaded together." Gould on Pleading, c. 8, § 26. Thus *non est factum*, usury, infancy, duress and payment may be pleaded together. So, in trespass, not guilty, a justification and accord and satisfaction may be joined. "The books," remarks Mr. Justice WESTON, in *Gordon* v. *Pierce*, 11 Maine, 215, "are full of double pleas, not to be reconciled with each other."

By R. S., 1857, c. 82, § 18, it is provided, "in all civil actions, if the defendant appears, he shall, at least fourteen days before the next term after his appearance, file with the clerk a brief *specification of the grounds of his defence*, with a declaration, signed by him or his attorney, that he believes there is a good defence to all or a part of the plaintiff's claim, and that he intends to make it." To this specification a demurrer may be filed. By the same section, at the trial, "*on leave*, double pleas may be filed."

It is urged that the several grounds of defence, set forth in the specifications filed by the defendants, are inconsistent. But no such restriction is imposed on the defendant, as that the several grounds of defence in the specifications should be consistent with each other. He may specify as many as he chooses. He is not required to ask leave, as is the case

where several pleas are filed. No court is in session at the time of their filing. As, where several pleas are filed, inconsistency between them is allowable, much more is it, where the grounds of defence are to be informally specified, and the statute does not require that any leave of Court should be asked or given. The Court are not to require more than the statute.

Neither is it necessary that each several ground of defence should constitute a valid and sufficient answer to the plaintiff's declaration. Each ground of defence is to be looked at by itself. If sufficient, its sufficiency is not to be impaired nor destroyed by the fact that other and insufficient grounds of defence have been set forth in the defendant's specifications. If there be one valid ground of defence, the defendant is not to be deprived of his right to a jury trial.

The declaration, required by § 18, is properly signed and filed. It precedes the grounds of defence, as set forth in the specifications. The statute does not require that it should follow them. It contains all the statutory requirements, and we perceive no reason for adding thereto.

By statute, the general issue may be pleaded in all cases. If this was not done, the defendants had a right at any time to do it. *Exceptions sustained.*

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

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DAVIS, WALTON and DANFORTH, JJ., dissented, and expressed their views in the following opinion drawn by

DAVIS, J.—There is no doubt that, at common law, a defendant might, by leave of Court, plead several pleas not consistent with each other. And there is a provision of statute to the same effect in this State. Such pleas may be made *specially*, or by way of brief statement in connection with the general issue. So that, before specifications of defence were required, it could seldom be determined from *the pleadings* what the defence would be; and a plaintiff

was obliged to anticipate every *possible* defence, in order to prepare for a trial of the case.

But it does not follow, because this was so at common law, and by statute formerly, that it is still so. On the contrary, it was to remedy *this very evil*, that the Act was passed requiring the defendant seasonably to put on file a specification "of the grounds of his defence." The object was to give the plaintiff notice of the points to be raised or controverted, in order that he might be able to prepare his case for trial.

It was *because* the pleadings would not give such notice that specifications of defence were necessary. And therefore it has been decided that specifications which do not give such notice, though they would have been sufficient as a *plea*, were insufficient as *specifications of defence*. *Hart* v. *Hardy*, 42 Maine, 196. As there may be several defences to a suit, so several may be specified. And several defences may actually be made that would be called *inconsistent, as pleas*. Thus, one might, in fact, *pay* a promissory note that he never signed, or a demand that he never promised to pay. Such defences may therefore, perhaps, be specified, as well as pleaded.

But if *two* or more defences are specified, *only one of which can possibly be made*, for the reason that the *proof* of one will necessarily *disprove* the others, the plaintiff cannot tell which, if either, will be made. Thus, to allege in the specifications that a promissory note in suit was never executed, and also that it embraces usurious interest, and that it was given without consideration, will give the plaintiff no notice of the defence; for *all* cannot be proved; and he will be unable to determine which will be attempted.

It may be said that a defendant cannot always tell beforehand which of two defences he can make. Such cases, though rare, may be possible. And so a defendant may not always be able to decide, in advance, whether he has any defence. But the statute requires specifications, nevertheless. And, if he is certain that he can defend on one

ground, or another, but he cannot tell which, and the two are inconsistent, he can elect which to specify; and if, at the trial, he finds that he is in error, he can obtain leave to amend. Cases are not infrequent in which defendants apply for leave to amend by specifying newly discovered grounds of defence. The power of the Court to allow amendments in specifications, as in pleadings, is sufficient to protect the rights of parties in exceptional cases, for which all loose rules of practice are always invoked. So far as the cause of action stated is definite and certain, unless we require equally definite specifications of defence, we give the statute no beneficial force. The printed forms used in some counties embrace nearly all possible defences, and, of course, more than are possible in any one case; and they are designed, like blanks for the money counts in a writ, to be used in all cases. Such specifications give no notice of defences really to be made, and amount to nothing. The only way to avoid this result is to require specifications to be made in good faith, sufficient, in each case, to give the plaintiff such notice of the defence as will enable him to prepare for trial.

What are *sufficient* specifications of defence is a question of law. In the case at bar, there are numerous grounds specified, only a part of which are possible to be made; and the plaintiff could not determine which to meet. He was in no better condition than if no specifications at all had been filed. The defendants had leave to amend, which they declined to do. Judgment was therefore properly ordered as upon a default.

HANNAH G. WING, *in Eq.*, *versus* DAVID M. AYER *& al.*

Where land conveyed to the husband of the complainant during their coverture was mortgaged back to secure a part of the purchase money; and the husband thereafterwards mortgaged a portion of said land to one of the respondents, who, after purchasing, by assignment, the former mortgage and the debt thereby secured, together with the right which the complainant's said husband had of redeeming said land at the time of his decease, conveyed a portion of it by deed of warranty to the other respondent; and the complainant, not having relinquished her right of dower, brought a bill in equity praying for her dower to be set out in the equity; on demurrer, it was *held*, —

1. That the former mortgage should be upheld;
2. That the complainant had a right of dower subject to the former mortgage;
3. That she is not dowable against the first mortgagee or his assigns;
4. That, to the extent of her interest, she stands in the relation of mortgager thereto;
5. That she may redeem the whole mortgage, and hold the whole as security for what she pays more than her proportion;
6. That she may redeem her interest with the consent of the assignee of said mortgage;
7. That, if she would redeem, she must bring her bill as provided by the statute; and
8. That this bill cannot be sustained, because it neither alleges a tender, nor a demand for an account, under R. S., c. 90, § 13; nor under c. 103, § 14, because it does not allege that said mortgage has been discharged.

BILL IN EQUITY.

The case was heard on demurrer.

The bill substantially alleges that the complainant, on Dec. 11, 1855, was lawfully married to James Fogg, with whom she lived until June 5, 1858, when said Fogg died; that during her coverture with said Fogg, two several parcels of land adjoining each other, situated in Lewiston, were conveyed to him, to wit, — one parcel (described) by one Nesmith, by his deed of warranty, dated June 23, 1857, duly acknowledged and recorded; the other parcel (described) by said Nesmith and one Wheelock, by their deed of warranty, of same date, duly acknowledged and recorded; that, on the same day, the said Fogg, by his deed

of that date, duly acknowledged and recorded, mortgaged both of said parcels of land to said Nesmith, to secure $925 of the purchase money; that the complainant did not sign said mortgage or otherwise relinquish her right of dower in said premises; that said Fogg entered upon said premises and remained in possession thereof till his death; that he built a dwellinghouse and made other great improvements thereon, at his own expense, and with money mostly furnished by the complainant; that the amount of money furnished by her was $1000; and that thereby the value of said premises was greatly enhanced, by means of all which she became dowable in said parcels of land and improvements.

The bill further alleges, that, on April 22, 1858, said Fogg mortgaged the parcels of land first mentioned to David M. Ayer, one of the respondents, to secure the sum of $200 and interest; that the complainant did not sign the latter mortgage nor otherwise relinquish her right of dower in the premises therein mentioned; that, on November 4, 1862, said Nesmith assigned the former mortgage to said Ayer; that, on June 7, 1859, Abiel Jones, administrator of the estate of said Fogg, sold and conveyed by virtue of a license from the Judge of Probate, to said Ayer, all the right, title and interest in and to the whole of said premises which said Fogg had at the time of his decease; that neither of said mortgages have been foreclosed; that, on Nov. 6, 1862, said Ayer, by his deed of warranty, duly acknowledged and recorded, conveyed to Jonathan P. Norton, the other respondent, a portion of said premises, (described,) which portion the said Norton has ever since held under his said deed; and that the residue of said mortgaged premises has, from the date of said administrator's deed to the present time, been held by said Ayer under the mortgages and deeds to him before mentioned.

The bill further alleges, that, on Feb. 8, 1864, the complainant made demands, verbally and in writing, for her dower in said premises, so held by said respondents, to wit,

of said Ayer her dower and just third part of all said lands, except so much thereof as the said Ayer had, by his deed aforesaid, conveyed to said Norton, — of the said Norton, her dower, &c., of so much of said lands as was conveyed by said Ayer to said Norton, but that the said Ayer and Norton both refused and neglected and still refuse and neglect to set out the same, although the complainant is now, and ever has been, since the death of said Fogg, ready to contribute, if necessary, the whole or her just proportion of the debt secured by the first mentioned mortgage, to redeem the same, and to be let in for her just dower in said lands.

The bill prays that the respondents may answer, and that the Court will determine and decree upon what terms, if any, the complainant shall be let in for her said dower, and offering to pay such sum towards the redemption of the first mortgage as the Court shall deem just; that her dower may be set out by said respondents; and that damages may be awarded to her for detention, &c.

The respondents demurred specially, assigning, among other causes, the following: — that the bill contained no allegation of any demand for an account of the sum due on the Nesmith mortgage, or of the rents and profits of said estate, or of the repairs, &c., thereon; that it contained no allegation of any unreasonable neglect or refusal to render such account in writing, or any default of either of the defendants which prevented the complainant from performing or tendering performance of the condition of said mortgage.

S. & J. W. May, for the complainant.

H. C. Goodenow, for the respondents.

Danforth, J. — The land in which the plaintiff claims dower was conveyed to her husband, during her coverture, by one Thomas Nesmith, and at the same time mortgaged back as security for the payment of a portion of the purchase money. Whatever the law may have formerly been, it is now clearly settled that the widow is dowable of an

equity. It is equally well settled that, in such a case as the one at bar, she is not entitled to dower as against the mortgagee, or those claiming under him. *Snow* v. *Stevens*, 15 Mass., 278; *Smith* v. *Austin*, 7 Maine, 41; *Young* v. *Tarbell*, 37 Maine, 509.

The plaintiff did not join with her husband in the mortgage which he subsequently gave to Ayer. It may be conceded, then, that the plaintiff is entitled to dower in the land, as against all persons except the holder of the Nesmith mortgage. No question is raised as to the discharge of this mortgage. It is alleged in the bill that the "said Nesmith executed an assignment of the first named mortgage to said Ayer, which was duly acknowledged and recorded, whereby the said Ayer became the owner and holder" thereof. Also that said Ayer, to the "present time, holds under said mortgages." Besides, the plaintiff only claims dower in the equity. Were it otherwise, the facts appearing in the bill require that it should be upheld. It takes nothing from the widow, as she never had even an inchoate right of dower, as against that mortgage. The consideration of the assignment was not paid with funds belonging to the estate, or by any one so connected with the husband or his estate, by contract or otherwise, as to make it his duty to pay the mortgage. Besides, it was clearly the intention of the parties that it should not be discharged. As the widow loses nothing by the assignment, there is no equitable reason why she should be benefited by it. *Brown* v. *Lapham*, 3 Cush., 554.

The widow, having a right of dower subject to this mortgage, stands in the relation of a mortgager thereto, to the extent of her interest. Her estate is a continuation of that of her husband's, and, so far as relates to this mortgage, to the extent of her interest, she has the same rights and is subject to the same liabilities, as would pertain to him if living. One of those rights is that of redemption. *Carll* v. *Butman*, 7 Maine, 102; *Gibson* v. *Crehore*, 5 Pick., 148.

True, she is not the only mortgager. The defendant Ayer is an owner of that interest with her, and hence, he

being both mortgager and mortgagee, she asks to be permitted to redeem her interest alone. But the Court has no power to decree this without the consent of Ayer. In the position which he occupies he has his legal and equitable rights. As mortgager, the Court has no power to compel him to redeem at the solicitation of his co-tenant. This is a matter within his own discretion, and he has an undoubted right to act upon his own judgment of what his interests may require. As mortgagee, he has a right to insist upon the payment of his whole debt, and is under no obligation, legal or equitable, to permit a portion of the estate to be redeemed without the whole. These principles can work no injustice to the plaintiff. She has her election to redeem or not. If she chooses to do so, and is compelled to redeem the whole, she would undoubtedly hold the whole as security for what she pays more than her portion. The same rule would apply in this case, as when several persons are, in the ordinary way, owners of the equity. *Gibson* v. *Crehore*, 5 Pick., 151.

The result is that the parties stand in relation to each other as mortgager and mortgagee. If the plaintiff wishes to redeem, she must bring her bill as provided by the statutes for the redemption of mortgages. If the defendants consent that she may redeem her interest, then she may do so; if not, she must redeem the whole. In either event, before she can compel the defendants to answer, she must comply with all the requisites of the statutes. This she has not done, having neither made a tender of the amount due, nor a demand for an account under the 13th section, c. 90, R. S.

This bill cannot be sustained under § 14, c. 103, R. S., because, among other reasons, the mortgage has not been discharged. *Demurrer sustained.*

Bill dismissed.

Costs for defendants.

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

THOMAS FARRAR *versus* HIRAM FAIRBANKS.

On an issue joined of *nul tiel record*, a judgment in favor of Thomas Far*row* will not support a declaration in debt on a judgment in favor of Thomas Farr*ar*.

It seems that such misprision may be avoided by an averment that the plaintiff, by the name of Thomas Farr*ow*, recovered such judgment.

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

Debt on a judgment.

The presiding Judge ruled that there was a material and fatal variance between the declaration and the record of the judgment offered, and ordered a nonsuit, to which ruling and order the plaintiff excepted.

The remaining facts appear in the opinion.

H. G. Cilley, for the plaintiff.

C. Record, for the defendant.

BARROWS, J. — The prevalent looseness in matters of pleading, growing out of the facility with which amendments are allowed, does not warrant the attempt here made on the part of the plaintiff.

Thomas *Farrar* avers that he recovered judgment against the defendant, "as by the record thereof now remaining in said Court appears."

The defendant pleads *nul tiel record*, and, upon issue joined, the record produced is of a judgment in favor of Thomas *Farrow*.

The naked issue raised was whether there was any such record as that set forth in the declaration. The presiding Judge ruled that there was a material and fatal variance between the declaration and the record of judgment produced to support it, and ordered a nonsuit.

The plaintiff excepts and asks us to determine as matter of law that Thomas *Farrow* is, in a record, one and the same with Thomas *Farrar*. Undoubtedly, if there were a

misprision, it was competent for the plaintiff to have averred that he, by the name of Thomas *Farrow*, recovered the judgment. Had he moved to amend so as to present that issue, leave would undoubtedly have been granted.

But, upon the pleadings here presented, we cannot presume that these two names refer to the same person.

There is no such record as the declaration sets forth, and the exceptions must be overruled, and

Nonsuit confirmed.

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

POLLY KEEN *versus* JAMES S. JORDAN.

A, owing the plaintiff $60, agreed to build her a wagon worth $85, she to pay the balance when completed. On May 16, 1861, when the wagon was completed, A, also, being indebted to the defendant, gave him a promissory note for $31, payable in thirty days, to which was appended an agreement stipulating that said "note, being given for a side spring wagon, delivered to" the defendant, "it was to remain the property of" the defendant "until said note is paid." On Oct. 12, 1863, the plaintiff, after tender and demand, brought trover: — *Held*, the action may be maintained.

What is a reasonable amount for storing the wagon is a question of fact; and when referred to the presiding Judge, his decision thereon is final.

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

TROVER.

The facts appear in the opinion.

A. M. Pulsifer, for the defendant.

Dunn, for the plaintiff.

APPLETON, C. J. — This is an action of trover for a wagon, which the plaintiff claims to maintain upon the following facts.

One William Anderson, being indebted to the plaintiff in

the sum of sixty dollars, for a horse, agreed to build her a wagon worth eighty-five dollars, she to pay the balance of twenty-five dollars, when completed. The wagon in controversy was built in pursuance of this agreement. When finished, Anderson being indebted to the defendant, conveyed the wagon to him by an agreement in the following terms: — "Auburn, May 16, 1861.

"$31,00. — For value received, I promise to pay James S. Jordan or order thirty-one dollars, in thirty days from date, without interest.

"The above note being given for a side spring wagon, which I, William Anderson, delivered to said Jordan, this sixteenth day of May, eighteen hundred and sixty-one. Said wagon is to remain the property of said Jordan until the above note is paid in full. "Wm. Anderson."

Subsequently Anderson conveyed his remaining interest in the wagon to the plaintiff, who, on 12th Oct., 1863, tendered the defendant thirty-six dollars in discharge of his claim, which he declined accepting, and refused to deliver up the wagon, whereupon this action was commenced.

This action was referred to the presiding Judge, with the right to except to any of his rulings as to the law.

The defendant, (the case finds,) "contended that such a tender (as is shown) would not defeat his title to the wagon so as to enable him to maintain trover for it, but the presiding Judge ruled otherwise."

The facts, as recited, do not show a conditional sale.

By the contract of May 16, 1861, the defendant was either mortgagee, or pawnee, or pledgee.

If mortgagee, there has been no foreclosure within the Act of March 12, 1861, c. 23, relating to mortgages of personal property. Until a foreclosure under § 3, the mortgager, by § 1, is entitled to redeem. The defendant has given no notice of his intention to foreclose within § 3. The plaintiff, therefore, had the right of redemption, if a mortgage.

If the defendant is pledgee or pawnee, he has only a

special property in the article pledged or pawned. If no time of redemption is fixed, the pledger or pawner may redeem at any time, and though a day of payment be fixed, he may redeem after the day. Neither Anderson nor his assignee has ever been called upon to pay or redeem. The right to redeem still exists and was conveyed to and remained in the plaintiff. 4 Kent, 138; *Brownell* v. *Hawkins*, 4 Barb. S. C., 492. In all cases of sale, the pledgee must, before sale, give a reasonable notice to the pledger. 1 Parsons on Contracts, 601.

In either event, therefore, the plaintiff, when the tender was made, had the right to redeem.

It is said the sum tendered is not sufficient, in not allowing the defendant reasonable compensation for storage of the wagon. What was such reasonable compensation was a question of fact submitted to the presiding Judge, whose decision is final. The case finds the title to the wagon in the plaintiff subject to the defendant's claim. Her title was not questioned. The defendant claimed a forfeiture and therefore refused to accept the sum tendered. No exception was taken to the plaintiff's right to make the tender. The tender having been made by one having full right to make it, and that right not being questioned, and no exceptions having been taken in relation thereto, we think it was "*such a tender*" as would defeat the defendant's right, and that the action can be maintained.

Exceptions overruled.

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

LEE LEAVITT, *pet'r for partition, versus* EDWARD PRATT.

An unexecuted verbal agreement made by a mortgagee, for a valuable consideration, to discharge a mortgage by a release, is void by the statute of frauds.

Such an agreement will not constitute an estoppel *in pais.*

ON MOTION AND EXCEPTIONS from *Nisi Prius*, WALTON, J., presiding.

PETITION FOR PARTITION.

The respondent offered to prove that the petitioner, in consideration that the mortgager, the respondent's grantor, had paid the money received from the respondent for the land mortgaged to the petitioner, the latter agreed to discharge the mortgage, and the presiding Judge admitted the testimony, against the objection of the petitioner.

The verdict was for the defendant, and the petitioner excepted.

The remaining facts appear in the opinion.

M. T. Ludden, for the petitioner.

Nahum Morrill and *Thos. H. Haskell*, for the respondent.

APPLETON, C. J.—The petitioner claims title as mortgagee, and that he has entered for the purposes of foreclosure. The mortgage debt has been paid but in part, and is still outstanding. The mortgage has not been discharged by a deed of release, from the person authorized to discharge it, nor by causing satisfaction and payment, under his hand, to be entered on the margin of such mortgage, in the register's office, in accordance with R. S., 1857, c. 90, § 26.

The respondent purchased the land of the mortgager and paid the purchase money to the petitioner, the mortgagee, upon his verbal agreement to discharge the mortgage by a release of the same, which he refuses to perform.

An unexecuted verbal agreement would constitute no bar to the maintenance of this process.

In Massachusetts and in this State, the interest of the mortgagee is held to be within the statute of frauds, and not to pass by delivery of the mortgage nor by parol assignment. *Warden* v. *Adams*, 15 Mass., 236; *Vose* v. *Handy*, 2 Greenl., 322; *Mitchell* v. *Burnham*, 44 Maine, 302. So, too, an oral promise, on sufficient consideration, made by a mortgagee to relinquish his claim to the land mortgaged, is void by the statute of frauds. *Parker* v. *Barker*, 2 Met., 423; *Maynard* v. *Hunt*, 5 Pick., 240; *Hunt* v. *Maynard*, 6 Pick., 488.

The law, however, on both of these points, has been held differently in some of the States. As, in New Hampshire, where it was decided that the interest of the mortgagee, being a mere incident to the debt, was not within the statute of frauds. *Southerin* v. *Mendum*, 5 N. H., 420. So, in many of the States, it has been decided that a mortgagee may release his mortgage by a sufficient parol agreement, though the mortgage be under seal and unpaid. *Wallis* v. *Long*, 16 Ala., 738; *Howard* v. *Gresham*, 27 Geo., 347; *Ackla* v. *Ackla*, 6 Barr., 228. But, as has been seen, the decisions have invariably been otherwise in this State and in Massachusetts.

Neither is there an estoppel *in pais*, by which the petitioner is to be precluded from maintaining this process. There was no concealment of any outstanding title on his part. The respondent was fully aware of the mortgage. He has not been misled as to the existence of any facts. If he sustains loss, it will be by his rash reliance upon a promise, which the law declares void. *Parker* v. *Barker*, 2 Met., 423; *Gray* v. *Bartlett*, 20 Pick., 186; *Odlin* v. *Gove*, 41 N. H., 465.

Exceptions and motion sustained.
Verdict set aside.
New trial granted.

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

WILLIAM H. STURTEVANT *versus* BENJAMIN RANDALL.

When a negotiable promissory note bears upon its back the names of the payee and another person, — the former above the latter, — the presumption is, in the absence of all controlling proof, that the payee indorsed it to the one whose name is under his, and the latter to some third party.

The contract *implied*, from one's placing his name in blank upon the back of a negotiable promissory note, is not a *written* contract so far complete in itself as to exclude parol evidence to show his connection with such note.

As between the original parties to such contract, or those having their rights, parol evidence is admissible to prove the circumstances which will determine its character.

When a judgment has been rendered against a person upon the verdict of a jury finding him to be an original promisor of the note in that suit instead of an indorser, as he alleged himself to be in his specifications of defence, he is estopped to deny that relation in any litigation with any other party to the note.

If the grounds of a judgment appear by the record, they must be proved by the record alone.

But, if the record need not and does not exhibit the grounds upon which the judgment proceeded, it may be shown, by parol evidence, that matters which might have been admissible under the pleadings were presented and considered in the adjudication.

A brief statement, when made with sufficient precision, becomes to all intents and purposes a substitute for the special plea.

Under a count for money had and received and money paid, a note bearing on its back the defendant's name would be admissible under the general issue.

And if the jury should find the defendant signed as original promisor instead of indorser, such finding would not be repugnant to the issue.

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

The facts sufficiently appear in the opinion.

Tallman & Larrabee, for the plaintiff.

S. May, for the defendant.

BARROWS, J. — Assumpsit. The writ contains a count for money had and received and money paid, with specification of a promissory note signed by William Patten payable to the present defendant, upon the back of which the

plaintiff and defendant have severally written their names, the latter above the former. No date or writing indicates when or for what purpose these names were placed there.

From the order in which they stand on the paper, in the absence of any controlling proof, the presumption would be that the defendant indorsed the note as payee thereof to the plaintiff, who subsequently had indorsed it to some third party. The signatures being admitted, the presentment of such a note by the plaintiff, if the case stopped there, would doubtless entitle the plaintiff to judgment.

But the defendant claims that, notwithstanding the signature of the plaintiff appears on the back of the note beneath his own, it was placed there in the inception of the note, and in the character of an original promisor with William Patten to himself, and that this fact has been conclusively established by the judgment in the suit of Hatherly Randall, his indorsee, against the present plaintiff, so that the plaintiff is estopped from denying it.

The plaintiff objects first, that if this estoppel existed and was to be relied upon by defendant, it should have been specially pleaded in bar, and, not being so pleaded, it is not conclusive. In his specifications of defence, filed in this suit according to the statute, the defendant did set out the judgment in favor of Hatherly Randall, averring that it was recovered against the plaintiff, as an original promisor upon the note; and he presents it in a brief statement of special matter of defence, claiming that plaintiff is thereby estopped from maintaining this action, and from putting in testimony in this suit to show that he was not an original promisor upon the same. Whatever different opinions may be entertained of the wisdom of the legislation which allows the general issue to be pleaded in all cases with a brief statement of special matters relied on in defence, it was no part of the object of the Legislature to set a trap for the feet of the unwary. An election of this sort being given, the brief statement, when made with sufficient precision, becomes, to all intents and purposes, a substitute for the special plea, the

place of which it is allowed to supply. The statement of the points therein made is equivalent to the filing of so many special pleas, and gives to the party filing it substantially the same rights. The difference is of form, merely, and not at all of effect. If the estoppel attaches, the objection to the form of pleading it cannot avail. To dispose of this point, it is not necessary for us to decide whether or not the weight of reason and authority would not require us to hold that, where a former recovery is simply given in evidence, it is equally conclusive in effect as if it were specially pleaded by way of estoppel. When that question necessarily arises, the arguments urged by KENNEDY, J., in *Marsh* v. *Pier*, 4 Rawle, 288, and seq., and other similar considerations which readily suggest themselves, will deserve careful consideration, before we hold that the conclusiveness of judgments and the consequent peace of the community, and the convenience of fresh litigants shall depend upon the option of persons litigiously disposed, or upon the accuracy of pleaders.

The record of the judgment, *Hatherly Randall* v. *Wm. H. Sturtevant*, exhibits a declaration against the present plaintiff, containing a count against him as second indorser of the Patten note, and *also the money counts*, a joinder of the general issue, a disagreement of the jury on the first trial, and a verdict upon a second trial as follows: — "the jury find that the defendant did promise, &c., and they further find that he signed the note as original promisor," upon which verdict, after a hearing upon exceptions and a motion for a new trial, judgment was finally rendered. Hereupon Sturtevant contends that if any estoppel is raised by that judgment between the parties in the present suit, it does not affect his maintenance of his action here, but that the defendant is estopped from asserting that he was connected with the Patten note, except as second indorser, according to the allegations in the first count in Hatherly Randall's writ, and that the finding of the jury, that he signed it as an original promisor, should be rejected as surplus-

age repugnant to the pleadings. Were the *first* count the *only* one in Hatherly Randall's writ, this ground might be tenable; as it is, it is only plausible. Under the money count the note would be evidence, and the issue joined in Hatherly Randall's suit would be found against Sturtevant, if he was liable upon the note, absolutely, as an original promisor, as the jury expressly found. There is nothing repugnant or beyond the scope of the issue tried in such finding, and it cannot be rejected as surplusage. On the contrary, it determines what was the precise point litigated in the suit of this defendant's indorsee against the plaintiff here, and which, having been once fully tried and settled upon the merits by a verdict of the jury and judgment thereon, cannot again be litigated between the parties to that suit or their privies. In his specifications of defence to Hatherly Randall's suit, the present plaintiff alleged that he indorsed the Patten note for the accommodation of Benjamin Randall, the present defendant, and at his request, and that Benjamin indorsed it to Hatherly after it fell due, but the jury found expressly that he signed it as an original promisor. It is manifest that if the result had been different, if the jury had found that Sturtevant placed his name upon the note as an indorser, according to the allegation in his specifications, and not as an original promisor, that question would have been settled conclusively, by the rendition of judgment upon that verdict, not only as between the parties thus litigating, but as to all in privity with Hatherly Randall in relation to the note. By such a result this defendant would have been conclusively estopped from again agitating that question had he paid the note to his indorsee, Hatherly Randall, and then vexed the present plaintiff with a suit upon such ground. *Durham* v. *Giles & als.*, 52 Maine, 206.

It is probable that, if the jury had affirmed the ground taken by the plaintiff, in Hatherly Randall's suit against him, and thereupon Benjamin Randall, taking up the note, had claimed to try the same question over again, in a new

suit, the importance and justice of the maxim "*nemo debet bis vexari si constet curiae quod sit pro una et eadem causa*" would have been more apparent to the party now claiming to renew the litigation upon a point once thoroughly tried and distinctly determined in this Court, in a suit to which he was a party. But there are others besides these parties interested here. *Expedit Reipublicae ut sit finis litium.* Where, as here, the record of a judgment shows that the identical point has been once determined upon judicial investigation, in the absence of fraud and collusion, the fact thus established must be deemed and taken to be true as to the parties to the suit and all in privity with them. The plaintiff has had his day in Court, and a jury have determined that his connection with that note is that of an original promisor. Judgment has been rendered upon that verdict, and he is estopped to deny the truth of it in any litigation with any other party to the note. He was not an accommodation indorser *for* Benjamin Randall, but an original promisor *to* him. It is not pretended that the note was originally *made* for the accommodation of Benjamin Randall. The express finding that the plaintiff signed the note as an original promisor is part of the record, and we have already seen that it is not repugnant to the issue joined in the case. That it was the matter directly in issue, and the question upon which the case turned, looking at the record alone, there is hardly room to doubt. But nothing is to be left to inference where an estoppel is relied on. With a finding thus explicit, it seems almost unnecessary to discuss the question how far evidence *dehors* the record is admissible, to ascertain more distinctly what the question was, which was directly put in issue, heard and decided.

It may be remarked, however, that the rule seems to be well established, that what appears by the record is to be proved by the record only, and nothing contradictory thereto can be admitted; but what need not and in fact does not appear by the record, if necessary to establish the identity of the subject matter or of the grounds upon which the

judgment proceeded, may be supplied by parol proof, to the extent of showing whether matters that might have been admissible under the pleadings were or were not actually presented and considered in the adjudication. *Chase* v. *Walker*, 26 Maine, 559, and cases there cited; *Palmer* v. *Thompson*, 3 Pick., 434; *Dunlap* v. *Glidden*, 34 Maine, 519, and cases there cited.

We have already referred to the specifications of defence, filed by the plaintiff here, in Hatherly Randall's suit against him, as assisting to demonstrate what was the direct issue tried to the jury in that case. They are not part of the record, for the parties here have made them part of this case, and, doubtless, they would be admissible evidence for the purpose just referred to. Other parol evidence, were it necessary ,would be admissible within the rule above stated, to place it beyond a doubt that the identical question, which the plaintiff proposes to litigate here, was put directly in issue, and was passed upon by the jury in the former case. It is one of the stipulations in the report to which the parties here have agreed, that, "if parol evidence is admissible to prove any fact in relation to the former trial, which, in connection with the judgment, verdict and proceedings aforesaid, would create an estoppel, then the plaintiff is to become nonsuit." If it could be said that the general character of the pleadings leave a possible doubt as to what the ground of the verdict and judgment in Hatherly Randall's suit was, this stipulation must be taken as an admission that parol evidence, if admissible, would abundantly establish the fact, that the question directly in issue in that case was whether the plaintiff became a party to the note for the accommodation of this defendant, or as an original promisor *to* him, and, through him, to Hatherly Randall, standing, for the purposes of that trial, in the same position that the payee would have done. It was decided against the present plaintiff, and, for reasons heretofore stated, that determination must be held conclusive.

It is, perhaps, not necessary to determine whether, if this

were *nova res* instead of *res adjudicata*, parol evidence would be admissible to show in what capacity and for what purpose the plaintiff put his name on the note, and whether he signed it as indorser or as an original promisor; but, as the question was disposed of in the previous case without a written opinion, it may not be amiss briefly to state here the grounds for holding that, where the matter has not been once tried and passed into judgment, parol evidence would be admissible to show whether an individual signing his name in blank upon the back of a note was to be held as an indorser or as an original promisor, and this without regard to the position in which his name stands on the paper in relation to that of the payee. The objection urged, is, that it is in effect allowing parol evidence to vary and contradict a written contract. The fallacy of the objection consists in confounding the contract implied by law where one places his name in blank upon the back of a note with a *written* contract. It is not a written contract which is so far complete in itself as to admit of the application of this rule, before the character of the liability assumed shall have been determined by ascertaining such details of the time of signature, absolute, and relative, the purpose and intention of the contracting parties, when the signature was placed there, and other circumstances, as may properly affect the contract and settle the question whether the liability assumed is absolute or conditional, — that of a promisor or an indorser or a guarantor. From a series of decisions in Massachusetts and this State, viz., — *Moies* v. *Bird*, 11 Mass., 436; *Baker* v. *Briggs*, 8 Pick., 130; *Chaffee* v. *Jones*, 19 Pick., 260; *Austin* v. *Boyd*, 24 Pick., 64; *Samson* v. *Thornton*, 3 Met., 275; *Richardson* v. *Lincoln*, 5 Met., 201, in Massachusetts; *Colburn* v. *Averill*, 30 Maine, 310; *Irish* v. *Cutter*, 31 Maine, 536; *Adams* v. *Hardy*, 32 Maine, 339; *Malbon* v. *Southard*, 36 Maine, 149; *Lowell* v. *Gage*, 38 Maine, 36; it may be deduced as settled law that, when one, not the payee of a negotiable promissory note, indorses it in blank, *at its inception*, the legal presumption arising from the act

is that it was done for the same consideration with the written contract on the face of the note, and the person thus indorsing will be holden as a surety and an original promisor; if the same act is done *at some subsequent time, but without a previous indorsement* by the payee, there is no such presumption as to the consideration, and the person thus indorsing will be held, if there was in fact a consideration for his contract, as a guarantor; if the same blank indorsement is made *after* an indorsement by the payee, then the person making it is to be regarded as a subsequent indorser; and, in the absence of date or proof, it is presumed that the indorsement was made at the inception. Now, that these presumptions have not been considered, as between *all* the parties to negotiable paper, to belong to that class of legal presumptions which admit of no opposing evidence, is manifest from the tenor of the reasoning in many of the cases above referred to. In *Moies* v. *Bird*, the directions to the jury, which were sustained as correct, were that the defendant would be considered as a surety for him who signed on the face of the note, "unless the indorsement had been explained by the evidence and proved to have been made with some different intent and purpose, and it was incumbent on the defendant to prove some different meaning or intent of his signature."

In *Chaffee* v. *Jones*, SHAW, C. J., says, that "this is the legal import and effect of such a note *independent of any extrinsic evidence.*"

But, aside from numerous *dicta* of similar import, it is too plain to need elucidation that in such cases parol evidence *must* be resorted to, in the absence of anything in writing, to determine *what the contract actually was*, whether that of an original promisor, guarantor, or indorser to transfer the title, and that this is no infringement of the wholesome rule that parol evidence shall never be received to vary or contradict a written contract.

Nor is it to be inferred that, when the circumstances are once ascertained which settles the character of the liability

assumed, proof of any verbal agreements inconsistent therewith would be admissible to change it.

Undoubtedly the order in which the names stand upon the back of the note would be *prima facie* evidence of the relative time at which the indorsements were made, and it may well be, that, as against an innocent indorsee for value, in the regular course of business, the policy which aims to facilitate commercial intercourse, by means of negotiable paper, would prohibit a defendant from asserting any extrinsic matter to vary the apparent liability; but, as between the original and immediate parties to the contract, or those occupying *their* position and having *their* rights only, the consideration of the contract is always the subject of inquiry until once judicially determined. Hence, in this very case, the note having been indorsed to Hatherly Randall after it fell due, the present plaintiff, *then* defendant, claimed, and rightfully claimed, that he was at liberty to show that he became a party to the note for the accommodation of Benjamin Randall, the payee. Hatherly Randall had no rights but those of the original promisee, Benjamin Randall, and, as we have already seen, if Sturtevant could have maintained his position, to the satisfaction of the jury, any claim of Benjamin Randall to recover upon the note, against him, would have received an effectual quietus. The decision was adverse to Sturtevant; it concludes him, and the result must be *Plaintiff nonsuit.*

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

ALBERT H. ABBOTT *versus* JAMES NORTON.

In cases of forcible entry and detainer, parties are entitled to a trial by jury only upon the issue of title.

Of all other matters, the inferior court has exclusive jurisdiction, from whose judgment an appeal lies.

Where, in such case, the respondent pleaded the general issue and filed a brief statement of title in a third person, under whom he claimed, and, at the trial at *nisi prius*, waived the brief statement and relied upon the general issue: — *Held*, that the only question open to the respondent was the question of title; and, when the complainant put in his title deed, the complaint was sustained.

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

FORCIBLE ENTRY AND DETAINER.

At the trial, at *Nisi Prius*, the complainant proved title in himself by deed and rested his case. Hereupon the respondent contended that the complaint could not be sustained; but the presiding Judge ruled that, under the pleadings, it might be.

Thereupon the case was taken from the jury and submitted to the Law Court, with the agreement that if, upon the pleadings, proof of title in the plaintiff is sufficient to entitle him to a verdict in his favor, the respondent was to be defaulted.

The remaining facts appear in the opinion.

Gilbert, for the complainant.

Tallman & Larrabee, for the respondent.

CUTTING, J. — This was a complaint for forcible entry and detainer, originally brought before the Municipal Court of the city of Bath, and comes before this Court upon the pleadings before the magistrate.

The complainant alleges that, on July 9, 1862, the respondent, having before that time had lawful and peaceable entry into the demanded premises, and whose estate in the same was determined long before, then did and still does unlawfully refuse to quit the same, and holds the complain-

ant thereout. To this the respondent pleads not guilty, and files a brief statement of title in one *Zachariah C. Norton*, under whom he claims as his tenant.

This plea necessarily, by force of stat. c. 94, § 6, suspended the process before the Municipal, and brought it up to this Court, where the issue could only be presented upon the brief statement. It was that alone which ousted the inferior court of its jurisdiction and transferred it to this Court; where, it seems, when the action came on for trial, the respondent waived his brief statement, and relied on his plea of not guilty, thinking perhaps, that his brief statement would operate like the former fictitious demurrer which has now become obsolete. In this he was mistaken. The questions here presented were properly cognizable by the Municipal Court on the general issue, whose jurisdiction over such subjects is exclusive, and whose error in judgment can be corrected only on an appeal to this Court. *See* §§ 3, 8, of the c. before cited. Any other construction of that statute would virtually oust the Municipal Judges of their jurisdiction, and transfer all such processes into this Court upon the filing of *fictitious* brief statements putting in issue the title to real estate; upon which issue the parties were only entitled to a trial by jury. Of all other matters the inferior court has exclusive jurisdiction, from whose judgment an appeal lies to this Court. *Copeland* v. *Bean*, 9 Maine, 19.

There may have been cases brought here under similar pleadings, where we have considered such preliminary questions as have now been presented; but in those cases the consideration of the Court was not called to the point to which our attention has now for the first time been directed. The ruling, therefore, of the Judge at *Nisi Prius* was correct, and judgment must be rendered for the complainant, and, according to the agreement of the parties, the defendant is to be defaulted. *Defendant to be defaulted.*

APPLETON, C. J., WALTON, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

MARTIN H. KENT *versus* CYRUS B. JUDKINS.

If a private way be unlawfully obstructed by the owner of the adjoining land, a person entitled to use the way may pass over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage.

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

TRESPASS *quare clausum fregit.*

The defendant justified under an alleged right of way. The plaintiff denied that defendant had such right of way over his land, and further contended that, if the defendant had a right of way over his land, he was nevertheless a trespasser, because he had deviated from the track usually taken by him, and passed over other lands of the plaintiff.

It appeared in evidence that a portion of the track or path generally used by the defendant over the plaintiff's land, had been ploughed up by the plaintiff; that he had built a stone wall across it, and that the defendant thereupon turned out of the track he had generally used, and passed over the adjoining land of the plaintiff, in a road used by the plaintiff for farming purposes. The plaintiff did not claim that the defendant had done any unnecessary damage by this deviation from the track usually taken by him, but denied that he had a right to make it.

Upon this point the presiding Judge instructed the jury that, if the defendant had a right of way over the plaintiff's land, and the plaintiff had wilfully and intentionally obstructed the track usually taken by the defendant, the defendant had a right to enter upon and go over the adjoining land of the plaintiff so far as would be necessary to avoid such obstructions, using due care and diligence to guard against all unnecessary damage to the plaintiff. To this ruling of the presiding Judge, the plaintiff excepted.

G. C. Vose, for the plaintiff.

E. O. Bean, for the defendant.

WALTON, J. — The question to be determined in this case is whether, if a private way is unlawfully obstructed by the owner of the adjoining land, a person entitled to use the way may justify passing over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage.

The law is well settled that a traveller upon a highway may lawfully pass over the adjoining land, when from any cause he finds the road impassable. This is justified upon the ground of necessity. "Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases, the only escape is by turning out of the usually traveled path and seeking an outlet over the fields adjoining the highway. If a necessity is not created under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case that would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject." *Campbell* v. *Race*, 7 Cush., 408.

Why should not a traveller on a private way, under the pressure of a like necessity, enjoy the same privilege? There are hundreds and probably thousands of families in

this State who have no way of getting to and from their houses except by means of private ways through the lands of others, especially in our frontier and remote settlements. Are their lives of less value when traveling on one of these private ways than when traveling on a highway? Are the rights of the adjoining owner more sacred in the one case than the other?

It has been held, in one case in New York, that the owner of a private way cannot justify passing over the adjoining land in any case. (*Williams* v. *Safford*, 7 Barb., 309.) But, it was long ago held in England, in a case reported by Sir WILLIAM JONES, that where a person has a right of way through another's land, and the way is impassable, *through the fault of the owner of the land*, a person entitled to use the way may go *extra viam*. The action was trespass *quare clausum*. Defendant pleaded a right of way. Plaintiff replied that the defendant went out of the way. Defendant rejoined that the way, (a foot path,) was founderous, &c. "*in default of the plaintiff, who ought to amend it.*" This was resolved to be a good plea and justification. (*Henn's case*, W. Jones, 296;) Greenleaf's Cruise, title 24, §§ 17, 18; Tudor's Leading Cases, 127.

And, in a recent case in Massachusetts, the Court held the law to be clear and unquestionable that if the owner of land, which is subject to a private right of way, obstructs the way, a person entitled to use the same may lawfully enter upon and go over the adjoining land. The case was this: the defendant had a private right of way over the plaintiff's land, which the latter ploughed up and fenced. Defendant thereupon passed over the plaintiff's land in a different place. Plaintiff then obstructed that place. Defendant then entered at still another place. Plaintiff also obstructed this. Defendant then selected and used a fourth place of entrance. Plaintiff thereupon sued the defendant in an action of trespass. The Court declared the defendant's right to pass over the adjoining land of the plaintiff

to be clear and unquestionable. *Leonard* v. *Leonard*, 2 Allen, 543.

This decision is founded upon a fundamental principle of the common law, namely, that a man shall not be heard to complain of an injury which is the direct and necessary result of his own illegal act; the same principle that justifies the breach of another's close, to recapture goods unlawfully taken, or to abate a nuisance, or to restrain the owner of the close from committing a felony. *Frustra legis auxilium quaerit qui in legem committit.* Vainly does he who offends against the law seek the help of the law. The law will not allow the owner to complain of a breach of his close which his own unlawful acts have made necessary.

In this case, the presiding Judge instructed the jury, in substance, that if the plaintiff unlawfully obstructed the defendant's way, the defendant had a right to enter upon and go over the adjoining land of the plaintiff, so far as would be necessary to avoid the obstructions, taking care to do no unnecessary damage. We think this instruction was correct.

Exceptions overruled.

Judgment on the verdict.

APPLETON, C. J., CUTTING, KENT, BARROWS, DANFORTH and TAPLEY, JJ., concurred.

ADNA L. NORCROSS *versus* HENRY NORCROSS, *Appellant.*

In case against an innkeeper, the words — "being entertained as a guest therein in the inn of the said" defendant, constitute a sufficient allegation that the defendant was an innkeeper.

The possession of a license does not make, nor the want of it prevent a person from being an innholder at common law.

Innkeepers are insurers of the property of their guests committed to their care, and are liable for its loss or injury, when not caused by the act of God, the public enemy, or the neglect or fault of the owner or his servants.

Upon proof of loss, the *onus* of bringing the case within the exceptions is upon the innkeeper.

If a person goes to an inn as a wayfarer and traveller, and the innkeeper receives him as such, the relation of landlord and guest attaches at once with all of its rights and liabilities, and so continues so long as he sojourns there as a traveller.

The liability of innkeeper attaches to goods when they are brought within the inn or otherwise placed within his custody in some customary and reasonable manner.

If a guest, in the absence of the landlord and his servants, hang up his coat in the place in an inn allotted for that purpose, it is *infra hospitium*.

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

CASE.

The writ contained three counts; the second count was for money had and received; and the first, being similar to the third, was as follows: —

"For that whereas, according to the law and custom of the land, the innkeepers, that keep common inns to lodge and to entertain as guests, travellers, strangers and others therein who abide in the same, are bound to keep their goods and chattels, being within those inns, day and night without diminution, pilfering or loss, so that no damage or loss may happen to any such traveller or such guest for want of due care in such innkeepers or their servants, and the said plaintiff, viz.: on the fourteenth day of October, eighteen hundred sixty-two, at Augusta, aforesaid, *being entertained as a guest in the inn of the said defendant*, had a certain overcoat, of the value of twenty dollars, within that inn and delivered the same to the said plaintiff, then and there to be safely kept. Nevertheless the said defendant, then and there knowing the said overcoat to be so as aforesaid, within his said inn, the same day and place, did so negligently keep said overcoat that said overcoat, for want of safe keeping thereof, by said defendant and his servants, was then in said inn wholly lost. And said defendant has not delivered to said plaintiff his said overcoat, although the said defendant was thereafterwards, viz., on the same day, thereto requested, but hitherto hath refused, and

still doth refuse so to do, or make him any satisfaction for the same."

The plaintiff testified:—"I first put up at the defendant's, Sept. 17, 1862. Usually stopped one day or more. Was there three nights the first time. Was there from 22d to 26th of Sept.; from 29th Sept. to 1st Oct.; and from Oct. 13th to 19th. The Kennebec House was burned in the evening before I retired. Great many were going in and out of the office, and I told defendant I would take my coat and put it on as there was a great deal of bustle and some one might steal it. I went to the fire and returned into the office about eleven o'clock. A man came in and wanted lodging; defendant told him he was full; I told defendant I would let the man have my room and I would go over the river and lodge, and did so, taking my coat with me.

"Next morning I came back to Franklin House; saw no one in the office; hung up my coat and went into breakfast. After I came out, I looked for my coat and could not find it, and never have found it. I told defendant I had lost my coat; hunted the coats all over.

"Defendant was at home Oct. 14, and also every time I was there. He knew I was there. I settled my bill Oct. 19. Some of them told me I could not have my horse until I settled the bill. Defendant looked over the bill and knew I paid it."

Cross examination.—"The receipt is dated September 18, 1862, but was paid Oct. 19th. I did not always register my name. Sometimes defendant, or the clerk, registered it. I hung my coat on hooks prepared for hanging up coats. There were coats all around. I did not put my coat into the charge of any one only as I have stated. The receipt paid the bills up to Oct. 19th. I think I was at defendant's house some eight or nine days in all. My name was registered at night, the 13th. I did not register my name the morning I lost my coat."

It was admitted that defendant was an innkeeper as alleged in the writ; that he kept the Franklin House; but

was not licensed as required by statutes. Also, that demand for the coat or its value was duly made. The parties agreed that the Court may exercise jury powers and, if the action can be maintained, defendant is to be defaulted for fifteen dollars damage and his cost; otherwise plaintiff nonsuit.

R. Foster, for the plaintiff.

E. F. Webb, for the defendant, contended—

The action is tort for a non-feasance.

Declarations in such cases are descriptive, and must allege all the circumstances necessary for the support of the action, and contain a full, regular and methodical statement of the injury complained of. 1 Chitty on Pl., 253.

It does not specifically state that defendant was an innkeeper at the time of loss; or that plaintiff's coat was in defendant's custody at time of loss; or that plaintiff continued to be and was defendant's guest at time of loss; or that the loss did not occur by negligence of plaintiff; or that the defendant kept a common inn in any county in the State; or that he was licensed. 2 Chit. Pl., 668.

"The plaintiff being entertained therein in the *inn of the defendant*" is not alleging whether it was kept *by* defendant or a *lessee*.

The admission does not include any venue. It may have been the "Franklin House" of Bangor. What "river" did plaintiff "*go over*"? Kennebec, or Penobscot?

Plaintiff's testimony does not indicate in what county he lost his coat.

If defendant was not licensed, he had given no bond. R. S. c. 27.

Hence defendant might have kept coffee-house or eating-house, and such are not innkeepers, and are not liable for losses. 1 Parsons on Con., 623. Plaintiff must show affirmatively that defendant was an innkeeper.

If an inn-keeper is licensed, there is an implied contract that he will receive and entertain guests, &c; but without

a licence there is no such implication. 3 Blackstone's Com., 164.

The test whether or not a man is an innkeeper is, is he bound to receive a guest and his goods. 1 Parsons on Con., 629, 630. Without a license he is not so bound. If a person become the guest of an unlicensed innkeeper, the contract must be a *special* one.

Evidence does not show plaintiff to have been the guest of the defendant at time of loss. When plaintiff "went over the river," the relation of guest and innkeeper ceased. 2 Kent's Com., 592, note 2; *McDaniel* v. *Robinson*, 26 Vt., 334.

Plaintiff must show that he again resumed the character of guest. Taking a room is the decisive act. *McDaniel* v. *Robinson*, *supra*.

Going into the house, hanging up his coat, and going into breakfast, all in absence of defendant and servants, do not constitute him a guest.

The coat was stolen before defendant knew it was there. Plaintiff was guilty of negligence, and hence defendant is not liable. *Armstead* v. *White*, 6 Eng. L. and Eq. R., 349; *Carhill* v. *Wright*, 37 Eng. L. and Eq. R., 175.

Putting the coat back from *whence he took it for "fear it might be stolen"* was negligence measured by his own sense of prudence.

Liability of innkeepers and common carriers are the same. *Mason* v. *Thompson*, 9 Pick., 280.

That of the latter does not attach until delivery, and in case of constructive delivery, such as leaving goods on a wharf, &c., notice must be given to the carrier. 1 Parsons on Con., 654; Story on Bailments, 532.

Berry v. *Shaw*, 31 Maine, 478, was decided before change of law admitting parties. More strictness should be required since such change.

DICKERSON, J.—The plaintiff seeks to recover of the defendant the value of an overcoat, committed to the care of

the latter, as innkeeper. Several preliminary objections are raised by the defendant against the plaintiff's right to maintain the action in its present form. It is said that the action is *assumpsit*, and that *case* is the proper form of action. It is true that *case* is the usual form of action where *negligence* is charged, though we are by no means certain that assumpsit could not be maintained on breach of an innkeeper's contract, safely to keep and deliver the goods of his guests, when the facts are sufficiently set forth in the declaration. The first and third counts in the writ, however, are drawn with the necessary formality of declarations in *case*, but the second count is in *assumpsit*. No demurrer has been filed to the misjoinder of the two forms of action, and the plaintiff has moved for leave to discontinue as to the money count. Under these circumstances, we think the objection cannot avail the defendant, it being entirely competent for the Court to allow the discontinuance of the second count, or to render judgment on the first and third counts.

The language of the writ, "being entertained as a guest therein, in the inn of the said Henry Norcross," though somewhat inartificial, is a sufficient allegation that the defendant was an innkeeper; and the admission that "the defendant was an innkeeper, as alleged in the writ, and kept the Franklin House," is sufficient proof, in connection with the plaintiff's testimony, that he kept the inn at which the plaintiff stopped.

That the defendant was not licensed as an innkeeper, is no objection to the maintenance of this action. A license does not change the character of the business of those who entertain travellers. The possession of it does not make, nor the want of it prevent a person from being an innholder at common law; it is his business alone that fixes the *status* of a party in this respect. A license saves an innholder from the penalty of being an innholder without license, but the want of it does not save him from his liability to his guests; it would be a perversion of justice, and a fraud

upon the law, if he could avail himself of his own criminality to defeat their lawful claims against him. Besides, it is not their duty to inquire whether one who entertains travellers is duly licensed, if, indeed, they could ascertain this upon inquiry.

Innkeepers are under the same liability as common carriers. They are insurers of the property of their guests committed to their care, and are liable for its loss, or any injury done thereto, not caused by act of God, the public enemy, or the neglect or fault of the owner, or his servants. This strictness of liability is necessary in order to protect travellers against any collusion between the innkeeper and his servants, and to compel him to take care that no improper persons be admitted into his house. His charge for the entertainment of his guests is supposed to cover this risk; and he, also, has a lien upon their property, entrusted to his care, to indemnify him against loss. Upon proof of loss, the burden of bringing the case within the exceptions to his liability is upon the innkeeper; and proof of the strictest care on his part avails him nothing, if it falls short of this. *Shaw* v. *Berry*, 31 Maine, 479; *Mason* v. *Thompson*, 9 Pick., 280.

Who are guests, in legal contemplation, and when the property of guests may be regarded as committed to the care of the innkeeper, are sometimes questions of no little intricacy. If a person goes to an inn as a wayfarer, and a traveller, and the innkeeper receives him into his inn as such, he becomes the innkeeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them. Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day, or per week, deprives him of his character as a traveller and a guest, provided that he retains his *status* as a traveller in other respects. If an inhabitant of a place makes a special contract with an innkeeper, there, for board at his inn, he is a boarder, and not a guest. The test questions are, was he a travel-

ler, and a wayfarer, and was he received and entertained, as such, by the innkeeper in his inn? If he was, he at once becomes the innkeeper's guest, and the relation subsists so long as he sojourns there, as a traveller. *Berkshire Woollen Co.* v. *Proctor*, 7 Cush., 417.

The liability of innkeeepers does not attach unless the goods are brought within the inn, or otherwise placed within their custody in some customary and reasonable way. It is not necessary that the goods should be placed in their special keeping, but it is sufficient if they are deposited in the house of the innkeeper, or entrusted to the care of his family or servants. 2 Kent's Com., 593; Story on Bail., § 479.

In *Clute* v. *Wiggins*, 14 Johns., 175, the guest put his sleigh, loaded with wheat, into an outhouse appurtenant to the inn, where loads of the kind were usually received, but without specially committing it to the innkeeper. The grain was stolen in the night, and the innkeeper was held liable for the loss. It would be otherwise if a traveller, on arriving at an inn, should place his loaded wagon under an open shed, not appurtenant to the inn, and near the highway, and make no request to the innkeeper to take it into his custody. *Albin* v. *Presley*, 8 N. H., 409.

It is evident from these principles that the plaintiff was a traveller, and a wayfarer, and was received and entertained by the defendant at his inn as his guest. The plaintiff hung up his coat in the place in the inn allotted for that purpose. It was not his fault that neither the innkeeper nor his servants were in the room at this time, nor was it his duty to guard his garment until they should come into the room, or to inform them where he had put it. His duty was discharged when he left his coat in the place established by the defendant for depositing such articles.

The defendant must be defaulted on the first and third counts in the writ, for fifteen dollars and costs.

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

WILLIAM FOLSOM *versus* THOMAS SKOFIELD.

In assumpsit for balance for wagons alleged to have been sold to the defendant, the plaintiff may testify that he *intended* to give credit to the defendant when he parted with the wagons, although he charged them on his book to the defendant's son.

When the testimony, as reported, does not necessarily establish the position that the jury erred in their verdict, or acted under any undue influence, bias, prejudice or partiality, it will not be set aside as being against evidence.

ON MOTION and EXCEPTIONS from *Nisi Prius*, WALTON, J., presiding.

The facts sufficiently appear in the opinion.

E. O. Bean, for the defendant.

Libbey, for the plaintiff.

BARROWS, J.—Assumpsit upon an account annexed to recover a balance of $261,70, for wagons alleged to have been sold by plaintiff to defendant. The wagons were charged upon plaintiff's book to Charles E. Skofield, son of the defendant.

Plaintiff's counsel asked the plaintiff the following question which he was allowed to answer subject to the defendant's objection: "At the time you parted with this property to whom did you intend to give credit?" Plaintiff answered:—"To Thomas Skofield, the defendant."

It was competent for plaintiff to prove that, although the charge upon the book was made to the son, the sale was actually made to the father. *James* v. *Spaulding*, 4 Gray, 452.

The defendant urges that the question should have been, "to whom *did* you give credit," and not "to whom did you *intend* to give credit." But so far as the question was one of pure fact it was one of intention. The *plaintiff's* intention was *one* element in the contract which he sought to prove. To the common apprehension and aside from any

admixture of opinion as to matter of law, *the questions are identical.* The exceptions must be overruled.

But proof of the *plaintiff's* intention and *his* understanding of the contract alone will not suffice. It still remains to be determined, from the whole evidence, whether the defendant's undertaking to pay for the wagons was an original one, or simply collateral, and so within the statute of frauds, which forbids the maintenance of an action to charge one man upon any special promise to answer for the debt, default or misdoings of another, unless the promise is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized.

The jury found, under instructions of which the defendant makes no complaint, that the defendant's contract was an original one, and not simply collateral to his son's promise, and a majority of the Court are of the opinion that the testimony, as reported, does not necessarily establish the position that they erred in so doing, or acted under any undue influence, bias, prejudice, or partiality; that the case is not one where a verdict either way can properly be set aside as conflicting with the law and the evidence. The entry must therefore be *Motion and exceptions overruled.*

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

LIBEL OF SIMEON HEATH *versus* INTOXICATING LIQUORS and MILTON FARNHAM, *claimant, appellant.*

Judgment will not be arrested in case of libel under c. 33, of the Public Laws of 1858, because the officer did not, in accordance with the requirements of the "search and seizure" warrant, arrest, or give any reason for not arresting the person in whose possession the liquors were found.

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

LIBEL, originating under a complaint and warrant, under

c. 33, of the Public Laws of 1858, for search and seizure of intoxicating liquors in the possession of Jarvis Barney, who was charged with unlawfully keeping them for illegal sale.

The warrant ordered the officer to arrest said Barney, if the liquors were found in his possession. The liquors were found in his possession, but he was not arrested. After verdict against him, the respondent moved an arrest of judgment, because—

1st. The said verdict is against the law of the case.

2nd. The complaint in this case alleged that the liquors were unlawfully kept for illegal sale, by Jarvis Barney, and the warrant issued thereon required the arrest of said Barney in case the liquors were found in his possession, to be held for trial forthwith, and the said liquors were so found in said Barney's possession, and he was never arrested or tried in the Court below, or at any time, as required by law; nor are any reasons given, by the officer serving said warrant, why said Barney was not arrested.

The presiding Judge overruled the motion, and the respondent excepted.

Solyman Heath, for the respondent.

Peters, Attorney General, contra.

By the Court.—(Appleton, C. J., Cutting, Walton, Dickerson, Barrows and Danforth, JJ.)

Exceptions overruled.

FRANK H. PAGE, *plaintiff in error, versus* CHARLES DANFORTH *& al.*

By R. S., c. 82, § 10, no process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood.

The assignee of a chose in action may maintain a suit in his own name upon the promise of the debtor to pay the same to him.

A declaration defective in not alleging a promise to the assignee by the debtor is amendable.

A judgment rendered on such a defective declaration cannot be reversed on error.

WRIT OF ERROR.

The error assigned was that the original action was illegally brought in the name of the defendants in error, they having no interest in the claim sued, except as assignees under the statute, of Rufus K. Page, and that there is no consideration or promise to pay them, set out in the declaration.

A. G. Stinchfield, for the plaintiff.

J. Baker, for the defendants.

APPLETON, C. J.—The demand in suit was a chose in action due from the plaintiff in error to Rufus K. Page. The writ alleged an assignment to the defendants of the claim sued for in the original action and a promise to the assignor, but it does not contain any promise to pay the assignees after the assignment, and it is sought to reverse the judgment for that cause.

The assignee of a chose in action may maintain a suit in his own name, upon the promise of the debtor to pay the same to him. *Lang* v. *Fiske*, 11 Maine, 385.

The Court will not reverse a judgment for any want of form, which might have been amended. *Lord* v. *Pierce*,

33 Maine, 350. This is specially prohibited by R. S., 1857, c. 82, § 1.

The declaration, though defective in not avering a promise to the original plaintiffs, might have been amended. *Pullen* v. *Hutchinson*, 25 Maine, 249; *Stephenson* v. *Mudgett*, 10 N. H., 338. In a suit against administrators, in which there was no averment of a promise by them, the plaintiff was allowed to amend by inserting the necessary averment. *Proctor* v. *Andrew*, 1 Sand., (Sup. Court,) 70; *Smith* v. *Proctor*, 1 Sand., (Sup. Court,) 72; *Flowers, Ex'r*, v. *Garr*, 20 Wend., 668. *Judgment affirmed.*

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

CUTTING, J. — At common law, choses in action, originally, were not negotiable, so as to authorize the assignee to commence an action in his own name. But that rule has, subsequently, been modified so as to embrace all such as are payable to order or bearer. The demand in the original suit was not of that character. It was "for money laid out, expended, and paid by *Rufus K. Page* (the assignor) to and for the use of said defendant (this plaintiff in error) for the use of the said *Page*, before he assigned his property as aforesaid, in consideration thereof, the defendant then and there promised the said *Page*, before he assigned his property as aforesaid, to pay *him* the same sum on demand." There was no allegation, that, after the assignment, the defendant promised the assignees to pay them. Had it been so, the judgment rendered on the default would have been unexceptionable. As it is, the declaration shows no privity between the parties of record.

ABRAHAM L. CUTLER *& al. versus* JOHN H. GILBRETH.

The fact that the article delivered is not in quality what was contracted for, will not excuse the vendee from taking the necessary steps to rescind the sale.

A party who would rescind a sale must use proper diligence.

By R. S., c. 82, § 47, a demand originally payable to the defendant in his own right, founded on a judgment or contract, express or implied, for the price of real or personal estate sold, for money paid or had and received, for services done, for a liquidated sum, or for one ascertainable by calculation, may be set off.

If, on account of his own laches in not rescinding a sale, the vendee cannot maintain a count for money paid or had and received for the article delivered, he cannot, under the above statute, set off the claim against the vendor's suit growing out of a distinct transaction.

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

ASSUMPSIT on account annexed.

The facts sufficiently appear in the opinion.

J. S. Abbott, for the plaintiffs.

Tenney, for the defendant.

BARROWS, J. — By the defendant's admission, with which the report is prefaced, the plaintiffs are entitled to judgment for the amount of the account annexed and interest thereon from the date of the writ, unless the defendant's claim filed in set-off, or some portion thereof, ought to be allowed. The account in set-off is for a certain sum of money, which the defendant asserts to have been received from him by the plaintiffs without consideration, and it may properly be filed in set-off if the defendant could maintain an action for money had and received therefor against the plaintiffs, upon the facts proved. They are as follows: —

Nov. 3, 1862, defendant, having previously dealt with plaintiffs, wrote to them inquiring their prices for certain kinds of goods enumerated, among which was machinery coal oil. Nov. 5, plaintiff replied, giving among other quotations the price of "machinery coal oil *best*" as 65 cents

cash. Nov. 7, defendant ordered, with quite a number of other articles of merchandise in various quantities, three barrels of best machinery coal oil at 65 c., proposing, if plaintiffs would make a discount of 5 per cent. from the price named, to take five barrels. Nov. 11, the goods were forwarded from Boston, where plaintiffs reside, and, among them, five barrels purporting to contain the oil. Prior to the 16th of Nov., the goods were received by defendant at Kendall's Mills, as was also a bill of them containing the following notice:—"All claims for damages or deductions must be made within five days from receipt of goods." Before the end of January, 1863, several letters had passed between the parties, and defendant had paid for the five barrels and their contents, as charged in the bill, and the other goods ordered at the same time, *without complaint*, and, on January 29, he wrote to plaintiffs for further quotations of prices, and among the articles enumerated is machinery coal oil. January 31, plaintiffs replied, naming 50 cents as the price. Under the same date, January 31, defendant writes to plaintiffs * * * "I requested you to send the price of machinery coal oil, as I wanted to know whether I had saved anything by a rise. I had quite a lot on hand when I bought the five barrels of you, and have just got ready to draw off one barrel of that I bought of you, and find it not of the "best" quality, and I want you to send me some that is, and have this returned to you at your own expense." He further alleges that the oil he had formerly bought was "first rate" for all purposes, "for machine shops, mills, threshing machines, and even sewing machines," and he proposes to receive three barrels of such oil as he has formerly bought of them and exchange two for some other goods in their line. This appears to be the first intimation given to plaintiffs that defendant was dissatisfied. They replied, under date of February 4, declining to accede to his propositions, informing him that the oil was bought expressly for him, and that after such a lapse of time they could not return it to their vendor.

The five barrels and their contents still remain at Kendall's Mills, and, in Sept., 1864, defendant took a portion of their contents and sent it to Portland to be analyzed by a chemist, and now contends, upon the chemist's testimony, that the article furnished cannot properly be styled machinery coal oil, but is in fact still bottoms, or dregs produced in the distillation of petroleum, and of comparatively little value as an article of merchandise, and there is a preponderance of testimony that such is the fact. Very manifestly the article was *not* the *best* machinery coal oil, although, whatever may be suspected, there is no evidence from which we are authorized to conclude that the plaintiffs knew it was not a good lubricating coal oil, suitable for the market for which they supposed it designed, and for heavy machinery. It is plainly a case where the defendant, but for his own laches, might have rescinded the contract. His counsel contends that, the article not being what was contracted for, he is excused from taking those steps which were necessary to rescind a contract,—that there was no contract to rescind. We cannot assent. The fact that it was not what the contract called for is the foundation of the right to rescind, and the difference between the article contracted for and that which was furnished is not so great here as in *Conner* v. *Henderson*, 15 Mass., 319, where the party, receiving a worthless mixture of sand and stones in place of the lime he contracted for, was held not to be entitled to maintain an action for money had and received, because he did not seasonably return the casks. The defendant here has done nothing to entitle him to treat the contract as rescinded. *Norton* v. *Young*, 3 Greenl., 30.

We are not disposed to relax the rule requiring proper diligence of the party who would rescind a contract. Whether the defendant might maintain upon the facts disclosed an action for damages is not a question before us. Not being in a condition to maintain a count for money had and received or money paid, his claim against the plaintiffs is not

such as can be offset under R. S., c. 82 §, 47, against the plaintiff's suit growing out of a distinct transaction.

Judgment for plaintiffs.

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

LOUISA HOLMES, *Execut'x, versus* GEORGE W. SAWTELLE.

By the 23d Rule of Court, neither party shall be required, *during term time*, to attend the taking of a deposition, except in the town in which the Court is holden, and at an hour when the Court is not actually in session, unless the Court, upon good cause shown, shall specially order the deposition to be taken.

"*During term time*" does not cover all the time from the commencement to the final rising of the Court, without regard to the length of intervening adjournments.

Where the Court adjourned on the 22d to the 29th of a certain month, and the plaintiff's attorney gave legal notice of his intention to take a deposition, on the 26th of the same month, in the town where the defendant's attorney resided; — *Held*, that the deposition was not taken "during term time," within the meaning of the 23d Rule, and was therefore admissible.

In an action of replevin for a colt, brought by an executor, the plaintiff will not be permitted to prove the declarations of his testator, made while the colt remained on his premises, with his other stock, tending to show that he claimed to own the colt, to rebut testimony offered by the defendant, tending to show a previous gift by the testator to his son who lived with him and of whom defendant had purchased the colt.

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

REPLEVIN.

The facts sufficiently appear in the opinion.

J. H. Webster, for the defendant.

J. S. Abbott, for the plaintiff.

BARROWS, J. — This action is replevin for a colt which formerly belonged to the plaintiff's testator, but is claimed by defendant, under a purchase from Augustus Holmes, the testator's son, to whom the defendant alleges it was given by the testator in his lifetime.

The first exception relates to the admission against defendant's objection of a deposition which was taken on the 26th of November, 1864, subsequent to the time fixed by law for the commencement of the term at which the action was tried, and in a town other than that in which the Court sat before which the action was pending. The 22d day of November was the time fixed by law for the commencement of the term, but the exceptions state that, by a previous arrangement, the Court was adjourned on that day to the 29th of November, and notice of this was published in the newspapers of Augusta, and no business was transacted and no Court, in fact, held between said 22d and said 29th of November. It seems that the deposition was taken on the 26th, in the town where the counsel of both parties resided, and upon notice to the counsel who now objects to the admission of the deposition. Was that admission in violation of Rule 23 of this Court, which provides that neither party shall be required, during term time, to attend the taking of a deposition, except in the town in which the Court is holden, and at an hour when the Court is not actually in session, unless the Court, upon good cause shown, shall specially order the deposition to be taken?

Rules of Court are designed to regulate and facilitate proceedings in causes, and no construction will be given to those rules which will needlessly embarrass such proceedings. In all the large counties, adjournments of Court to dates late in the vacation, even very shortly preceding the next following term, are common and necessary for the convenience of Court, parties and counsel. The construction contended for by the defendant's counsel would make the statute regulating the taking of depositions practically unavailing, or subject the parties to the additional inconvenience and expense of procuring the attendance of deponents and counsel at the shire town of the county, where the action is pending, during a large portion of the time in these counties. He maintains that, "during term time" covers all the time from the commencement till the final rising of the

Court, without regard to the length of intervening adjournments.

We cannot accede to such a construction. The design of the rule is to prevent fraudulent or oppressive practices in the taking of depositions, at times and places when and where it might be reasonably supposed that it must be inconvenient, perhaps impossible, for counsel to be present. If adjournments of Court during the progress of a term are of sufficient length to permit the return of counsel to their homes, and the service of notice thereafterwards for the taking of the deposition, according to the requirements of the statute, and a return from the place of taking to the town where the Court is holden, before the recommencement of the session of the Court, no good reason is perceived for holding that a deposition taken under such circumstances is taken "during term time" within the meaning of this rule. It is not disputed that all these conditions are complied with in the present case and this exception must be overruled.

Another, not so readily disposed of, arises from the admission of certain declarations of the plaintiff's testator, offered by the plaintiff and received subject to the defendant's objection. That plaintiff's testator once owned the colt was conceded, but defendant claimed that he had bought him of the deceased's son. To prove a gift from the father to the son, testimony was offered by defendant to the effect, that, before his death, the deceased spoke of the colt as belonging to his son, and that he said that he had given the colt to him. "Plaintiff was then permitted to prove, defendant objecting, that, after the time when these alleged declarations were said to have been made, and while the colt remained on the testator's premises with his other stock, he made *other declarations* tending to show that he still claimed to own the colt." It does not seem to be claimed or understood that these other declarations were made in the presence of the son, or accompanied any act or fact material to the issue, unless the circumstance that the colt was on his premises at the time, can be so considered. The

able counsel for the plaintiff says that it is "the usual evidence introduced to sustain such an action," and, "in accordance with every day's practice." If we concede that such evidence is often received, without objection, to "sustain such an action" against a mere intermeddler who shows no evidence of title, does it follow that it is competent to rebut the declarations of the owner that he has parted with his title by proving other declarations subsequently made, that he still claims the property as his own? What is it but receiving the unsworn declarations of the party in his own favor?

The evidence offered and admitted here seems to be incompetent, for the reason that a party cannot be permitted to prove his own declarations in support of his own case, nor can the executor or administrator of a party deceased be allowed to put in like declarations of the individual whose interest and title he represents. The plaintiff might properly prove any statements of her testator that made a part of those which were offered in evidence by the defendant. She might explain the conversations that were thus put in, or controvert by proper testimony the fact of their occurrence, but to show that the deceased had made at another time a contradictory declaration, did not prove, or in any way tend to prove, that he had not said that upon which the defendant counts as evidence of a gift. It was nothing more or less than a declaration in his own favor, offered to control those admissions against his interest made at another time, which the opposite party might properly and did in fact offer in evidence and rely upon. To prove that a man makes a declaration in his own favor to-day has no tendency to disprove or control the fact of his having made an admission against his interest yesterday. It does not even appear that these declarations were coupled with any acts of ownership over the colt exercised by the deceased. The only circumstance alleged is that it was on his premises with his other stock at the time, *a fact by no means inconsistent with a previous gift to a minor son.* In the cases of

Holt v. *Walker*, 26 Maine, 107, and *Hatch* v. *Dennis*, 10 Maine, 244, to which our attention has been called, the declarations offered and received, were against the interest of the declarant and not in affirmance of his title.

In *Bartlett* v. *Delprat & al.*, 4 Mass., 702, the demandant in a real action offered in evidence the fragments of what purported to be a deed of the demanded premises from his deceased father to himself, "to hold to him his heirs and assigns in fee from and after the death of his father," and an office copy of the same by which it appeared that the supposed deed was not placed upon record until after the father and all whose names purported to be appended as witnessing the execution or taking the acknowledgment of the deed were dead. The tenants, to whom the father had devised the estate, introduced the declarations of the father subsequent to the date of the supposed deed to the demandant, made in speaking of the demanded premises, and the disposal of his estate among his children, to the effect, "that he had never made and had refused to make to his son Humphrey (the demandant) a deed of the premises in controversy;" "had given him his full share of the estate in another manner" and the like, and on account of the admission of this evidence the verdict for the tenants was set aside and a new trial granted, though SEWALL, J., in pronouncing the opinion, remarked that, "the other facts appearing in this case leave very little doubt of the justice of the verdict." In like manner here, as we do not find that the competency of the evidence excepted to can be maintained upon principle or authority, we think, without examining the other exceptions taken, that the exceptions must be sustained, verdict set aside, and a

New trial granted.

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

GEORGE F. GILMAN, *Appellant from a decree of the Judge of Probate, versus* JOANNA B. GILMAN.

The allowance to a widow is to be determined by the law of the domicil of her husband.

By R. S., c. 63, § 24, the Supreme Court of Probate may reverse or affirm, in whole or in part, the sentence or act appealed from, pass such decree thereon as the Judge of Probate ought to have passed, remit the case to the Probate Court for further proceedings, or take *any* order therein that law and justice require.

An appeal from a decree of the Probate Court, fixing the amount of allowance to a widow, vacates the judgment appealed from; and the whole subject matter of the appeal is, without any statute restriction, open to the appellee in the Supreme Court of Probate.

Hence, where one of the heirs of a deceased person appealed from a decree of an allowance to the widow, for the reason that it was "excessive, unreasonable and not necessary, according to the degree and estate of her husband and the state of the family under her care;" — *Held*, that the Supreme Court of Probate might increase the amount decreed below, if, in its opinion, law and justice require it.

The circumstances to be considered in fixing the amount of an allowance.

ON REPORT from *Nisi Prius.*

APPEAL from the decree for an allowance by the Judge of Probate for the county of Kennebec, to the appellee, widow of the late Nathaniel Gilman.

The facts fully appear in the opinion.

J. W. Bradbury, for the appellant.

W. B. S. Moore & J. Baker, for the appellee.

APPLETON, C. J. — It was determined in *Gilman* v. *Gilman*, 52 Maine, 165, after a full hearing of all parties and upon satisfactory proof, that the domicil of the late Nathaniel Gilman was at the time of his death in Waterville in Kennebec county.

This Court has jurisdiction of the probate of the will of said Gilman, from the fact that his domicil, at the time of his death, was in this State. He deceased, too, in the place in which his domicil was established. The probate of the

will has been had in the Supreme Court of Probate. As is well remarked by DENIO, C. J., in *Petersen* v. *Chemical Bank*, 32 N. Y., 23,—"The succession to the personal estate of a deceased person is governed by the law of the country of his domicil at the time of his death. This is so, whether the succession is claimed under the law providing for intestacy or for transmission by last will or testament." So, too, the allowance to the widow is to be determined by the law of the domicil of the husband, where administration is granted. Ancillary administration may be granted elsewhere and wherever the estate of the deceased may be situated.

The Judge of Probate for Kennebec county, upon the petition of the appellee, widow of said Nathaniel Gilman, made her an allowance under the authority given him by R. S., 1857, c. 65, § 13, and the statute of 1861, c. 22, §

The appellant, one of the heirs at law of said Gilman, and one of the executors of his will, appealed from the decree of the Judge of Probate, making the allowance, for the reason that the allowance granted was "excessive, unreasonable and not necessary, according to the degree and estate of her husband and the state of the family under her care." Other reasons were filed, but, as they were not relied upon at the argument, they may be regarded as waived.

The appellant seasonably filed the reasons of his appeal, gave the bond required by law and entered his appeal, which was fully heard. Each party offered such proof and adduced such argument as was respectively deemed necessary and advisable. The case has been heard upon proof and argument, and now the question is presented whether, upon the appeal taken by the appellant, this Court can by its decree finally determine, as to the parties to this litigation, the allowance to be made the appellee, and increase or diminish that made by the Judge of Probate, if, in their judgment, "law and justice shall require" it.

The general principle applicable to appeals, when they are allowable, seem to be well settled. Either party may

appeal from an adverse judgment. Both parties may deem the judgment adverse and appeal therefrom. An appeal in all cases vacates the judgment appealed from.

When both parties appeal and only one enters his appeal, the cause is heard *de novo* upon new proofs and arguments. The amount of the judgment, thus vacated by the appeal, may be increased or diminished, or it may remain unaltered. If, as a measure of precaution, both parties enter an appeal, still there is but one cause and but one trial, in and by which the rights of all are finally heard and conclusively determined, subject to such exceptions as either party may allege.

By the statutes of 1821, c. 51, § 6, the Supreme Judicial Court is made the Supreme Court of Probate, and has appellate jurisdiction over all matters determinable by the Judges of Probate in their respective counties. By § 64 "any person aggrieved at any order, sentence, decree or denial of any Judge of Probate in any county, may appeal therefrom to the said Supreme Court of Probate, * * * and such appeal shall be *taken notice of and proceeded upon* at the next term of the Supreme Judicial Court," &c., &c.

This was not regarded as giving sufficient power over the subject matter. Accordingly, to remove all doubt, a new section was added to the chapter relating to the Court of Probate, in the revision of the statutes in 1841. By c. 105, § 33, "the Supreme Court of Probate may reverse or affirm, in whole or in part, the sentence or act appealed from, and may pass such decree thereon as *the Judge of Probate ought to have passed;* and may remit the case to the Probate Court for further proceedings, or *may take any order therein, as law and justice shall require.*" This provision is retained in the revision of 1857, c. 63, § 24, with hardly a verbal alteration and without any change in its meaning.

The section just referred to is entirely inconsistent with the idea that the Supreme Court of Probate may not, upon appeal, correct any error which was adverse to the appellee in relation to the subject matter of the appeal, and, in

the case at bar, refers only to the amount of the allowance. On the contrary, it implies that the whole subject matter is before the Court, and that it is its duty to correct any and all errors shown at the hearing to exist.

The appellant is heard on new proofs and arguments. The rights of the appellee in this respect are the same as those of the appellant. In this case, then, the question of the allowance to be granted the appellee is before the appellate tribunal at the instance of the appellant. The judgment of the Probate Court, by his act, has been vacated. A new judgment is to be rendered in this Court. Why not then, while confining the appellant to the reasons of his appeal, and limiting the decision on his side by those reasons, regard the case as open on the part of the appellee, and thus upon one hearing finally determine the rights of all parties? Why require two hearings when one will suffice? Why divide the question of an allowance and hear one party, on his appeal, as to whether it is too large and his adversary, on his appeal, as to whether it is too small? Why not hold, upon an appeal by either party, that as to the appellee the judgment is vacated, and that the whole question on his part is before the Court, while on that of the appellant, it is limited by the reasons of appeal?

The very language of the statute confers the most ample authority on the appellate Court. It "may pass *such decree thereon as the Judge of Probate ought to have passed*, remit the case to the Probate Court for further proceedings, *or take any order therein, that law and justice require.*" This Court is to decree what the Judge of Probate ought to have decreed. But the decree of this Court may be upon an entirely different state of facts, from those presented for the consideration of the Probate Court. This Court is to decide upon the proofs and argument presented. It is to do what upon the same evidence the Court of Probate should have done. It is to "take any order therein that law and justice require." But it cannot do this if there be restrictions prohibiting its action in one direction. But there

are restrictions if its freedom of judgment is in any way limited or interfered with. The right to decree as law and justice may require, is unlimited so far as relates to the appellee. While there are restrictions on the part of the appellant, and he is limited by the reasons of appeal as assigned, the statute imposes no restraint upon the action of the Court upon the subject matter of the appeal, so far as relates to the correction of any errors injurious to the appellee, in the decision of the Court from which the appeal is taken. The original judgment having been vacated by appeal, a new one is to be rendered, such "as law and justice may require," and that upon the whole evidence. Any other construction would prevent and prohibit the appellate Court from acting in accordance with the requirements of law and justice.

"By the practice of the civil law and of the Courts which follow that practice," observes Mr. Chancellor SANFORD, in *Vanderheyden* v. *Reid*, Hopk., 412, "a cause removed to a superior tribunal, by an appeal, is reheard at large, upon the facts as well as the law. It is treated as if it had been commenced in the Superior Court; the parties may introduce new proofs; and any proceedings may take place, which law and justice may require for the investigation of the truth." These principles apply to courts of probate equally as to other courts. Indeed, they apply universally, except where by statute some change in the law has been made.

The Legislature may impose restrictions upon the party appellant only, or on both parties. By R. S., c. 63, § 20, the party aggrieved is to file the reasons of his appeal. The judicial construction given to this section has limited the appellant to the reasons assigned by him for his appeal. But this limitation is by statute. But no such limitation is imposed upon the appellee. His rights are unaffected. As to him, so far as relates to the subject matter of the appeal, the judgment of the Court appealed from is vacated and a new judgment must be rendered, and this judgment

must be based upon the proofs before the Court by which it is rendered. The appellant is limited by the statute to the reasons he chooses to assign. The rights of the appellee remain unaffected, for no statute has touched or impaired them. Undoubtedly both parties may appeal in a case like the present, as was done in *Hughes* v. *Decker*, 38 Maine, 153. But, in the case last cited, the question now discussed could not be raised, because of the appeal by both parties. It has, therefore, no bearing on the question now under discussion.

These views are in entire accordance with the weight of judicial authority upon the subject. In *Boynton* v. *Dyer*, 18 Pick., 1, MORTON, J., in discussing probate appeals, says, "the case is to be tried anew here, and each party may adduce new evidence and rely upon new grounds to support the claim or defence. But in the mode of trial there is a manifest difference between an appeal from a common law court and from the Court of Probate. * * In the latter the appellants are restricted to such points as are specified in their reasons of appeal." In *Bean* v. *Burleigh*, 4 N. H., 550, it was decided that in an appeal from a decree of the Judge of Probate, the appellant is restricted to such matters as are specified in the reasons of appeal.

"The Court of appellate jurisdiction," as is remarked in *Washburn* v. *Washburn*, 10 Pick., 375, "is to revise the case upon the evidence produced, uninfluenced by the decision of the Court below." In Massachusetts, an appeal from the Judge of Probate allowing an executor's private account against the estate, under R. S., c. 66, § 19, without submitting the claim to arbitration, opens the whole account, and the appellate Court has authority, if neither party requests a jury, to decide on the claim and to decree that a balance is due from the executor to the estate, although the executor claims a balance due from the estate to him. *Willey* v. *Thompson*, 9 Met., 329. "When, therefore," remarks SHAW, C. J., in the case last cited, "an appeal is taken and entered in this Court, the whole case is brought before this Court

by the appeal. * * The authority of the appellate Court is to revise the whole decree and pass such decree as the Court below might and should have rendered."

"But, can the appellee" inquires EASTMAN, J., in *Twitchell* v. *Smith*, 35 N. H., 49, "who has claimed no appeal, have the decree opened so far as he is concerned? In *Wendell* v. *French*, 19 N. H., 205, it was held that he could, and that on appeal taken he might show error in the decree, and have it corrected. And, in that case, charges of the appellee, which had been disallowed by the Probate Court, were allowed by the superior Court, and the decree made to conform to such allowances. We are not inclined to disturb the rule there laid down. We do not discover that it can work hardship to any one, but, on the contrary, it may save expense to all parties. It may also act as a salutary check to hasty appeals. If the rule is understood to be that an appeal opens the case on the part of the appellant, to the extent to which he may assign causes of appeal, and also that the appellee may show error in the decree, the appellee will have notice of the claim of the appellant, while the appeal itself will be notice to the appellant that the appellee may contest the decree." Upon an appeal from a decree of the Judge of Probate allowing a guardian's account, the only matters open to inquiry by the appellant, are those specified in his reasons for appeal. But the appellee is not thus confined, but may, on such appeal, show error in any part of the decree and have it corrected. *Patrick* v. *Cowles*, 45 N. H., 553.

The conclusion to which we have arrived is that, upon a reasonable construction of the statute, under the provisions of which this appeal is before us, and in accordance with the weight of judicial authority, we have, upon this appeal, the right to affirm the decree of the Judge of Probate, or to increase or diminish the allowance decreed by him, as we shall adjudge law and justice to require.

The determination of this question becomes important, as the appellee claims an increased allowance under this ap-

peal. There is an appeal taken by her, now pending in the Court below, in which the cause assigned is, that her allowance is too small. The necessity, therefore, arose of determining whether the amount of allowance was to be determined in two hearings, or whether it was fully before us on this appeal.

The Judge of Probate, upon the petition of the appellee, decreed her an allowance of seventy-five thousand dollars from the personal estate of Nathaniel Gilman, deceased, from which an appeal was duly taken and entered by the appellant. With this decree the appellee also is dissatisfied. Proofs have been offered and arguments furnished on each side as to what sum would be a proper allowance to the appellee under the circumstances of the present case.

By the common law, as it stood, according to GLANVILLE, in the reign of Henry 2d, a man's goods were to be divided into three equal parts, one of which went to his wife, one to his children, and one was at his own disposal. The share of the wife and children were called their reasonable parts, and the writ *de rationabili parte bonorum* was given for their recovery. By the statute of descents, R. S., 1857, c. 75, § 9, if the husband die intestate, "the widow takes one third, if no issue, one half, if no kindred, the whole" of the personal estate of her deceased husband. This share, therefore, in the absence of a will, is to be regarded as the proportion of the personal estate of the husband, to which, in the judgment of the Legislature, the wife is justly entitled. A similar liberality of legislation is to be found in most of the States.

When the estate is insolvent, or "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." R. S., 1857, c. 65, § 13. The allowance may be more or less than in case the husband had died intestate and

solvent. Each case will depend on its own peculiar facts. No general rule can be established, for what, in one case might be an allowance amply sufficient, in another might be clearly inadequate. The amount in each case must be left to the judicial discretion of the Judge of Probate, regard being had to what will be necessary according to the degree and estate of the husband.

The amount of one third is not to be regarded as a statutory provision in cases like the present. But while not imperative as an enactment, it is eminently suggestive as indicating the general purpose and views of the Legislature on this subject. While this may not be deemed binding on the Court, but rather as guiding its action, it leaves to the Judge a discretion to be exercised under all the circumstances which may increase or diminish the allowance.

All the attendant and accompanying circumstances are to be considered, — the ages of the husband and wife, — the length of their cohabitation, — whether a first or second marriage, — the number of children of each and of both, — that is, by former marriages or by their joint union, — the wealth of the husband, — the estate of the wife in her own right, — any anti-nuptial agreements, — their performance or non-performance, — the treatment of each to the other, — the health, place of residence and necessary expenditures of the wife, — the family under her charge and whatever other circumstances may address themselves to a sound judicial discretion, and may enable the Court to approximate as nearly as possible to exact justice to all whose interests may be involved in its judgment. The elements upon which the decision must rest, some tending to increase, some tending to diminish the allowance, will vary, as between case and case, according to the changing condition of parties. No rule can be established in advance as to the relative weight of any particular fact, for it cannot be foreknown how far it may be modified by the other facts with which it is indissolubly connected.

In the case before us, the husband was possessed of from

five to six hundred thousand dollars, mostly in personal property. The real estate, of which he died seized was of trifling value. The dower of the appellee is but nominal. The provision made for her by the will was so disproportionally inadequate, reference being had to the testator's great estate, as to indicate anything rather than affectionate or kindly relations on the part of the husband toward his wife. The appellee had well founded reasons for dissatisfaction and for an appeal to the law in vindication of her rights.

The appellee was married in 1836. The marriage was a second one on the part of her husband, who was twenty-six years older than his wife, and was the father of six children by a previous marriage. By the second marriage, there were four children living at the time of the husband's decease, two of whom were minors. Most of the children of the first marriage had the aid of the large capital and the rare talent and sagacity of their father, — were at different times in partnership with him, — and had amassed estates rivaling or exceeding his own in magnitude. The children by the second marriage have lost the benefit of their father's counsel, and of the assistance which his wealth might afford, and of the advice which his great business talent would have enabled him to render.

Before their intermarriage, the husband agreed in anticipation of their intended union to make a settlement of thirty thousand dollars upon his future wife. The marriage was consummated, — but the agreement was never performed. This is no slight indication of what the testator then deemed as reasonable and necessary, regard being had to his degree and estate. Since that time his estate has greatly increased. To this sum and its increase the wife was equitably entitled, for marriage is a good consideration, and an agreement to make an allowance is one which a court of equity will enforce. In 1841, the husband received and retained two thousand dollars to which the appellee was entitled from the estate of her father. These sums, thus withheld, and which the appellee should have received, have gone into the estate

of the husband and become a part of its assets. They amount, with interest to the present time, to over ninety thousand dollars.

The appellee was an accomplished lady, who, at the time of her marriage, was a member of the family of the first Chief Magistrate of this State, and had ever been conversant with good society. An allowance proportionate to the ample means of her husband can properly be made, without infringing upon the rights of others. The degree and estate of her husband render this necessary and reasonable. A just respect to his memory requires it. Her health is poor. If the requirements of her health compel her to resort to a more genial climate, the large estate of her husband authorizes an allowance such as would afford her this indulgence. The ecclesiastical courts, in suits for divorce, when the health of the wife requires it, may allow such sum for alimony, while the suit is pending, as will enable the wife to proceed to a more genial climate to seek its restoration, and the courts of chancery in this country do the same. *Lynde* v. *Lynde*, 4 Sand. Ch., 373. On appeal, the decree of the Vice Chancellor was affirmed by the Chancellor. 2 Barb. Ch., 72. The expenses of living are greatly increased. The burden of taxation bears more heavily. The health of the wife may require her to visit a warmer clime. The statute directs us to have reference to the degree and estate of the husband. Taking into consideration all the facts to which we have alluded, it seems to us that an allowance of eighty-five thousand dollars would be but reasonable and necessary according to the degree and estate of her husband, and the state of the family under her charge.

And it is accordingly ordered and decreed, that, instead of the sum allowed by the Judge of Probate, there shall be allowed to the said widow, Joanna B. Gilman, the sum of eighty-five thousand dollars out of the personal estate of said deceased, to be paid by the executors of his will; and she may select any portion thereof from the said estate at the appraisement thereof in the inventory, from any articles

not specifically bequeathed, and the executors of said will are ordered to deliver the same to her and take her receipt therefor, and thereupon charge the same in their account of administration upon said estate.

And it is further ordered, that the said appellee recover against the appellant, George F. Gilman, her taxable costs upon this appeal.

KENT, DICKERSON, BARROWS and TAPLEY, JJ., concurred.
WALTON and DANFORTH, JJ., concurred in the result.

CUTTING, J.—It appears that, at a Court of Probate, held at Augusta, within and for the county of Kennebec, on the fourth Monday of May, 1864, there was allowed to this appellee, widow of the late Nathaniel Gilman, out of the personal estate of her deceased husband, the sum of seventy-five thousand dollars. From that decree an appeal has been taken to this Court, by one of the heirs to the estate, because, as he alleges,—"the allowance granted by said decree is excessive, unreasonable, and not necessary according to the degree and estate of her husband and the state of the family under her care." Other reasons were assigned, which, as the case is now presented, become immaterial.

At the hearing, a question arose, whether this Court, if so disposed, upon the foregoing facts, could increase the widow's allowance, she appearing as the appellee, and not as the *aggrieved party;* which question is now presented and involves the construction of our statute upon that subject.

Section 19 of c. 63 provides that:—"The Supreme Judicial Court is the Supreme Court of Probate, and has appellate jurisdiction of all matters determinable by the several Judges of Probate; and any person aggrieved by any order, sentence, decree, or denial of such Judges, may appeal therefrom to the Supreme Court."

By section 20:—"That, within ten days, after claiming his appeal, he shall file in the probate office his bond, and also the reasons of appeal, with the register of the Court appealed from, and serve all other parties, who appeared

before the Judge of Probate in the case, with a copy of such reasons."

By section 23:—"That, after an appeal is claimed, all other proceedings, *in pursuance of the matter appealed from*, shall cease, until the determination of the Supreme Court *thereon*."

By section 24:—"That said Court may reverse or affirm, in whole or in part, *the sentence, or act appealed from*, pass such decree *thereon* as the Judge of Probate ought to have passed, remit the case to the Probate Court for further proceedings, or take any order *therein* that law and justice require."

I have thus referred to, and condensed the several sections giving this Court jurisdiction in cases of appeal from the Probate Courts; from which it must be understood, that none but the *aggrieved* party has admittance here as the actor, while the party not aggrieved can only appear to repel and defend against the grievances *alleged*.

Such grievances present and form the only issues to be tried by the Court, or, under their direction, by the jury. It is "the sentence or act of the Probate Court *appealed from*," which this "Court may reverse or affirm, in whole or in part." But such reversal or affirmation would be ineffectual without a decree; therefore the statute provides that this Court, in such an event, "may pass such decree *thereon* as the Judge of Probate ought to have passed." If reversed in part, the decree would be for the balance; if in whole, that the appellee should receive no allowance. Such decrees by the appellate Court are only authorized by statute. The word "*thereon*" has reference to the sentence or act appealed from, as likewise our authority to "take any order *therein*, that law and justice require." All those terms have reference to the allegations of the aggrieved party, which alone confer jurisdiction.

But it has been contended that, if we find the appellant not to have been aggrieved, we can still entertain a sort of fictitious jurisdiction, so as to inquire and ascertain, judicially,

whether the non-aggrieved party may not have been wronged by the probate decree. What injustice has she suffered? None appears of record. It is true her counsel now contend, *arguendo*, that her allowance was too small. If aggrieved, she should have filed her reasons, and her statute bond, and given due notice, such as were required of the appellant, that evidence might have been produced by the one party to prove and by the other to disprove the allegations. But the only issue now presented to us by the pleadings is whether the appellee has been allowed too much, not whether she has been allowed too little; and it has been presumed that the evidence was taken with reference to that issue. Such has been the practical, as well as the judicial construction of the statute. In *Hughes, Appellant*, v. *Decker*, and *Decker, Appellant*, v. *Hughes*, 38 Maine, 153, where eminent counsel were employed, we have the practical illustration. There both parties appealed, and, by their respective reasons filed, put in issue the allowance; the one party was aggrieved because it was insufficient and the other because it was more than sufficient. The reasons, although numerous, tended to raise an issue as to the amount of the allowance, except one, which, it was contended, put in issue the jurisdiction of the Probate Judge; upon which the Court remark, that "the appellants are not prohibited from showing such want of jurisdiction, provided it comes legitimately within any one of the reasons of their appeal filed in the probate office, *to which by law they are strictly confined.*" And further, "we are not satisfied that either of the reasons assigned puts in issue the jurisdiction."

So, too, in the case of *Moody, Appellant*, v. *Hutchinson*, 44 Maine, 67, it appears that the widow appealed from a decree of the Judge of Probate, allowing her out of the personal estate of her deceased husband the sum of ten hundred and twenty-four dollars and sixty-three cents, and the principal reason by her filed was the insufficiency of that sum. In their opinion, the Court remark, — "it is true that, on an appeal from the Probate Court, the whole pro-

ceedings are again examinable in the appellate Court, *so far as they are opened by any of the causes assigned*, and new, as well as the former, testimony may be introduced touching *those issues*, which are in this case; *first*, as to the *sufficiency* or *insufficiency* of the allowance."

If this Court had decided that the sum was sufficient, the widow would not have sustained her appeal; but no one ever contended that the appellee, without becoming an appellant, with appropriate reasons filed, could in the appellate Court reduce the allowance decreed by the Probate Judge. That case and the one at bar are similar, only the parties are reversed.

In Massachusetts, whose statute is like our own, the Court have given it the same construction. *Boynton* v. *Dyer*, 18 Pick., 1, where the Court say:—"But in the mode of trial there is a manifest difference between an appeal from a common law court and from the Court of Probate. In the former, the whole case is to be tried over again, as if it had never been tried. In the latter, the appellants are restricted to such points as are specified in their reasons of appeal. These are the only subjects, which the adverse party has been notified to be prepared to investigate. *Every thing else*, not having been objected to, is impliedly assented to, and presumed to be correct."

So, in the present case, the sum allowed was not objected to by the appellee, but, on the contrary, from aught that appears, with that she was satisfied, or, in other words, she was not the aggrieved party; and now, shall we add to the contentment of the one unsolicited, and to the grief of the other amid his prayers and tears? Such an act would be as unscriptural as it would be illegal.

In *Willey* v. *Thompson*, 9 Met., 329, the claim, filed in the Probate Court and allowed, was for *the balance of account;* and the Court held that, from the character of the charge, they could examine into and ascertain what the balance really was, and upon which side of the leger, when correctly posted and balanced, that balance would appear,

and they found a sum in favor of the appellant, the aggrieved party. In such case, "all the items on both sides are put in issue," and are manifestly embraced within the reasons of the appeal. Other remarks in the opinion had reference to such a state of facts; for the Court introduce the subject by saying that, "where the claim is on a single specific demand they are not required to give an opinion." I can discover nothing in that or any other decision from which an inference can be drawn that the Court would give a happy and contented widow what she never lawfully claimed; if otherwise, such almoners have no jurisdiction beyond the limits of their own State.

Again, in New Hampshire, the same rule of law prevails. In *Bean* v. *Burleigh*, 4 N. H., 550, RICHARDSON, C. J., remarks, — "It seems to us, from the very nature of the case, that the hearing must be confined to the grievances alleged."

It cannot be pretended that the principle thus announced has ever been overruled by subsequent decisions. Errors have been corrected in debits and credits, but not otherwise. The idea recently advanced that the appellant is strictly confined to his reasons of appeal, that is, to the issue by him presented, and that the appellee may open the whole case, *otherwise than to rebut such reasons*, has, in my apprehension, no foundation in the statute or in the rules of pleading. If one party is confined to the issue, so is the other, otherwise there is no issue, without which there can be no trial.

The opinion of the Chief Justice assumes what the record does not disclose. He apprehends from facts, *aliunde*, that both parties have been aggrieved, and as such came up here specifying their grievances, as in the case of *Hughes* v. *Decker*, and *Decker* v. *Hughes*. Had such been the record, some of his conclusions might be justly inferable. That he travelled out of the record, I infer from the question, which he put; viz.: — "Why not, then, while confining the appellant to the reasons of his appeal and limiting the decision on his side by those reasons, regard the case as open on the part of the appellee, and thus upon one hearing finally de-

termine the rights of all parties? *Why require two hearings when one will suffice?*"

What evidence has this Court that there are to be two hearings, on one day the aggrieved party, and on the next the party not aggrieved, the one strictly confined to his reasons and the other unlimited, with no reasons filed, no bond and no notice given to his adversary? Whereas, had each party appealed, their respective reasons would have formed only one issue and demanded but one hearing.

From the evidence before us touching the issue, we are all satisfied that the *appellant* has not been aggrieved; consequently the decree of the Judge of Probate should be affirmed; and, inasmuch as we are authorized by statute to "take any order *therein*, that law and justice require," and seeing that the enforcement of the decree has been delayed by the act of the appellant, law and justice require that the appellee should recover interest on the sum allowed from the time of its allowance until final judgment shall be rendered *therein* by this Court, with costs.

SAMUEL GREELEY *versus* THE MAINE CENTRAL R. R. CO.

No action lies for the turning of mere surface water from one's own land upon the land of another.

ON FACTS AGREED. This was CASE, in which the plaintiff alleges that the water from the springs and brooks upon and over his land, from the time whereof the memory of man runneth not to the contrary, in its natural course and channel, was wont to run in a north-westerly direction from the plaintiff's land on to land north of and adjoining the plaintiff's lot, and thence over and across said adjoining lot into Chandler's pond; yet the defendants, not ignorant of the premises, but intending to deprive the plaintiff of the use of a part of his said land, on the first day of May,

1854, and continually afterwards to the date hereof, the ancient and natural course of the water of the springs and brooks upon and flowing over and across the land of said plaintiff, at Readfield aforesaid, on to and across and over the land of the lot next north of and adjoining the plaintiff's said lot into said Chandler's pond, with a certain railroad track-bed and embankment, erected and maintained by them across the plaintiff's lot, did carelessly and negligently and needlessly obstruct and turn from its natural and ancient course; by reason of which turning and obstruction, the water of said brooks and springs was carried along by the easterly side of said railroad track-bed and embankment, from and off of the land next adjoining the plaintiff's lot, on the north of the same, over and across the plaintiff's said lot into said Chandler's pond, by reason whereof his said land has been overflowed by the same and the earth and gravel carried by such overflow on to the same," &c.

It was agreed that, in 1847, the defendants duly located their railroad across the land described in the writ of the plaintiff, and his grantor conveyed to them the land covered by their location. The plaintiff became the owner of his lot in 1854.

Defendants excavated upon the higher side of their roadway and made an embankment in the middle of it, with ditches at the side, in the manner in which the road-bed for railways is accustomed to be built. The road-bed across plaintiff's lot is made by excavation or cut, and across the lot next adjoining north, it is made by an embankment or fill. When said railroad was built, the defendants made a cattle-pass under the road, near the south line of plaintiff's land, to allow cattle to pass from plaintiff's land upon one side of their railroad to his land on the other side. They built no culvert in their road on plaintiff's land.

The land of plaintiff declines in a southwesterly direction to Chandler's pond, into which the water from his lot naturally flows. Plaintiff's land, adjoining defendants' road

on the east, is higher than that portion of his lot lying farther east, and the water from his lot in its natural course flows north-westerly, on to the adjoining lot, and thence over said adjoining lot into Chandler's pond. There is no brook with defined banks upon plaintiff's land, but upon the adjoining lot, next north of plaintiff, there is a deep gully which receives the water from the plaintiff's lot and also from the lands north of the plaintiff's lot. The land lying north of plaintiff's declines towards the south-west.

In wet seasons, and during the fall and spring rains, and the melting of the snow, large quantities of water drained from the plaintiff's lot and, uniting with the water draining from the lands north of the plaintiff's lot, flowed in its natural course into said gully, and thence into said pond. The defendants constructed and have always maintained a culvert across their railroad in this gully, sufficient to pass all the water which now flows down this gully.

By the construction of the railroad, the water naturally draining and flowing from the plaintiff's land, east of the railroad, on to and over the adjoining lot north, and from the adjoining lands north of plaintiff's lot into the gully above named, and thence in said gully into Chandler's pond, has been diverted and turned from its natural and accustomed course before it reached said gully, into the ditch on the east side of the road-bed, and carried along this ditch to the cattle-pass, and through that on to the plaintiff's land on the other side of the railroad; and in wet seasons, and after heavy rains and the melting of snow, the water carried along with it dirt, sand, and gravel, which have been yearly deposited on plaintiff's land, injuring it, &c.

E. O. Bean, for the plaintiff.

1. The injury complained of is not one of the necessary consequences of building a railroad in a proper manner; and, therefore, the original assessment or payment of damages is no bar to this action.

2. For turning running water, whether from surface

streams or otherwise, from its natural course on other lands, on to those of the plaintiff to his injury, the defendants are liable in this form of action.

Drummond, for the defendants.

DANFORTH, J. — From the statement of facts, it appears that the injury complained of arises from the turning of mere surface water, — that which accumulated from rains and melting snows, — from its accustomed course upon land of plaintiff. This being caused by erections upon defendants' land authorized by law, no action will lie. *Dickenson* v. *Worcester*, 7 Allen, 19; *Flagg* v. *same*, 13 Gray, 601; *Barry* v. *Lowell*, 8 Allen, 127; *Parks* v. *Newburyport*, 10 Gray, 28, and cases cited. *Judgment for defendants.*

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

JOHN H. WEBSTER *versus* ASAEL W. CALDEN *& al.*

By R. S., c. 71, § 30, if the validity of a sale of real estate by license from a Probate Court is contested by one claiming adversely to the title of the wife, ward, or deceased aforesaid, or by a title not derived through either, the sale shall not be held void on account of any irregularity in the proceedings, if it appears that the license was granted by a court of competent jurisdiction, and the deed was duly executed and recorded.

The mere fact that lands sold for a very small sum compared with their intrinsic value, is not conclusive evidence of fraud.

John H. Webster, pro se.

D. D. Stewart and *Coburn & Wyman*, for defendants.

APPLETON, C. J. — This is a writ of entry to recover certain lands situated in Skowhegan.

On July 26, 1853, Obadiah Mann conveyed, by deed of quitclaim, certain tracts of land now in controversy to Wm. M. Mann.

The demandant claims title to what was thus conveyed by virtue of a sale under license from the Judge of Probate for the county of Somerset, to the guardian of the heirs of Wm. M. Mann, deceased, and a deed given upon such sale, he being the highest bidder therefor.

The tenant claims to hold the premises in dispute by virtue of a deed from Wm. M. Mann to Obadiah Mann, dated July 28, 1853, and recorded in Somerset Registry, Sept. 14, 1859, deriving his title through various mesne conveyances from said Mann.

The controversy between the parties is whether or not the deed from Wm. M. Mann to Obadiah Mann, dated July 28, 1853, was ever delivered to the grantee during the life of the grantor, and as to this fact there is much conflicting testimony.

If the deed was delivered before the death of the grantor, the demandant has no title to part of the demanded premises; and, in the event the deed from Kerswell, deputy sheriff, of two equities of redemption to Obadiah Mann should be held valid, he has none to the premises thus conveyed.

If the deed was not delivered, the demandant claims the premises therein conveyed by deed from the guardian of the heirs of Wm. M. Mann as before stated.

To this deed the tenants make several objections. But by R. S., 1857, c. 71, § 30, "if the validity of such sale is contested by one claiming adversely to the title of the *wife, ward, or deceased aforesaid*, or by a title not *derived* through *either*, the sale shall not be held void on account of any irregularity in the proceedings, if it appears the license was granted by a court of competent jurisdiction, and the deed was duly executed and recorded." If the deed in question was never delivered, then the tenants do not have a title derived through Wm. M. Mann or his wife or any ward interested in his estate.

This provision is first found in the revision of the statutes in 1841. It is not necessary, therefore, to consider the de-

cisions prior to the passage of this Act, as they become inapplicable so far as they are at variance with its provisions.

The tenants, by section 30, can only contest the demandant's deed on the grounds that the license was not granted "by a court of competent jurisdiction, and that the deed was not duly executed and recorded." But the jurisdiction of the court was unquestioned, and the deed under which the demandant claims was duly executed and recorded.

It is true, various exceptions are taken to the proceedings of the guardian in the sale of the premises in controversy. They might, perhaps, avail the heirs, if they were parties to this suit, and contesting the validity of the sale. But the statute would preclude us from considering the points raised by the learned counsel of the tenants, they not being within its exceptions.

The sale was public. The title to the premises was in controversy. The mere fact that these lands sold for a very small sum compared with their intrinsic value is not conclusive evidence of fraud. It is no fraud on the part of the demandant, that others declined to bid, and that he purchased the premises for an inadequate consideration. Mere inadequacy of price is no reason for avoiding a fair sale at public auction. *Brothertine* v. *Swires*, 48 Penn., 68.

The question in this case involves the character and integrity of the parties by whom the alleged delivery of the deed is proved. A jury, before whom the evidence will be offered, and who will see the witnesses, and from their appearance and manner can judge of the truthfulness of their answers, is the proper tribunal to determine this fact.

Report discharged. — Case to stand for trial.

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

FREDERIC OLIVER *versus* JOSEPH BERRY.

Persons deaf and dumb are *prima facie non compos mentis;* and the statute of limitations does not run against them, unless they are shown to possess sufficient intelligence to know and comprehend their legal rights and liabilities.

ASSUMPSIT on a promissory note given to the plaintiff for his personal labor in the defendant's saw mill. Defence,—statute of limitations. The plaintiff was proved to have been deaf and dumb from infancy. He was able to labor, but no evidence was offered to prove that he possessed sufficient intelligence to know and comprehend his legal rights and liabilities. There was evidence tending to prove that the defendant had made payments upon the note in suit within six years before the action was commenced; but the jury returned a verdict for the defendant, and the plaintiff's counsel moved to have the verdict set aside as against evidence.

Gilbert, for the plaintiff.

Tallman & Larrabee, for the defendant.

WALTON, J.—The statute of limitations does not run against a person deaf and dumb, unless he is shown to possess sufficient intelligence to know and comprehend his legal rights and liabilities. The improved method of educating such persons, adopted at the present day, develops in them a higher degree of intelligence than it was formerly supposed they possessed; but, nevertheless, as the want of hearing and speech must necessarily prevent a full development of their intellectual powers, and place them at a great disadvantage in their dealings with others, the law throws around them for their protection the presumption of incapacity to manage their own affairs till the contrary is shown. This presumption, however, is not conclusive; it may be rebutted. But when a person is shown to have been deaf

and dumb from his birth, it is *prima facie* evidence of incompetency, and unless rebutted must be regarded as establishing it. Such seems to have been the rule of the common law from a very early date. *Brower* v. *Fisher*, 4 Johns. Ch., 441. In this case, Chancellor KENT says that, the presumption is a reasonable one, and that a special examination to repel the inference of imbecility seems always to have been required. Lord HALE refers to the laws of King Alfred as recognizing the doctrine. 1 Hale, P. C., 34. The same rule prevails in the civil law. Justinian's Inst., lib. 1 tit. 23, § 4. See also 1 Greenl. on Ev., § 366, and 2 Kent's Com., 452, (Little & Brown's Ed. 609,) and authorities there cited.

The plaintiff's right to recover in this action seems to have been fully established, unless it was barred by the statute of limitations. The statute of limitations does not apply to an *insane* person, (R. S., c. 81, § 100,) and the words "insane person," as there used, are declared to be applicable to a person *idiotic*, or *non compos mentis*, (R. S., c. 1, § 4, rule 8,) which, as we have already seen, a person deaf and dumb is *prima facie* presumed to be. The plaintiff was shown to have been deaf and dumb from his infancy, and no evidence was offered to show that he possessed sufficient intelligence to know and comprehend his legal rights and liabilities, and thereby rebut the legal presumption of incapacity. The evidence of payments within six years was very strong, and it is difficult to understand why it did not satisfy the jury of the fact. The Court is of opinion that the verdict was clearly wrong.

Verdict set aside.—New trial granted.

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

EDWARD HODGKINS, *in Equity, versus* HANNAH A. MERRITT *& als.*

In 1852, the complainant, by his deed, absolute in its form, but only intended as security, conveyed certain real estate to M. & R., co-partners. In 1858, M. & R. gave him a bond conditioned to reconvey the premises upon payment, within three years, of whatever he should then owe them, which limitation was thereafter waived. Before final settlement, M. died; and, subsequently, the complainant settled with R., as surviving partner, and paid him the full amount due the firm; — *Held*, that the complainant was entitled to a release from the heirs of M., with covenants of warranty against claims by, through or under them.

BILL IN EQUITY.

The case was heard on bill and answer.

The facts sufficiently appear in the opinion.

The case was submitted without argument.

WALTON, J. — This is a bill in equity in which the plaintiff prays for a decree authorizing and directing the defendants to release to him any supposed interest they may have in certain real estate.

The plaintiff says that, in 1852, he conveyed the real estate in question to Merritt & Robinson, then co-partners, by a deed in form absolute, but intended in fact as security merely. That afterwards, in 1858, Merritt & Robinson gave him a bond conditioned to reconvey to him upon payment, within three years, of the amount that should be found due them upon a full, fair and just settlement. That the three years limitation was afterwards waived, and that he paid them large sums both before and after the expiration thereof. That, before any full and final settlement was had, Merritt, one of the co-partners, died. That, since Merritt's death, he has settled with the surviving partner, Robinson, and paid him the full amount due the firm, being more than six thousand dollars. And the plaintiff claims that he is now entitled to such a reconveyance as will free his real estate from any apparent defect in the title. This the

defendants seem willing to do, but doubt their authority. They do not deny any of the facts stated in the plaintiff's bill, but, on the contrary, express their belief that they are all true. We therefore regard the facts stated in the plaintiff's bill as admitted.

The necessity for applying to the Court for aid probably arises out of the fact that when Merritt died he left three children, then and still minors, and that their guardian does not feel authorized to release their apparent title to one half of the land, without authority and direction from the Court so to do.

It being admitted that the conveyance from the plaintiff to Merritt & Robinson, though absolute in form, was in reality intended as security merely, and that the whole amount due Merritt & Robinson has been paid, we think the plaintiff is entitled to such a reconveyance of his property as will clear the title of any apparent defect.

A decree may be entered authorizing and directing the defendants, (the minor children of Isaac Merritt acting, of course, through their guardian,) to release to the plaintiff any supposed interest they may have in the real estate in question, with covenants of warranty against the claims of all persons claiming by, through, or under them, or either of them. *No costs allowed either party.*

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

CALEB S. JENKS *versus* GEORGE F. MANSON.

Where an agent of the plaintiff, to sell a vessel, paid the proceeds to the defendant, for the use of the plaintiff, the former cannot resist the claim of the latter on the ground that he did not own the vessel, which he authorized his agent to convey.

Jenks *v.* Manson.

On Report by Walton, J.

Assumpsit for money had and received.

The case is stated in the opinion.

Tallman & Larrabee, for plaintiff.

Gilbert, for defendant.

Appleton, C. J.—The plaintiff, as the receiver of the estate of C. & W. D. Crooker, and the defendant, gave one Bradstreet Rariden, the master of the ship Ocean Romp, a power of attorney to sell the same. The defendant owned five-eighths and the plaintiff, as receiver, claimed two-eighths of the ship. The remaining one-eighth belonged to Rariden.

Under this power, a sale of the vessel was effected in London, and the plaintiff's share of the price and of the previous earnings was paid by Rariden to the defendant for the plaintiff's use, to recover which this suit is brought.

The defendant resists the plaintiff's right, to the extent of one-sixteenth, on the ground, that the legal title thereto was in one Charles C. Duncan of the city of New York, who held the same in trust for Wm. D. Crooker in his individual right.

The defendant received the money for the use of the plaintiff, who *prima facie* is entitled to recover.

If the legal title to the one-sixteenth in controversy was in Duncan, then that portion of the vessel has never been sold, for it is not pretended that he, or any person claiming title under him, either authorized Rariden to sell this interest, or has in any way since ratified the same, or claimed or asserted any right to the proceeds of such sale.

The defendant is not shown to be liable to any one for the amount in controversy. If there was a failure of title as to one-sixteenth, the plaintiff is entitled to these funds, with which to remunerate the purchaser to the extent of the failure of title in the ship conveyed. If there was no failure of title, still less has the defendant any pretence for

withholding any portion of the funds, which he received for the plaintiff's use. In either contingency, the defence fails. *Default to stand.*

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

SETH LABEREE *versus* CYRUS R. CARLETON *& al.*

As between the parties to a deed, a consideration is not necessary.

Conditions subsequent are not favored in law, and are raised only by apt and sufficient words.

A condition is a qualification or restriction annexed to a conveyance.

The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it.

M. L. conveyed land by deed of warranty to the plaintiff, conditioned that, if the grantor "maintained and supported," the plaintiff, &c., the deed to be void. Subsequently, M. L. having deceased, the plaintiff conveyed the same premises, by deed of quitclaim, to his son M., "in consideration of the conditions to be performed for me and mine by" M., "agreeably to the deed of the late M. L. to me;"— *Held*, that the claim "in consideration of the conditions," &c., did not constitute a condition of the latter deed, but only a description of the consideration.

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

REPLEVIN of hay and other property.

The plaintiff introduced a deed of warranty from Miles Laberee to Seth Laberee, (plaintiff,) dated Feb. 14, 1842, duly acknowledged and recorded, conveying the land therein described, "intending to be the same premises I recently purchased of Daniel Good." Immediately following the covenants, occurred the following:— "Provided, nevertheless, that if the following conditions and things shall be duly and fully performed by me, the said Miles, that is to say, that, whereas for services had and received by me, the said Miles, and divers good considerations moving me thereunto, if the said Miles shall well and truly find, provide

for, maintain and support my father, the said Seth, and my mother Susan," &c., "during their natural lives," &c., "then the aforesaid deed shall become void, otherwise," &c.

Also a deed from Seth Laberee to Myrick Laberee, dated April 10, 1849, duly acknowledged and recorded, "in consideration of the conditions to be performed for me and mine by Myrick Laberee agreeably to the deed of the late Miles Laberee, deceased, to me the said Seth Laberee, dated Feb. 14, 1842," remising, releasing unto the said "Myrick Laberee, his heirs and assigns forever, all right, title and interest in and to the premises," described in the "aforesaid deed from Miles Laberee, dated," &c.

Upon the construction of the latter deed the rights of the parties depended.

For the purpose of presenting the construction to the Law Court, the presiding Judge ruled *pro forma* that the deed conveyed a fee simple and not a fee upon condition. If the ruling was correct, the plaintiff was to become nonsuit.

A. G. Stinchfield, for the plaintiff.

Gould, for the defendant.

DANFORTH, J.—The only questions involved in this case are raised upon the validity and construction of the plaintiff's deed to Myrick Laberee. It is contended that the deed is void for want of consideration. In this State, it has been held that, as between the parties to a deed, a consideration is not necessary. *Green* v. *Thomas*, 11 Maine, 318.

The question principally argued is, whether the deed conveys a fee simple or conditional.

In *Rawson* v. *Inhabitants of School District No.* 5, *in Uxbridge*, 7 Allen, 125, the principles applicable to conditional deeds are clearly set forth, and the authorities cited and commented upon so fully as to render it unnecessary to go over the ground again. It was there held that conditions subsequent are not favored in law, are not to be raised readi-

ly by inference or argument, and only when apt and sufficient words are used for that purpose.

It is also a fundamental principle, that a condition is a qualification or restriction annexed to a conveyance. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it. Neither of these requirements appear to be complied with in the deed under consideration. The words relied upon for this purpose are found in the premises, and are as follows:—"In consideration of the conditions to be performed for me and mine, by Myrick Laberee, * * agreeably to the deed of the late Miles Laberee * to me." It will be seen that the conditions in Miles' deed are referred to and thereby become a part of this. These conditions are certain stipulations to be performed by Miles, as a condition of his deed, but when incorporated into the plaintiff's deed, as the reference requires, they become stipulations, to be performed, not by the grantor, but by the grantee, and not as a condition of the deed, but as descriptive of the consideration and nothing more. The meaning of the language would not be changed if it should read, in consideration that Myrick has agreed to perform the stipulations specified. The words are merely descriptive of the consideration for which the deed was given, and do not in any way qualify or limit the conveyance.

It is however contended that admitting these words to refer exclusively to the consideration, still, as no other consideration is named and this is a promise of future service, it thereby becomes a condition to the conveyance.

In the case already cited, pp. 128–129, BIGELOW, C. J., says, "it is sometimes said when a deed is made * * * in consideration of an act to be done or service rendered, it will be interpreted a conditional estate. But this is an exception to the general rule, and is *confined* to cases where the subject matter of the grant is in its nature executory; as of an annuity to be paid for service to be rendered or a privilege to be enjoyed. But ordinarily the failure of the

consideration of a grant of land, or the non-fulfilment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate." The deed under consideration, being one of an executed grant, comes under the rule and not under the exception. The case cited is much stronger than the one at bar.

Plaintiff's counsel contends that this is a question for the jury. The terms of a contract, when in dispute, are to be ascertained by the jury. The construction of it, when ascertained, is always for the Court. *Moore* v. *Holland*, 39 Maine, 307; *Homans* v. *Lambert*, 21 Maine, 308.

Plaintiff nonsuit.

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

STATE *versus* JAMES O. MCINTYRE *& als.*
STATE *versus* JAMES O. MCINTYRE *& als.*
STATE *versus* JAMES O. MCINTYRE *& als.*
STATE *versus* JAMES O. MCINTYRE *& als.*

If a master in chancery report that he "gave reasonable notice to each and all of the said defendants" of the time and place appointed by him for the hearing of the parties, it is sufficient in the absence of any evidence to the contrary.

If, after reasonable notice, the master proceeds in the absence of the defendant, his report cannot be successfully objected to as being *ex parte*.

When a matter of fact, unaccompanied by any evidence, is urged against the acceptance of the report of a master, the decision of the presiding Judge in accepting it, is not subject to exceptions; as that the master had expressed feelings of hostility to the party objecting; or that he had made certain mistakes in estimating the damages.

In actions upon the class of bonds in which the Court is required to assess the damages, the presiding Judge may, without the consent of the parties, appoint a master for that purpose.

An allowance made to a clerk of the Supreme Judicial Court by the County Commissioners, "for expenses and sums paid out," does not have the force of a judgment, and is not conclusive.

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

The person appointed master in these cases had been previously appointed a general master in chancery by the full Court, under Act of 1862, c. 155, and the "additional rule in chancery."

The remaining material facts will be found in the opinion.

T. M. Hayes, for the defendants.

I. The master's report should state what notice was given and when, that the Court might judge whether it were "reasonable" or not. *Ware* v. *Hunnewell*, 20 Maine, 291; *Manhattan Co.* v. *Evertson*, 4 Paige, (C. R.,) 276. This objection may be taken, although not made at the hearing. *White* v. *Johnson*, 2 Mumf., 235.

II. The report should be set aside, because the appointment of the master was unauthorized. In actions at law, auditors only can be appointed. R. S., c. 82, § 59.

Masters are strictly officers of a court in equity, appointed only by the court sitting in equity, and to "perform the duties pertaining to said office according to the practice in equity." Public Laws, 1862, c. 155; Rule, 47 Maine, 599. The duties of an auditor and master are different, their proceedings different, and the effect of their report different. An auditor's report is only evidence, while a master's is taken as true, subject only to exceptions regularly taken. Law jurisdiction of the Court, defined by R. S., c. 77, § 2; Equity jurisdiction, § 8; *Jones* v. *B. Mill Corporation*, 4 Pick., 510; *Norton* v. *Preston*, 15 Maine, 14.

The counsel here went into an elaborate review of the English and American statutes and authorities relating to bonds subject to chancery, which the decision of *Philbrook* v. *Burgess*, 52 Maine, 271, renders it unnecessary to report.

The reports of the master are erroneous upon their face, charging sums received "for services by virtue of his office," which appear by the reports to have been received for "services as clerk;" and these sums are so blended with the total

sums reported, that they cannot be separated. Cases under note 1, div. 3, letter a, Eastman's Dig., 41.

When a master's report is erroneous on its face, it may be inquired into, although no objection was taken before the master. *Sweet* v. *Redwood*, 9 Porter, 79; *White* v. *Johnson*, 2 Mumf., 235; *Hook* v. *Sellers*, 1 Den., c. 61.

By R. S., c. 79, § 9, a clerk is to account only for fees lawfully received for services.

By R. S., c. 116, clerks of courts have no authority to exact and receive fees for any services except those enumerated in that chapter; and he is not obliged to account for fees received for any other services.

The allowances made by the commissioners are conclusive until reversed.

Tapley, for the State.

Howard & Cleaves, in reply.

DAVIS, J. — These are several actions of debt, upon the official bonds of McIntire, as Clerk of Courts for the county of York. They were entered in Court in 1859. The breaches of the bonds for which damages were claimed were specified August 29, 1860; and specifications of defence were filed Dec. 14, 1860. At the January term, 1861, a general default was entered by consent, and John N. Goodwin was appointed a master in chancery to assess the damages. The cases were afterwards continued from term to term, until September, 1863, when, there having been no hearing by the master, and, he being unable to serve, E. E. Bourne was appointed in his stead. At the May term, 1864, his reports were presented for acceptance. To this the defendants made objections in writing; and the reports having been accepted by the Court, the cases are presented on exceptions.

1. It is objected that the hearing of the master in chancery was *ex parte*. This was so. But he gave due notice to the defendants; and he proceeded in their absence only

because they declined to appear. It would be a strange doctrine to hold that one could defeat legal proceedings against himself on such a ground.

2. It is said, however, as a reason for not appearing, that the master in chancery had expressed feelings of hostility to the defendants, and was not impartial. But no evidence of this was presented to the Court, and being a matter of *fact*, the decision of the Court, that the master was impartial, is one to which no exceptions could be taken.

3. But it is urged, as another reason for not appearing, that the master in chancery was improperly appointed, without the consent of the defendants; and that he had no jurisdiction of the cases. That, in suits upon this class of bonds, the damages are to be assessed by the Court, and not by the jury, was settled in the case of *Philbrook* v. *Burgess*, 52 Maine, 271. In such cases it is sometimes impracticable for the presiding Justice to attend to the hearing personally. There can be no doubt of his authority to appoint a master for that purpose; and the consent of the parties to such appointment is not necessary.

4. Another objection to the acceptance of the reports is that the master made certain mistakes in estimating the amount of fees received by McIntyre as Clerk of Courts. But no evidence was offered of any such mistakes. The amount actually received could probably have been shown by McIntyre, without difficulty; but he declined to make any exhibit, either to the master or to the Court. It is natural to suppose that, if the master had *over* estimated the amount, he would have shown the error, by producing his own account, which he has never done.

5. But it is argued that the reports themselves show that the master charged McIntyre with having received certain sums as *fees*, which were allowed to him by the county commissioners as for *disbursements*. And it is said that the allowance of the commissioners, as "for expenses and sums paid out," is conclusive of that fact, having the force of a

judgment. Upon this proposition it is sufficient to make the following suggestions.

1. The county commissioners are authorized to examine and allow claims against the county, and draw orders upon the treasurer for their payment. But these acts do not constitute *judgments*, any more than the auditing, by the proper officers, of claims against towns, or other corporations. Such an allowance, if not paid, may be sufficient to sustain an action, like orders given by selectmen of towns. But it could not be enforced, if payment should be refused, without an action. It is not recorded as such; and it is not analogous to a judgment of any Court, either in its nature, or its effect.

2. But, if this were otherwise, the master's reports do not *impeach* any allowances made by the commissioners to McIntyre. On the contrary, they *affirm* them. So far is the result from annulling or reversing their acts, it is based upon them. The Clerk of Courts performed some services by virtue of his office, for which he was paid by the county, upon the allowance of his claims by the commissioners. For such receipts, as well as others, it was his duty to render his account. *White* v. *Fox*, 22 Maine, 341. The reports of the master in these cases do not question that McIntyre received the payments rightfully. They sustain the action of the commissioners in ordering the treasurer to pay him.

3. In allowing his claims, the commissioners described them as for "expenses and sums paid out." But it by no means follows that they described them correctly. The clerk was bound to account for "all moneys received by him for services by virtue of his office." The commissioners could decide whether the county should *make* certain payments; but there is no pretence of any authority, by statute, or otherwise, for them to decide whether any sums received by him *were for official services*. That question can be determined only by this Court, in suits upon the bonds. The proposition that the county commissioners had

any power to try and adjudicate that question, is as destitute of reason, as it is of authority, to sustain it. Nor is there any evidence that they attempted to exercise any such authority. As in other cases, they merely allowed certain claims against the county, or State, which McIntyre presented to them. But whether he *should account* for the sums he received in payment, they did not pretend to decide. They claimed no power to make any such decision; and, if they had, instead of being conclusive, it would have been void.

These cases appear to have been examined by the master with great care. He probably proceeded with all the more caution on account of the refusal of the defendants to appear before him. If he erred, it was for want of evidence which they might easily have furnished. But the fact that no error was attempted to be shown, when there was an opportunity to do it, before the Court, authorizes the presumption that there is no error in the reports. There can be no doubt, therefore, that the principal defendant, as Clerk of Courts, received money from year to year for which he neglected to render any account, in violation of his official oaths, as well as of his bonds. If the amount is rendered large, by the accumulating interest, at the rate of twenty-five per cent., it is only by reason of his persistent and continued refusal to render any account, even to this time. It is not for him, therefore, to complain of the result. *The exceptions must be overruled in all the cases.*

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

DICKERSON, J., (dissenting.)—I am unable to concur in the result arrived at by a majority of my associates, and, as the points of difference between us have some general importance, I am unwilling that their opinion should be promulgated, as the law of the land, unchallenged.

Unquestionably the decision in *Philbrook* v. *Burgess* recognizes the right of the Court to assess the damages in the

case at bar. The same authority, however, deduces this power, not from the equity side of the Court's jurisdiction, nor from any statute, but from the common law. In that case, the Court say,—"this appears to have been the common law of New England." In actions on bonds in a penal sum, the stipulated amount is not to be regarded as liquidated damages, when the actual damages may be ascertained without difficulty. In such cases, it is the gist of the obligation that, while the obligee *may* recover the amount of the penalty in a certain contingency, he *shall* not, when the actual damages fall short of that sum. The penal sum is inserted in the bond as a guaranty that the obligor shall fully indemnify the obligee for his undertaking, and, when he has done this, the obligee has no further claim on him.

In exercising its right to assess the damages in an action on a bond like the one in suit, the Court is governed by the principles of the common law, and the rules of practice applicable thereto. A court of law that, independently of statutory provisions, should, in the same case, be governed by the common law in one branch of its proceedings, and by equity in another, here dispensing a little law, and there a modicum of equity, would be a judicial anomaly. The Court may hear the evidence, and assess the damages directly, or it may appoint another to perform that service, as it may employ the hand of its clerk to assess the damages, where they are a mere matter of computation, but the damages are regarded as assessed by the Court; and whether the person thus appointed be called commissioner, auditor, assessor, or master in chancery, he must be governed in his adjudications by the rules of the common law, and cannot exercise an iota of the distinctive powers of a master in chancery acting under equity process. *Pierce* v. *Dearborn*, 34 N. H., 432.

The defendants had the same right to have the damages assessed upon *legal* principles that they would have had if the damages had been assessed by a jury. But the commission issued by the clerk, and under which Mr. Bourne acted,

afforded them no such security. It happened that Mr. Bourne was a master in chancery, and that the commission was issued to him in that capacity, but, as we have seen, he had no authority to exercise chancery powers in a suit at law. Indeed, the language of the commission defining his duties was not appropriate for an officer at law, or a master in chancery; he was not required to determine what was *legally* due, or what was due "in equity and good conscience," but "to ascertain what was *reasonably* due from the defendants to the plaintiff." He was thus not only at liberty, but it was his duty to determine what he should find to be *equitably* due, provided it should appear *reasonable*, though by so doing he should violate the requirements of law. From the meagre report of the evidence, and proceedings before Mr. Bourne, it is impossible for this Court to determine whether such contingency actually occurred. Nor, indeed, is this necessary, since neither this Court, nor any Judge thereof, sitting at *Nisi Prius*, can confer authority upon any one to violate the law. The commission or appointment, under which the so called master in chancery acted, being primarily and fundamentally defective, gave him no authority whatever to act in the premises.

Another ground of exception, applicable to all the suits, is based upon that clause in the report, which charges the principal defendant with certain gross sums, as moneys received exclusively for services as clerk, after the accounts containing the items which make up these sums had been audited, and allowed by the county commissioners, as accounts "for *services*, *expenses*, and *bills paid out*." The amount thus charged against the defendants in the several reports exceeds three thousand dollars, exclusive of several years' interest at twenty-five per cent. *per annum*.

The R. S., 1841, c. 99, § 3, and the R. S., 1857, c. 78, § 6, authorize and empower the county commissioners of the respective counties "to examine, allow and settle accounts of the receipts and expenditures of the moneys of the county, represent it, and have the care of its property,

and the management of its business, and concerns." It is not denied that the county commissioners had authority "to examine, allow and settle" the accounts in question, but the question is whether, they having done so, it is competent for the Court at *Nisi Prius*, in ordering the acceptance of the report of an assessor, to impeach and set aside their adjudication.

Though the adjudications of county commissioners may not have the force of judgments of courts of record, yet, when made upon a subject matter within their jurisdiction and in the legitimate exercise thereof, they are final and conclusive until they are annulled or reversed by *certiorari*. *Small* v. *Pennell*, 31 Maine, 270; *Woodman* v. *County of Somerset*, 25 Maine, 300; *Goodwin* v. *Hallowell*, 2 Greenl., 27; *Plummer* v. *Waterville*, 32 Maine, 566.

This doctrine has been so long and repeatedly held in this State, that it would seem presumptuous to question its correctness. It rests upon a foundation too firm to be shaken, and is sustained by grave considerations of public policy. In order to save the county from the vexation and expense of a lawsuit at the instigation of every one who might have a claim against it, the statute has provided a tribunal by whom such claims may be examined and audited, and the amount allowed put into the county tax. The statute imposes upon the commissioners the duty to examine, allow, and settle certain accounts against the county,—a duty which they are not at liberty to neglect, or refuse to perform,—and necessarily makes it compulsory upon claimants to present their claims before them for adjustment; in other words, their jurisdiction over this subject matter is exclusive. If the commissioners neglect or refuse to examine and audit claims duly presented before them, they may be compelled to adjudicate upon them by writ of *mandamus;* if the claimant neglect to present his account before the board for allowance, he cannot maintain an action therefor against the commissioners, or the county. If either the claimant or the county is aggrieved at the decision of the

commissioners, the case may be revised by this Court on application for a writ of *certiorari*. If neither party do this, the decision of the commissioners is final and conclusive. Upon no other principle can the wise and salutary policy of the statute be upheld; for if persons having claims against the county, of the description mentioned in the statute, could maintain an action thereon without first presenting them before the commissioners for adjustment, or having thus presented them, and being dissatisfied with the decision of the board, could sue the county therefor, the object of the statute would be defeated, and the statute itself become a nullity.

The courts of the State of New York have repeatedly given this construction to a statute of that State, empowering county supervisors "to examine, settle and allow all accounts chargeable to such county, and to direct the raising of such sums as may be necessary to defray the same." In *Brady* v. *The Supervisors of the City and County of New York*, 10 N. Y., 260, the Court of Appeals held that the board of supervisors had exclusive jurisdiction in such matters, and that no action could be maintained for the recovery of a county charge, either against the county or the board of supervisors; and, in *The People* v. *Supervisors of Columbia*, 10 Wend., 363, it was held that, if the board of supervisors refused to act upon claims submitted for their determination, a writ of *mandamus* would issue to compel them to adjudicate upon such claims. In the recent case of *Martin* v. *Supervisors of Green County*, 29 N. Y., 645, the claimant alleged that the supervisors had erred in respect to the amount actually and legally due him, and brought his action against the board to recover the amount of his claim. The Court before whom the action was originally brought decided, as matter of law, that such action of the board was final. The plaintiff appealed to the general term of the Supreme Court, where the judgment was affirmed. Thereupon the plaintiff appealed to the court of appeals, In delivering the opinion of the Court, JOHNSON, J., says,

"the erroneous decision of the board, if it committed any error, furnishes no ground for an original action to recover the same claim; and certainly the law recognizes no such proceeding for the purpose of reviewing and correcting the errors in its decision. On the contrary, as the law gives no appeal from the determinations of the board of supervisors in auditing, allowing, or rejecting claims properly submitted to be audited, it necessarily follows that their action is final and conclusive."

In order to avoid the force of this reasoning and the weight of these authorities, it is asserted that the county commissioners had no authority to decide whether any sums received by the principal defendant were received *for official services*. The answer to this objection is that the statute giving the commissioners jurisdiction over the subject matter does not restrict them to determine *only* what sums were due him for other than official services. On the contrary, their authority to adjudicate upon his claims against the county is general, embracing as well his claims for *official* services, as for other services and sums paid out. Will it be pretended that while the county commissioners may audit and allow a clerk's claim for labor done upon the county buildings at their request, they had no authority to adjust his claim for entering and filing petitions, making out copies, issuing notices, and other multifarious services rendered by him for the county in virtue of his office? And yet this objection involves such an anomaly. The statute admits of no such construction, and it is difficult to perceive that this argument rises above the dignity of a *petitio principii*.

It is the right and duty of county commissioners, in auditing accounts against the county, so to describe them as to prevent fraud, and advise tax payers of the items that enter into the county assessments. Such description is necessary to perpetuate the identity of the claims passed upon; it is part and parcel of the adjudication, and stands or falls with

it. No adjudication would be complete without such identification.

The suggestion that the master's report does not impeach the allowances made by the county commissioners would be entitled to greater consideration if it was sustained by the report. The language of the report in one of the cases, — and the same language is used in the other reports, is as follows: — "At the county commissioner's court for the May term, 1853, said McIntyre was allowed, *as clerk*, for *service*, expense and bills paid out, $485,39, and at the October term, $346,84. * * * I have regarded these sums as allowed him *for his services as clerk*." The gross amount allowed McIntyre by the commissioners "for *service*, *expenses* and *bills paid out*," is charged to him in the reports as wholly "*allowed him for his service as clerk*." A more direct impeachment of an adjudication can scarcely be conceived of. The argument falls with the assumption upon which it was predicated.

To accept these reports, therefore, in my judgment, is to sanction the impeachment, by a mere assessor of damages, of an unreversed and subsisting adjudication of the county commissioners upon a subject matter over which they had exclusive jurisdiction, to overrule the decisions of courts of the highest authority, and render the statute a nullity. I think the exceptions should be sustained, and a new hearing ordered.

YORK CO. M. F. INS. CO. *versus* NAPOLEON B. TURNER.

A mutual insurance company has no right to assess a premium note for losses occurring after the cancellation of the policy, or for anticipated losses arising from a supposed failure of others to contribute their proportion of losses occurring after such cancellation.

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

The facts appear in the opinion.

J. N. Goodwin and *Joseph Howard*, for the plaintiffs.

D. D. Stewart, for the defendant.

TAPLEY, J. — This is an action upon a premium note, upon which an assessment of $54,14 had been made and payment refused. The plaintiffs allege, in their closing argument, that no specifications of defence were filed and therefore they are entitled to judgment. If such was the case they would be entitled to judgment.

The report is silent upon this subject; but it appears that "the case was withdrawn from the jury" after the evidence which is reported had been introduced. If there had been no specifications of defence filed, it was the duty of the presiding Judge to order a default. Such a disposition not having been made by the presiding Judge, and the case having been opened to the jury, we are bound to presume that specifications of defence were filed, and that they were sufficient to authorize the introduction of the evidence reported, if it were otherwise admissible.

Section 13 of the plaintiff's Act of incorporation provides that when any property insured by the company shall in any way be alienated, the policy thereupon shall be void, and be surrendered to the directors of said company to be cancelled, and, upon such surrender, the assured shall be entitled to receive his note, upon the payment of his proportion of all expenses and losses that have accrued *prior to such surrender*."

The case shows that the defendant's policy was surrendered September 12, 1856, and cancelled September 13, 1856.

By the report, it appears that "pages 71 and 72" of the plaintiffs' records were offered for the purpose of showing the assessment on all the notes of the third class in said company for losses and bad debts, interest and expenses of collection *to Dec.* 26, 1856. It is admitted by the defendant that the assessment against him on said premium note,

for *said losses, &c.*, was $54,14, and that payment of *that sum* was demanded of him by an agent of said company on July 27, 1857, and he refused to pay the same."

By the records of said company, it appears that, on Dec. 26, 1856, the directors "voted to assess upon the premium notes of the third class of said company the sum of five thousand, six hundred and sixty dollars and eighty-seven cents, ($5660,87,) to pay the following losses which have happened and occurred, been adjusted and acted on, and voted to be paid by the directors of said company, in the said third class, viz.;" here follows a list of the losses and amounts of each, aggregating the sum of $5660,87, among which is one loss occurring September 19, 1856, and one occurring September 29, 1856. By another vote of said directors, passed at the same time, it was "voted to assess thirty-five per cent. additional upon the above sums, upon the said premium notes, to meet estimated expenses, bad debts, interest and cost of collection."

The defendant's premium note appears to have been assessed, not only for *two losses occurring after the cancellation of his policy*, but also for anticipated losses arising from a supposed failure of others to contribute their proportion of these *two losses*. The assessment, thus made, amounted to the sum of $54,14, and was demanded of the defendant, and he refused to pay the same.

It is very clear the directors had no right to assess the defendant for those losses occurring after the cancellation of his policy, nor for the anticipated failure of others to contribute their proportion of those two losses, and this assessment, thus made, is not such a portion of the premium note as "the directors of said company may, agreeably to their Act of Incorporation and By-Laws, require;" and, being an unauthorized assessment, the defendant was not bound to pay it. *Judgment for defendant.*

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

JOHN BRACKETT *& al., Petitioners for Partition, versus* PERSONS UNKNOWN.*

Open, notorious, exclusive and adverse possession of upland adjacent to flats, and of portions of the flats, for twenty years, under a deed duly recorded, gives a title to all the flats fronting such upland and described in the deed.

As a general rule, the title acquired by an entry under a defective deed, and a continued disseizin for more than twenty years, is the same in extent, as if the conveyance had been valid.

No change was made by statute of 1821, c. 62, § 6, as to the effect of an entry under a record title, and a continued disseizin.

A book purporting to be proprietary records, in the handwriting of the clerk, found among his papers after his decease, and remaining ever since in the hands of his executor, is sufficiently proved to justify its admission as evidence, especially when there is no proof that there was ever any other records or clerk.

The neglect of such clerk to deposit the records with the town clerk, after the proprietary ceases to exist, as required by statute of 1821, c. 4, § 3, does not affect the validity of the previous proceedings of the proprietary.

When such records have not been so deposited, the original is admissible in evidence without any certificate of the town clerk to authenticate it.

When certain persons assume under that statute to act as a proprietary, describe themselves as such, and keep a record, the legal presumption, after the lapse of thirty years and more, is that they were proprietors; and the admission of evidence, outside of the record, that they were so in fact, affords no legal ground of complaint.

The fair construction of a return, that notice had been given "by posting a copy in two public places, in, &c.; and by inserting the same in, &c., more than fourteen days previous" to the time of meeting, "as the law directs," is, that the "*posting*" and "*inserting*" were *both* done fourteen days before the time of the meeting.

When a record states, "it was voted," &c., it will be presumed, especially after the lapse of nearly forty years, that the voting was done in the manner provided by law.

Although the doings of some meetings of a proprietary are invalid because they are not legally called, the validity of prior or subsequent meetings is not thereby affected.

The proceedings of such proprietary, at meetings not legally called, may be given in evidence to show the origin of the possession of land by parties claiming by disseizin and adverse occupation, and to give color of title thereto.

* This case has just come into the hands of the present Reporter.

For the same purpose, a deed, executed by one as the attorney of another, may be given in evidence, without proving the attorney's authority.

Twenty years' adverse occupation of real estate under recorded deeds is an insuperable bar to the maintenance of a petition for partition, whatever may be the legal title of the petitioners.

On Exceptions, to the rulings of Davis, J.

Petition for Partition of certain flats in the city of Portland. Issues were framed and submitted to the jury, whose verdict was for the respondents. The petitioners excepted to certain instructions of the presiding Judge, and to the admission of certain testimony.

The case, so far as relates to the various questions of law raised, is stated in the opinion.

F. O. J. Smith, for petitioners.

E. & F. Fox, for respondents.

Appleton, J. — The defendants derive their title to the premises in dispute under conveyances from the Brackett Dower Proprietary, a corporation organized on 4th Sept. 1822, under the provisions of statute 1821, c. 43, and which, having sold all its land, ceased its corporate action in 1824 or 1825.

If the deeds of the defendants or their grantors should be adjudged defective for any cause, they rely for their defence upon open, adverse, notorious and exclusive possession, under a recorded deed, for more than twenty years.

"It was admitted," the case finds, "that the defendants' testimony proved that they, and those under whom they had claimed, had held record titles derived from said proprietors above described, sales by deeds duly executed and severally recorded, and conveying both upland and the flats in front thereof, and have claimed the flats fronting the upland of the Dower lands in question, so conveyed, for a period of more than twenty years prior to this trial, and had, during said period, actually occupied the entire shore line of said flats with a breastwork of about sixty feet deep toward

the channel, and with a wharf about four hundred feet deep and sixty wide in front of a portion of the upland, —that there has been no adverse occupancy of any of said flats or upland by any person during said period, —and, upon this evidence, the Court ruled that, if the jury were satisfied the respondents had been in possession of the upland adjacent to said flats for more than twenty years, under a record claim of title to ownership thereto and of the adjacent flats, and had, under such title, claimed and occupied openly, notoriously, exclusively and adversely, portions of the same, by themselves, or those under whom they claimed, at the end of twenty years they would acquire thereby a title to the whole of the flats fronting such upland, not only to the extent of the flats actually so occupied by or under them as wharves or otherwise, but in regard to all the flats fronting such upland and originally conveyed therewith and included in the deed, and that the actual occupation of a portion of the flats during such period under a duly recorded conveyance thereof with the upland, claiming ownership of the whole of the flats under said deed, and no one occupying adversely any portion of such flats, would vest under the law of the State a complete title to the premises in such occupant."

The instructions of the presiding Judge are clear, precise, guarded, and in strict conformity with the uniform and entire weight of authority. They assume as their basis, what is admitted, the open, notorious, exclusive and adverse occupation of the premises for twenty years, by the resporndents, under a recorded deed as therein stated, and without interference or even the assertion of a claim by these petitioners or those from whom they derive their title, during that period.

In *Prescott* v. *Nevers*, 4 Mason, 326, STORY, J., says,— "I take the principle of law to be clear, that where a person enters into land, under a claim of title thereto, by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have seizin of the land co-

extensive with the boundaries stated in his deed, when there is no open, adverse possession of any part of the land so described in any other person." In *Little* v. *Megguier*, 2 Maine, 176, MELLEN, C. J., says, "in such case, though the deed may not convey the legal title, still the possession of a *part* of the land described in it, under a claim of the *whole* and as a disseizin of the true owner, is equivalent to an actual and exclusive possession of the whole tract, unless controlled by other possessions." In *Putnam Free School* v. *Fisher*, 34 Maine, 177, WELLS, J., remarks thus: — if the "tenant entered under a deed recorded, claiming title to the land, and had a visible possession of a *part* of it, such entry and possession would be a disseizin of the true owner of the *whole* tract described in his deed. *Kennebec Purchase* v. *Laboree*, 2 Greenleaf, 275. And in contemplation of law he would have possession of the whole parcel, and it would be as effectual as actual possession." In *Bailey* v. *Carleton*, 12 N. H., 15, PARKER, C. J., says, that the general rule that where a party having color of title enters into the land conveyed, he is presumed to enter according to his title, and thereby gains constructive possession of the *whole* land embraced in his deed, seems to be settled by the general current of authorities. This was again affirmed to be law in *Tappan* v. *Tappan*, 11 Foster, 41; *Hoag* v. *Wallace*, 8 Foster, 553.

It is admitted that the deeds, under which the respondents claim title, cover the flats. "The grantees," remarks SHEPLEY, J., in *Treat* v. *Strickland*, 23 Maine, 243, "have been in possession of lands under deeds recorded. This would have the effect to disseize others, and to give them a seizin of the flats according to the bounds named in the deed, whether they actually occupied the flats or not." Possession under color of title is in law possession of *all* the land described in the deed conferring such color of title lying in the same tract. *Little* v. *Downing*, 37 N. H., 357.

As a general rule, the title acquired by an entry under a defective deed and a continued disseizin for more than

twenty years is the same in extent as if the conveyance had been valid.

The learned counsel for the petitioners relies on the opinion of MELLEN, C. J., in *Proprietors of Kennebec Purchase* v. *Laboree*, 2 Maine, 275, as determining that the distinction between possession under claim of title or record, and possession without any such claim, was abolished by the statute of this State. Statute 1821, c. 62, § 6. From this he would infer that a title by disseizin under a recorded deed is *only* co-extensive with the actual occupation of the disseizor. But this is an unauthorized inference.

By the common law, when one enters without color of title, his seizin is bounded by his actual occupancy. If under a deed or title, if the true owner be not in actual possession of any part of the land, his seizin extends as far as his deed or title. The purpose of the statute then under discussion was to extend the doctrine of constructive disseizin by a disseisor in possession without claim of title, not to restrict it when the disseizor is in possession under a recorded deed. The statute in question in terms obviates the necessity of fences, and provides that "no part of the premises demanded and defended shall be excluded from the operation of the aforesaid limitation because such part may be wood land or without cultivation." No change is made or intended to be made as to the effect of an entry under a record title and a continued disseizin. Indeed the doctrine of the common law as to the effect of an entry under a deed duly registered is affirmed in the opinion of Mr. Chief Justice MELLEN, in almost the precise terms as stated by the presiding Judge in the case now before us. "The reason is," says he, "the extent and nature of his claim are or may be known by inspection of the public registry. His deed being registered there, gives notoriety to his act and his motives respecting the land he occupies." *Proprietors Kennebec Purchase* v. *Laboree*, 2 Greenl., 286.

The decisions of this Court are in entire agreement with each other and with those of the highest tribunals of other

States on the same subject. The instructions given are in strict accordance with the unvarying current of authorities.

2. The book of proprietary records was sufficiently proved to justify its admission. It is in the handwriting of the Clerk. It was found among his papers after his decease. It has remained in the hands or under the control of his executors for the last thirty years. It is not pretended there is any other book or that there was ever any other clerk.

3. It is contended that, by statute 1821, c. 43, § 3, a place, (the office of the town clerk,) for the safe keeping, and a mode for the authentication (by the town clerk) of the records of a proprietary, organized under the last named Act, were provided, and that, without a compliance with this provision of law, such records, after the *proprietary ceases to exist*, lose their legal validity, whatever may be the proof of their authenticity otherwise; and that a proprietary without a legal record becomes a nullity as much as any other unperfected act of title.

The substance of this proposition is, that, if the records are not deposited as it is claimed they should be, all the preceding action of the proprietary by this *ex post facto* neglect becomes null and void. In other words, that estates, vested by vote or deed by the legitimate action of the proprietary, become divested by the subsequent omission of the corporation to place the records in their proper place of deposit, and this too after deeds have been recorded and the grantees have entered into possession under them. This would be a severe punishment on those who have no control of the records. The proprietary, which has sold, would lose nothing, while their vendees would without fault forfeit their rights. The construction contended for is as absurd as the result would be iniquitous.

By § 8, the clerk last chosen was to continue in office, "notwithstanding the final and total division of such lands and estate as fully, to all intents, constructions and purposes whatsoever, as though there had been no such division made,

and *until* the same records shall be lodged with the clerk of the town where the land lies," &c. The statute does not make it imperative on the proprietary clerk to deposit his records. And, if it did, the clerk only would be liable to punishment for his neglect of duty. It would not affect the preceding acts of the corporation or render them null and void.

The provision is for the benefit of the purchasers of the estates of the proprietary, that there may be a convenient place where its records may be deposited, but, if it is not done, it was not the intention of the Legislature that their estates should be injuriously affected by the failure of the clerk of their grantor to perform his duty.

The same section provides that the town clerk may authenticate copies of records when deposited. But, when the original is produced, it is manifestly superior in trustworthiness to any copy, and needs not the certificate of the town clerk for its authentication.

4. It is objected, the defendants were permitted to prove, independently of the record, that the persons purporting to be proprietors and signing the application for the warrant were proprietors of the Brackett Dower Lands.

The correctness of the course pursued by the presiding Judge is fully established by the case of *Dolloff* v. *Hardy*, 26 Maine, 545, where, in reference to a similar objection, the Court say, — " It is certified in the records that the proprietors met under such application and passed votes; the application signed by them, styling themselves proprietors, is a part of the record. No objection was taken by any one at the meeting to repudiate or annul the doings for this reason." So in *Copp* v. *Lamb*, 12 Maine, 312, it was held that where certain persons had assumed to act as proprietors more than thirty years ago, a stranger could not controvert rights derived from and held under them. It would seem, after this lapse of time, that the presumption of law would be that they were proprietors, and, if so, proof in support of

a legal presumption cannot afford any just ground of complaint.

5. The first meeting of the proprietary was held on 4th September, 1822. It is insisted that it does not appear that sufficient notice was previously given.

The person to whom the warrant was directed certified that he had given notice, &c., "by posting up a copy of said petition and warrant in two public places in this town, (Portland,) viz., at the public house kept by Jacob Coburn, and at the public room of the Cumberland Insurance Co.; and by inserting the same in the Portland Gazette and in the Independent Statesman and Maine Republican, two public newspapers printed in Portland, for more than fourteen days previous to the fourth day of September, A. D. 1822, *as the law directs.*"

The fair construction of the return is, that all was done fourteen days before the 4th of September, the posting as well as the publishing of the notices. The Court will not assume a difference without proof, for the purpose of defeating the proceedings of an ancient proprietary. The posting *and* the inserting are in the same position—and if one was seasonable, so was the other. *Dolloff* v. *Hardy*, 26 Maine, 545.

6. It is urged that it does not affirmatively appear that the votes were collected and numbered according to the interest of the proprietors present, when the same were known, and that consequently the proceedings are void. The record shows that "the proprietors voted," or that "it was voted," &c. The presumption of law after this lapse of time, nearly forty years, is, that the voting was according to law. Where a charter required two thirds to form a quorum and it was stated that on due invitation the corporators met, and it was not usual to mention the names or numbers of those present, this was held to amount to saying that two thirds assented. *Cone* v. *Wodper*, 3 S. & R., 29. When an officer of a corporation is required to be chosen by ballot, the presumption of law is that the choice

is made in the legal mode, that is, by ballot. *Blanchard* v. *Dow*, 32 Maine, 557.

7. It is objected that other meetings referred to were not duly notified, and that the proceedings under such notice were void.

It is apparent that the proprietary was duly organized. If, in some of the meetings, there was a failure to give the required notice, that would not affect the validity of prior or subsequent meetings for which legal notices had been given.

But it is not necessary to consider very carefully the sufficiency of the notices or the legality of all the meetings of the proprietary.

The proprietary having been duly organized, the meetings were legal or not.

If legal, and the proceedings valid, then the respondents have a perfect title by deed.

If not legal, if in some respects defective, they are admissible to show the origin and give color of title to the possession of the respondents. If the paper title were sufficient, there would be no occasion to resort to adverse possession. Where the title is acquired by disseizin under a recorded deed, it is of course, that the title is defective.

"All the authorities," says FOWLER, J., in *Farrar* v. *Fessenden*, 39 N. H., 269, "decide that it is wholly immaterial, as to the effect of an entry and long continued occupation under a colorable title, whether the title be valid or not, and whether the instrument creating it be defective or not." In *Sanborn* v. *French*, 2 Foster, 246, it was held that a married woman's separate deed of her land, though absolutely invalid from its inception, as a conveyance of title, will give color of title to the grantee sufficient to extend an adverse seizin by construction, to the limits of the land described in it. In *Jackson* v. *Newton*, 18 Johns., 355, the deed was defective by reason of not having a seal. In *Gage* v. *Gage*, 10 Foster, 421, the grantee entered under a deed which conveyed no right, by reason of the defective execution of a

power of attorney, and he, and those claiming under him, remained in possession more than twenty years. The Court, in their opinion, assume the power of attorney as fatally defective, "but," remarks EASTMAN, J., "when an entry is made upon land under color of title, however defective the title may be, the party is presumed to enter according to his title, and his possession to be adverse to all others." *Lund* v. *Parker*, 3 N. H., 49; *Wood* v. *Banks*, 14 N. H., 100. In *Grant* v. *Fowler*, 39 N. H., 101, it was urged that the title under which the plaintiff and his grantors claimed was defective and invalid, but the Court say, "it is not necessary for the purposes of this case to inquire into the sufficiency or validity of that title, since all the authorities concur in holding distinctly that it is wholly immaterial as to the effect of an entry, and continued open, visible, adverse occupation under a colorable title, whether that title be valid or not, or whether the instruments conferring it be defective or not."

The records, therefore, whether the proceedings were in all respects valid or not, were properly admissible as part of the proof to give color of title to those under whom the respondents claim the estates in controversy.

For the same reasons, the deed by Wm. Tyng, as the attorney of Elizabeth Ross, to Joseph H. Ingraham, of Feb. 24, 1798, was properly received, as, if for any reason defective, it gave color of title to one entering under it and continuing in possession.

The petitioners, by the finding of the jury, whatever their legal title, are barred by the limitation of twenty years adverse occupation under recorded deeds. The lapse of time affords an insuperable bar to the petitioners' claim. In the vigorous and eloquent language of PLUMER, M. R., in *Cholmondely* v. *Clinton*, 2 Jac. & Wal., 139, "it is the fixed limit to the remedy, the *tempus constitutum*. One day beyond it is as much too late as one hundred years. This is the peremptory, inflexible rule at law, fixed by positive statutes. No plea of poverty, ignorance or mistake, can be of any avail. However clear and indisputable the title, if

the merits could be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession, and the time, preclude all investigation of the title. The door of justice is closed. It is a decisive answer to them that it comes too late. That alone is the bar. His title remains, but he has lost his remedy. The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. *Interest reipublicae ut sit finis litium* is a favorite and universal maxim. The public have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost."

Exceptions overruled.

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

JOHN BRACKETT *& als., Petitioners for Partition, versus* PERSONS UNKNOWN.*

In a petition for partition, a sole seizin in the respondent may be established by a possession commenced twenty years *before the trial*, although less than twenty years *before the commencement of the suit.*

Open, notorious, exclusive and adverse possession of upland adjacent to flats for twenty years, under a deed duly recorded, gives a title to all the flats fronting such upland and described in the deed.

Exceptions to a refusal to give requested instructions will be overruled,

* This case has just come into the hands of the present Reporter.

when they call upon the Court to take from the jury the determination of facts; or when the case does not show the facts to which the requested instructions relate.

A description in a deed "thence north-easterly as Fore river runs," includes the flats to the middle of Fore river.

A widow is entitled to dower in flats owned by her husband, although they are covered by tide waters and remain unimproved down to the time of his decease.

On Exceptions to the rulings of Davis, J.

Petition for Partition of certain flats in the city of Portland, consisting of the flats fronting the three parcels of land described as conveyed by separate deeds of Thomas Brackett to Joshua Brackett, to Keziah Brackett and to Mary Smith, in 1787.

The petitioners put in evidence a copy of an assignment of widow's dower, and of a deed of Thomas Brackett to Wm. Vaughan, dated in 1787; and also a copy of the three deeds above mentioned.

It was admitted that the petitioners represent five-eighths of the estate of Thomas Brackett, if any remains undivided, and that Thomas Brackett did not in his lifetime convey the premises demanded for partition, unless by the deeds above mentioned, and that he died before the year 1830.

The respondents, who claim the premises in fee by record title, as well as possession, put in sundry mesne conveyances, by which, (it was admitted,) all of the upland adjoining the flats in question were derived by sufficient title from Thomas Brackett, made during his lifetime or subsequently to his decease, and that the respondents and those under whom they have claimed, for more than twenty years past, have been in open, notorious, exclusive and adverse possession of the upland, and claimed all the flats in question by recorded titles of upland and flats; that no actual, adverse and continued occupancy of said flats, other than by occupancy of the upland, and claiming title on record of the flats adjacent and appurtenant, has been made by the respondents or those under whom they claim, for a period of twenty years past; while no possession has been had of the

flats or upland by any of the petitioners, or by any other persons, except the respondents.

Upon the foregoing testimony the petitioners requested the presiding Judge to charge the jury as follows:—

1. That a conveyance made by a party having no legal record title, or open, notorious, adverse and exclusive possession of the premises, does not constitute a disseizin *of any person*, by either the *grantor* or *grantee*, in such conveyance, nor by any one claiming under them, or either of them, beyond what such successors to such grantor have established for more than twenty years before the entry of the petitioner's petition, by open, notorious and exclusive actual occupation.

2. That such an occupation of upland, *bordering upon tide waters*, as is supposed above, although open, notorious, adverse and exclusive, does not, *per se*, constitute an *open*, *notorious*, *adverse* and *exclusive* possession *of the flats fronting such upland*, such as will operate as a disseizin of any other person, or invest by possession title thereto in the owners of such upland, without or beyond the extent of an actual, visible occupation of the same adversely to others.

3. That there is no testimony in this case that any portion of the flats claimed by the petitioners has ever been occupied openly, notoriously and exclusively and continuously by any respondent, or any grantor of any respondent to any extent, anterior to the year 1850, except so far as the P. S. & P. R. R. have occupied portions of it since the dates of the deeds put into the case by them, and that, therefore, the petitioners, who are proved to have been the heirs of Thomas Brackett, have never been disseized of the same by either of the respondents, or any grantor of any of the respondents, for more than twenty years, either prior to the date of the petition in this case, or prior to the present time.

4. That there is no evidence that any *actual* entry into possession of the premises described in the mortgage of James Smith to Neal Dow, was ever taken by said Dow for

foreclosure of the same, under the written consent of said Smith, put into the case by the respondents.

And that, upon the evidence in the case, said mortgage is outstanding, and has never been foreclosed, and the fee simple of said premises is not proved to be in any of the respondents claiming the same.

5. That there is no evidence that said Dow caused said James Smith's said consent to said Dow, dated October 30, 1838, to enter into possession of said mortgaged premises, for purposes of foreclosure, to be recorded in the registry of deeds for the county of Cumberland, until Sept. 8, 1841, according to the proof put into the case by the respondents. And that such record, made Sept. 8, 1841, would be wholly invalid, without a record made pursuant to the statutes of Feb. 20, 1839.

6. That the deeds of Thomas Brackett to Joshua Brackett, of 1787, and of same to Keziah Brackett, of 1787, taken in connection with the previous conveyance to William Vaughan, by said Thomas, referred to in said Thomas' deed to Joshua Brackett, did not include the flats below the bank of Fore river.

7. That the deed of Thomas Brackett to Mary Smith, in 1787, in this case, did not include the flats below the upland described therein, within the meaning of the parties thereto, as evidenced by the language and references contained in the deed.

8. That there has been no open, adverse, notorious and exclusive occupation of the flats in front of said Mary Smith's lot, by any person, for a period of more than twenty years prior to the date of the petition filed in this case, nor prior to the present time.

9. That the respondents, under the instructions herein before enumerated, are not entitled to hold any portion of the flats demanded for partition by the petitioners, against the petitioners.

10. That flats covered by tide waters *unimproved down to the time of the husband's* decease by any actual and exclu-

sive occupation, are not the subject matter of dower, within the meaning of the statutes of Massachusetts, or the law of that State, at the time of the decease of Anthony Brackett, and, if so, the corner bound of the dower of Kerranhappuck Brackett, referred to in the deed of Thomas Brackett to Mary Smith, can only refer to an upland boundary on the bank of Fore river.

The instruction asked for in the first request was given, except that the limitation of the twenty years' possession was to the time of the trial, instead of the entry of the petition.

The second was not given, but the jury were instructed that such an occupation for twenty years, if under recorded deeds purporting to convey both flats and upland, would warrant the jury to find the title of both flats and upland in the occupants, provided no other person had, during the time, had or claimed possession of or title in the flats.

The third, fourth and fifth were not given.

The sixth was given.

The seventh, eighth and tenth were not given, but the jury were instructed that the deed of Thomas Brackett to Mary Smith, dated Oct. 9, 1787, did, by its terms and the references contained in it, convey the flats appurtenant to the upland therein described.

The ninth was not given, but the jury were instructed that, if the respondents and those under whom they claim, had for more than twenty years been in open, notorious, exclusive and adverse possession of the upland to which the flats claimed are incident, under recorded deeds thereof purporting to convey both upland and flats, and no other person had during any portion of that time been in possession of any portion of the flats, claiming title therein, that was sufficient to warrant them in returning a verdict for the respondents.

The verdict was for the respondents, and the petitioners excepted.

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

E. & F. Fox, for the respondents.

APPLETON, J.—This is a petition for partition of certain flats. The petitioners derive title from Thomas Brackett. The respondents set up a title by adverse possession.

"The respondents," who claim the premises in "fee, by record title as well as by possession," as appears from the report, "put in sundry mesne conveyances, which need not be copied but may be referred to by either party, by which (it is admitted) all of the upland adjoining the flats in question were derived by sufficient title from Thomas Brackett, made during his lifetime or subsequently to his decease, and that the respondents and those under whom they have claimed, for more than twenty years past, have been in open, notorious, exclusive, and adverse possession of the uplands and claimed the flats in question by recorded titles of uplands and flats; that no actual, adverse, and continued occupancy of said flats, other than by occupancy of the upland and claiming title on record of the flats adjacent and appurtenant, has been made by the respondents or those under whom they claim, for a period of twenty years past, while no possession has been had of the flats or upland by any of the petitioners, or by any other person, except the respondents."

The counsel for the petitioners requested certain instructions, the correctness of which, as well as those given, will be considered.

1. "That a conveyance made by a party having no legal record title, or open, notorious, adverse and exclusive possession of the premises, does not constitute a disseizin of any person by either the grantor or grantee in such conveyance, nor by any one claiming under them, or either of them, beyond what such successors to such grantor have established for more than twenty years before the entry of the petitioners' petition, by open, notorious and exclusive actual occupation."

This instruction was given, except that the limitation of the twenty years possession was before the time of the trial instead of the entry of the petition.

The limitation was properly imposed. In a petition for partition, a sole seizin in the respondent may be established by a possession commenced twenty years *before the trial*, though less than twenty years before the commencement of the suit. *Saco Water Power Co.* v. *Goldthwait*, 35 Maine, 456.

If, in some respects, the Court erred in favor of the petitioners, it is not for them to complain. The instruction given is sufficiently favorable.

It required the admitted fact of occupation for twenty years of upland and flats under a recorded title.

2. The second request was refused and properly. But "the jury were instructed that such an occupation for twenty years, if under recorded deeds purporting to convey both flats and upland, would warrant the jury to find the title of both flats and upland in the occupants, provided no other person had or claimed possession of a title in the flats."

The instruction as given, it has been seen, in *Brackett, pet.*, v. *Persons unknown*, (*ante* p. 228,) is in entire conformity with the well settled principles of law.

3. The third request was properly refused. It required the Court to determine the effect of the evidence, instead of submitting the facts under proper instructions to the jury.

4 & 5. The fourth and fifth requests were properly refused, because they take away from the jury the right to determine the facts in question, and because the bill of exceptions is silent as to the facts to which they relate.

6. The sixth request was granted.

7. The seventh request was refused, and the jury were "instructed that the deed of Thomas Brackett to Mary Smith, dated Oct. 9. 1787, did, by its terms and the references contained in it, convey the flats appurtenant to the upland therein described."

This was correct. The description in the deed is as fol-

lows:—"Beginning at the most southerly corner of that lot or parcel of land which has been set off to Kerranhappuck Brackett as part of her dower, thence N. 45° west, one hundred and twelve rods to a stake; thence S. 33° E. one hundred and twenty-seven rods; thence north-easterly, *as Fore river runs*, twenty eight rods to the first bounds."

The grantee bounded on a river goes *ad medium filum aquæ*, unless there be decided language showing a manifest intent to stop short at the water's edge. Where premises adjoining a river are described as bounded by a monument standing on the bank and a course is given as running from it *down the river*, as it winds and turns, to another monument, the grantee takes *usque filum aquæ* unless the river be *expressly* excluded from the grant by the terms of the deed. *Luce* v. *Carley*, 24 Wend., 451. "It is never thought," says COWAN, J., "that monuments mentioned in such a deed as occupying the bank of the river are intended by the parties to stand on the precise water line at its high or low water mark. They are used rather to fix the terminus of the line which is described as following the sinuosities of the river." So "down the creek with the several meanders thereof;" was held to describe the water in the bed of the creek and not the top of the bank. *McCulloch* v. *Aten*, 2 Ham., 307. The Fore river, it is manifest, must have been regarded as one of the boundaries. *Pike* v. *Munroe*, 36 Maine, 309.

9. The ninth requested instruction was not given, but instead thereof the same was given as in *Brackett, pet.*, v. *Persons unknown*, the correctness of which was fully affirmed in that case. *Ante* p. 228.

10. The tenth was, that flats covered by tide waters unimproved down to the time of the husband's decease, by any actual and exclusive occupation, are not the subject of dower within the meaning of the statutes of Massachusetts, or the law of that State, at the time of the decease of Anthony Brackett, &c., &c.

When a man is seized during coverture of an inheritance

in lands and tenements, which by possibility any issue of his wife might inherit, the wife holds, after his death, one-third part of those lands and tenements for her natural life as an estate in dower. This seems to be the well settled law. Now the flats are real estate which the issue of the wife would inherit.

The widow is not dowable of wild lands, because clearing them by cutting the trees would be deemed waste. But it would not seem to be waste to lease the flats or to permit the erection of a wharf thereon. *Exceptions overruled.*

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

OTIS BROWN, *in Equity, versus* JOHN JOHNSON *& als.*

Where a mortgagee assigns the mortgage and the notes thereby secured as collateral security for his own debt, he must be made a party to a bill to redeem.

So must the assignee who receives such assignment, although he afterwards makes an absolute assignment of the mortgage to another party.

Where the want of proper parties is apparent on the face of a bill in equity, the Court will not proceed to a decree until the proper parties are before it.

BILL IN EQUITY, to which the defendants demurred.

The case is stated in the opinion.

Drummond, for plaintiff.

A. A. Strout, for defendants.

BARROWS, J.—On demurrer. The bill sets forth a mortgage of a parcel of real estate, made by the complainant to the Cumberland Brick Manufacturing Co., to secure his own promissory note for $1200, given to said corporation "to cover such sums of money as he might be then owing them, and they should thereafter advance to him, and the price of goods thereafter to be sold to him, and whatever sums might

be due to said company upon a settlement;" an assignment of said note and mortgage by the company to one John Tate, otherwise called John S. Tate, *as collateral security* for moneys which said company were owing said Tate; an assignment, by deed not recorded, of the mortgage and note from John S. Tate to Augustus Tate, made after the note fell due; an action for possession, brought by Augustus Tate against the complainant, in which said Augustus had conditional judgment at the January term, 1862, and for non-payment of the amount found due, sued out his writ of possession, which was served Sept. 23d, 1863, and the said Augustus went into possession of the mortgaged premises; a supposed sale and assignment, by unrecorded deed, from Augustus Tate to Washington Tate, of an undivided half of the mortgage and debt secured thereby; a conveyance by said Augustus and Washington Tate to the respondent, John Johnson, by deed duly executed and recorded, of all the right, title and interest of said Augustus and Washington in the premises, operating, as is alleged, as an assignment of the mortgage and debt secured thereby; and a reception by Johnson through his tenant of the rents and profits subsequently accruing; a demand made upon Johnson for a true account of the sum due on the mortgage, and of the rents and profits, &c., and a refusal by Johnson to render such account.

This suit is brought against John Johnson and Augustus and Washington Tate, who object that John S. Tate and the Cumberland Brick Manufacturing Company ought also to be made parties.

Assignors of choses in action need not be made parties to proceedings in equity respecting them if the assignment is absolute and unconditional, and the extent and validity of it not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree.

But where there are remaining rights or liabilities of the assignor, which may be affected by the decree, he is not

only a proper but a necessary party. Story's Equity Pleadings, § 153; *Houghton* v. *Davis*, 23 Maine, 33.

A court of equity will be careful to have all the parties, who apparently have an interest in the subject matter of the suit which may be affected by the decree, before them, giving all an opportunity to be heard, so that such decree may be made as will effectually bind all and settle the rights of all thus interested; and this, with the twofold purpose, first—to do full justice to all concerned, and make a decree the performance of which shall be ultimately and entirely safe to those who are bound to obey the order of the Court in the premises, and second—to prevent future litigation.

The plaintiff here alleges that the whole sum for which he was ever indebted to the Cumberland Brick Manufacturing Company, which was the sole consideration of this note for $1200, was $909,78 and no more; that John S. Tate was informed of this partial failure of the consideration of the note, and agreed with the company, when he received the note and mortgage from them as collateral for their indebtedness to him, to collect on said $1200 note no more than the amount justly due from plaintiff to said company; and that he made certain payments to said John S. Tate before he assigned the mortgage to Augustus.

The Cumberland Brick Manufacturing Company would seem to have such an apparent interest in the subject matter of this suit as to make them a necessary party. The amount of their indebtedness to John S. Tate is not stated. Whether it has ever been paid, or whether they have a subsisting right to redeem the note and mortgage which they conveyed to him *as collateral security* does not appear. Neither the terms nor the manner in which they thus assigned it are set forth in the bill. We are only informed that it was assigned as collateral security for moneys which said company were owing said Tate. Manifestly, this is not such an absolute unconditional assignment as leaves neither rights nor liabilities in the assignor to be affected by the decree. It is argued on the part of the plaintiff that the word "assigned'

covers the ground and that it must be considered an assignment absolute in itself, giving power to Tate to collect the amount actually due upon the note and apply the proceeds to the payment of the company's indebtedness to him, and that it is immaterial in this process whether Tate applied the proceeds according to his agreement with the company or not, because he had the right to receive the payment of the note and discharge the mortgage. The counsel seems to use the word "right" in this connection as synonymous with legal power. We may have no doubt that the assignment passed to John S. Tate the legal right to do all that counsel claims for him and his grantees, yet it does not follow that there is not remaining in the Cumberland Brick Manufacturing Co. an equitable right and interest which should be regarded in this process in equity, and which renders them a proper and necessary party to it. An assignment, though it be absolute in its form, if made for collateral security, while it vests the *legal* title in the assignee, still leaves in the assignor a right which equity will regard. For equity looks not so much at the form as at the substance and intent of the parties in the transaction.

In *Hobart* v. *Andrews*, 21 Pick., 527, one Carter assigned to the defendant Andrews, as security for a loan, certain notes secured by mortgage, and afterwards failed, and assigned all his property for the benefit of his creditors, and his assignees, to close the assignment, assigned all Carter's claims against the defendant, with the property remaining in their hands to the plaintiff. The assignment there was absolute and conveyed all the legal interest and title of the assignor, but it was held that Carter ought to be a party to the process in equity against the defendant, notwithstanding his equitable interest in the property had passed through his assignees to the plaintiff, because the notes, &c., were transferred by him to the defendant as collateral security, and, consequently, if they should be found insufficient to satisfy the defendant's claims, he would be liable to the defendant for the balance. Accordingly, it was held that

he ought to be a party so as to be bound by the decree as to the amount of the avails of the notes, &c., thus transferred. So that, besides the equitable *interest* which still remains in the Cumberland Brick Manufacturing Co., it would seem that they ought to be made a party on the score of a *liability* which might be affected by the decree.

The necessity for making John S. Tate a party is not, at first view, so apparent, for he made an absolute and, for aught that appears, unconditional assignment to Augustus, retaining no equitable interest in the subject matter, and, according to the rule before stated, he need not and should not be made a party, unless he is under some remaining liability which may be affected by the decree. What is his position in this respect? He parted with all his interest, legal and equitable, when he made the absolute assignment. But "the duties to be discharged by the assignor and the liabilities by him to be borne he cannot assign." *Montague* v. *Lobdell*, 11 Cush., 116.

He received the assignment as collateral for the company's indebtedness to him. Should the avails of the mortgage exceed the amount of the indebtedness, it is he who must account to his mortgager for the surplus. The probability or improbability, that such a burden may be found in fact to exist, makes no difference in the principle. Upon the whole, if he who has assigned a chose in action secured by mortgage, as collateral for his own indebtedness, has a right to be heard in determining how much shall be paid by the original mortgager to redeem the property, it would seem that, to conclude all parties and prevent ulterior litigation with possibly different results, his assignee ought also to be made a party, though he may have divested himself absolutely of any direct interest in the avails of the mortgage.

The case is unlike *Williams* v. *Smith & als.*, 49 Maine, 564, for there the original mortgagee, Nichols, assigned absolutely to Smith, and Smith had parted unconditionally with all his interest to the other respondents, prior to the

filing of the bill. In this case there was no contingent liability over to his assignor.

John S. Tate should be made a party to this bill.

It is not perceived how the judgment against the complainant in the suit at law in favor of Augustus Tate, upon which the complainant relies as an estoppel, can affect the right of the Cumberland Brick Manufacturing Co. to have their equitable interest considered in this process. It was obtained behind their backs, possibly in disregard of their equitable rights. They are no parties to it and are not estopped by it. If these respondents, Augustus Tate and Washington Tate, and John Johnson, as his grantees, were to be considered as estopped, yet, where, as here, the want of proper parties is apparent on the face of the bill, the Court will not proceed to a decree until the proper parties are before it. Aiming to do complete justice to all beneficially interested in the subject matter of the suit, they will take notice of the defect, whether presented by plea or answer or not. This complainant mortgaged his estate to the Cumberland Brick Manufacturing Company for $1200. He claims to redeem by the payment of a sum less by some hundreds of dollars than the face of his mortgage. By his own showing, the corporation never parted with their interest as payees and mortgagees fully and absolutely, but only as collateral security for their own indebtedness, and, for aught that appears, they still have an equitable interest. In this process in equity, notwithstanding the legal title may have passed to another party, and a judgment in a suit at law followed, the mortgager must make his mortgagee who is not fully divested of his interest a party, and, for reasons before stated, the assignee of the mortgage should be summoned in also. Unless the plaintiff shall obtain leave at *Nisi Prius*, upon such terms as the presiding Judge may think proper, to make these additional parties, the bill must be dismissed. *Demurrer sustained.*

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

INHABITANTS OF SCARBOROUGH *versus* GEORGE W. PARKER.

By R. S. of 1841, c. 14, § 63, (R. S. of 1857, c. 3, § 85,) the assessors shall require the collector to give bond for the faithful discharge of his duty, &c., in such sum, and with such sureties, as the selectmen shall approve.

This section is merely directory; and the giving of such bond is not a condition precedent to the collector's assuming his official duties.

By R. S. of 1841, c. 14, § 71, (R. S. of 1857, c. 3, § 93,) collectors are empowered to complete their collections notwithstanding new collectors may have been chosen and sworn.

Tax bills, together with a legal warrant for their collection, were duly committed to the defendant, chosen collector in 1856, who, thereupon, without giving bond, entered upon and continued his official duties until 1862, when, upon request, he voluntarily gave a bond, of the latter date, without sureties, to the plaintiffs, reciting, that, whereas he had been appointed collector for the year 1856, conditioned "if he shall well and faithfully discharge all the duties of said office, then said bond to be void, otherwise," &c.; *Held*, —

1. That the bond was good at common law;
2. That it was prospective, and covered no past faults or omissions; and
3. That, after the lapse of a reasonable time, an action would lie for non-diligence in its performance.

Damages in such case.

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

DEBT on a bond, dated Feb. 21, 1862, given by the defendant alone to the plaintiffs, of the condition of which the following is a copy: —

"The condition of this obligation is such, that whereas the said *George W. Parker* has been appointed *collector of taxes* of said town, for the year *eighteen hundred and fifty-six*, now if the said Parker shall well and faithfully discharge all the duties of said office, then this obligation to be void, otherwise to remain in full force."

The remaining facts sufficiently appear in the opinion.

Howard & Cleaves, for the plaintiffs.

Vinton & Dennett, for the defendant, contended, —

I. That the town was in equal fault by assuming such a direction as excused the defendant.

II. Bond is void, for being so widely variant from the law.

1. None but the assessors who assessed the tax can "require a bond of the collector." R. S., c. 6, § 85. Between the assessors of 1856 and any other year, there is no privity.

2. "Assessors shall require a bond of the *collector*." Collector is chosen annually. Office annual. When 1856 expired, office of collector for that year expired with it, and another was chosen to fill vacancy caused by expiration. Private individual cannot give collector's bond, nor the town take such bond; and, if such a bond is given, it is without consideration. Consideration is the office. A bond given for past or executed consideration is void.

Collectors may "*complete* their collections," by R. S., c. 6. § 93. That is, they may finish their *old* business; they can do no *new* business. Similar provision in relation to sheriffs; but ex-sheriffs cannot make a valid sheriff's bond.

3. Collectors are to "give bonds to the *inhabitants*" who elected them, to whom they are officially related. The inhabitants of no other year are contemplated by the statute.

4. Bond without *sureties*.

On void bonds, counsel cited *Purple* v. *Purple*, 5 Pick., 226; *Stevens* v. *Hay*, 6 Cush., 229; *Currier* v. *Greeley*, 39 Maine, 516; 7 Cush., 116; *U. S.* v. *Howell*, 4 Wash., 620; *U. S.* v. *Morgan*, 3 Wash., 10; U. S. Dig., vol. 20, title Bond, p. 165, § 95; *U. S.* v. *Giles*, 6 Cranch, 212; *Sweetsir* v. *Hay*, 2 Gray, 53; *Farrar* v. *U. S.*, 5 Peters, 372; *Armstrong* v. *U. S.*, Peters' C. C. R., 46.

5. Bond given in 1862 for the faithful discharge of official duties in 1856 is an absurdity.

Conditions in bonds must be *sensible, certain and possible*. *Wharf* v. *Mussey*, 48 Maine, 307.

III. Can be no breach until collector has had same time in which to collect these uncollected taxes, that he would have had if bond had been given when it ought to have been. *Haynes* v. *Fuller*, 40 Maine, 162. Ten months—time between date of bond and writ—not enough.

BARROWS, J.—The defendant was collector of taxes in the plaintiff town for 1856; and, sometime in September of that year, received the tax bills and a warrant for collection, of the sufficiency of which no question is made.

The R. S. of 1841, c. 14, § 63, then in force, (reënacted in R. S. of 1857, c. 6, § 85,) directed the assessors to require of the collector a bond for the faithful discharge of his duty, in such sum and with such sureties as the selectmen might approve, and the selectmen were directed to require a bond of the treasurer, by § 141, of the same c. 14. These directions were not followed. Neither the defendant nor the treasurer of Scarborough appears to have been required to give bond during that year. The defendant, however, proceeded under his warrant and collected a portion of the taxes.

In June, 1857, the treasurer having given no bond, and, according to the defendant's testimony, refusing to give him a treasurer's receipt, the defendant declined to pay over to him a sum of about $500 which he then had in his hands. There was then remaining uncollected the sum of $4800, or thereabouts. It was now discovered by the selectmen that neither the treasurer nor the collector had given bond, and all concerned seem to have adopted the idea that there was no way of enforcing the collection of the tax, and it was agreed that the affair should be kept secret, and the defendant should collect what he could. The treasurer for the year 1857, shortly after, gave bond and the defendant paid over to him the $500 which he had collected, and, in the course of the following year, reduced the amount of uncollected bills somewhat, making payments as he collected. By this time, the tax payers had learned that there was no bond, and repeated demands made by the defendant failed of producing any effect. He seems not to have attempted to coërce payment, acting under the direction of the selectmen, and thus matters went on, (the amount uncollected being, meanwhile, reduced by payments made upon defendant's solicitations, to about $1300,) until the year 1861, when the town authori-

ties endeavored to procure an adjustment. Various attempts to bring about a settlement by reference failed, and at last, on request of the selectmen, defendant paid over the balance of the collections remaining in his hands and gave the bond in suit, Feb. 21, 1862. Defendant has no money belonging to the town in his possession, but plaintiffs claim to recover on account of failure to collect.

The bond is not the bond contemplated by the statute. It should have been given long before, with sureties, and approved by the selectmen for the year 1856, and there is a want of definiteness about the condition, which, while we think it not sufficient to invalidate the instrument, is by no means desirable.

The defendant contends that the bond, not being conformble to the statute, is void. It is good, unless declared void by the statute or common law. *Morse* v. *Hodsdon*, 5 Mass., 318.

We know of no statute provision which makes such a bond void.

It appears to have been voluntarily given and for a purpose that is neither immoral nor illegal. Why should it be adjudged void by the common law? We cannot so adjudge it. The defendant received a valid warrant, which was a protection against all irregularities or illegal proceedings but his own. *Ford* v. *Clough*, 8 Greenl., 334.

The directions therein contained the law required him faithfully to obey. R. S. of 1841, c. 14, § 62; R. S. of 1857, c. 6, § 84.

The want of a treasurer's bond, then, did not prevent him from doing his duty in the matter of collections, and is no excuse for the non-performance of it.

In the case of a treasurer, the neglect or refusal to give bond is by statute declared equivalent to a refusal to accept the office. R. S. of 1841, c. 14, § 141; R. S. of 1857, c. 6, § 134. There is no such provision in relation to the collector and his bond, but a series of sections give to the municipal officers of the town the right of constant supervision

of his proceedings, and furnish summary remedies if he is unfaithful or dilatory.

Great pains apparently have been taken by legislators to facilitate and secure the collection of taxes once lawfully assessed, and regularly committed with a proper warrant. It is not to be supposed that the ample powers conferred upon the collector, which were designed to insure the prompt collection of the funds necessary for the common welfare, are to depend upon a compliance with the directions of the statute in the matter of giving bond, in the absence of any statutory provision to that effect. If such had been the intention the office would have been declared vacant upon non-compliance as in the case of the treasurer. The constant inspection by the town authorities, and the summary remedies against collectors above referred to, are relied upon in lieu thereof to afford some protection, and the bond to be required is but a cumulative security, and the statute in that respect simply directory. If the assessors fail to require the bond as directed, the collector, having a valid warrant, may nevertheless proceed to perform his duties, and no tax-payer would be exonerated from the payment of his tax by reason of the deficiency. The giving of a bond is not a condition precedent to his assuming the duties of the office.

By § 21, c. 14, of R. S. of 1841, (reënacted in R. S. of 1857, c. 6, § 93,) collectors are empowered to complete their collections, notwithstanding new collectors may have been chosen and sworn. The defendant in this case has collected a large portion of the tax and faithfully paid over the money in his hands. But it was not an unlawful act for the town authorities, in 1862, in order to insure the completion of the collection, to request him to give a bond, and he, having voluntarily given the bond in suit, we hold it good at common law.

This being so, the defendant must show performance of the condition, if he would maintain his defence. *Inhabitants of Trescott* v. *Moan*, 50 Maine, 347.

This bond, given Feb. 21, 1862, is prospective by its very terms. It covers no past defaults or omissions. It is to be void if said Parker *shall* well and faithfully discharge all the duties of said office. It seems to be of the very essence of a bond for the faithful discharge of official duty that it shall be prospective. See *United States* v. *Giles & al.*, 6 Cranch, 212; *Farrar & al.*, v. *United States*, 5 Peters, 372; *Armstrong* v. *United States*, Peters' C. C. R., 46.

Now, if it had appeared that Mr. Parker had faithfully proceeded to complete the collection of the tax of 1856, after the giving of this bond, a plea of performance might have been sustained. But, weary of ineffectual solicitation and mistakenly supposing that he could not coërce payment from the delinquents, he seems to have made no effort to fulfil the condition of his bond. A reasonable time elapsed before the commencement of the suit for him to have collected what was collectable by any process that still remained available under the law. For his neglect to take any measures to collect, he is responsible in this suit.

This view of the case disposes at once of the objection that the selectmen were equally in fault, (even if that could originally have excused a neglect of this description,) and of the plaintiffs' claim to have execution awarded for the entire amount of the uncollected bills. Since the giving of this bond it does not appear that he has had any countenance from the town authorities in delaying the collection. And he is liable under this bond for nothing that was lost by previous neglects.

The power to enforce payment by a sale of real estate was no longer available when the bond was given. Laws of 1844, c. 123, § 15; R. S. of 1857, c. 6, § 156.

The individuals assessed might have died and their estates been settled, they might have gone beyond the reach of process, they might have become so impoverished that any attempt to collect would have been useless, before the bond was given, and the defendant would not be liable upon this bond for any loss to the town thus accruing.

All that was required of him by the bond was diligently from that time forward to proceed with his collections.

According to the stipulations in the report, if the action was found maintainable, the damages, unless agreed upon by the parties, were to be fixed by the Court in such manner as they might determine. Unless the parties agree upon the amount for which execution should issue, an assessor will be appointed by the Court at the next *Nisi Prius* term. *Defendant defaulted.*

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

JOSEPH I. WALKER *& al. versus* DAVID T. CHASE.
same *versus* same.

When a fact has been once judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, is conclusive upon the parties.

And, if the fact that a question has been once judicially determined can be shown by the record, the former judgment may be pleaded by way of *estoppel*, or given in evidence under the general issue.

But, if the fact cannot be shown by the record, it may be proved by evidence *aliunde*.

EXCEPTIONS from the ruling of KENT, J.

ASSUMPSIT for rent under a lease by the plaintiffs, as lessors, against the defendant, an alleged assignee of one Kilborn, who was the lessee.

The action was referred, by rule of Court, to J. H. Drummond, Esq., at the April term, 1864, who made his report to the October term, 1864.

The plaintiffs claimed rent for two quarters, due in 1863 and 1864, by virtue of a five years' lease of a certain mill from them to one Kilborn, dated Feb., 1860, for an alleged assignment thereof in Nov., 1860, to the defendant.

The defendant denied the assignment.

At the hearing before the referee, the plaintiffs, to establish the fact of the alleged assignment, introduced the record of a judgment of the S. J. Court, rendered April term, 1864, in a case between the same parties, for the quarter's rent which became due under said lease, April 1, 1861, and introduced parol evidence tending to show that the question of the alleged assignment had been presented to, and decided by the jury.

The referee found, as matter of fact, from said record and the evidence *aliunde*, that, in the former case, "the alleged assignment was put in issue at the trial, and that the jury found the lease had been assigned as claimed by the plaintiffs, and that, if the jury had not so found, their verdict must have been for the defendant."

The defendant, at said hearing, offered parol evidence tending to negative the assignment as alleged; but the referee refused to receive such evidence, ruling that *the finding of the fact of the assignment by the jury, in the former case, was conclusive on the parties in this case.*

The referee accordingly reported in favor of the plaintiffs, and that, if the above "ruling was not correct," the report, "by the agreement of the parties, is to be recommitted for a further hearing of the case."

The presiding Judge sustained the ruling of the referee, and the defendant excepted.

S. C. Strout, for the plaintiffs, contended,—

That, while special pleading was in use, an estoppel should appear of record; but now, it is the policy of the law that material facts once determined shall be regarded as conclusively settled between the parties and their privies. And, if the record does not show the grounds of the decision, they may be proved by parol. *Chase* v. *Walker*, 26 Maine, 557; *Rogers* v. *Libbey*, 35 Maine, 202; *Dunlap* v. *Glidden*, 34 Maine, 519, and cases there cited; *Young* v. *Black*,

7 Cranch, 565, and *Wood* v. *Jackson*, 8 Wend., 9. Also, *Outram* v. *Morewood*, 3 East, 346, 366; *Hancock* v. *Welch*, 15 Stark. R., 347; *Hopkins* v. *Lee*, 6 Wheat., 113; *Merriam* v. *Whittemore*, 5 Gray, 316; *Sawyer* v. *Woodbury*, 7 Gray, 499; *Jennison* v. *Springfield*, 13 Gray, 544; *Burlen* v. *Shannon*, 14 Gray, 433.

Vinton & Dennett, for defendant, cited—

Dutton v. *Woodman*, 9 Cush., 260; *Eastman* v. *Cooper*, 15 Pick., 276–280; *Parker* v. *Standish*, 3 Pick., 288, and 1 Greenl. on Ev., § 531, *et seq.*

WALTON, J.—The question is how far a fact once litigated can be again called in question between the same parties.

Litigation is an expense to the public as well as to the parties. In fact the expense to the public is often greater than it is to the parties. It is for the public good, therefore, that there be an end of litigation. *Expedit reipublicae ut sit finis litium.* And when a cause has been once fairly tried, it ought not to be tried over again, even if the parties are willing. Such a course would be unjust to other parties whose causes might be thereby delayed. As well might a man who has a right to draw water at a public fountain, when he has filled his pitcher, claim the right to upset it, and to keep others waiting till he had filled it over and over again.

The fact that a question has been once litigated can sometimes, but not always, be proved by the record. If the fact that a question has been once before litigated can be shown by the record of a court of competent jurisdiction, the former judgment may be pleaded by way of estoppel, or given in evidence under the general issue. Whichever course is adopted, the result will be the same. The parties will be precluded from again litigating the same question.

If the fact that the same question has been once before litigated cannot be shown by the record, the law is now well settled that it may be proved by evidence *aliunde*, and when

thus proved the result is still the same. In such case, the party sought to be affected by the previous litigation may contest the fact that the same question was then tried; but this fact being established, the result will be all the same, whatever the *manner* of establishing it may be. It is the *fact* that the same point has been once tried, and not the manner of proving it, that precludes the parties from again contesting it. The mode of proving it cannot affect the quality or legal effect of a fact.

We have been referred to several cases in Massachusetts, (3 Pick., 288, 15 Pick., 276, 9 Cush., 260,) in which there are *dicta* to the effect that the former adjudication is admissible in evidence, but is not conclusive in a second trial of the same question. But in no one of these cases was the question of the *effect* of the previous litigation directly before the Court for adjudication. In the first, (3 Pick., 288,) the Judge at *Nisi Prius* excluded the evidence, and the only question before the law court was whether it ought to have been admitted, and it was held that it was admissible, the Court at the same time remarking that it would not be conclusive. In the second, (15 Pick., 276,) the Court admitted the evidence, and the party against whose objection it was admitted, excepted. Here the only question to be determined was its admissibility. The excepting party could not, of course, object that sufficient effect was not given to it when he objected to its being received at all; and what was said about its effect was mere *obiter dicta*. In the third, (9 Cush., 260,) the former judgment was excluded at *Nisi Prius*, and the only question for the law court was its admissibility. In none of these cases was the *effect* of the former adjudication brought directly before the law court for determination.

But, in *Sawyer* v. *Woodbury*, 7 Gray, 499, the effect to be given to a former adjudication of the same question was directly before the Court, and was very carefully examined by Chief Justice SHAW. The former *dicta* of the Court, to the effect that the previous determination of a fact may be

given in evidence at a second trial of the same fact between the same parties, but is not conclusive upon them, are not overruled in terms, but are either in fact overruled, or so explained and limited in their meaning, as not to be in conflict with the view of the law we have hereinbefore expressed. "It is a principle," says Chief Justice SHAW, in the case just cited, "lying at the foundation of all well conducted jurisprudence, that when a right or a fact has been once judicially tried and determined by a Court of competant jnrisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties, and those in privity with them in law or estate."

And, again, in *Jennison* v. *Springfield*, 13 Gray, 544, the Court say:—"It is wholly immaterial to the question of the conclusiveness of a judgment, whether the issue between the parties was raised by the averments of the plaintiff or of the defendant. The real point is, was the fact in issue the subject of judicial controversy, relied upon either in the support or the defence of the action, and comprehended within the verdict at the former trial? If so, it is, by inference of law, *conclusively* settled between the parties by the judgment." See also, to the same effect, the opinion of the Court in *Burlen* v. *Shannon*, 14 Gray, 433. In fact no reason can be given why the effect to be given to the former litigation should be affected by the mode of proving it. The legal quality and effect of a fact must and ought to be the same, whatever the mode of proving it may be, provided the proof is legal and sufficient.

One of the facts in dispute between these parties is whether a lease of certain real estate was assigned to the defendant. The case shows that, in a previous suit between the same parties, this question was litigated and determined favorably for the plaintiffs. The defendant contends that inasmuch as the *record* of the former judgment does not show this question to have been litigated, and the fact is established by evidence *aliunde*, he is not precluded from again contesting it. As already stated, we hold the law to

be otherwise. The fact having been once tried and determined, principles of sound public policy, as well as justice to the plaintiff, preclude the defendant from again contesting it. *Exceptions overruled.*

APPLETON, C. J., KENT, BARROWS and DANFORTH, JJ., concurred.

IRA C. KIMBALL, *Executor and Trustee in Equity, versus* RUTH P. CROCKER *& als.*

I. C. gave and bequeathed to trustees named $40,000, the same to be "kept safely invested for twenty-five years" after the testator's decease, "for the use and benefit of his two grandchildren named," to be paid to them at the end of said twenty-five years; the interest thereon "to be invested and added to the principal, and neither principal nor interest to be distributed till the expiration of the twenty-five years aforesaid," and the trustees to withhold its distribution even then, "if, in their opinion, it would be liable to be wasted or squandered by the improvidence of the person entitled to it, except the interest that may arise therefrom from time to time as needed." In case either of his grandsons should die without lawful issue, before the time of distribution, his share is to go to the survivor; but if both should die "without lawful issue or lineal descendants, before said fund became distributable, said fund is devised over to the testator's brothers, or their lineal descendants." The residue of his property, he devised to a trustee named in trust for the benefit of persons afternamed, subject to certain charges specified, and the "residue, should any remain, is to be distributed in the same manner and to the same persons, and at the same time as the fund called the $40,000 fund;" — *Held,* —

1. That the grandsons named take vested interests in the $40,000 fund, and also in the residue of the estate subject to the charges therein;

2. That the provision directing an accumulation of interest for twenty-five years is invalid, and the interest on the $40,000 fund falls into the residue and belongs to the trustee of such residue, for the purposes of the trust created therefor; and

3. That the interest on the residue, after discharging all trusts declared, is to be paid over annually to the guardians of said grandsons during their minority, as heirs of undevised estate.

Costs in bills of this nature.

BILL IN EQUITY, filed by Ira C. Kimball, executor and trustee, named in the last will and testament of Ira Crocker,

to determine the construction, validity and effect of the following articles in the will:—

"*Third.*—I give and bequeath the sum of forty thousand dollars, to Samuel Small, jr., and Ira C. Kimball, and the survivor of them, in trust, upon and for the trusts, intents and purposes, and subject to the powers and provisions hereinafter mentioned and expressed of or concerning the same—that is to say—that they, the said Samuel Small, jr., and Ira C. Kimball, and the survivor of them, and such as may be appointed in their stead, shall keep the same safely invested for and during the term of twenty-five years, from and after the time of my decease, for the use and benefit of my two grandchildren, Ira Crocker and Frank Calvin Crocker, and to be paid to said Ira Crocker and Frank Calvin Crocker at the end of said twenty-five years, not subject to any charges made on said trust fund by my executor or trustees, for taxes, or any other charges, but as a fund to be kept on interest in such safe securities as they may deem most advantageous. The interest arising from said sum or fund is to be invested from time to time as received, and added to the principal of said fund, and neither the principal nor interest is to be distributed till the expiration of the twenty-five years as aforesaid. At the termination of this trust, or at the expiration of twenty-five years from and after my decease, said trust fund may be distributed to my grandchildren equally, share and share alike, or to the survivor of them if either shall die before that time without lawful issue. If either of my grandchildren should die before the same is distributed according to the provisions of this my will, leaving lawful issue or lineal descendants, then said sum shall be distributed and paid over to such issue or descendants in proportion to the share that each of my grandchildren would have had in the estate if living. The distribution of this fund, or any share of it, is to be made by my trustees, at the expiration of the term of twenty-five years, only in the event that either of my grandchildren, or their lineal descendants shall show themselves capable of

making a prudent and economical use of the same, and no part of the principal of said sum shall be distributed during the life of either of my grandchildren, if, in the opinion of my trustees, the same would be liable to be wasted or squandered by improvidence by the person entitled to it, except the interest that may arise therefrom, from time to time, as needed.

"In case both of my grandchildren, before named, should die without lawful issue or lineal descendants, and before said trust fund becomes distributable, according to the terms and conditions of this my will, then, and in such case, I give, devise and bequeath all of said sum or fund to my brothers, and the lawful lineal descendants of deceased brothers by right of representations, agreeably to the laws regulating the descent of personal estate. * * * *

"*Fourth.*—I give, devise and bequeath all the rest and residue of my property, real, personal and mixed, to Ira C. Kimball, aforesaid, in trust, upon and for the trusts and purposes and for the benefit of the persons hereafter to be named. * * * * * * * *

"In their education and support the said grandchildren are to receive, each, such sums as may be necessary therefor in the judgment of said trustee, or his successor, and, if either engage in business, or professional pursuits after he becomes twenty-one years of age, my executor and trustee is authorized and required to make such advances as he may deem expedient or necessary from said fund, and their receipt therefor shall be his discharge.

"This property, which I give to my executor and trustee in trust, is to be charged with all my debts, the payments to my wife, if necessary, the allowance to be made yearly to Mary E. Crocker, the expenses of my trustee and the administration of my estate, together with all taxes on this property, and on the trust fund of forty thousand dollars, and the residue, should any remain, is to be distributed and paid over by my executor and trustee in the same manner and to the same persons, and at the same time, as the fund

called the forty thousand dollar fund in the hands of my first named trustees."

E. & F. Fox, for the complainant.

APPLETON, C. J. — The complainant, the executor and trustee under the will of Ira Crocker, brings this bill to ascertain the legal construction of various clauses therein, and for the purpose of the better enabling him to discharge the trusts arising under the same. The jurisdiction of the Court is conferred by R. S., 1857, c. 77, § 8.

By the third item of his will, Ira Crocker gave to Samuel Small and Ira C. Kimball forty thousand dollars in trust, to keep the same invested for twenty-five years after his decease "*for the use and benefit*" of his two grandchildren, named, "to be paid to them" at the end of said twenty-five years. The interest to be added to the principal "and neither interest nor principal to be distributed till the expiration of the twenty-five years aforesaid." He authorizes the trustees to withhold the distribution of the fund at that time, if in their opinion the same would be liable to be wasted or squandered by the improvidence of the person entitled to it, except the interest that may arise therefrom, from time to time, as needed. In case one of his grandsons should die "*without lawful* issue," before the time of distribution, his share is to be distributed to the one surviving. In case both should die "without lawful issue or lineal descendants," before the time appointed for distribution, there is a devise over of the fund to his brothers, or their lineal descendants.

By the fourth item, he devises the residue of his estate and property to Ira C. Kimball, in trust, for the benefit of persons afternamed, subject to the support of his widow, to the support and education of his two grandsons, to advances that may be made to them after they attain the age of twenty-one years upon their entering into business, to an annuity to the widow of a deceased son, and to the payment of debts, taxes and all expenses. He then directs, "the resi-

due, should any remain, is to be distributed in the same manner and to the same persons, and at the same time, as the fund called the forty thousand dollar fund in the hands of my first named trustees."

The principal question presented for consideration is whether the bequests and devises are not in violation of that rule of law, which requires that the interests of devisees and legatees under a will should become vested within a life or lives in being, and twenty-one years after the life of the testator.

Certain rules have been established, which may aid us in determining the construction to be given to the language of the testator in the case under consideration.

When there is a gift of a legacy, or a share of a residue to be paid at or when legatee shall attain twenty-one years, or any specified age; or at the death of a particular person; or when legatee shall have served out his apprenticeship, the gift *vests* in the legatee at the death of testator, the time only applies to the payment. 6 Bac. Abr., 263; Tit. Legacy, E.

A legacy or devise should be considered as giving a vested rather than a contingent interest. "It has long been an established rule," says BEST, C. J., in *Duffield* v. *Duffield*, 1 Dow & Clark, 311, "for the guidance of the Courts of Westminster, in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession."

The interest is to be regarded as vested, if the time of payment be postponed beyond the time required to prevent a perpetuity, when the language of the will operates to make

an antecedent gift. *Watson* v. *Hayes*, 9 Simons, 500, n.; *Leake* v. *Robinson*, 2 Mer., 363.

By the will of Mr. Crocker, there is a present gift of the $40,000 to trustees "for the use and benefit" of his two grandsons. These words give a present and vested interest in the fund. This interest, thus vested, is not destroyed by the words "to be paid said Ira Crocker and Frank Calvin Crocker at the end of said twenty-five years." This language is only applicable to the time when the legatees are to have possession of their legacies. The declaration that "neither principal nor interest is to be distributed till after the expiration of the twenty-five years aforesaid," is only a mode of declaring when payment is to be made. It does not determine or affect their absolute right to the fund.

By the fourth item, the testator gives all the rest of the residue of his estate to Ira C. Kimball, "upon and for the trusts and for the benefit of the persons hereafter to be named." The widow is named, and her right to a support is a vested interest as well as the annuity to the widow of his deceased son. The grandsons take an interest in the advances "required" to be made to them on their attaining the age of twenty-one and engaging in business. The residue remaining is "to be distributed and *paid over* in the same manner and to the same persons and at the same time" as the fund of $40,000. The trust is for the benefit of those afternamed, and the grandsons coming within these terms, take a present interest in what is by form of words designated for their benefit. This residue is so designated in the language prescribing when it should be distributed and paid over to them. By reference to the language used respecting the fund of $40,000 only, is there a devise over of the residue to his brothers or their lineal descendants, in case of the death of the grandsons without issue. By the same reference the grandsons are the first devisees of this residue, taking a present and vested interest, because devised to the trustee for *their benefit*, they being designated as the beneficiaries.

These views are in accordance with the general current of authorities. In *Bland* v. *Williams*, 3 M. & K., 411, the bequest was in several respects like the present. The testator gave to his daughter an annuity, "and from and after the decease of my said daughter upon trust to receive the said rent, dividends, and proceeds of all my estate and effects, to *pay*, apply and dispose of the same or a sufficient part thereof, for and towards the maintenance, education and bringing up of all and every the child or children of my said daughter, until they shall severally and respectively attain the ages of twenty-four years; and *when* and *as* they shall severally and respectively attain that age, then upon trust to pay, assign and transfer and convey all the residue of my estate, effects, * * equally unto and amongst all her said children *when* and *as* they shall severally and respectively attain the said age of twenty-four years."

Sir JOHN LEACH, in delivering his opinion, says,— "Whether in a gift of this nature the term of vesting is postponed, or only the term of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age. In this case, the gift over is not simply upon the death under twenty-four, *but upon the death under twenty-four without leaving issue.* If, upon a death under twenty-four, at whatever age issue was left, then the gift over is simply not to take place. It is in effect, therefore a *vested* interest, with an executory devise over in case of death under twenty-four without leaving issue. All the cases upon the subject, except the one before Lord GIFFORD, *Bull* v. *Pritchard*, 1 Russ., 213, are reconcilable with this distinction."

In *Farmer* v. *Francis*, 2 Sim. & Stu., 505, the devise was of a residue amongst children of his daughter, living at the decease of his wife and daughter, "equally amongst them * * * *when* and *as* they shall respectively attain the age of twenty-four years." "As to the personal estate," says Sir John LEACH, "they plainly take absolute vested

interests; the time of division only, as in common cases, the time of payment, being postponed until they attain the ages of twenty-four years."

In the will of Mr. Crocker, there is a direction to accumulate. In *Blease* v. *Burgh*, 2 Beavan, 221, the bequest was "in trust for all and every the child or children of her son John Blease by Elizabeth, other than Frances Lidden Blease, * * to be *paid*, assigned or transferred to him, her or them, being a son or sons, *on* attaining the age of twenty-three years, and, being a daughter or daughters, at the like age of twenty-three years, or day or days of marriage; * * * in case of death of one under that age, the share to be transferred to the survivors." She also gave £1000 to Thomas Seddon Blease, "to be paid on his attaining twenty-three years, together with all the accumulations; and, in case of his death before he should attain twenty-three years, the whole to become part of the residue." Lord LANGDALE, in delivering his opinion, says:—"But it does not appear to me that a gift in terms which import a present *vested* interest, with a postponed time of payment, is made contingent by a direction to accumulate, till the time of payment arrives; and I think a gift over which is too remote and void, as in the case here, cannot defeat the vested interests previously given; and, on consideration of these and other parts of the will, it appears to me that the gift of the residue vested in the children of John who were entitled to take."

In *Snow* v. *Poulden*, 1 Keene, 186, the testator directed the residue of the property to be invested in land, and given to S. "who was not to be of age to receive his until he attained his twenty-fifth year." It was held that S. took a vested estate tail in the land. "The devisee is entitled," remarks Lord LANGDALE, "according to all the authorities, to a vested estate tail, subject to be divested if the contingency should not take effect." By the civil law, which is adopted in courts of equity, "when a legacy is given absolutely," remarks Sir JAMES WIGRAM, in *Leeming* v. *Sherratt*, 2 Hare, 14, "and the payment is postponed to a future definite pe-

riod, the Court considers the time as annexed to the payment and not to the gift of the legacy, and treats the legacy as *debitum in presenti solvendum in futuro*." The same general principles as to the vesting of an estate are affirmed in *Dolley* v. *Ward*, 9 Ad. & Ell., 502.

There are limitations over in the will of Crocker. When a devise is to A *at* twenty, or *when* he attains the age of twenty-one, the devise standing alone would be contingent. But when such devises are accompanied with a limitation over that in case A dies under twenty-one without leaving issue living at his decease, then over, the last limitation is explanatory of the sense in which the testator used the preceding words, and as showing the event upon which the real estate was to go over to the ulterior devisee. "The contingency in such case is held not to constitute a condition precedent, making the vesting to depend upon the devisee's attaining the specified age, but the estate is held to vest *instanter*, subject to be divested upon the happening of the contingency." 1 Roper on Legacies, 571; *Doe* v. *Newell*, 1 M. & Sel., 327; *Phipps* v. *Akers*, 4 Man. & Gr., 1107; *Patterson* v. *Ellis*, 11 Wend., 259.

The authorities in this country are in accordance with the English decisions to which we have referred. In *Furness* v. *Fox*, a legacy to one "if he shall arrive at the age of twenty-one years then to be paid over to him by my executor," is not a contingent but a vested legacy. So in *Patterson* v. *Ellis*, 11 Wend., 259, when the gift of a legacy is absolute, and the time of payment only is postponed, the time not being of the substance of the gift was held to postpone the payment, but not the vesting of the legacy. This principle is affirmed in *Blanchard* v. *Blanchard*, 1 Allen, 223; *Brown* v. *Brown*, 44 N. H., 281.

The cases which may be cited as apparently adverse to these views will be found to be distinguished by the want of any words importing a present gift, upon which distinction the opinions are based,—as in *Newman* v. *Newman*, 10

Sim., 51; *Vawdry* v. *Geddes*, 1 Russ. & Mylne, 203, and others.

The whole will must be taken together. The subsequent clause in the third item of the will, delaying the distribution in case of the improvidence of the legatees, does not prevent the legacies from vesting. In *Nares' Ex'rs* v. *Van Shaick*, 20 Wend., 565, the testator gave to each of his grandchildren who should be living at the time of his death the sum of $6000, to be paid upon their attaining the age of twenty-one or marrying, such payments however to be subject to the approbation of the parents of the grandchildren, and the time of payment fixed by them; — it was held the legacies were vested and not contingent and that the power given to the parents did not prevent the vesting of the legacies. "If the testator had stopped after directing the legacies to be paid upon their attaining respectively the age of twenty-one years or marrying, the legacies," observes Mr. Justice BRONSON, "would clearly have vested. The clause which follows, requiring the approbation of the parents, cannot alter the case. It only provides for a further postponement of the time of payment. The gift is still absolute. The parents of any legatee have no other power over his legacy than that of fixing a proper and discreet time for its payment. A discretionary power of this kind will not prevent the vesting of a legacy. *Churchill* v. *Speak*, 1 Vern., 251." A restriction similar in character was sustained by this Court in *Morton* v. *Southgate*, 28 Maine, 41.

When the accumulation is for a gross number of years, the rule against perpetuities prohibits more than twenty-one years. Whenever lives in being do not form part of the time of suspension or postponement, the only period under the rule against perpetuities is twenty-one years absolute. "The law forbids perpetuities," observes Mr. Ch. Justice LEWIS, in *Philadelphia* v. *Girard's heirs*, 45 Penn., 29. If the period exceeds twenty-one years, though there is no preceding limitation for life, it is equally void."

The trust for accumulation is void. No transgressive trust was ever sustained for any part of the common law period. We have no such statute as that of 39 and 40 Geo. 3, c. 98, commonly termed the Thelusson Act. Under that, the excess of accumulation beyond the period allowed by its provisions have been held void, and those within its limitations sustained. But such is not the common law.

The annual receipts from the forty thousand dollar fund, not being allowed to be retained by the trustees, for the purpose of accumulation, fall into the residue as they accrue. *Leake* v. *Robinson*, 2 Mer., 389.

A void trust, for the accumulation of income, does not invalidate a bequest. A will may be void in part and valid as to the residue. In the present case the direction to accumulate is void. The will is not defeated so far as relates to the trusts arising under the will, or as to the legacy to the grandchildren. *Williams* v. *Williams*, 4 Selden, 539; *Hawley* v. *James*, 5 Paige, 318; *Gooding* v. *Reed*, 31 E. L. & Eq., 109. The rule as to wills is that, where a testator's intentions cannot operate to its full extent, it shall take effect as far as possible.

But the residue is to have its accumulations, which could no more be allowed than in the other fund specially set apart for that purpose. The amounts annually received from the residue thus created are undisposed of by the will, and are to be paid to the guardian of the grandsons during their minority, and, after that, to the grandsons in their own right.

The trust fund, after the expiration of the term limited for its payment, "may be distributed to my grandchildren equally, and share alike, or to the survivor of them, if either shall die before that time *without lawful issue*." It is settled, by the great preponderance of judicial authority, that the words *dying without lawful issue*, signify, as applied to personal estate, issue living at the death of the first taker, and that the gift over is good. *Campbell* v. *Harding*, 2 K. & M., 390; Lewis on Perpetuities, 337.

The executor was in the discharge of his duty in filing this bill to obtain a judicial construction of the various clauses in the will, to which we have referred. The reasonable costs, attendant upon its prosecution, are a proper charge upon the estate. *King* v. *Strong*, 9 Paige, 94.

There are other and more remote limitations. But no occasion is perceived for their present discussion or consideration.

According to the true construction of the will of Ira Crocker, it is therefore declared that, —

1. The grandsons of Ira Crocker take vested interests in the $40,000 fund.

2. That they take vested interests in the residue of his estate, subject to the charges upon the same.

3. That the provision directing an accumulation of interest for twenty-five years is invalid, and cannot be sustained.

4. That the interest on the $40,000 fund falls into the residue, and belongs to the trustee of such residue, for the purposes of the trust created in the fourth item of the will.

5. That the interest on the residue, after discharging all trusts as declared in the will, is to be paid over annually to the guardians of the testator's grandsons, during their minority, as heirs of undevised estate.

It is ordered and decreed that the costs of these proceedings are a charge upon the estate of said Crocker.

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

JOHN K. CHAPLIN *versus* JAMES S. BARKER.

In ejectment, the general issue alone admits the defendant to be in possession of the premises described in the declaration.

In such case, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant.

Matter in the nature of a disclaimer must be filed within the time allowed for pleas in abatement.

Under the general issue, the defendant may rest upon his possession until the plaintiff has shown some right to disturb it.

The defendant may rebut the plaintiff's proof of seizin by any legal evidence.

Where the plaintiff's seizin depended upon a sheriff's sale of the defendant's right in equity to redeem the premises from a mortgage, consisting of a warranty deed with a bond of defeazance back; — *Held*, that it was competent for the defendant to prove assignment of said bond prior to the plaintiff's attachment, together with the consideration of said assignment.

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

The facts sufficiently appear in the opinion.

S. M. Harmon and *N. S. & F. J. Littlefield*, for plaintiff.

H. P. Deane, for defendant.

BARROWS, J. — The plaintiff brings his action of ejectment for the recovery of a parcel of real estate which he alleges is in the actual possession and occupation of the defendant as his homestead. The defendant, *in his specifications*, denies that the plaintiff was ever seized of the premises as alleged, and asserts that long before the plaintiff's original attachment he had sold and assigned all his own right, title and interest in and to them. Then he pleads the general issue, which is joined, and, by way of brief statement, he further says that neither now has he, nor when this action was commenced, nor at any time during any of the proceedings or suits of said demandant against him, did he have "any title or interest in said demanded premises, and that all the right, title and interest that he once had in said premises he conveyed to William Bickford, long before the commencement of any action against him by the de-

mandant, and that said Bickford is now, and for a long time prior to the commencement of this action has been, seized in fee and possessed of said premises, as said demandant well knows."

This anomalous and apparently contradictory set of pleadings seems to have blinded the plaintiff to the burden which the general issue, (which is well pleaded,) imposes upon *him*. He must recover, if at all, on the strength of his own title, and not upon the weakness of that of the tenant, and must show that he has the legal interest and a possessory title. The naked plea of the general issue admits the tenant to be in possession of the premises described in the declaration. The brief statement here is utterly nugatory *as a disclaimer*, not having been seasonably filed. It is inconsistent with the general issue, and the matter it contains, in order to be available *as special matter of defence*, must, if not pleaded in abatement, be filed in the form of a brief statement within the time allowed for pleas in abatement, unless the time is enlarged by the Court. R. S., c. 104, § 6.

But, under the general issue, the tenant may rest upon his possession until the plaintiff has shown some right to disturb it, and may put in such evidence to rebut the proofs adduced by the plaintiff as is found admissible under the specifications he has filed. To show his right and title to the premises demanded here, the plaintiff introduces an office copy of a warranty deed thereof from the tenant to Nathaniel Pease, dated August 13, 1859, duly acknowledged and recorded August 15, 1859; also a bond of the same date, *not recorded*, from Pease to the tenant conditioned for the re-conveyance of the premises on payment of a note therein described; also a writ, record, execution and officer's return thereon, &c., himself against the tenant, showing an attachment of defendant's right to real estate in Cumberland county, January 7, 1862, filed in the Registry, according to law, January 9; a judgment for plaintiff, rendered February 2; a seizure on execution, March 7, of all defendant's right in demanded premises, and a sale of the

same after due proceedings had, April 10, by the officer to the plaintiff, and a deed thereof in due form of law, and duly recorded, in pursuance of the sale. Russell Lamson testified that he was a deputy sheriff, and made the sale and executed the deed to the plaintiff, and, on cross-examination, that *Bickford* was present at the sale and claimed the property as *his*.

If this were all, the plaintiff would be entitled to judgment, for, although the tenant had no record title to the premises when the plaintiff made his attachment, yet, for aught that appears thus far, he was the owner of an equity of redemption which may have passed by the seizure and sale on execution to the plaintiff, thus giving him a better right than a naked possession. But, on the back of the bond from Pease to the tenant, which was introduced by the plaintiff, appears an assignment under seal from the tenant to Bickford, bearing date *before the plaintiff's attachment*. The defendant offers this assignment, with evidence which proves, unless it is discredited, that the assignment was actually made when it bears date, for a full and valuable consideration paid by Bickford to the tenant; that Bickford took possession forthwith, and subsequently paid the note to Pease, and took a deed of quitclaim from Pease to himself and surrendered the bond to Pease; and that, since the execution of the assignment aforesaid, tenant has been there only as *his* tenant, paying rent. Plaintiff does not attempt to discredit this testimony, or in any manner to control it, but takes the ground that it is not admissible under the pleadings and specifications. *To defeat the plaintiff's action*, if he succeeded in showing a title to the premises, *upon the ground of non-tenure*, it is *not* admissible; but to show that nothing passed to the plaintiff by virtue of the sale on execution, and the sheriff's deed upon which he relies, it *is* admissible under the specifications of defence and *the general issue*. It is competent for the purpose of disproving the plaintiff's allegation of seizin. It is but doing what the tenants were allowed to do, in *Stanley* v. *Perley*, 5 Greenl.,

369, under the general issue, in days of more rigid technicality in matters of pleading than the present.

An officer's deed of a debtor's supposed right of redemption gives neither title nor seizin to the purchaser, where it appears that no such right existed in the debtor, either on the record or in fact. It is true, that were the seizin of the demandant once established, the tenant here would be precluded from setting up Bickford's title, by his laches in not seasonably putting in a plea of special non-tenure. Pease's title, though confessedly superior to any that the demandant could have acquired by virtue of his attachment and sale of the equity, could not, *under these pleadings*, have precluded the plaintiff from having judgment *in this action against the present defendant*, if he had maintained his allegation of seizin. But the officer's deed purported to convey nothing but such right of redemption as Barker had at the date of the attachment on the original writ, and it turns out that he had *none* at that date, either real or apparent upon record.

The foundation of the demandant's title fails altogether. It is not because the tenant has a *better title*, but because the demandant has *none at all*, that he must fail. It was competent for the demandant, at the trial, if he had seen fit, or supposed that he could do so successfully, to contest the validity of the assignment to Bickford, and, if he could have shown that it was fraudulent and void as against creditors, his purchase of a valid subsisting equity in his debtor would have entitled him to judgment here. He declines that contest. The proof of title which he adduced must be considered as rebutted, and there must be

Judgment for the tenant.

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

STATE *versus* THOMAS O. GOOLD.

It is a reasonable regulation for a railroad corporation to fix rates of fare by a tariff posted on their stations, and to allow a uniform discount on these rates to those who purchase tickets before entering the cars.

A passenger, who has thus neglected to purchase a ticket, has no right to claim the discount, whether he had knowledge of the regulation or not; and, if he refuses to pay to the conductor the fare established by the tariff, the conductor is justified in compelling him to leave the train at a regular station.

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

INDICTMENT FOR ASSAULT AND BATTERY.

The defendant was a conductor on the Grand Trunk Railroad, and, while acting in that capacity, forcibly expelled a passenger from the train, which was the assault complained of.

Evidence, by the defence, showed that the company had established certain passenger rates, being the sums which were required to be paid, when payment of fares was made to the conductors in the cars; *that these rates were the regular rates;* were published in tariff tables, conspicuously posted in the stations of the company, and that the conductors were required, by the regulations of the company, to collect these rates of all persons, who paid their fares in the trains; but that, by the same regulations, a discount of ten cents was made from these rates as the rate for persons who purchased tickets at the ticket offices, before entering the trains, and that large painted sign-boards were placed conspicuously in the stations, on which were painted in large letters, a notice that such discount would be made.

The passenger, upon whom the alleged assault was made, entered the train, at a station where it was known to him that a ticket office was kept, and where a tariff table and sign-board were posted and placed, as above stated, without having purchased a ticket, and, before reaching the first or

second station after starting, was required by the defendant, who was in charge of the train as conductor, to pay his fare according to the rates established by the company to be paid in the cars, which he refused to do, but offered to the defendant the sum required at the ticket office. The defendant refused to receive it, and, upon the continued refusal of the passenger to pay the sum demanded, forcibly removed the passenger from the cars, at a regular station, where the cars were then stopping.

The presiding Judge instructed the jury, that if the officers of a railroad company, having a regulation requiring a larger sum to be paid for a passenger fare, when paid in the car, than when paid for a ticket at the ticket office, would protect themselves against liability for ejecting a passenger, who, being without a ticket, refused to pay the larger sum, it must appear in evidence that the passenger had knowledge of such regulation before he entered the train; that the defendant could not justify his conduct in this case, unless it was shown in evidence, to the satisfaction of the jury, that the regulation, under which the defendant acted, was made known to the passenger in question before he entered the train; that a railroad passenger has a right to presume that the amount to be required for his fare will be the same, whether paid at the ticket office or in the car, — the transportation of the passenger and the rate to be paid therefor being matter of contract.

He further instructed the jury, that a regulation, such as that adopted by this company, by which the larger rate was required to be paid in the cars, with a discount to those purchasing tickets at the office, was only another method to secure the payment of a higher rate of fare if paid in the cars, than when paid at the ticket office, and did not differ in substance from a regulation by which the lower sum should be required to be paid at the ticket office, with an additional sum when paid in the cars; that the difference in form was immaterial, and that, in either of such cases, if a passenger without knowledge of such regulation, entered a train, and

offered for his fare the sum required to be paid at the ticket office, a conductor would not be justified in ejecting him from the train, upon his refusal to pay the larger sum.

The jury found the defendant guilty, and he excepted.

Barnes, for the defendant.

Peters, Attorney General, contra.

KENT, J.—Railroad corporations have an undoubted right to fix and determine the rates of fare on their roads, within the limits specified in their charters or by existing laws. They have also an undoubted right to make reasonable regulations as to the time, place and mode of collecting the same from passengers. They may reasonably require payment before the arrival of the train at the station where the passenger is to leave the cars. We see no reason to question their right to require payment in advance, to be made at a convenient office, and at convenient times; certainly, where there is no positive interdict to entering the cars without a ticket, as in this case. There is neither hardship nor unfairness toward the passenger, who, ordinarily, can pay his fare and procure his ticket without trouble or delay, at the office. But, to the company, it is something more important than mere convenience that such regulations should be enforced. It is important in simplifying accounts. It is important to promote and secure safety, by allowing time to the conductor to attend to his proper duties on the train, and which would be often seriously interfered with if his time was taken up in collecting fares and exchanging money, and answering questions. It is highly important as a check against mistakes or fraud on the part of the conductors, and as a guard against imposition by those seeking a passage from one station to another without payment.

In the case at bar, no absolute rule of exclusion was established. It appears, from the statement of facts in evidence, that certain rates of fare were established by the company — that these rates were the regular rates, publish-

ed in the tariff tables, posted in the stations of the company. It was the rate thus established that the passenger in this case was requested to pay. But he says that he was not bound to pay the sum thus fixed, because, by the same rules and tariff, a discount of ten cents was made from the rates to those persons who purchased tickets at the office before entering the train, and that this, in fact, created two distinct and different rates for the same passage.

If this were so, we are not prepared to decide that it would be an unreasonable or illegal exercise of the power given to the corporation. Assuming that it is reasonable to require pre-payment and the production of a ticket, it would seem to be simply a relaxation of the rule, in favor of the passenger, to allow him to pass upon the payment of another rate, slightly advanced. If he neglected to avail himself of the opportunity offered to him to procure a ticket, at the lower rate, he can hardly complain that he is allowed to proceed in the train, on payment of the rate established for such cases, instead of being at once removed from the car.

In fact, however, in this case, but one rate was established, and that was the sum required in the cars. This was "the established fare," specified in our R. S., c. 51, § 47. A discount of ten cents was made on these rates, if a ticket was purchased before entering the train. What right had this passenger to claim this *discount* on the established rate? If he knew of the regulation, it was his carelessness or folly that led him to neglect this opportunity. If he did not know it, it was his misfortune. The company had done all that could reasonably be required of them, by posting the regulation conspicuously in the stations of the company. It would be an utterly impracticable rule to require that every passenger should be personally notified of its existence before entering the cars. Although it is not important in the view we take, yet one cannot help asking how this particular passenger persistently insisted on paying only "the sum required at the ticket office," if he did not know of the rule allowing the discount at the offices? But, if the

regulation was reasonable, and reasonable notice had been given of its existence, it is not necessary to prove actual knowledge of its existence on the part of the passenger before entering the cars. It was not a special and exceptional, but a general rule. If a passenger enters the car, without knowing anything of the rates of fare or of the rules in relation thereto, and without making any inquiries, he must be held to pay, as on an implied contract, according to the reasonable rates and rules of the company. He might as well claim exemption from the payment of *anything* for his passage, because he did not personally know that any rates, or what rates, were established, as to claim exemption from the rule which makes a distinction in rates, because he did not ascertain the fact before entering the train. The question is to be determined on the ground of reasonableness and power, and not on the ground of individual knowledge.

The conductor of a train is justified in compelling a passenger, who utterly refuses to pay his legal fare, to leave the car at a regular station. R. S., c. 51, § 47.

The principles before stated have been recognized and sanctioned in Vermont, in the case of *Stephen* v. *Smith*, 29 Verm., 160, and by the Court in New Hampshire, in the case of *Hilliard* v. *Goold*, 34 N. H., 230. See also Redfield on Railways, § 26; *Commonwealth* v. *Powers*, 7 Met., 596.

The decision of the questions involved in this case rest upon two general principles, well established, viz. — that it is the *duty* of the corporation to adopt such regulations as are required to secure the comfort and safety of passengers, and it is equally their *right* to adopt all reasonable rules for their own security and the orderly management of their business. The corporation is no more bound by the one than the passenger is by the other.

The rulings of the Judge were incorrect.

Exceptions sustained. New trial granted.

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

STATE OF MAINE *versus* BENJAMIN D. PECK *& als.*

A bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, and also that he has been induced upon the faith of such bond to act to his own prejudice.

ON EXCEPTIONS to the ruling of BARROWS, J., and on MOTION to set aside the verdict as being against evidence, by the defendants.

DEBT on a State Treasurer's bond. The case is fully stated in the opinion.

E. & F. Fox, for defendants.

The ruling does not recognize the legal effect of an escrow. There was never any delivery with the consent of the sureties. If delivered without such consent, the instrument was void. 1 Touchstone, (Am. Ed.,) c. 4, p. 57; Idem, p. 59; *Pawling* v. *The United States*, 4 Cranch, 222, is a case very similar to this.

See also *Duncan* v. *same*, 7 Peters, 448; *Johnson* v. *Baker*, 4 B. & Ald., 440; *Bibb* v. *Reed*, 3 Ala., 88; *U. S.* v. *Nelson*, 2 Brock., 64; *Haskins* v. *Lombard*, 16 Maine, 143; *Quarles* v. *The Gov.*, 10 Humph., (Tenn.,) 122; *Perry* v. *Patterson*, 5 Humph., 133; *Smith* v. *South Royalston Bank*, 32 Vermont, 341; *Jackson* v. *Sheldon*, 22 Maine, 570; *Rhodes* v. *School District in Gardiner*, 30 Maine, 112; *Carr* v. *Hoxie*, 5 Mason, 40.

The case is similar in principle to that of a conditional sale of personal property, in which case a *bona fide* purchaser, for value, and without notice, takes subject to the condition. *Coggill* v. *Hartford & New Haven R. R. Co.*, 3 Gray, 547.

J. & E. M. Rand, for defendants.

A surety may sign a bond *conditionally*, and, if condition is not complied with, the instrument is not *the deed* of the signer. *Johnson* v. *Baker*, 4 B. & A., 440; *Wheelwright* v. *Wheelwright*, 2 Mass., 452; *Fertig* v. *Bucher*, 3 Barr, 308.

Even if obligee obtains possession of it. *Haskins* v. *Lombard*, 16 Maine, 140; *Cutler* v. *Whittemore*, 10 Mass., 444.

Peters, *Attorney General*, and *Drummond*, for plaintiff.

BARROWS, J.—Benjamin D. Peck, duly elected Treasurer of State for the year 1858, before entering upon the duties of his office, in conformity with constitutional and statutory provisions, presented to the Legislature the bond now in suit as his official bond.

It was, when thus presented, upon its face, a perfect instrument, drawn according to the requirements of law, and apparently duly executed by all whose names appear therein. It purported to be signed, sealed and delivered by the several obligors, and no question is now made as to the genuineness of the several signatures. Peck, the principal, delivered it, without stipulation, reservation or condition, to the committee of the Legislature. There was no suggestion, from any quarter, that the instrument was not in very deed what it purported to be,—no indication of incompleteness, to put the Legislature upon inquiry as to the manner of its execution. The bond was found satisfactory, duly approved and filed, and, upon the faith of it, Peck became Treasurer of State. The intelligent and wealthy gentlemen who had *signed* this instrument as Peck's sureties made no inquiries as to the disposition which had been made of it, and knew that Peck was exercising the functions of the office throughout the year. He proved unfaithful to his trust, and they now claim to be exonerated from liability as his sureties, on two alleged grounds. 1. That there were no seals upon the instrument when they signed it, and they affixed none, and gave no authority to any person to place seals up-

on it. 2. That some of them signed and delivered the bond only upon condition that certain other gentlemen, who had been co-sureties with them for Peck the previous year, should also execute this bond.

The verdict of the jury being against them, they present the case to this Court upon a motion to set aside the verdict as against law and evidence, and also upon exceptions to the instructions given by the Judge presiding at the trial.

I. As to the alleged want of the seals. The jury settled that question against the defendants, under instructions of which they make no complaint. Is the verdict supported by the evidence on this point? While the oral testimony preponderates in favor of the defendants' position, we cannot shut our eyes to the fact that marks evidently left upon and against these seals by the pens of the signers, in the act of affixing their signatures, afford evidence falling very little short of absolute demonstration, that there were seals upon the bond when it was signed by the defendants. Such a mark was left by the pen of him who was confessedly the first to subscribe his name to the instrument. The jury were fully warranted in finding against the testimony of those defendants who were examined as witnesses, and in conformity with the declaration to which they had subscribed, — "*sealed with our seals*," — that the bond *was* duly sealed.

In saying this, we do not mean to be understood as expressing the belief that these sureties gave wilfully false testimony in this matter, but they were palpably mistaken as to the fact. By one of those fantastic tricks which self-interest plays with memory, this bond was probably confounded in their minds with another not here in suit. The motion for a new trial cannot be sustained, for the finding of the jury was strictly in accordance with law and evidence unless the instruction excepted to is found to be erroneous.

II. That instruction relates to the testimony by which it is claimed that the defendants have shown a conditional delivery.

Upon this point, John B. Cummings, one of the sureties, testified that he signed the bond at his house, where it was brought by Allen Haines, another of the sureties, and in presence of his daughter, (who affixed her name as a subscribing witness in the ordinary form,) and of said Haines. He further testifies: — "At the time I signed I said to Haines that I would sign it only upon the condition that all those persons who were on Peck's first bond should put their names on this one. I mentioned their names, St. J. Smith, Spring, &c. When I handed the paper to Mr. Haines, I said to him, this goes for nothing unless those names are on; make no delivery of this except those names are all on. I did not know until the defalcation that the others had not signed; don't recollect whether I expected paper to be brought back to me; *supposed others would see to that matter.*"

Upon cross-examination, he says, "I can't say that I read the paper, only glanced at it. I knew that I was signing as security for Peck as Treasurer for 1858. I understood that, if those others signed, it was to be delivered as Peck's bond. Mr. Haines asked me if I would sign as surety for Peck when he first came in. I never called on Peck for any security, and never said anything to him about the bond. Haines told me that the other names were to go on to the paper. I think I wrote my name in the body of the instrument. I did not know whether the instrument was accepted by the State as a bond of Peck. Never heard anything about it. I did not expect the bond to be delivered till the others signed it."

Some of the other defendants gave testimony indicating that they signed with the expectation and understanding *among themselves*, that other names were to be procured, but the testimony of Cummings, above recited, approaches more closely than any other to the point of a conditional delivery, and the presiding Judge instructed the jury, that a mere expectation that other persons would sign the paper was not sufficient to make the obligation a conditional one, and that the testimony of Cummings, as to his acts and declarations,

at the time he signed it and handed it to Mr. Haines, if true, and believed by the jury, would not clear him from liability, although the other names were not put on, *if he allowed the paper to go beyond his control into the possession of the State authorities.*.

It should be borne in mind that this conversation of Cummings was with a co-surety and co-defendant, and, so far as appears, never communicated even to Peck, the principal in the bond. Not a hint that any such expectation existed, much less that any such condition was attempted to be imposed, reached the ears of the State government or any of their agents. Unlike some other bonds, where a similar condition annexed to the delivery has been held to be effectual, this instrument was apparently complete and executed by all who appeared upon the face of it ever to have been expected to become parties to it.

Every one must allow that it would be a monstrous violation of law, justice and good faith, to permit one party to a contract to introduce into it conditions, upon the happening of which alone he will be bound, that are not made known to the other party. Is it any less so to permit a man to deny his own solemn declaration that he has become a party to it, when that declaration has been communicated to the other party, and acted upon by him to his prejudice, under circumstances not calculated to excite even a suspicion that such a denial would ever be attempted? That the estoppel imposed by law in a case like the present would not apply in a case where there was anything upon the face of the paper, or in the circumstances attending the reception of it by the obligee or his agents, to put him upon inquiry, nor where the obligee has not been induced to act to his prejudice by the imprudent act of the obligor, may well be conceded, and it is believed that no well considered case has ever gone further. If the doctrine contended for by the defendants here can prevail, it is not easy to perceive why sureties who may hereafter find themselves in a similar unfortunate position may not with equal propriety come into Court and set

up (and testify to) some purely mental reservation which should exclude the idea of an intention on their part to make an absolute delivery; for it is certainly true that the question of delivery depends upon an act done and the *intent* with which it is done. *Rhodes* v. *School District in Gardiner*, 30 Maine, 112, and cases there cited.

But of paramount importance is the question — Under what circumstances is the obligor or grantor at liberty to dispute the intent which is implied by the act? The estoppel does not apply in the case of an instrument the execution of which is upon its face incomplete. The case of *Pawling* v. *The United States*, cited and relied upon in defence here, was error to the District Court for the District of Kentucky, in an action of debt upon an official bond given by *Ballinger* as collector, and signed and sealed by Pawling and others as his sureties, who *pleaded* that they delivered the same as an escrow to Ballinger, to be safely kept upon condition that, if Simon Ingleman and William Patton, *named on the face of the bond*, should execute the same *as co-sureties*, then the bond should be delivered to James Morrison, supervisor, on behalf of the United States, as their deed, and not otherwise, and that the same never was executed by Ingleman and Patton, yet Ballinger delivered it to the supervisor, *and so not their deed*. The testimony fully supported this plea, and showed that the names of Ingleman and Patton were inserted in the body of the bond as obligors by one of the defendants, and that the supervisor, who received the bond, suggested to the principal that those who had already signed were sufficient, though the principal appeared anxious to have more. Under such circumstances, and when the defendants had apparently been deprived of the co-sureties for whom they had stipulated by the suggestion of the government agent, it is not surprising that nobody claimed or held that the defendants in that case were estopped from availing themselves of the condition annexed to their delivery.

In *Duncan* v. *The United States*, 7 Peters, 435, *the bond was drawn in the names of three*, as sureties for the fourth,

but was executed by the principal and two sureties only. The Court recognizes as "a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen." But counsel had no occasion to raise and the Court no occasion to consider the question of estoppel, as affected by the apparent incompleteness of the instrument, for the heirs of the surety were held liable, for want of proof of an express condition annexed to the delivery. In that case there were no subscribing witnesses, and, of course, the distinct, unequivocal written declaration, made in the presence and by the consent of the obligors, and communicated to the obligee upon the reception of the paper, (which is found in the case at bar,) that the instrument was "signed, sealed and *delivered*" by the obligors, as their deed, was wanting. But the Court held that the acknowledgment of the bond by two of the sureties, "and its delivery to the government, would seem to rebut the inference drawn against its validity, from the simple fact of its not having been signed by" the other surety. "There is, therefore, nothing upon the face of the record which would go to destroy the validity of this bond," say the Court. The case of *Wells* v. *Dill*, 1 Martin, 592, where the defendant relied upon "the want of the signature of another person to the instrument, whose name is mentioned in the body of it as a co-surety," and where the Louisiana Court held "the contract incomplete until all the parties contemplated to join in its execution affix their names to it," and that "the law *presumed* that the party signing did so upon the condition that the other obligors named in the instrument should sign it," being cited, the Court remarked that *under the civil law* the principle is correctly stated as above by the Louisiana Court, but, as has been seen, *under the common law*, they hold a different doctrine, and decide that, even when the names of others besides the signers are inserted as co-sureties in the

body of the bond, there is nothing *upon the face of the record* which would go to destroy the validity of the bond; and that is *all* that is decided, upon that branch of the case. It is not perceived that the decision affects favorably the position taken by the defence in the case at bar. For, *without it*, we should hold it to be unquestionably correct that, where one surety has signed a bond on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen, *unless* the obligor by his acts and declarations has estopped himself under the circumstances of the case from asserting a conditional delivery; and the sureties were held liable in Duncan's case without resorting to an estoppel. *Scott & al.* v. *Whipple & al.*, decided some years before by the Supreme Court of this State, 5 Maine, 336, is identical in principle and similar in result.

In *Cutler* v. *Whittemore*, 10 Mass., 442, the bond was written as if to be executed by three, but was executed by only two. It was held valid and effectual against the two who executed it, as in the two cases last adverted to, with the remark by the Court that, "if there had been any agreement or condition at the time that it should not be delivered as their deed, unless the third person named as obligee should also execute it, this would show that it was only delivered as an escrow." But this plainly does not interfere with the principle that conditions imposed by a party to a contract, to be effectual against the other party who has been induced by the contract to alter his condition to his prejudice, must have been in some way brought to his notice.

Haskins v. *Lombard*, 16 Maine, 140, enunciates a rule that is strictly correct, in holding that an obligor in a bond, *so written that it seems to have been contemplated by the parties* that it should be signed by several, may annex an effectual condition to his act of signing and sealing that it shall not be binding upon him unless executed by the other obligor named, and this appears to be the entire length to which any well considered case has gone. Unfortunately for these

defendants, the bond in suit was not so written, and it never seems to have been "contemplated by *the parties*," (which term includes the obligees,) or their agents, that the bond was to be executed by any but those who did in fact execute it, nor had the obligees or their agents any reason to suspect the existence of any such reservation or condition as that which the defendants now claim to set up.

The case of *Fertig* v. *Bucher*, 3 Barr, 308, goes no further than simply *this*, — if a party, executing a bond, expressly stipulates that it shall not be delivered up until twelve names are obtained to it, *and the agent of the other party so promises*, the bond is in the hands of the agent but in the nature of an escrow, and, until the condition be performed, it cannot be legally delivered, and so cannot be the deed of the party making the stipulation. It appeared that one *Boas* undertook with a list of names to procure a bond to indemnify Fertig and others, (the plaintiffs,) for signing as sureties of a sheriff, and got the defendant's signature under the above circumstances. Others refused to sign — *Boas* kept the bond in his desk for several years without saying anything to the plaintiffs about it, but finally delivered it to them. The Court very properly held the condition thus made with the plaintiff's agent effectual.

Wheelwright v. *Wheelwright*, 2 Mass., 452, refers approvingly to the rigid technicality of ancient law as laid down in the Touchstone, as follows: — "If a grantor deliver any writing *as his deed* to a third person to be delivered over by him to the grantee *on some future event*, it is the grantor's deed presently, and the third person is a trustee of it for the grantee, and, if the grantee obtain the writing from the trustee *before the event happen*, it is the deed of the grantor, and he cannot avoid it by a plea of *non est factum*, &c. But, if the grantor make a writing and seal it and deliver it to a third person *as his writing or escrow*," the case is different. The Touchstone carefully propounds two cautions to be heeded where delivery as an escrow is intended, the first of which is, that the form of words used

in such delivery must be apt and proper. "The words, therefore, that are used in the delivery, *must be after this manner*. I deliver this to you *as an escrow* to deliver to the party as my deed upon condition," &c. "For if, when I deliver the deed to the stranger, I shall use these or the like words, — I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions, * * * the deed doth take effect presently, and the party is not bound to perform any of the conditions." It is manifest that, if this case were to be decided upon learning so technical, the defendants would be in sorry plight upon their own showing, for they can only claim upon the testimony that Cummings, without any such apt form of words as is prescribed in the Touchstone, handed over to Haines a bond *attested in the usual form as his deed*, with a simple caution not to deliver it to the obligee without performance of the condition, — the precise case in which, according to the Touchstone, the deed doth take effect presently and the party is not bound to perform any of the conditions.

But it is needless to remark upon this, for a doctrine so technical was denied in *Johnson* v. *Baker*, 4 B. & A., 440, and by our own Court, in *Jackson* v. *Sheldon*, 22 Maine, 570, where it is rightly held that it is not necessary that there should be an express declaration that an instrument is delivered as an escrow to make it such. Both the last named cases are also cited in defence, and the attempt to bring the case of *Wheelwright* v. *Wheelwright* to bear upon the case at bar, *through them*, is somewhat like "putting new wine into old bottles." Neither of the three cases has any bearing upon the principles of estoppel, which we believe must be decisive of the present case.

Johnson v. *Baker*, which most nearly resembles it, was *this*. Before the execution of a composition deed, it was agreed in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety at the same interview, afterwards executed the deed in the ordinary way, and the deed was

then delivered to one of the creditors *in order that he might get it executed by the rest.* It was held, and rightly held, that this was to be considered a delivery of the deed as an escrow, and thus, all the creditors not having executed it, the surety (defendant) was not bound. Plaintiff was one of the creditors *and not present at the conversation.* The essential element that was wanting to estop the defendant in that case from treating the delivery as conditional and availing himself of the stipulation accordingly, was — that the creditor apparently was not induced to do any act prejudicial to himself in the premises. He only failed to obtain the additional security for a preëxisting debt to which he would have been entitled had the condition been performed. The surety was entirely free to rely upon the condition annexed to his act in the accompanying conversation.

Perry v. *Patterson*, 5 Humph., 133, which is claimed by counsel as identical in principle with the case at bar, seems, as it is given in the Digest, (the volume of Reports is not accessible,) rather to be identical with *Johnson* v. *Baker*, and presents the same reason why no estoppel was raised.

In *Rhodes* v. *School District in Gardiner*, the condition was made with the agent of the district, and by him communicated to a meeting of the district.

So in *Quarles* v. *The Governor*, 10 Humph., 122, the declaration that the surety would not be bound, unless others were obtained, was made to the clerk, the agent of the government.

In *Millett* v. *Parker*, 2 Metcalf's (Kentucky) Reports, 608, (1859,) Millett, (original defendant,) offered the testimony of his co-defendant Vansant, that the instrument relied upon by Parker was signed by Millett, upon the express understanding and condition that R. G. Beverly was also to sign it, and that, unless he did sign it, the witness was not to deliver it to Parker nor was it to be binding on Millett, — that he did afterwards deliver it to Parker without the knowledge or consent of Millett, and without having obtained the signature of Beverly; but he did not state

that Parker was apprised, or had any information of the agreement between Millett and the witness.

The testimony was rejected, and, when the case was presented on appeal, the Court, (after reviewing in an elaborate opinion by SIMPSON, C. J., the authorities copiously cited on both sides in argument,) say they are "of the opinion that the testimony which was rejected was insufficient to support the defence relied upon, and, if it had been admitted, still that a judgment should have been rendered against the appellant. He alleged in his answer that Parker, to whom the covenant was executed, had notice of the promise which was made by Vansant, that the writing should not be delivered unless it was signed by Beverly; but there was no testimony whatever tending to prove that he had any information, &c. If he had been apprised of the existence of that agreement, then he would have acted in bad faith to have accepted the covenant when it was offered to him by the principal obligor; but, being ignorant that any such agreement had been made by the obligors, he had a right to presume that the instrument had been prepared for his acceptance, and that the obligor who had it in his possession was authorized to deliver it to him. *Wherefore* the judgment is affirmed." This case is direct to the point stated in the syllabus as follows:—"One who signs a covenant as surety upon the condition and agreement, between him and his principal, that it is not to be binding upon him or delivered to the covenantee unless another person should also sign it as surety, is bound thereby, although the principal to whom he entrusted it deliver it to the covenantee without a compliance with such condition, of which, and its breach, the latter had no notice." It is true that in New York a different doctrine has been held.

In the case of *The People* v. *Bostwick*, 43 Barbour's Sup. Ct. Reports, 9, the decision in *Millett* v. *Parker*, is impugned, and we, in our turn, must be permitted to question the authority of the New York case, in which we find quoted indiscriminately, to support a decision that overrides the

whole doctrine of estoppels *in pais*, cases where the instrument was on its face incomplete, such as *Pawling* v. *The United States*, (*ubi supra*,) *Fletcher* v. *Austin*, 11 Ver., 447; *State Bank at Trenton* v. *Evans*, 3 Green, (N. J.,) 155, with cases where the obligee had done nothing to his own prejudice upon the faith of the instrument, such as *Johnson* v. *Baker*, (*ubi supra*,) *Leaf & als.* v. *Gibbs*, 4 Car. & Payne, 464, and cases where "previous to the obligor's signing there was an agreement *between the parties* to an instrument" that it should not be delivered till all had signed, like *Black* v. *Lamb*, 1 Beasley's (N. J.,) Reports, 108.

We have already had occasion to advert to the several reasons why, *in such cases*, no estoppel would attach.

The case does not seem to be materially strengthened by the opinions given by the learned Judges in the Court of Appeals where the decision was affirmed. 5 Tiffany, 445. They refer to the same cases, with the addition of *Bronson* v. *Noyes*, 7 Wendell, 188, where a bond was given to the sheriff on an arrest. "The sheriff said to the party signing, 'sign the bond and he will get some other person to sign with you or get other bail in the morning,'" and the Court thereupon held that "*if it was the agreement of the parties*, at the time it was put into the hands of the officer, that it was not to be delivered to take effect until additional bail was procured * * * the bond would be inoperative and have no legal existence." It is superfluous to say that we have no occasion to question the correctness of the decision in *Bronson* v. *Noyes*.

It is urged that the case at bar is similar in principle to that of a conditional sale of personal property, through which even a *bona fide* purchaser, for value, from the conditional vendee, can obtain no title as against the conditional vendor, though he may have had no notice of the condition, and the case of *Coggill* v. *The Hartford & New Haven R. R.*, 3 Gray, 547, is cited. It seems to us that there is a marked distinction. The conditional vendee is not the agent

of his vendor to make sale, upon any terms whatever. It is not *with him* a question of conformity to secret instructions limiting apparent authority. The naked possession of a chattel, which is all that has been entrusted to him by his vendor, carries with it, under ordinary circumstances, no authority to sell, either real or apparent. That possession may be the possession of a lessee or a borrower, and the case of a sale of personal property may well be left upon the rule which requires the purchaser to see to it, at his own proper peril, that his vendor has a good title to that which he undertakes to sell. But Cummings entrusted to his co-obligor a bond, perfect in form, which he himself had subscribed and *caused to be attested as delivered*, and thereby gave him an apparent authority to dispose of it according to the natural course of proceeding in such cases. There is no substantial analogy between the possession of personal property and the possession of such an instrument as this. What could the most cautious and prudent business man, finding this bond in the possession of Haines, and having no knowledge of the private conversation between Cummings and him, infer was to be done with it except that which actually was done; to wit: to transmit it to Peck, the principal, to be by him presented to the Legislature and filed as a valid bond for the security of the State? It is the ordinary course of business in such cases. The bond passes from hand to hand among the obligors, one after another subscribing it, and *authorizing the attestation of it as delivered by him*, and this solemn declaration is finally communicated to the obligee, when he receives the bond from the principal; and when the obligee, in good faith, accepting an instrument perfect upon its face and relying upon these acts of the obligors, has been induced thereby to act to his prejudice upon the faith of the security, common justice forbids the obligors to allege any secret arrangement among themselves, to defeat the effect of their acts, as rigidly as it would exclude evidence of a reservation merely mental for the same purpose. Instead of resembling the case of a conditional

sale of personal property, the case resembles rather the act of him who sends his goods to an auction room. It is not to be supposed that they were sent there merely for safe keeping, and, whatever the secret instructions of the owner may have been, the purchaser will be safe. For, if the principal clothe his agent with the apparent right of disposing of property in the ordinary course of trade, it will be presumed that he is really invested with the requisite authority. *Pickering* v. *Bush & al.;* 15 East, 38.

Chancellor KENT says, "the principal is bound by the acts of his agent, if he clothe him with powers calculated to induce innocent third persons to believe the agent had due authority to act in the given case." He further says, and it is believed that it embodies the correct rule, "whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power, though, *if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power.* What the power indicated by the possession and control of an instrument thus attested, and by the ordinary course of business in such cases, was, in *this* instance, we have already seen.

The case falls within the principle of *The Passumpsic Bank* v. *Goss*, 31 Vt., 315, or, if there is any difference, this is the stronger, for Peck, the principal, who finally handed the bond over to the State authorities, does not appear to have had any knowledge that other sureties were expected or desired.

It falls within the principle of that great array of cases, from *Hern* v. *Nichols*, 1 Salk., 289, and *Lickbarrow* v. *Mason*, 2 T. R., 63, 70, hitherto — establishing and maintaining the doctrine that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

It is believed that the doctrine contended for in the defence here would be mischievous beyond endurance. Take for example that very numerous class of securities, — probate

bonds, — varying in amount as they do from less than one hundred dollars to many thousands, seldom executed in the presence of both parties, rarely becoming the subjects of litigation till after such a lapse of time that the details of the transaction have faded and become obscure in the memories of the actors; what can be done to insure their validity, if the obligors are at liberty under the stimulus of impending loss to do away with their declaration of absolute delivery, (which they have caused to be subscribed in their own presence and allowed to be presented to the Probate Judge,) by some ill-remembered conversation about other proposed sureties whom they now claim as indispensable parties, no hint of which conversation has ever reached the officer who receives and approves the bond?

The simplest maxims of good faith forbid the effect which the defendants propose to give to their conversation among themselves. *In traditionibus chartarum non quod dictum, sed quod factum est, inspicitur.*

Upon a careful review of the cases cited in argument, and such others as have fallen under our notice, we feel bound to say that the position of the defendants is not maintained, either upon principle or by any sound authority. If there are cases that militate against the views here expressed, we are satisfied that they savor more of the growing looseness of commercial morality than of adherence to wholesome legal principles.

Motion and exceptions overruled.

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

William H. Wood *& al. versus* William Watson.

If the notice to the indorser of the dishonor of a bill of exchange is such that he must know what bill is referred to, it is sufficient to charge him.

Mercantile usage in this State has established the damages on a dishonored bill of exchange on London at ten per cent.

The Court cannot vary this rule, in a monetary crisis, on account of a depreciation of the currency of the country. (Davis, Walton and Barrows, JJ., dissenting.)

On Agreed Statement.

Assumpsit against the defendant, the indorser of a bill of exchange for thirty-one pounds sterling, drawn by Gomes & Filhos, at Rio Janeiro, on the Union Bank of London, 2 Princes street, Mansion House, London, payable to the order of the defendant, and indorsed by him to the plaintiffs.

The only questions raised were in relation to the form of the notices and the damages.

The following is a copy of the bill: —

"No. 3543. (Gomes & Filhos, Rio de Janeiro.) Rio de Janeiro, 2d August, 1864.

"For £31.0.0d. At sight, pay this first of Exchange, 2d and 3d not paid, to the order of David Watson, Esq., the sum of thirty-one pounds sterling.

2096.

"Value of same,

"which place to account as advised by ———. To the Union Bank of London, 2 Princes street, Mansion House.

"Gomes & Filhos.

(00 270)

"Indorsed. — David Watson, jr., Wm. H. Wood & Son, M. Bolles & Co., pay to the order of B. S. Cohen, Thomas Groom & Co., B. S. Cohen."

The copy in the protest of the notary was as follows: —

"Rio de Janerio, 2d August, 1864. For £31.0.0d.

"At sight, pay this first of Exchange, (2d and 3d not paid,) to the order of David Watson, Esq., the sum of thirty-one pounds sterling. Value of same, which place to account as advised by "Gomes & Filhos.

"To the Union Bank of London, 2 Princes street, Mansion House, London.

"Indorsed. — David Watson, jr., Wm. H. Wood & Son, M. Bolley & Co., pay to the order of B. S. Cohen, Thomas Groom & Co., B. S. Cohen."

The plaintiffs sent the following notices to the defendant in the same envelope: —

"STATE OF MAINE.

"Cumberland, ss. "Portland, Nov. 18, 1864.

"To David Watson, Sir: ——— & Filhos' bill on Union Bank of London, for thirty-one pounds sterling, dated Rio de Janeiro, 2d August, 1864, payable at sight, in favor of your order, and indorsed by you, and payment having been duly demanded at said bank in London, and refused, as per protest returned, is *protested* for non-payment thereof.

"The holder requires of you payment thereof.

"Done at the request of W. H. Wood & Son, Portland.

"Yours, &c.,

"H. Ilsley, *Notary Public.*"

"Portland, Nov. 18, 1864.

"David Watson, Esq., Dear sir: — The bill on London we bought of you for £31, drawn by Gomes & *Phelos* on Union Bank, London, dated Aug. 2, 1864, Rio de Janeiro, has been returned, protested, the drawers having failed. Please come in and take it up.

"Yours truly,

"W. H. Wood & Son."

To which the defendant replied as follows: —

"Limerick, Nov. 21, 1864.

"W. H. Wood & Son, Gentlemen: — I received your note to-day. I have been sick, shall not be able to come in for some days to come. As soon as I am able, will come in and see you about the matter.

"Yours, &c.,

"David Watson."

Howard & Cleaves, for defendant.

The notarial certificate must contain a *copy* of the bill.

Edwards on Bills, 694; Chitty on Bills, 455; Story on Bills, 276; *Halliday* v. *McDougall*, 20 Wend., 81; *Bank of Rochester* v. *Gray*, 2 Hill, 227.

Evans & Putnam, for plaintiff.

APPLETON, C. J.—The protest of the notary shows a demand upon the drawee and notice to the indorsers. The defendant could not have been misled by the notice received. He must have understood to what bill reference was had. This is all the law requires.

The more important question relates to the damages to which the plaintiffs may be entitled.

Damages given on foreign bills of exchange, for non-payment, are as much part of the contract as interest. *Bank of U. S.* v. *U. S.*, 2 How., (U. S.,) 711, 737. The per centage allowed by statute on the protest of a foreign bill is a commutation for interest, damage and reëxchange. It is a statutory liquidation of damages, by which the parties are to be governed. *Lloyd* v. *McGarr*, 3 Barr, 482.

Now, mercantile usage has established the damages on bills on London, in case of dishonor, in Massachusetts, as determined in *Grimshaw* v. *Bender*, 6 Mass., 157, and, in this State, in *Snow* v. *Goodrich*, 14 Maine, 235, at ten per cent., instead of reëxchange. This usage forms a part of the law of the State. It had been of so long continuance, that, in 1809, when the judgment of the Court in *Grimshaw* v. *Bender*, was pronounced, Mr. Ch. Justice PARSONS said that its origin could not be ascertained. It must, therefore, be deemed a part of the law merchant, and as obligatory as any portion of the common law, until it shall be modified or changed by the Legislature.

Whether the rule of damages is established by statute or by a long continued usage, having the force of law, it is to be deemed a part of the contract of indorsement. The rule referred to, not having been altered by the Legislature, must be regarded as remaining in full force. It is not for the Court to change the law, whenever a monetary crisis occurs.

The rule may operate hardly in some instances, but it is for the party to obviate this by a special contract, fixing the damages, in case of dishonor, at a specified rate, or for the Legislature to establish a new rule which in their judgment shall be more equitable. It would be an act of legislation for us to intervene by changing the existing law on the subject. *Defendant defaulted.*

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

DAVIS, J., (dissenting.)—We are satisfied that there is no such variance between the bill of exchange in suit, and the notarial protest, as to render the latter inadmissible in evidence, or insufficient to prove the demand at the place of payment, and notice to the indorsers. It could not have misled them. They must have known from its tenor what bill it was which had been dishonored; and the law requires nothing more. *Dennison* v. *Stewart*, 17 How. U. S., 606.

The controversy in regard to the rule of damages presents a more difficult question.

By the general law merchant, the holder of a protested foreign bill may draw at the place of payment upon the maker, or indorser, for an amount, at the current rate of exchange, sufficient to raise a sum equal to what is due upon the unpaid bill, with the expenses of protest. Or he may recover that amount by a suit against the maker, or the indorser.

But, by the usage in this State, derived from Massachusetts, and which has prevailed so long as to become a local law merchant, the holder of such a bill can recover only the amount due upon it, with ten per cent. damages, and the interest thereon. *Snow* v. *Goodrich*, 14 Maine, 235.

This rule was adopted by merchants, for their convenience, to avoid the difficulties and controversies arising from the application of the law merchant to the fluctuations in the rates of exchange. It has been in force so long that we

should not feel at liberty to disregard it merely on account of such fluctuations, however great. To do so would be assuming the power to change the rule whenever, in our judgment, it will work injustice, and this without any proof that the usage has in fact been changed. If the law merchant was thus subject to the mere discretion of the Courts, there would no longer be any rule; and greater injustice would be liable to follow than can result from adhering to the rule during a temporary monetary crisis. We must therefore regard the rule as still subsisting, with the exception which we will state, until changed by the Legislature, or by an actual change of usage among merchants, by common consent, or agreement.

The exception referred to is the change of the law by which the holder of such a bill could require payment from the maker, or the indorser, *in coin*. This alone has a standard value, approximating to uniformity throughout the mercantile world. If the holder of the bill can exact payment in coin, as always has been the case under the rule recognized in this State, the ten per cent. additional will generally cover the damages caused by the non-payment. But if he may be compelled to take his pay in the paper currency of the country where the maker or indorser lives, that, when converted into funds at the place where the bill is payable, may fall far below the amount originally due. We therefore think that the law by which the holder could compel the maker or the indorser, residing here, to pay the amount in gold or silver coin, was an important and essential element of the rule, constituting a part of it. It was the basis of the usage, without which it never would have been adopted. And when this right, which was so essential a part of the rule, has been abrogated by statute, temporarily it is to be presumed, the rule itself must be regarded as abolished or suspended. There can no longer be any presumption that merchants make their contracts with reference to it, or with the understanding that their rights and liabilities are to be governed by it.

By the Act of Congress of July 17, 1862, and by subsequent Acts, it is provided that United States' notes "shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports," &c. 12 U. S. Statutes. Assuming the constitutionality of this statute, which is not questioned in this case, the holder of a foreign protested bill of exchange can now compel an indorser residing here to pay him only in our national currency. We are therefore of the opinion that the rule which prevailed when nothing but *coin* was a legal tender in payment, and which must have been based upon that right, cannot be regarded as in force. Judgment should therefore be rendered for the plaintiffs, and the damages assessed according to the rule of the general law merchant in such cases.

WALTON and BARROWS, JJ., concurred.

STATE OF MAINE *versus* NEAL DOW.

The discharge of a State Treasurer's bond is *prima facie* a discharge of all claims against the Treasurer, for which he or his sureties were liable on his bond.

The Court will not take judicial notice of the report to the Legislature of the committee appointed, by the Resolve of March 20, 1860, to settle with the sureties of the then late State Treasurer.

ON REPORT by BARROWS, J., presiding.

ASSUMPSIT for money had and received.

The facts, so far as they affect the decision of the case, are stated in the opinion.

Drummond, for the plaintiff.

The discharge of the official bond does not affect this case. The defendant's counsel barely suggests the point. He does not rely on it. But the report of the committee to the Leg-

islature expressly negatives the settlement of this claim. That report is a public document of which the Court will take judicial notice. The committee were appointed by a Resolve of the Legislature, approved by the Governor. Their report was made to the Legislature, being transmitted by the Governor in a special message. Of such public documents, the Court is bound to take notice.

[His argument upon the other questions are omitted.]

E. & F. Fox, for the defendant.

APPLETON, C. J.—The claim of the State, briefly stated, is as follows:—Benjamin D. Peck, Treasurer of the State for 1859, loaned a large sum of money belonging to the State, to the defendant, without authority and against law. It is admitted that a part of the money so loaned has been paid. The plaintiff claims that there is a balance of three thousand dollars still remaining due, which is sought to be recovered in this action.

In defence, it is shown that the defendant indorsed a note of Peck for the sum of three thousand dollars, which was discounted at the Market Bank and the proceeds thereof were passed to the credit of the State, on the books of the bank, by the direction of said Peck. It further appears, that it was understood, that, if Dow paid the note thus discounted, the amount so paid was to be in payment of the money illegally borrowed of Peck. The note in question was paid by the defendant before its maturity. These facts would seem to be an equitable discharge of the plaintiffs' claim to the extent of the discount, leaving a balance of fifty-six dollars only as due.

Whether the claim of the State has been legally discharged to the extent above specified, it is not important now to determine, inasmuch as we think, upon other grounds, the defence is made out.

The loan to the defendant was illegal. It was covered by the bond given by the Treasurer of the State. The bondsmen of the Treasurer, of whom the defendant was

one, would be liable to the State for this illegal loan of the Treasurer.

On April 24, 1860, a committee of the Legislature duly authorized, discharged the sureties on the bond of 1859.

The discharge thus given is as follows: — "By virtue of authority vested in us as commissioners, under Resolve, March 20, 1860, we, the undersigned, hereby discharge and release *the sureties on the bond from all further liability to the State on said bond*, in consideration of said sureties paying to the State the sum of thirty-seven thousand dollars, according to the terms and stipulations agreed upon as the basis of adjustment.

"Witness our hands and seals this 24th April, A. D. 1860.

"Signed and sealed in presence of E. P. Chase.

"J. G. Blaine, [L. S.]
"Geo. K. Jewett, [L. S.]
"Frederick Robie, [L. S.]
"Jas. M. Stone, [L. S.]
"Rowland Fisher, [L. S.]
"Joseph Porter, [L. S.]
"Geo. Comstock, [L. S.]"

By this, *prima facie*, the sureties were released and discharged from all their liabilities to the State by reason of their having signed the bond given by Peck as Treasurer. They were liable for his official misfeasance in loaning the money of the State to the defendant. Thirty-seven thousand dollars was paid in discharge of the liability of the defendant and others to the State on account of Peck's defaults. The presumption would be that all liabilities were included in the adjustment. It is for the State, if it is otherwise, to show it. No evidence to that effect has been offered. The report of the committee showing the terms and stipulations of the adjustment are not made part of the case. What they were, the parties have not deemed it important that we should know. The discharge is all that is before us. We think the liability in question is one for which the bondsmen were responsible to the State, and from

which they have been discharged upon payment of a large sum. If the release is effectual as to one surety, it is so as to all. If it embraces one instance of defalcation, *prima facie* it does all. The burthen was on the State to show that the claim in controversy was not included in the adjustment. This it has entirely failed to do.

Judgment for the defendant.

KENT, WALTON, DANFORTH, BARROWS and TAPLEY, JJ., concurred.

CITY OF BATH, *in Equity*, *versus* GILBERT MILLER *& als.*

In replevin, a judgment for return is a direct and conclusive adjudication that the defendants' right of possession is superior to the plaintiffs'.

The lien provided for in § 11, c. 450 of the Special Laws of 1860, took effect at the time the liability was incurred, and could not include property not then owned by the company.

Where a railroad company, by virtue of a special Act of the Legislature, mortgaged to the plaintiffs not only all of the property then owned by both the new and the old portions of the road; — *Held*, that wood, subsequently purchased with the earnings and for the use of the whole road, would not pass by said mortgage, and is attachable.

Attaching creditors would hold such wood as against any lien of the plaintiffs, claimed by a subsequent taking possession under § 6, c. 450, of the Special Laws of 1860.

If the mortgagee of wood, attached as the property of the mortgager, replevy the same from the attaching officer, and permit it to go back into the possession of the mortgager, who burnt it with the knowledge and consent of said mortgagee; the mortgagee thereby waives all lien held by virtue of the mortgage.

BILL IN EQUITY.

The bill alleges that, before March 17, 1860, the Androscoggin Railroad Co. had constructed and operated their road from Farmington, in Franklin county, to Leeds, in Androscoggin county; that, on said 17th March, said company had been authorized by an Act of the Legislature to extend its road from Leeds to Brunswick; that said company were

deeply in debt, had mortgaged all their property, and were wholly unable, of their own means, to construct the proposed extension; that said proposed extension, though of great public importance, was likely to fail for want of means; that, with a view to effect the purpose aforesaid, the complainants, by said Act of the Legislature, were authorized to loan its credit to said company, to aid in the construction of said proposed extension, in a sum not exceeding $200,000, subject to certain conditions, &c., which said Act was duly accepted by the complainants; that, on Jan. 1, 1861, said company having done and performed all the conditions, &c., required by said Act to entitle them to receive aid from said complainants, to the amount of $100,000, the complainants issued to the directors of said company the scrip of the complainants for the sum of $100,000, for the purposes aforesaid, payable in thirty years, with coupons for interest, payable semi-annually; that, on Nov. 11, 1861, the complainants issued their scrip for the amount of another $100,000 for the same purposes, with coupons; that, by the Act of Legislature of Feb., 1861, the complainants were authorized to loan their credit to said company in the further sum of $200,000, to aid in the construction of said extension; that the complainants, in accordance with the provisions of said Act, issued their scrip for the amount of $200,000, with coupons; that the whole was appropriated and expended for the purposes aforesaid; that said extension was completed and operated by means thereof, &c.; that all of said scrip is still outstanding and obligatory upon the complainants.

The bill further alleges that, by virtue of the provisions of said Acts of March 17, 1860, and February 7, 1861, said company executed and delivered to the complainants a mortgage of said extension of said railroad, and of all the property of said extension which they then had or might subsequently acquire, and the franchise of said extension, and embracing in said mortgage the original road of said company and all the property, including the franchise thereof;

and it was provided in said Act that said mortgage, being executed, &c., should be and was therein declared to be a full and complete transfer of said extension and all of the property of said extension, real and personal, then or subsequently to be acquired, and also a full and complete transfer of said road from Leeds to Farmington, and all of the property of said road; and it was further provided in and by said Act, that, as an additional and cumulative protection to the complainants, that all liabilities which said complainants might assume or incur under said Act, should at the time, and by force thereof, and for the security and payment of the same, create, in favor of the complainants, a lien on the whole of said railroad, its franchise and all its appendages, and all real and personal property of said railroad corporation, which should have preference and be prior to all liens and incumbrances whatever, on the said extension, and on all other property of said corporation, &c.; that said company executed and delivered to the complainants the mortgage provided for in Act of Feb. 7, 1861, both of which mortgages were duly recorded.

It further alleges that, by virtue of said mortgages and Acts, the complainants acquired a lien on the whole of said railroad, its franchise, and other property, real and personal, then owned or to be subsequently obtained, and of the earnings of said road; that afterwards, and at different times between Jan. 1, and Sept. 1, 1862, said company purchased for the purposes of operating said road, divers quantities of wood, in said counties of Androscoggin and Franklin, making payments therefor from the income and earnings derived from the use and operation of said road through its whole extent and every part thereof, indiscriminately, and deposited said wood in various places where the same might be convenient for use, within the limits of said counties; that, by virtue of said Acts and the mortgages made in pursurance thereof, the complainants acquired and still have a lien paramount to all other liens, incumbrances or attachments, &c.; that, in January, 1863, said company neglect-

ed to pay certain sums of interest due on a portion of said scrip; that, subsequently, a demand was made upon the complainants for payment under said Acts; that, by reason of such neglect and non-payment, the complainants, on April 28, 1863, by virtue of the Act of March 17, 1860, and in the manner therein provided, took actual possession of the whole of the said railroad, and all of its property, real and personal, and of the franchise thereof; that, since January, 1863, said company have neglected to pay certain other sums of said interest, and payment thereof has been demanded of the complainants.

It further alleges that, in Sept., 1862, one Dyar, sued said company and attached, through one Gilbert Miller, a deputy sheriff, all of said wood in Androscoggin county, being 1,319 cords, as the property of said company; that immediately thereafterwards one Andrew T. Tuck, a deputy sheriff, attached on the same writ all of the said wood in Franklin county, being 952 cords, as the property of said company; that, subsequently, said suit was assigned to J. C. Woodman and Ezekiel Treat; that judgment was recovered in said suit, on which execution issued July, 1864, which is in full force; that several other suits have been commenced against said company, all of which have been assigned to said Woodman, and on all of which the said Miller and Tuck, in their respective counties aforesaid, attached, as the property of said company, all of said wood subject to the prior attachments; that judgments have been duly obtained in all of said suits, and executions issued thereon in July, 1864, and are still in force.

It further alleges that it became indispensable for the running and operation of said road, and the earning and obtaining the income thereon for the payment of the interest on said scrip, to use and consume all of said wood, and to obtain possession of the same for that purpose; that, by legal advice, the complainants, in Dec., 1862, replevied against said Miller the wood so attached by him, and gave bond in due form to prosecute said suit; that said wood was

delivered to the complainants according to the precept of said replevin suit, and was and has been wholly consumed by the consent of complainants in operating the said railroad, under the direction of said company, and in obtaining income for the payment of interest on said scrip; that the Court adjudged that said replevin suit could not be maintained, for the reason, that, by said Act of March aforesaid, the lien of the complainants should be enforced by bill in equity, and directed and ordered said wood to be returned to said Miller; that the complainants replevied against the said Tuck the wood so attached by him, and duly gave bond, which said suit is still pending, and which said bond is still outstanding, whereby the complainants are exposed to a suit on the same,—it not being in their power to return said wood, should such be the order of the Court; that they have offered to pay all costs in the Miller suit, and are willing to pay the costs in the Tuck suit, if such shall be the order of the Court; that neither Miller, Woodman or Treat has sued out any writ of restitution, nor made any demand for a return of said wood, &c.; that the said Miller sued the said bonds given by the complainants in the Miller suit, and threaten to prosecute the same, thereby intending to deprive the complainants of the lien, security and protection which they have and are entitled to hold under said Acts and mortgages, &c.

The bill prays that the said Miller, Tuck, Woodman and Treat may be made parties; that the said Miller and Tuck may be enjoined from commencing or prosecuting any suits on any said bonds, or suing out any process at law with a view to recover said wood, or the value thereof, or in any way to deprive the complainants of their lien on the same; that said Dyar, Treat and Woodman may be enjoined against enforcing their said attachments; but that the same may be decreed void and be dissolved.

The respondents severally answered, admitting the main facts alleged, but denying that the complainants obtained any lien upon said wood by virtue of the aforesaid Acts of

the Legislature, or of said mortgages for the reasons which appear in the opinion, and pleaded the judgment for return recovered in the replevin suit by Miller, in bar.

The case was heard on bill, answer and proof.

Seth May, for the complainants.

The extension was of great public importance.

The Androscoggin R. R. Co. was insolvent and unable to construct the extension.

The Legislature, after providing the various securities and remedies in the statute preceding § 11, with a view of giving other and enlarged security to the complainants, as an inducement for the complainants to loan its credit for the great enterprise, and to make them absolutely secure for all liabilities it might assume, and thereby to protect the complainants, at all events, against loss, so far as the property of the company could possibly do it, provided, by the new, distinct and separate provisions in § 11, for a lien as broad as the whole property which the company might then or subsequently have, on the whole line of the road from Brunswick to Farmington, both real and personal; and also gave a remedy, by a bill in equity, as broad as the lien itself.

Upon such inducements, the complainants loaned its credit to aid in the construction and completion of a great public necessity, and to deprive the complainants of the lien would be unjust and oppressive.

By § 4 of the Act of March 17, 1860, the mortgage therein provided for is expressly made to cover, not only all existing property, but all the property subsequently to be acquired by the company. Same provision is in § 4, c. 18, 1861. *Min. Co.*, v. *St. Paul Co.* 2 Wallace, 645, and note by reporter.

The money loaned of the complainants was expended for the subsequent acquisition of personal and real property; and, if the mortgages had not covered subsequently acquired property, they would have furnished little or no security.

"All" includes in its application personal and real property to be acquired.

The liabilities creating the lien necessarily preceded the purchase of land and rolling stock of the extension; and, unless the intention of the Legislature was, that the lien for liabilities assumed should attach to the road, as it should come into existence, and to the real and personal estate connected and subsequently purchased, they would not have guarded the restricted lien against all other liens and incumbrances upon the whole property, which might subsequently be created by the company or by attachments.

By § 6, the complainants are authorized, under certain conditions, to take possession of "the whole of said railroad and all the property, real and personal, of said company." This provision extends, not only to the whole road as it exists when such possession is taken, but to the whole of the rolling stock and appendages, including wood upon the line in the various wood-houses. 23 Howard, 126; *Pierce* v. *Emery*, 32 N. H., 384; Red. on Railways, 589. "All property, real and personal, of the company," must embrace wood. *Woodman* v. *Y. & C. R. R. Co.*, 45 Maine, 207. Wood is a fixture or appendage, indispensable.

The Legislature did not intend to restrict the lien to property owned "at the time" when the lien commenced, because large portions of it would be used up, worn out or destroyed long before the liabilities assumed would become due.

The lien was not to be limitied by the liabilities assumed at the time, because the Act expressly provides, (§ 4,) that such mortgage shall be given upon the receipt of the first issue of the scrip; and, by § 2, the only aid to be given was to be by the issuing of scrip. A liability assumed in any other way would not be a liability embraced within the lien. The statute lien was "additional and cumulative" to the securities before provided, and antecedent to the existence of liabilities assumed.

The public interests forbid the attachment of the wood. *Hill* v. *La Crosse R. R. Co.*, 11 Wisconsin, 214.

The mortgage covered wood as much as rolling stock. *Morrill* v. *Noyes*, 53 Maine; also cases cited by C. J. REDFIELD in Law Register, 32, 1863; *Pennock* v. *Coe*, 23 Howard, 126.

J. C. Woodman, for the respondents.

WALTON, J.—On the 9th of Sept., 1862, a quantity of wood was attached as the property of the Androscoggin Railroad Company. In December following, the inhabitants of the city of Bath, claiming to have a lien on it to secure them against certain liabilities they had assumed for the railroad company, replevied the wood in two suits, one against Andrew T. Tuck, a deputy sheriff, who attached a portion of the wood lying in Franklin county, and one against Gilbert Miller, a deputy sheriff, who attached another portion of the wood lying in Androscoggin county. The former suit is said to be still pending. The latter has been determined in favor of the attaching officer, *and the wood ordered to be returned to him.* This order was not obeyed, and a suit has been commenced on the replevin bond, and the prayer of the bill now under consideration is that Miller and Tuck may be enjoined against commencing or prosecuting any suit or action on the replevin bonds, or from instituting any proceedings to recover the wood, or the value of it, or in any way to deprive the city of the lien which it claims to have on it, and that the attaching creditors may be enjoined against enforcing or taking any legal measures to enforce the attachments, and that the same may be declared void and be dissolved.

The defendants deny that the city of Bath have, or ever had a lien on the wood; and contend further, that the judgment and order for a return, in the replevin suit against Miller, is a conclusive adjudication in favor of the attaching officer, and against the pretended claim of the plaintiffs.

1. *Of the former judgment.* In actions of replevin, judg-

ment may be rendered against the maintenance of the suit, and yet the defendant not be entitled to a return of the property. When *non cepit* alone is pleaded, the defendant cannot have judgment for a return, because the taking only is in issue, and not the title to the property. So, if for any cause, the defendant was entitled to the possession of the property when the action was commenced, but his right to possession has expired, or been extinguished, or lost, at the time judgment is rendered, the defendant is not entitled to judgment for a return. Hence, in actions of replevin, when it is determined that the action cannot be maintained, it is always necessary to inquire and determine, and to have a distinct adjudication, whether or not the property shall be returned to the defendant; and this latter inquiry necessarily involves an inquiry into the title and the right of possession as between the contending parties, of the broadest and most unlimited character. It is a well established and familiar rule of law, that a return of property replevied will not be ordered "when in equity it ought not to be returned, though the defendant has judgment in his favor in the suit." In determining whether or not there shall be a return, the power of the Court, and the extent of inquiry, are as unlimited in an action of replevin as in a suit in equity. A judgment for return, therefore, in an action of replevin, must be regarded as a direct and conclusive adjudication that the defendants' right of possession is superior to the plaintiffs'.

In *Bath* v. *Miller*, the plaintiffs set up precisely the same title, derived from the same source, by the same means, as that which they now set up. The defendant relied solely upon the validity of the attachments which he, as an officer, had made, and his right to keep possession of the property to satisfy the judgments, if any, which the attaching creditors might recover. Upon this issue he obtained judgment for a return. Was not this a direct adjudication that his title was superior to the plaintiffs'? Could such a judgment

have been rendered without such an adjudication? Clearly not.

But the plaintiffs assume that the Court determined that the replevin suit against Miller could not be maintained, for the reason that, by the provisions of the Act of March 17, 1860, the lien of the city could be enforced and protected only by proceedings in equity. In the opinion of the Court, this is stated as one reason why an action of replevin could not be maintained to enforce a lien created by the *eleventh section* of that Act; but, by taking the whole opinion together, it is clear that this was not intended to be given as the only reason why the action could not be maintained. On the contrary, the previous reasoning, which is as applicable to a lien created by the eleventh section as to a lien created by the mortgages, shows that the wood had been purchased by the railroad company under such circumstances, and with funds that had accrued in such a way, that the plaintiffs had no lien upon it in either of the modes they had set up. The opinion states expressly that the wood was attachable, and that a lien was created by the attachment, which could not be true if the plaintiffs had a valid lien on it. This was sufficient to dispose of the whole case. To be sure, the opinion then states, as another reason why the action could not be maintained for any supposed lien the plaintiffs might have under the eleventh section, that their rights, if any, under that section, were to be protected by a bill in equity rather than a suit at law. This remark was inserted only as an additional reason why the action could not be maintained, after enough had already been said to dispose of the case in favor of the defendant. The Court had declared that the wood was attachable, and that a valid lien had been created by the attachments. This was a good and sufficient reason why the action of replevin could not be maintained, and adding another to it did not invalidate it, even if the latter should be found to be fallacious. If a valid lien had existed in favor of the plaintiffs, it would have been the lien itself, wholly independent of any measures

that might be adopted to secure or protect it, that would invalidate the attachments; and, when the attachments were declared valid, the invalidity of the plaintiffs' pretended lien was necessarily established. The latter was correlative to that of the former. The two liens were inconsistent and could not both exist at the same time. And, if the Court could have seen that the plaintiffs had a valid lien, however created, it would not, and could not, with propriety, have rendered judgment for a return of the property to the attaching officer. The judgment for return was necessarily an adjudication in favor of the validity of the attachments, for upon no other hypothesis could the officer have been entitled to a return. The contingency that the Court might decide against the maintenance of the suit, and yet not order a return, was by no means overlooked. The parties took the precaution to insert in the report, that, if the defendant prevailed in the suit, he should not have judgment for a return, unless the Court should be of opinion that he was entitled to it. The question of return or no return was, therefore, distinctly presented for adjudication. Such a judgment must have its legitimate effect, even if the reasoning by which it was supported does not necessarily show it to be right. The opinion is no part of the judgment, and it would be a most dangerous doctrine to hold that judgments could be impeached by showing that the reasoning, by which they were attempted to be sustained, is defective or fallacious.

But we do not think the former decision was erroneous. If the questions involved were now before us for the first time, we see no reason for coming to a different conclusion. We will briefly review the grounds on which the plaintiffs found their claim to a lien on the wood in question.

2. *Of the lien claimed by the plaintiffs.* Our attention has been called to three Acts of the Legislature, (Act of March 17, 1860, Act of March 20, 1860, and Act of Feb. 7, 1861,) authorizing the city of Bath to loan its credit to the Androscoggin Railroad Company, and directing how the city should be secured. The aid was granted and the secu-

rity given. The object of this aid was to enable the railroad company to make an extension of their road from Leeds Junction to Brunswick; and one of the peculiar features of these statutes, authorizing the aid and providing security for the city, is that they treat and speak of the *extension* as if it was to be a distinct and independent road, and provide that the security of the city upon the extension, and the property belonging to it, shall be much more full and complete than upon the property belonging to the old portion of the road, or such as should belong jointly to both portions of it. The statutes referred to authorize, and the company executed to the city certain mortgages, which in terms convey, not only all the property *then* owned by both the new and the old portions of the road, but "*all the property of said extension subsequently to be acquired.*" It is claimed that the city obtained a lien upon this wood by virtue of these mortgages.

The wood in question was purchased subsequently to the execution of these mortgages. It was purchased with the earnings of the *whole* road, for the use of the *whole* road, and we think it must therefore be regarded as the *property* of the whole road, and not the property of any particular portion of it. It is therefore unnecessary to determine whether after acquired property, belonging exclusively to the extension, would pass by these mortgages or not, for this wood was not the exclusive property of the extension, and it is very clear that none other would pass. The affairs of this road were in a peculiar condition. It could be said of one piece of property, this belongs to the whole road; of another piece, this belongs exclusively to the old portion of the road; of a third, this belongs exclusively to the new portion of the road, called the *extension*. This will be made plain by reading the legislation in relation to it, and observing the subsequent action that has taken place in pursuance of it. With respect to after acquired property, such only as should belong exclusively to the new portion of the road, was attempted to be conveyed by the mortgages.

The same is true of the earnings. By the Act of March 20, 1860, the company was authorized to mortgage the *extension* of said road, with its franchise, right of way, rolling stock, and all the property belonging thereto, *with its earnings;* and, if this wood had been purchased with the separate earnings of the extension, and for its separate use, the argument for the plaintiffs would be very much strengthened.

But such was not the case. The wood was not bought with the exclusive earnings of the extension, but with the joint earnings of the whole road, and for the use of the whole road. The wood cannot, therefore, be regarded as the property of the extension, and the plaintiffs fail to establish a lien to it by virtue of their mortgages.

The *sixth section* of the Act of March 17, 1860, provides that, in case of neglect of the company to pay the principal or interest of the scrip issued by the city, as it should become due, the city might take possession of the road, and all its property, and hold the same and apply the income to make up and supply such deficiency, and all other deficiencies that might occur while the same is so held, until such deficiencies are fully made up and discharged. It is claimed that after this wood was attached the city took such possession, and that thereby its inchoate lien became perfected, by virtue of which they are entited to the wood as against the attaching creditors. The defendants deny that the city ever took such possession in good faith, or that there has been such a failure to pay either principal or interest of the scrip, as would authorize them to take such possession. But, suppose it to be true that the city for a sufficient cause took such possession, it would thereby acquire no greater rights than were at the time held by the company. The property must be taken *cum onere*. Vested rights, valid attachments, would not be thereby destroyed. The plaintiffs fail, therefore, to establish such a lien by virtue of proceedings under this section as will defeat the attachments.

But there is still another ground on which the plaintiffs

claim to prevail.. As additional security to the city, the Act of March 17, 1860, § 11, provides that "all liabilities which by said city may be assumed or incurred, under or by virtue of any of the provisions of this Act, shall *at the time*, and by force thereof, and for security and payment of the same, create in favor of said city a lien on the whole of said railroad, its franchise, and all its appendages, and all real and personal property of said railroad corporation."

This lien, it will be observed, is to take effect *at the time* the liability is incurred, and, of necessity, can attach to such property only as the company then own. The liability and the lien, by the very terms of the statute, are to come into existence at the same moment. The incurring of the one instantly creates the other, and there is no provision for enlarging this lien or creating a new one at a subsequent period. This wood was purchased long after all the liabilities of the city were incurred. Acts creating liens should not be construed to attach to after acquired property, any more than grants or mortgages, unless such is the plain meaning of the language used. Such is not the plain meaning of the language here used. On the contrary, the language used excludes such a construction. The lien provided for in this section is to take effect at the time the liability is incurred, and cannot be held to include property not then owned by the company.

But there is another and wholly independent view of the case, which we regard as conclusive against the plaintiffs; namely, if they ever had a lien on the wood, it is very clear that they have waived it. Every stick of the wood, long before this bill was filed, was consumed by the railroad company in running their cars, except ten cords, and that was used by one of the employees of the road; *and all this was done with the knowledge and consent of the plaintiffs themselves.* This is stated in the bill, (page 9,) and agreed to in the statement of facts. With what propriety then can this Court be called upon to interfere by way of injunction, under pretence that it is necessary to protect or enforce the

plaintiffs' lien, when, by their own showing, every stick of the wood has long since been burnt up, with their knowledge and consent? Was not the lien necessarily lost when the wood itself thus ceased to exist?

It is a well settled rule of law that when a party entitled to a lien on property acts inconsistently with the preservation of his lien, he will be deemed to have waived or abandoned it. (*Spaulding* v. *Adams*, 32 Maine, 211.) We can conceive of no act more significant, one that would more conclusively show an intention to waive or abandon a lien on property, than consent that the debtor, for his own benefit and convenience, may burn it up. How can property be made available as security which has ceased to exist? In what way can a lien be enforced upon it? If this Court possessed the power of an English Parliament, it could not enforce a lien on property which had ceased to exist.

A party tortiously deprived of his lien, by a destruction of the property, would undoubtedly have a remedy against the wrongdoers. But when the property has been destroyed with his consent, he not only loses his lien, but he has no just ground of complaint. The plaintiffs, having consented to the use of the wood by the railroad company, the conclusion is inevitable that they intended to waive or abandon any supposed lien they might have upon it. And, as we have a right to infer previous motives from subsequent acts, we infer that the plaintiffs are consenting to the use of their name in this as well as the former suits, not with any expectation or design of making the wood available to them as security, but to aid the railroad company and the trustees under the old mortgages in defeating these attaching creditors, and thereby securing to the company the use of the wood, and the value of it to the trustees.

The case shows an agreement between the trustees under the old mortgages and the railroad company, entered into a short time after the wood was attached, that the latter should endeavor to defeat the attachments, and, in case of failure,

that the company might deduct the amount they should pay for other wood, and the costs and expenses incurred in such efforts, from funds that would otherwise go to the trustees. It seems not to have then occurred to any one that the city of Bath had any interest in the wood. The case further shows "that said trustees paid the counsel fees and all other costs and expenses of the plaintiffs in the replevin suits, and have advanced money for the prosecution of this suit, and are to pay the costs and expenses of the same, provided judgment be rendered against the plaintiffs; *and also all damages and costs said Miller and Tuck have recovered, or shall recover against said city of Bath, or the sureties upon the replevin bonds.*" (Facts agreed, § XI.) We thus see that the city of Bath is but a nominal party; that it has no interests in the subject matter of this suit to be protected, and no liabilities to be indemnified against; that its name is being used for the benefit and at the risk of other parties.

The argument of the able and learned counsel for the plaintiffs seems to assume that, if the city of Bath had a lien on this wood, it gave the city the right, not only to take and hold it as security, but also the right *to protect it for the use of the railroad.* We cannot concur in this view of the law. The word *lien* has never been held to create rights so extensive, and there is nothing to indicate that the Legislature used it in so extensive a sense in this case. The right to a lien on the part of a creditor is inconsistent with a right to so use the property as to consume it on the part of the debtor; and consent that the property may be so used is necessarily a waiver of the lien.

We have carefully examined all the grounds on which it is claimed that the bill can be maintained, and we think no one of them is sufficient. 1. With respect to so much of the wood as was embraced in the replevin suit against Miller, the judgment for a return of the wood must be regarded as a conclusive adjudication in favor of the validity of the attachment. 2. None of the provisions of the Acts of the Legislature referred to, nor the mortgages from the rail-

road company to the city of Bath, gave the city a lien on this wood. 3. The consent of the plaintiffs that the rail-road company might use and dispose of the wood for its own convenience and benefit, and the use of the wood by the company in pursuance of that consent, are such acts as would necessarily amount to a waiver or abandonment of it, if the city had then had a lien upon it.

Bill dismissed, with costs for defendants.

APPLETON, C. J., BARROWS and DANFORTH, JJ., concurred.

KENT, J., concurred in the result.

INHABITANTS OF LISBON, *Petitioners*, *versus* INHABITANTS OF BOWDOIN.

By R. S., c. 3, § 30, when a town petitions the Court, stating that a controversy exists between it and an adjoining one respecting a town line or lines, the Court may appoint commissioners, who shall "*ascertain* and *determine* the line or lines in dispute," and make duplicate returns of their proceedings, one to the Court, and the other to the office of the Secretary of State; and such line or lines, shall be deemed in every court of law, and for every purpose, the true dividing line or lines between such towns.

The validity and efficacy of the proceedings of the commissioners must be determined upon the facts appearing on the reports.

If the report does not "*ascertain* and determine" the line, the "controversy" is not terminated, and commissioners may be appointed on a new petition.

A report declaring that the commissioners do "*award* and determine" that a certain defined line "shall be the true boundary," &c., does not make it certain that they did not establish a *new* line, instead of *ascertaining* and *renewing* the *old* one, and hence is insufficient.

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

PETITION for the appointment of commissioners to "ascertain and determine" the boundary line between Lisbon and Bowdoin near the "Hall bridge," so called. The petition

was dated April, 1864, and signed by the selectmen of Lisbon.

The respondents put in copy of a petition entered at the August term, 1862, of S. J. Court for Sagadahoc county, together with the proceedings thereon, including the report of the commissioners appointed under the latter petition. So much of that report as is material to this case was as follows:—"The undersigned, commissioners, appointed," &c., "having notified and met the parties," &c., "do *award* and determine that the following described line *shall be* the true boundary line between the towns of Bowdoin and Lisbon." Then follows a line described by monuments, courses and distances.

A. P. Moore, for the petitioners.

Tallman & Larrabee, for the respondents.

KENT, J.—The petitioners allege that a controversy exists between them and the adjoining town of Bowdoin respecting town lines, and pray for the appointment of commissioners to ascertain and determine the line or lines in dispute.

The right and duty of the Court, as to such appointment, depends upon § 30, c. 3, of the R. S. "When a town petitions the Court, stating that a controversy exists between it and an adjoining town respecting a town line or lines," the Court, after notice, may appoint three commissioners, who shall *ascertain and determine* the line or lines in dispute—and make duplicate returns of their proceedings—one of which shall be returned to the Court and the other to the office of the Secretary of State, "and such line or lines shall be deemed in every court of law, and for every purpose, the true dividing line or lines between such towns."

The allegations in the petition, if true, are sufficient to give this Court authority to appoint the commissioners as prayed for. But the respondents deny the first allegation, viz., that a controversy exists. They say a controversy did

once exist, but that it has been terminated by proceedings under this section, on their own petition, and that the line in dispute has been legally fixed, so that it must be deemed in every court of law, and for every purpose, the true dividing line, and that no "controversy" can be said to exist respecting it.

The question then, is,—Is there an existing controversy, within the meaning of the statute. It is clear that, if there has been a legal determination of the questions in dispute, binding on both parties, there can be no longer a legal controversy, however much either or both parties may be dissatisfied, or however strenuously they may insist upon continuing the controversy concerning their town lines.

What has been determined? It appears that the town of Bowdoin, by its selectmen, by their petition to this Court, in 1862, represented that the selectmen of the two towns had undertaken to perambulate the lines between the two towns, but that a controversy arose between them as to one of the lines, whilst they were attempting to *renew and establish* the lines between the towns. They thereupon pray that commissioners may be appointed under the provisions of this third section. Such commissioners were appointed by this Court, and they were directed to "*ascertain* and *determine*" the line in dispute. They undertook to do so and made a report, in which they say, that after hearing the parties, they "do award and determine that the following described line *shall be* the true boundary line between the towns of Bowdoin and Lisbon." A description of the line then follows. This report was made to the Court as required by law. The report was accepted, and a warrant of distress for cost was ordered to be issued against both towns.

Did these proceedings legally fix and determine the line in dispute, so that no question or controversy could afterwards arise? The objection, which appears on the face of the papers, is, that the commissioners, according to their report, did not "ascertain and determine" the line, but simply declared that a certain defined line "*shall be* the true bound-

ary between the towns. The declaration or determination that a certain line *shall be* the true line does not necessarily assert that it *is* the true line, or the line which they were directed to ascertain and determine. All that the report sets out may be true, and yet the described line may be a new and arbitrary line, departing entirely from the boundaries established by the Legislature, and one which the commissioners think on the whole more convenient or just, than the old and established line.

It is well settled that the boundaries of towns are created by Act of the Legislature and cannot be changed by any other power. The consent even of towns cannot change them. *Ham* v. *Sawyer*, 38 Maine, 41. This Court has no power to change them.

It is equally clear that commissioners, appointed by the Court, cannot alter or depart from the boundaries established by the Legislature. Their duty is to determine, in case of a dispute, where and how the line in question is to be run and established on the face of the earth. Their determination may be erroneous, but it is binding on the parties, if they keep themselves within the power given, and if their report shows that they simply undertook to ascertain and determine where the line given by the Legislature was in fact. But this should appear by their report; at least nothing should there appear which leaves in doubt, whether the line established by them is the old line or a new and arbitrary one. This report does not follow the language of the statute, and, under it, we cannot be certain that it is not an entirely new line, as alleged by the petitioners.

We come to this conclusion upon the face of the papers, without reference to the offered parol testimony.

The statute does not require any judgment or action by this Court on the report. It does not even require an acceptance. It simply directs that the report shall be made in duplicate, and that one of the originals shall be returned to the Court and the other to the office of the

Secretary of State. The validity and efficacy of the proceedings must therefore be determined upon the facts as they appear on the reports filed in the Court and in the Secretary's office.

There is no judgment of the Court which requires a writ of error or *certiorari* to set it aside. If the report does not follow the requirements of the statute, and does not ascertain and determine the line, then the "controversy" is not terminated, but still exists. The prior proceedings may be deemed invalid and ineffectual, and the whole matter is open for the appointment of commissioners.

That part of the report, which directs how the bridge and a portion of a road are to be built and supported, is clearly beyond the power of the commissioners. But this would not necessarily have vitiated the other part, if the line had been legally ascertained. It might have been regarded as surplusage or excess of authority, not invalidating the other portion. *Prayer of petition granted.*

Commissioners to be appointed.

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

STATE *versus* JESSE WRIGHT.

The jury are not judges of the law in criminal prosecutions.

By R. S., c. 106, § 3, "all officers of the United States, and coroners," among others, "shall be exempted from serving as jurors, and their names shall not be placed on the lists."

Exemption is not disqualification, but a personal privilege of the person exempted which he may waive; and, if he does so, parties have no ground of complaint.

Hence, an indictment will not be quashed because one of the grand jurors finding it was a postmaster.

Nor will judgment be arrested because one of the traverse jurors was a coroner.

State *v.* Wright.

When, after examination, no cause of challenge appearing, a juror is peremptorily challenged and discharged, the prisoner has no legal right to recall him and have him sworn.

The statute does not require the name of a talesman to be in the jury box.

When all the counts in an indictment substantially set out the same offence, differing only in the description of the means used to commit it, a general verdict is all that the law requires.

The defendant was indicted, tried and convicted of murder in the first degree, at the October term, 1863, WALTON, J., presiding.

The case came before this Court on exceptions which appear in the opinion.

Webster & Whitcomb, for the defendant.

Peters, Attorney General, contra.

WALTON, J. — The most important question raised by the bill of exceptions in this case is whether, in the trial of criminal cases, the jury may rightfully disregard the instructions of the Court, in matters of law, and, if they think the instructions wrong, convict or acquit contrary to such instructions. In other words, whether they are the ultimate, rightful and paramount judges of the law as well as the facts.

Our conclusion is that such a doctrine cannot be maintained; that it is contrary to the fundamental maxims of the common law; contrary to the uniform practice of the highest courts of judicature in Great Britain, where our jury system originated and matured; contrary to a vast preponderance of judicial authority in this country; contrary to the spirit and meaning of the constitution of the United States and of this State; contrary to a fair interpretation of our legislative enactment, authorizing the reservation of questions of law for the decision of the law court, and the allowance of exceptions; contrary to reason and fitness, in withdrawing the interpretation of the laws from those who make it the business and the study of their

lives to understand them, and committing it to a class of men who, being drawn from non-professional life for occasional and temporary service only, possess no such qualifications, and whose decisions would be certain to be conflicting in all doubtful cases, and would therefore lead to endless confusion and perpetual uncertainty.

1. *It is contrary to the fundamental maxims of the common law.* It was very early provided that the jury should not entangle themselves with questions of law, but confine themselves simply and exclusively to facts. This rule is expressed in the well known maxim, *ad questionem facti non respondent judices, ad questionem legis non respondent juratores.*—It is the office of the judge to instruct the jury in points of law—of the jury to decide on matter of fact." Broom's Legal Maxims, 77. "An invaluable principle of jurisprudence," says Mr. Forsyth, in his History of Trial by Jury, "which, more than anything else, has upheld the character and maintained the efficiency of English juries, as tribunals for judicial investigation of truth." The author says it is impossible to uphold the doctrine that the jury are in any case to give a verdict according to their own view of the law; that it is founded on a confusion between the ideas of *power* and *right*. "The law," continues he, "cannot depend on the verdict of a jury, whose office is simply to find the truth of disputed facts; and yet such must be the result if they may decide contrary to what the judge, the authorized expounder of the law, lays down for their guidance. This would introduce the most miserable uncertainty as to our rights and liberties, the *misera servitus* of *vagum jus*, and be the most fatal blow that could be struck at the existence of trial by jury." Forsyth's History of Trial by Jury, 259, 265.

2. *It is contrary to the uniform practice of the highest Courts of judicature in England.* Mr. Forsyth, after assigning as a reason for the unpopularity and final disuse of juries in Scandinavia and Germany, that they carried in

their very constitution the element of their own destruction, in this, that the whole judicial power,—the right to determine the law as well as the fact,—was in their hands, says: "Far otherwise has been the case in England. Here the jury never usurped the functions of the judge. They were originally called in to aid the court with information upon questions of fact, in order that the law might be properly applied; and this has continued to be their province to the present day. * * * Hence it is that the English jury flourishes still in all its pristine vigor, while what are improperly called the old juries of the continent have either sunk into decay or been totally abolished." Trial by Jury, 11, 12.

Parties have often endeavored to appeal from the court to the jury in matters of law, especially in state prosecutions for treason and libel; but it is believed that no English case can be found in which such an appeal has been sanctioned by the court.

In 1649 one Col. Lilburne was tried for treason. He was very contumacious, and at one time claimed the right to read some law to the jury. This the Court would not allow. He flew into a passion and told the judges that they were "no more but Norman intruders, and indeed and in truth, if the jury please, no more but cyphers to pronounce their verdict." One of the judges, (JERMIN,) in language more emphatic than elegant, pronounced the doctrine a "damnable blasphemous heresy;" and the jury were instructed by the Chief Justice that they were not the judges of the law; that they "ought to take notice of it, that the judges, who are twelve in number, and who are sworn, have ever been the judges of the law, from the first time we can read or hear that the law was truly expressed in England, and the jury only judges of matter of fact." 2 Hard. State Trials, 69, 82.

In 1734, a criminal information in the nature of a *quo warranto*, to try the validity of an election to a corporate office, had been submitted to a jury, and a motion was made

to have the verdict set aside as against law. Lord HARDWICKE said:—"The thing that governs greatly in this determination is that points of law are not to be determined by juries; juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England, and to the subject, that these powers of the judge and jury are kept distinct; that the judge determines the law and the jury the fact; and if they ever come to be confounded it will prove the confusion and destruction of the law of England." *King* v. *Poole*, Hard., 28.

In 1784 the Dean of St. Asaph was indicted for a libel. Lord ERSKINE defended him and insisted that the jury had a right to pass upon the whole issue, including the law as well as the fact. Being overruled by Mr. Justice BULLER, he moved for a new trial for misdirection; and in support of his motion is said to have made one of the most captivating arguments ever listened to in Westminster Hall. But he did not succeed. The judges were unanimously against him.

Lord MANSFIELD, in delivering judgment, declared that in matters of law the judge ought to direct the jury, and the jury ought to follow the direction; that this practice ought not to be shaken by general theoretical arguments or popular declamation; that the jury do not know and are not presumed to know the law; that they do not understand the language in which it is conceived, or the meaning of the terms in which it is expressed; and have no rule to go by but their passions and feelings; that if they should happen to be right it would be by chance only; that to be free is to live under a government of law; that if the law is to be in every case what twelve men who shall happen to be the jury shall be inclined to think, liable to no review, subject to no control, under all the popular prejudices of the day, no man could tell, no counsel could advise, what the result would be; that such a doctrine was contrary to judicial practice, contrary to the fundamental principles constituting trials by jury, contrary to reason and fitness, and he was glad that he

was not bound to subscribe to such an absurdity. 3 T. R., 428, note.

3. *It is contrary to a vast preponderance of judicial authority in this country.* Before the revolution the doctrine seems to have met with some favor. It was undoubtedly believed that in the then condition of things it would be safer for the colonies that the power of determining the law should be vested in the jury than to leave it in the hands of the judges. And even after the revolution the doctrine seems to have obtained some currency that in all cases, civil as well as criminal, the jury had a right to determine the law as well as the facts. In a case tried in the Supreme Court of the United States, in 1794, the full Court instructed the jury that they had a right "to determine the law as well as the fact in controversy." This was in a civil suit. *Georgia* v. *Brailsford*, 3 Dall., 4.

But this mode of administering justice could not continue. The federal courts soon discovered that however useful such a doctrine might have been to us as colonies, it was wholly incompatible with our new and improved system of government under the federal constitution. It was seen that to concede such a power to the jury would deprive the Judges of the Supreme Court of that supremacy in matters of law which the constitution had wisely conferred upon them.

In a case before Mr. Justice BALDWIN, of the Supreme Court of the United States, a man by the name of Shive was tried for counterfeiting notes of the United States Bank. His counsel gravely argued to the jury that they ought to acquit his client on the ground that the act chartering the bank was unconstitutional and void, and that to counterfeit the bills of such an institution was no crime. True, he said, the Supreme Court of the United States had decided otherwise, and, as it was composed of very respectable gentlemen, he would not deny that their opinion was entitled to some consideration; but he contended that, nevertheless, it was the right and the duty of the jury to revise the decis-

ion, and if in their judgment it was wrong to disregard it.

Judge BALDWIN at once saw the absurdity of such a doctrine. "Should you assume and exercise this power," said he, in his charge to the jury, "your opinion does not become a supreme law; no one is bound by it; other juries will decide for themselves, and you could not expect that courts would look to your verdict for the construction of the constitution as to the acts of the legislative or judicial departments of the government; nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow citizens or the Court. If juries once exercise this power we are without a constitution or laws. One jury has the same power as another. You cannot bind those who may take your places. What you declare constitutional to-day another may declare unconstitutional to-morrow. We shall cease to have a government of law, when what is the law depends on the arbitrary and fluctuating opinions of judges and jurors, instead of the standard of the constitution, expounded by the tribunal to which has been referred all cases arising under the constitution, laws and treaties of the United States." *United States* v. *Shive*, 1 Bald., 512.

In *United States* v. *Battiste*, 2 Sum., 243, Judge STORY charged the jury that it was their duty to follow the law as it was laid down by the Court. "I deny," said he, "that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it a most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the Court as to the law. It is the duty of the Court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the Court."

So in *United States* v. *Morris*, 1 Curtis' C. C. R., 53, Mr. Justice CURTIS placed his ruling on the same high constitutional ground. "My firm conviction is," said he, "that, un-

der the constitution of the United States, juries in criminal cases have not the right to decide any question of law; and that, if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given them by the Court."

In *Stettinus* v. *United States*, 5 Cranch's C. C. R., 573, Chief Justice CRANCH, in a very full, able and instructive opinion, held that neither at common law, nor under the constitution of the United States, had the jury any right to judge of the law. This was in the Circuit Court of the United States for the District of Columbia.

In a criminal case tried in the Circuit Court of the United States, in the city of New York, Mr. Justice THOMPSON, when requested to charge the jury that they were judges of the law as well as the facts, briefly, but not ambiguously, answered: "I shant: they aint." 2 Whar. Criminal Law, § 3100.

In *Pierce* v. *The State*, 13 N. H., 536, the indictment charged a violation of the Act regulating the sale of wines and spirituous liquors. The defendant's counsel contended that the jury were the judges of the law as well as the facts in the case; that it was their duty to judge of the constitutionality of the Act, and to form their own opinion upon that question, and that the Court had no right to *instruct* them in relation to questions of law, — it could only *advise* them. The Court held that the jury were not judges of the law in criminal cases. "We cannot believe," said the Court, "that impartial and reflecting men, of whatever profession they may be, can advocate doctrines which may lead to such results as the right of the jury to decide the law may end in. * * * No reflecting man in the jury box would be willing to take upon himself this responsibility. * * * And it is the opinion of the Court, that it is inconsistent with the spirit of the constitution that questions of law, and still less questions of constitutional law, should be decided by the verdict of the jury, contrary to the instructions of the Court."

In *Commonwealth* v. *Porter*, 10 Met., 263, the defendant's counsel contended that the jury had a right to disregard and overrule the decision of the Court, as to whether one of the sections of a prior statute was, by implication, repealed by a subsequent statute. The right of the jury to determine questions of law was fully considered, and the Court held that it is the duty of the jury to receive the law from the Court, and to conform their decision thereto; that to this duty jurors are bound by a strong, social and moral obligation, enforced by the sanction of an oath.

In *Carpenter* v. *People*, 8 Barb., 610, the Supreme Court of New York said: — "The idea, which has become somewhat current in some places, that in criminal cases the jury are the judges of the law as well as the facts, is erroneous, not being founded upon principle or supported by authority." And again, in 1863, in *Duffy* v. *People*, 26 N. Y., 588, the New York Court of Appeals unanimously held that "the jury in criminal cases are bound by the instructions of the Court as to the law to the same extent as in civil cases."

The question seems never to have been directly before the Supreme Court of the United States sitting *in banc*; but several of the Judges of that Court, namely, — BALDWIN, THOMPSON, STORY and CURTIS, as we have already seen, have emphatically denied the right of the jury to decide the law in any case, civil or criminal; and we cannot doubt that such will be the decision of the full Court if the question ever comes before them.

The following States unite in the doctrine that it is the duty of the jury to be governed by the law as it is laid down by the Court: New Hampshire, in *Pierce* v. *State*, 13 N. H., 536; Massachusetts, in *Com.* v. *Porter*, 10 Met., 263; *Com.* v. *Anthers*, 5 Gray, 185; Rhode Island, in *Dorr's Trial*, 121; New York, in *People* v. *Pine*, 2 Barb., 566; *Carpenter* v. *People*, 8 Barb., 610; *Safford* v. *People*, 1 Parker, 474; *Duffy* v. *People*, 26 N. Y., (Smith,) 588; Pennsylvania, in *Penn.* v. *Ball*, Addison, 860; 2

Whart. Cr. Law, § 3106; Virginia, in *Davenport* v. *Com.*, 1 Leigh, 588; *Com.* v. *Garth*, 3 Leigh, 761; *Howel* v. *Com.*, 5 Grat., 664; North Carolina, in *State* v. *Pearce*, 2 Jones, (Law,) 251; Ohio, in *Montgomery* v. *State*, 11 Ohio, 424; *Robbins* v. *State*, 8 Ohio St. R. (N. S.,) 131; Kentucky, in *Montee* v. *Com.*, 3 J. J. Marsh., 150; *Com.* v. *Van Tuyle*, 1 Met., (Ky.,) 1; Alabama, in *Pierson* v. *State*, 12 Ala., 153; *Batse* v. *State*, 18 Ala., 119; Missouri, in *Hardy* v. *State*, 7 Mo., 607; Mississippi, in *Williams* v. *State*, 32 Miss., (3 George,) 389; Arkansas, in *Pleasant* v. *State*, 8 Eng., (13 Ark.,) 360; Texas, in *Nels* v. *State*, 2 Texas, 280; Tennessee, in *McGowan* v. *State*, 9 Yerger, 184.

In Indiana the decisions are influenced by local legislation, and are therefore unimportant. There are, however, two well considered decisions in that State in which the right of the jury to determine the law is denied. (2 Black, 156; 2 Carter, 617.) *Contra*, 4 Black, 150, 247; 10 Ind., 503.

State v. *Holden*, 5 Geo., 441, and some other cases in that State, (Georgia,) have been supposed by some to be in favor of the doctrine. But this is an error. In that State the subject is regulated by express statutory law, and their decisions have no bearing upon the question as a common law right.

In Vermont, in *State* v. *Croteau*, 23 Vt., 14, a majority of the Court held that, in criminal cases, the jury are judges of the law as well as the facts, but the doctrine was resisted in a very able dissenting opinion by Judge BENNETT; and, in a later case, (*State* v. *McDonnell*, 32 Vt., 523,) the presiding Judge declared to the jury that to him such a doctrine was "most absurd and nonsensical," and the full Court held the remark unexceptionable.

In Maine, in *State* v. *Snow*, 18 Maine, 346, the Court seems to have taken it for granted that the law was settled in favor of the right of the jury to determine the law in criminal cases, and gave the question apparently very little

consideration. Two cases only are cited. One of them (*Croswell's case*, 3 Johns. Cases, 337,) establishes no such doctrine; and the other, (*Com.* v. *Knapp*, 10 Pick., 497,) has been emphatically overruled by the same Court which made the decision.

4. *It is unconstitutional.* The constitution of the United States confers upon the Judges of the Supreme Court the power to adjudicate and finally determine all questions of law properly brought before them. To allow juries to revise, and, if they think proper, overrule these adjudications, would deprive them of their final and authoritative character, and thus destroy the constitutional functions of the Court.

The Supreme Court of the United States and of this State have decided that prohibitory liquor laws, like the one now in force in this State, are constitutional. Is it within the legitimate power of each successive jury impannelled to try a liquor case, to reconsider that question, and, if they think proper, overrule those decisions? Is each successive jury impannelled to try a person charged with counterfeiting our national currency, to be told that they may rightfully disregard the decisions of the Supreme Court of the United States and the rulings of the presiding Judge, if they, in the exercise of their own judgment, think them wrong, and acquit the defendant upon the ground that the Act of Congress authorizing our national banks is unconstitutional? Every intelligent mind must perceive that it is impossible to maintain such a doctrine.

Law should be certain. It is the rule by which we are to govern our conduct. To enable us to do so we must know what the law is. Doubtful points ought therefore to be settled, not for the purpose of a single trial only, but finally and definitively. If each successive jury may decide the law for itself, how will doubtful points ever become settled? They will be bound by no precedents. They may not only disregard the instructions of the presiding Judge, and the verdicts of all former juries, but they may

also disregard the decisions of the law court. They will be authorized to construe statutes, declare the meaning of technical terms, and pass upon the constitutionality of legislative and congressional enactments, and acquit or convict according to their own view of the law. In doubtful cases — cases where authoritative expositions of the law are most needed — we should undoubtedly have conflicting verdicts, and the law would remain in perpetual uncertainty.

Difficult and important questions of law arise in criminal as well as civil suits. There is scarcely an Act of Congress, or of our State Legislature, the construction, interpretation or validity of which may not be brought in question in a criminal prosecution. Technical terms are to be explained, conflicting provisions reconciled, their prospective or retrospective operation ascertained, their effect to repeal or restore former statutes considered, and their constitutionality determined. To do this often requires much time, careful thought, the examination of numerous authorities, and a familiarity with the law as a science which a lifetime of preparatory study is scarcely sufficient to supply.

Juries are generally composed of upright men, willing and anxious to discharge their duty to the best of their ability. But they are drawn from non-professional life, and lack the advantage of a legal education. When a cause is finally committed to them they are put under duress of an officer, and are not allowed to separate till their consideration of the case is closed. They are not allowed the use of books, not even the statutes which they may be required to construe. Twelve men thus situated may be admirably qualified to weigh evidence and determine facts, and may be justly entitled to all the encomiums passed upon them in that respect; but it is impossible to believe they constitute a suitable tribunal for the determination of important and intricate questions of law.

"The founders of our constitution," said Chief Justice SHAW, (5 Gray, 235,) "understood, what every reflecting man must understand, from the nature of the law, in its

fundamental principles, and in its comprehensive details, that it is a science, requiring a long course of preparatory training, of profound study and active practice, to be expected of no one who has not dedicated his life to its pursuit; they well understood that no safe system of jurisprudence could be established, that no judiciary department of government could be constituted without bringing into its service jurists thus trained and qualified. The judiciary department was intended to be permanent and co-extensive with the other departments of government, and, as far as practicable, independent of them; and therefore it is not competent for the Legislature to take the power of deciding the law from this judiciary department, and vest it in other bodies of men, juries, occasionally and temporarily called to attend courts, for the performance of very important duties indeed, but duties very different from those of judges, and requiring different qualifications."

We have already seen that many other eminent jurists, and among them Chief Justice PARKER of the Supreme Court of New Hampshire, and Justices BALDWIN, STORY and CURTIS of the Supreme Court of the United States, take the same view of this question; namely, that where, as in this State, the fundamental law vests the judicial power in the courts, it is unconstitutional to take from the judges the power to determine the law, and vest it in juries. "Jurors," says Chief Justice SHAW, (5 Gray, 235,) "though they have important duties to perform in courts of justice, yet do not compose an essential element of the judicial department; their duties are limited and temporary, and the necessity of the attendance of juries and a trial by them is distinctly provided for by the constitution, and their function in such trial was well understood to be the finding of facts upon evidence, under the direction of the Court."

Origin of the doctrine. The doctrine that the jury are judges of the law in criminal cases originated in a controversy in relation to the law of libel. The doctrine of implied malice, which, when applied to homicides, has been

resisted by some of the best judicial minds in this country and in England, was exceedingly distasteful to the defendants, when applied to libels. The Judges, (in England,) formerly held that the character of the publication, — that is, whether it was or was not libellous, was to be determined by the Court; and, if the Court declared it to be libellous, then malice was implied and need not be proved; and, what was still more objectionable, the Judges were in the habit of directing the jury to return a verdict of guilty upon proof of publication and the truth of the *innuendos*, without telling the jury whether the paper was or was not a libel, and without permitting the jury to determine that question for themselves; and then putting the defendant to the trouble and expense of moving in arrest of judgment, or suing out a writ of error, if he thought the publication innocent. Thus, in the trial of the Dean of St. Asaph, for publishing a very harmless pamphlet, entitled a dialogue between a gentleman and a farmer, written by Sir William Jones, Mr. Justice BULLER told the jury that it was no part of their duty to form any opinion as to the character of the pamphlet, or the motives of the defendant in publishing it, and did not himself express any opinion upon these points; and, after long and vexatious litigation, judgment was finally arrested, because not a single sentence in the whole pamphlet could be pointed out that was libellous. If the Judge had told the jury that the pamphlet was not libellous, or had allowed them to determine that question for themselves, or had allowed them to pass upon the question of malice, the defendant would have been acquitted at the trial. This manner of trying libel suits led to a controversy in relation to the law of libel, which lasted for more than half a century in England; and finally resulted in an Act of Parliament, known in history as "Fox's Libel Act," declaring the right of the jury to pass upon the whole issue, and the duty of the Court to give their opinion and direction to the jury, as in other criminal cases. But this Act has never been construed in England as giving the jury the right to

determine the law, even in libel suits. "The judge is the judge of the law in libel as in all other cases," said the Court in *Rex* v. *Burdett*, 4 Barn. & Ald., 131. It was passed to correct the practice of requiring the jury to return a general verdict of guilty without the sanction of the judge's opinion that it was one warranted by law.

In the course of this controversy the argument was invented and urged with great plausibility by Lord Erskine, that, in all cases tried under the general issue, the jury had a right to determine the law as well as the facts. But this doctrine never met with favor in England. The principal ground relied upon was, not that the jury were judges of the law, but that the malicious intent with which a libel is always charged to have been made, is a question of fact and not a question of law; and the judges were charged with invading the province of the jury, not in withholding from them the decision of questions of law, but in withholding from them the decision of a question of fact; and it was upon this ground that the advocates of the right of the jury to pass upon the whole issue in libel suits, and to have the opinion of the Court whether the facts, if proved, would or would not warrant a verdict of guilty, finally triumphed.

In this country the right of the jury to pass upon the whole issue in prosecutions for libel is universally admitted. In this and many other States it is secured by constitutional provisions. In many of the constitutions it is provided that the jury may do this "under the direction of the Court," or "after having received the direction of the Court." The latter is the form of expression in this State. Upon these and similar provisions the question has been frequently raised, whether the jury are bound to follow the directions of the Court in matters of law, or are at liberty to disregard them, and determine the law for themselves. "Upon this point," says Mr. Greenleaf, "the decisions are not entirely uniform; and some of them are not perfectly clear from the want of discriminating between the *power* possess-

ed by the jury to find a general verdict, contrary to the direction of the Court in a matter of law, without being accountable for so doing, and their *right* so to do, without a violation of their oath and duty. But the weight of opinion is vastly against the right of the jury in any case, to disregard the law as stated to them by the Court; and, on the contrary, is in favor of their duty to be governed by such rules as the Court may declare to be the law of the land; the meaning of the constitutional provisions being merely this, that the jury are the sole judges of all the facts involved in the issue, and of the application of the law to the particular case." 3 Greenl., Ev., § 179.

We thus see that the doctrine that the jury are judges of the law as well as the facts in criminal cases, is contrary to the fundamental principles of the common law, contrary to a vast preponderance of judicial authority, contrary to reason and fitness; and, if allowed to prevail, will destroy the constitutional functions of the judicial department of the government. Whether under the provisions of our State constitution they may do so in prosecutions for libel, we express no opinion; but in all other criminal prosecutions we have no hesitation in saying it is the duty of the jury to be governed by the law as it is laid down by the Court. We fully concur in the opinion expressed by Chief Justice SHAW, (5 Gray, 198,) that, "the true glory and excellence of trial by jury is this: that the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of law; and another body, well qualified for the duty, is charged with deciding all questions of fact, definitively; and whilst each, within its own sphere, performs the duty entrusted to it, such a trial affords the best possible security for a safe administration of justice and the security of public and private rights."

Several other questions remain to be considered.

1. Exception is taken to the refusal of the presiding Judge

to allow the prisoner to retract his plea of not guilty, and plead in abatement that one of the grand jurors, by whom the indictment was found, was disqualified to act, being a postmaster of the United States; and to the refusal of the Court to quash the indictment for the same cause. All officers of the United States (which of course includes postmasters) are exempted from serving on juries. R. S., c. 106, § 3. But to *exempt* is not to *disqualify*. Exemption is the personal privilege of the party exempted, with which no one else has any concern. A postmaster of the United States is not, therefore, disqualified to act as a grand juror. He may waive his privilege; and if he does so, the parties to the suit have no ground of complaint. *State* v. *Fellows*, 5 Greenl., 333; *State* v. *Forshner*, 43 N. H., 89.

2. While the jury was being impannelled to try the prisoner, Warren Leland was called and examined, and, no cause of challenge appearing, the prisoner challenged him peremptorily, and he was discharged from any further attendance. The impannelling of the jury then proceeded for some time, when the prisoner moved to have Leland recalled and placed upon the pannel. This, the presiding Judge declined to do; and to this exception is taken. The exception cannot be maintained. Leland had been discharged from further attendance. Whether he was still present in Court does not appear. If he was, he was there as a spectator only, and the prisoner had no more right to have him recalled and put upon the jury, than if he had never been returned as a juror.

3. After one of the jurors had been sworn and taken his seat upon the pannel, the attention of the Court was called to the fact that he was a coroner. The juror did not claim to be excused, and the prisoner, under the advice of his counsel, expressly waived all objection to his sitting, and the attorney general did the same. It is now urged in arrest of judgment that the juror was incompetent, and that his being upon the pannel vitiates and renders the verdict invalid. The juror was not incompetent. Coroners, though

exempted from serving on juries, are not, as we have already seen, for that cause rendered incompetent to serve, if they will. It is therefore unnecessary to say anything about the effect of the waiver, for there was no valid objection to waive.

4. One of the jurors returned as a talesman from among the bystanders was objected to, because it did not appear that his name was in the jury box of the town where he resided; and *Com.* v. *Knapp*, 10 Pick. 477, is relied upon in support of the objection. The ruling in the case referred to was based on a statute then in force in Massachusetts requiring the names of those returned as talesmen to be in the jury box. There was such a statute in this State prior to 1841; but in the revision of that year it was omitted, and has not since been reënacted. At the time of the trial in this case, the law did not require the name of a person returned as a talesman from among the bystanders, to be in the jury box, and the objection was properly overruled.

5. Another ground relied upon in arrest of judgment is that the jury returned a general verdict, instead of a separate verdict, on each count in the indictment. When, as in this case, all the counts are substantially for the same offence, and differ only in the description of the means used to accomplish it, a general verdict is all that the law requires. 1 Whar. Cr. Law, §§ 421–425, and authorities there cited.

6. The prisoner's counsel contended that the jury were judges of the law as well as the facts; but the Court instructed them that it was their duty to take the law from the Court; that it would be a violation of their duty to reject the law as given them by the Court and return a verdict contrary thereto. To this the prisoner excepted. This point we have already considered. Our conclusion is that the instruction was correct.

Exceptions overruled.

Judgment on the verdict.

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

ELIAS SWEET *versus* JOHN BRACKLEY.

If a judgment is conclusive in the State in which it is rendered, it is equally conclusive in every State of the Union.

Whenever a cause of action has passed into a judgment, it is merged so long as the judgment remains in full force and not reversed.

Hence, where the indorsee of a witnessed promissory note, given in Maine, sued the present defendant as maker in Massachusetts, — whither the latter had removed; and the defendant, after pleading payment and the statute of limitations, obtained a general verdict in his favor; and subsequently the present plaintiff, as payee, brought this action against the defendant, — he having previously removed back to Maine; — *Held*,

1. That the action could not be maintained; and

2. That evidence that the statute of limitations was the only issue tried in the former action was inadmissible.

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

The facts sufficiently appear in the opinion.

P. M. & P. H. Stubbs, for the plaintiff.

E. F. Pillsbury, for the defendant.

APPLETON, C. J. — The plaintiff, the payee of the two notes in suit, indorsed the same to one William Stickney, who commenced a suit thereon in Massachusetts. To this the defendant pleaded payment and the statute of limitations and obtained a general verdict in his favor, upon which judgment was duly rendered.

It is of no importance whether the verdict was upon the ground of payment or the statute of limitations. In either event the judgment rendered upon the verdict was conclusive between the parties in the State in which the trial was had. No new suit could have been maintained by the plaintiff against this defendant for the causes of action already determined in that suit. *Nemo debet bis vexari pro una et eadem causa.*

The Court in Massachusetts, before which the trial was had and by which the judgment was rendered, had jurisdiction of the subject matter of the suit as well as of the par-

ties thereto. By the constitution of the United States, Art. 4, § 1, "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." By the Act of Congress of May 26, 1790, it was declared "that the said records and proceedings * * shall have such faith and credit given them in every Court within the United States, as they have by law or usage in the Courts of the State from whence said records are or shall be taken." If a judgment is conclusive in the State in which it is pronounced, it is equally conclusive every where, in the States of the Union. No suit, therefore, could have been maintained by Stickney on the notes in controversy in Massachusetts or in any of the States of the Union. *McElmoyle* v. *Cohen*, 13 Peters, 312; *Bissell* v. *Briggs*, 9 Mass., 462; *Gleason* v. *Dodd*, 4 Met., 333.

After the rendition of judgment in Massachusetts in the suit, Stickney against this defendant, the present plaintiff having in some way obtained possession of the notes, which had been sued and upon which a judgment had been rendered, commenced this action. When that judgment was rendered the legal title to the notes was in Stickney. Whenever a cause of action, in the language of the civil law, *transit in rem judicatam*, and the judgment remains in full force and not reversed, the original cause of action is merged, and gone forever. The notes then in suit had gone to judgment. They were in the custody of the Court. They had ceased to be negotiable. Had they remained negotiable, which will hardly be pretended, there is no proof that they were ever attempted to be negotiated.

If Stickney had assigned his interest after judgment, if he had any, he could transfer no greater rights than he had. "The successors of parties are considered as the parties themselves, and therefore a judgment has the same authority for or against them as it had with respect to those whom they have succeeded." 1 Ev. Poth. p. 4, c. 3, art. 5. Such too, is the well established rule of the common law. *Adams* v. *Burns*, 17 Mass. 365.

The evidence offered was legally inadmissible. The plaintiff is concluded by the former judgment.

Plaintiff nonsuit.

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

WYMAN V. TAINTER, *Treasurer*, *versus* WILLIAM WINTER.

A note payable by its terms to A. C. H., treasurer of the Ministerial and School Fund of C., or his successor, may be sued in the name of him who was the legal treasurer at the date of the writ, if the note was then and always had been the property of the trustees.

Where one of the signers makes a partial payment of a promissory note, and causes to be indorsed thereon that the payment was made by him, by name, and the holder of the note, relying upon such payment, permits the note to outlaw as to the other makers, the defendant will not be permitted to repudiate the payment as his own, and say it was done for another.

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

ASSUMPSIT.

The writ, dated April 1, 1862, contained a count on the note hereinafter mentioned, together with a count for money had and received.

Plea, general issue and statute of limitations.

The following is a copy of the note declared on.

"Carthage, March the 20th, 1834.

"For value received, we jointly and severally promise to pay Abner C. Holman, Treasurer of the Ministerial and School Fund of Carthage, or his successor in that office, the sum of forty dollars, in one year from this date, and interest annually. "Samuel Gray,

"Attest: "John Gray,

"Daniel Stickney." "Wm. Winter."

Harrison Storer, called by the plaintiff, testified that he was treasurer of the Ministerial and School Fund in Carthage, in 1844; that defendant, on March 16, 1844, paid

him,.as treasurer, $1,20 on said note, which the witness indorsed at the time on the note in the following words and figures:—"March 16, 1844, received one dollar and twenty cents in part payment of the interest of the within note, by the hand of William Winter;" that, according to his best recollection, the indorsement was made at the request of the defendant, and he thinks the defendant stated that he wished it to be so made, that Samuel Gray might know it was paid *by defendant.*

The plaintiff introduced the records of the Trustees of the Ministerial and School Fund of Carthage, from which it appeared that Abner C. Holman was treasurer at the date of said note, and that the plaintiff was treasurer in 1862.

The defendant was introduced as a witness and testified that he never received any part of the consideration of said note, but signed it as surety; that he never paid any part of said note from his own means; that Samuel Gray, the first signer of said note, moved out of Carthage, and when he left town he was indebted to defendant and left with him some claims against the town, which the defendant was to collect and pay himself, and to pay over the balance on a note.

By sundry indorsements upon the note, the interest appeared to be paid to March 20, 1841.

By the agreement of the parties, the case was submitted to the full Court to be decided according to the legal rights of the parties; the Court to draw such inferences as a jury might.

Robert Goodenow, for the plaintiff.

S. Belcher, for the defendant.

DANFORTH, J.—By the Act of Feb. 12, 1824, c. 254, § 2, the trustees of the Ministerial and School Fund are constituted and declared to be a body corporate. By the same section, it is made their duty, each year, to choose a treasurer. The note in suit is made payable to such treasurer

or his successor in office. The note is, and always has been the property of the trustees, and the plaintiff is the legal successor of the payee. Under these circumstances the action may be maintained in the name of the present plaintiff or in that of the corporation. *Fisher* v. *Ellis*, 3 Pick., 325; *Bank* v. *French*, 21 Pick., 491.

It is true, the note introduced in evidence varies somewhat from the one described in the writ, still it is sufficient to maintain the action under the count for money had and received.

The only other question relates to the effect of the payment indorsed March 16, 1844. Was this made by the defendant so as to avoid the statute of limitations? That the money was paid by him there can be no doubt. That the indorsement was made, as it now appears, at his request, would seem to be satisfactorily proved. He, then, made the payment for himself, and not in behalf of any other person. This fact remains the same and its effect is unchanged whether the money belonged to himself or another. So far as the plaintiff is concerned, it is just as much a payment by the defendant whether he appropriated the money for this purpose rightfully or wrongfully. He certainly did appropriate the money to his own use, both by his act and his request, thus renewing his contract; and now, after the plaintiff has rightfully relied upon his act so long that all other remedy has gone, it is too late for him to repudiate it and say it was done for another. *Howe* v. *Saunders*, 38 Maine, 350; *Holmes* v. *Durell*, 51 Maine, 201.

If, at the time, he had given notice and made the payment in behalf of Gray, a different question would have been presented. *Defendant defaulted.*

APPLETON, C. J., KENT, WALTON, BARROWS and TAPLEY, JJ., concurred.

JOSIAH PIERCE, *in Equity, versus* JAMES FAUNCE.

Unless it clearly appear from the report of the master, or otherwise, that he has acted under a mistake, it will be sustained.

The rule for computing interest upon interest-bearing claims, when partial payments have been made.

In stating the account between the parties to a bill in equity to redeem a mortgage, the master should ascertain the gross amount of rents and profits; and then the costs of reasonable repairs and improvements on the premises; the taxes thereon; together with a suitable compensation for the care and management of the estate; from the gross amount of rents and profits the charges against the estate are to be taken, and, whenever the balance in the hands of the mortgagee exceeds the interest on the mortgage debt at that time, it is to be regarded and deducted as in case of partial payment; and so on from year to year.

When an estate is incumbered with dower, the mortgagee, so long as he occupies, may either permit the dowress to enter, or pay her a reasonable compensation for her right during his occupation; and, for such sum thus paid, he should be allowed.

He is to be allowed also for all expenses necessary for the protection and preservation of the estate.

New erections are not necessarily such.

When a mortgagee insures on his own account, he is not, as a matter of course, entitled to charge the premium to the estate.

Where the master reported an increased rate of rent, and disallowed a claim for an amount of wood and timber alleged to have been cut from the premises by the mortgagee: — *Held*, that, if erroneous, the burden was upon the respondent to show it.

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

BILL IN EQUITY, to redeem mortgaged premises.

The complainant claimed as grantee of the original mortgager, and the respondent as the assignee of the mortgagee.

The bill was filed at the March term, 1864.

At the December term, 1864, the bill was taken *pro confesso*, and Alvah Black, Esq., was appointed master to ascertain and report the account between the parties.

At the following March term, the master made his report, stating among other things, that he "had appropriated the sums due the defendant for repairs and improvements to the payment of the sums due the plaintiff for rents and profits

and other claims; and on the balances, whichever way they might be, I have allowed *no interest.*"

"Amount paid Diana Byram for right of dower, $10, I have not allowed."

The master also reported that he allowed only for repairs, and disallowed claims for new erections on the premises.

To the acceptance of the master's report, the respondent filed written objections; but the presiding Judge, *pro forma*, overruled the objections, and the respondent excepted.

J. J. Perry, for the respondent.

Lewis Pierce, for the complainant.

APPLETON, C. J.—The owner of the equity of redemption brought his bill against the mortgagee to redeem certain mortgaged premises.

Upon the default of the defendant, a master was appointed to determine the amount due on the mortgage. The matter was heard by him and, upon the presentation of his report, objections were made to its acceptance, which being overruled, the defendant alleged exceptions.

Unless it appears clearly, from the report of the master or otherwise, that he has acted under a mistake, his report will be sustained. *Adams* v. *Brown*, 7 Cush., 220.

1. It appears from the master's report that he allowed the defendant for improvements and repairs, and charged him with the rents and profits of the estate, appropriating the sums allowed defendant for repairs and improvements, &c., to the payment of the sum due the complainant for rents and profits and other claims, and on the balances, whichever way they might be, he allowed no interest.

The rule for the computation of interest in case of partial payments has been conclusively established and invariably acted upon. Where partial payments have been made on a note, or other claim bearing interest, the interest is to be computed on the principal sum, from the time when the interest commenced, to the first time when a payment was made, which exceeds alone or in conjunction with the pre-

ceding payments, if any, the interest at that time due; add the interest to the principal, and from the sum subtract the payment made at that time, together with the preceding payments, if any, and the remainder forms a new principal, on which to compute and subtract the interest, as upon the first principal, and proceed in this manner to the time of judgment. *Dean* v. *Williams*, 17 Mass., 417; *Leonard* v. *Wildes*, 36 Maine, 265.

By R. S., 1857, c. 90, §§ 2, 13, 19, the mortgagee in possession is to account for the "clear rents and profits, from the time of the entry" or "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."

It is immaterial how the mortgagee is paid, whether in money or by the rents and profits of the mortgaged estate, the payment in either event is equally beneficial to him. If in money, the rule for the computation of interest is well established. If by rents and profits, the same principle applies. The gross amount of the rents and profits is to be ascertained, as well as the costs of reasonable repairs and improvements on the premises, and a suitable compensation for the care and management of the estate and taxes thereon, one sum to be set off against the other, and whenever the balance in the hands of the mortgagee exceeds the interest on the mortgage debt at that time, it is to be regarded and deducted, as in case of a partial payment on such debt, and so on from year to year. "Had the rents and profits exceeded the sums paid for repairs and betterments, so as to have applied to the payment of the note, then," observes SHAW, C. J., in *Reed* v. *Reed*, 10 Pick., 398, "as in other cases of part payment, where interest and principal are both due, the creditor has a right first to apply the payments to the keeping down interest, before any part is applied to the reduction of the principal." This is substantially the rule adopted by this Court, in *Ireland* v. *Abbott*, 24 Maine, 155, and, although not in entire conformity with that of the Eng-

lish Courts of Chancery, it is one which seems to do the most perfect and entire justice to all parties.

2. It would seem that the estate was incumbered with dower. The mortgagee, so long as he occupied the estate, might either permit the dowress to enter, or pay her a reasonable sum for her right of dower during the period of his occupation. For such sum, thus paid, he is to be allowed.

3. There is nothing before us, which in any way impeaches the justice of the allowance made by the master for repairs and improvements. "The mortgagee," observes Lord LANGDALE, in *Sandon* v. *Hooper*, 6 Beavan, 246, "has not a right to make it more expensive for the mortgager to redeem than may be required for the purpose of keeping the property in a proper state of repair and for protecting the title to the property." But he is to be allowed for all expenses necessary for the protection and preservation of the estate. *Reed* v. *Reed*, 10 Pick., 398; *Ruby* v. *Abyssinian Society*, 15 Maine, 306.

4. It does not appear that insurance was effected with the privity of the mortgager or at his request. Where the mortgagee insures on his own account he is not, as a matter of course, entitled to charge a premium to the mortgaged estate. *Mix* v. *Hotchkiss*, 14 Conn., 32.

5. The taxes are to be paid out of the rents and profits. If they were insufficient for that purpose, then interest should be allowed. But it does not appear that such was the case.

6. The master is appointed to determine the reasonable annual rents of the estate. It seems, that during the occupation of the mortgagee, he increased the charge for rent. It nowhere appears, that he erred in so doing.

7. If the decision as to wood and timber cut by the mortgagee was erroneous, the burden is on the excepting party to show such error. This he has not, in any mode, attempted to do.

The first and second exceptions to the master's report sustained, and the remaining exceptions overruled.

The case is recommitted to the master so far as the exceptions are sustained.

KENT, DICKERSON, BARROWS, DANFORTH and TAPLEY, JJ., concurred.

WALTON, J., having been of counsel, took no part in the decision.

CHARLES CROOKER, *Petitioner*, *versus* ELBRIDGE RANDALL.

A review will not be granted in a case which has been referred, on the mere ground that the petitioner's counsel was not present, when the report of the referee was offered and accepted in Court, although it was not offered until after the second day of the term.

A review will not be granted on the ground of newly discovered evidence, when it does not appear that the evidence is admissible, or that it is not cumulative.

ON EXCEPTIONS to ruling of WALTON, J.

PETITION FOR REVIEW, to which the respondent demurred. The presiding Judge sustained the demurrer, and the petitioner excepted.

The original case was referred. The petitioner alleged that his counsel attended the term of Court at which the report of the referee was accepted, but, it not having been presented during the first two days of the term, he left. It was afterwards presented and accepted. The petitioner also alleged that he relied on his counsel's being present when the report was offered. He also asked for a review on the ground of newly discovered evidence.

S. May, for the petitioner.

J. Smith, for the respondent.

DICKERSON, J. — The facts admitted by the demurrer

would not authorize the rejection of the report of the referee; *a fortiori*, the Court will not grant a review. The "mistake" alleged was the fault of the petitioner's counsel, which the Court will not cure.

It does not appear that the newly discovered evidence is admissible, or that it is not cumulative; nor is the Court furnished with the whole evidence before the referee, to enable it to determine whether the evidence is cumulative.

Exceptions overruled.

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

SAMUEL ABBOTT *versus* MOSES ABBOTT.

To determine the true construction of a deed, it is proper to look at its origin and the sources of its derivation, as well as to the then existing state of facts.

Where several particulars descriptive of the land intended to be conveyed by a deed are named therein, some of which are false, if the true are sufficient to designate the land, the false will be rejected.

Where the land described was the "west half of lot 284 * * as surveyed by I. B. & J. B., by order of the *Court of Sessions;*" when in fact I. B. & J. B. never surveyed it by order of any court, but as a committee of the *Court of Common Pleas*, duly partitioned said lot assigning the "west half" to the defendant's grantor and the east half to the plaintiff's grantor; — *Held*,

1. That the latter words referred to the partition made by order of the Court of Common Pleas, and not to a former partial survey made by one J. H. at the request of the then owner, but never adopted by him: and

2. That if the latter words were to be rejected as erroneous, then the words "west half of lot 284" are a sufficient description to pass the title.

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

TRESPASS QUARE CLAUSUM.

The case was referred to the presiding Judge with the right to except, who found as matters of fact as follows: —

That neither party have acquired rights by open, adverse and exclusive possession for twenty years.

That the line run by Harvey was always recognized and claimed by the owners and occupants of the two parts of the lot until 1854, when the plaintiff discovered it was not in the centre of the lot, and after that period there was a mixed possession of the land in dispute.

That the land was legally held in common, though the occupation may have been several until 1834, when partition was made.

That the commissioners divided the land equally; that the defendant had, as a matter of fact, acquired no rights by adverse possession, and that the plaintiff was not disseized.

That, if parol evidence of the intention of the plaintiff is admissible, he intended to convey the west part of the lot only, according to the division made by the commissioners.

The presiding Judge determined as a matter of law, upon these facts and findings, that the effect of the deed of the plaintiff to Stevens, and Stevens to defendant, was to convey the west half of the lot 284 by a true centre line, and that the grass was cut upon the land lying between the centre of the lot and the dividing line, and that the defendant was guilty of the trespass in manner and form as the plaintiff has declared against him, and assessed one cent damage for the plaintiff.

To which the defendant excepted.

The remaining facts appear in the opinion.

McCrillis, for the defendant, argued elaborately the following propositions: —

The description in the deed was sufficient to identify the land conveyed. The description in the deed was to be taken as if it embraced these words alone — "west half of lot 284 as surveyed," because the words "by Johnson and Boynton by order of Court of Sessions" — are false, and to be disregarded.

2. When the words "west half of lot 284 as surveyed" were brought into contact with the collateral facts, there was a surveyed line dividing the lot; it tallied with the de-

scription in the deed, and was a sufficient and complete description of the land conveyed.

3. Where the description in the deed applies equally to two or more pieces of land, parol evidence of the real intention as to which of the two or more pieces of land was actually meant to be conveyed, was admissible.

4. Or, if the description in the deed, when brought into contact with the collateral facts, was so loose and uncertain that it could not be applied, parol evidence of the real intention may be received to aid the application of the description and prevent the deed being inoperative, provided such parol evidence of intention does not contradict the language of the deed. If it does contradict the words of the deed, it is inadmissible, and the deed is void for uncertainty.

5. In regard to the acts of the parties in recognizing this line after the deed conveying the land was delivered. The courts sometimes say such acts amount to a construction of the language of the deed by the parties. Such acts are *collateral* to the true intent of the parties. In this case the recognition of this dividing line by the parties is evidence collateral to the true intent of the word surveyed in this deed, and conclusive that the parties intended to convey by this dividing line.

L. Barker and *C. P. Stetson*, for the plaintiff.

APPLETON, C. J.—This is an action of trespass *quare clausum*. The trespass is described as having been committed on the east half of lot No. 284, in Etna. If the plaintiff is entitled to the east half of the lot, his right to recover is not denied.

It was in proof that Samuel Abbott, the father of these parties, was the owner of lot 284, and, being dangerously ill and wishing to divide his real estate between his children and his wife, procured one Joseph Harvey to run certain lines for that purpose. Harvey ran one exterior line on the east side of this lot, and a line as and for the dividing line of the same, which in fact divided the lot unequally, and

likewise ran around other lots of said Abbott and made a plan of his doings.

Samuel Abbott, senior, for whom these and other lines on other lots had been run, for the purpose above indicated, made his will without referring to any plan or survey of Harvey, devising lot 284, to his wife and sons, in certain proportions as tenants in common.

The two lines on the lot in controversy were run for Samuel Abbott, senior, for a specific purpose, which was never carried into effect, for it is certain that these runnings were never adopted as a divisional survey by the person by whose order and for whom they were thus made.

Upon the death of Samuel Abbott, in September, 1831, the devisees of lot 284 held the same as tenants in common.

At the October term of the Court of Common Pleas, 1833, Sewall Abbott, who had acquired by purchase from the devisees thereof an undivided half of lot 284, petitioned said Court for a partition thereof, and Israel Johnson and Isaac Boynton were duly appointed a committee to make partition. On the 17th day of May, 1834, after being first sworn, they proceeded to execute their commission, and made a report of their doings, assigning to the petitioner the west half of the lot, which was accepted, and their doings confirmed, and these proceedings entered of record. The plaintiff subsequently acquired his title to the east half from the devisees upon whom it devolved by virtue of these proceedings.

These parties respectively derive their title from the will of their father, and through the partition referred to. No other partition is alleged or pretended.

In 1834, Sewall Abbott released his interest to the plaintiff, who, on the 15th April, 1836, conveyed the same to John Stevens, from whom the title passed to the defendant by deed dated Jan. 31, 1837. These deeds, after describing other lots in Etna, proceed as follows:—"Also, west half of lot 284 and half of gore, both containing fifty acres, being

the same, more or less, as *surveyed by Israel Johnson and Isaac Boynton*, by order of the Court of Sessions.

In construing a deed, the intention of the parties, if ascertainable, should in all cases govern. To determine the true construction of the deed under which the defendant derives his title, it is proper to look at its origin and the sources of its derivation, as well as to the then existing state of facts. The lot had but recently been divided among the devisees by Israel Johnson and Isaac Boynton. No other partition had or has ever been made. It had been done by a court having competent jurisdiction, but which is misdescribed. The parties knew of the partition. Now, looking at the record title, we cannot doubt that the deed refers to the partition made by order of the Court of Common Pleas, by a committee appointed by said Court. If so, the plaintiff's right to recover is unquestioned, as by his partition the lot was divided into two equal parts.

If parol evidence is admissible to show the intention of the grantor, then the Court found as matter of fact that the reference in the plaintiff's deed to Stevens to the survey was inserted for the express purpose of limiting the grant by the terms of the partition, which would give the defendant the west half of the lot and no more. This finding as a matter of fact is conclusive.

If the clause "as surveyed," &c., is open to explanation to ascertain its meaning, then the evidence introduced negatived the fact that it referred to any survey, and shew that the clause referred to the partition, and nothing else.

The expression "west half of lot No. 284," is clear and unambiguous. No body doubts or can doubt what is thereby intended. The clause "as surveyed by Israel Johnson and Isaac Boynton, by order of the Court of Sessions," is incorrect, neither they nor any other person having made such survey by order of the Court of Sessions or by that of any other court.

The rules of construction, upon the last hypothesis, seem to be well established. When several particulars are nam-

ed descriptive of the land intended to be conveyed in a deed, if some are *false* and inconsistent, the true are sufficient to designate the land, and those which are false and inconsistent will be rejected. *Vose* v. *Handy*, 2 Greenl., 322. A clear general description of the property is not controlled by any subsequent expression of doubtful import in respect to any particular. *Ela* v. *Card*, 2 N. H., 175. Erroneous or defective reference to the sources of title will not be permitted to vary a prior description, clearly and definitely given. *Crosby* v. *Bradbury*, 20 Maine, 61. Where the description consists of several parts, it may prove, upon comparing the description with the land itself, that some of the particulars are incorrect, mistaken or false. "In such case," observes BELL, J., in *Drew* v. *Drew*, 8 Foster, 498, "the law is well settled that, if it can be ascertained from such parts of the description as are found correct what was intended to be conveyed, the instrument will be effectual, the property will pass, and the incorrect parts of the description will be merely rejected and disregarded. The authorities on this are very numerous and uniform." If, in the description of the land intended to be conveyed by a deed, any part of the description is false or mistaken, it will be rejected. *Harvey* v. *Mitchell*, 11 Foster, 575. So if there is a contradiction in the description, that part of it is to be taken which gives most permanence and certainty to the location. *Jackson* v. *Loomis*, 18 Johns., 81.

Rejecting what is erroneous, the conveyance of the half remains.

When this case was first presented, the fact of a partition made by Johnson and Boynton, by order of the Court of Common Pleas, was not in proof, and the material facts upon which that decision is based are shown to be erroneous.

That the parties did not refer to the alleged running of Harvey is abundantly manifest. He never surveyed the whole lot or either half thereof. His running was never adopted by the party by whom he was employed. He is

not referred to by name in any of the deeds under which the parties respectively claim title. The deed refers to a survey by two men by name acting under the order of a court, not to that by one man not named and acting without judicial authority.

The question of adverse possession does not arise in the case as now presented. It is conceded that no rights have been acquired by either party by disseizin.

In any view which can be taken of the case, the plaintiff is entitled to recover. *Exceptions overruled.*

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

MARY W. BOYNTON, *in Eq. versus* DEODAT BRASTOW *& als.*

Equity will not permit trust property to be reconveyed to one of several trustees, before his duties as trustee are ended, for the same considerations for which it was sold by them, except for the benefit of the *cestui que trust.*

Instructions to the master.

BILL IN EQUITY.

The facts sufficiently appear in the opinion.

A. W. Paine, for the complainant.

J. S. Rowe, for the respondents.

WALTON, J.—This is a bill in equity by a sister against her two brothers, in which she claims that they, as trustees under their father's will, are unjustly withholding from her her interest in her father's estate. The plaintiff's husband is a nominal defendant, being one of the trustees under the will; but his feelings as well as his testimony, are in favor of his wife; so that the controversy is between the sister and her two brothers. The plaintiff, Mrs. Boynton, and the defendants, Billings Brastow and Deodat Brastow, jr., are the only children of Deodat Brastow, senior, deceased.

The father died in August, 1846. By his last will and testament he gave all his property, real and personal, to his two sons, and the husband of his daughter, *in trust*, for certain purposes therein expressed, *the residue, after discharging certain other trusts, to be equally divided among his three children.* The estate has been fully administered in the Probate Court, and the administration accounts closed. The plaintiff claims that there is a residuum in the hands of her two brothers, one third of which belongs to her. They deny that there is any such residuum in their hands.

During the administration the defendants sold the testator's interest in real estate, and within a short time after, the whole of it was re-deeded to Deodat Brastow, one of the defendants. These sales were for sums little more than nominal. No considerations in fact passed between the parties, the reconveyances being made in satisfaction of the sums agreed to be paid at the time of the first sales, neither more nor less. The plaintiff claims that these re-sales — the purchasing back of the testator's interest — were for the benefit of all the children, and that the property was thenceforth held in trust for their joint benefit. This the two brothers deny. They say that the property was fairly sold, and that the re-sales were not for the benefit of all the children, but for the benefit of Deodat alone; and that he thenceforth held it, not in trust for himself and others, but for himself alone.

A careful examination of the case satisfies us that the plaintiff is right, that the conveyances to Deodat were in fact intended for the benefit of the plaintiff as well as her two brothers; or else they must have intended a fraud upon her, which a court of equity will not allow them to consummate.

We are satisfied that the property was sold, not for the largest, but for the smallest sums possible. There may not have been any express agreements to that effect, — most likely there were not, — but it is impossible to believe that

the executors did not expect to be able to buy it back again for the benefit of the heirs, at the same price for which it sold. And it is equally difficult to believe that the purchasers did not expect to re-sell the same to the executors upon those terms. It does not appear that they paid, or offered to pay anything for their purchases; or that they were in any hurry for their deeds. One of the purchasers was the confidential friend of the brother who conducted the sales, and the other two purchasers were his legal advisers.

It is enough, however, for us to know that the property was re-deeded to one of the trustees for the same considerations for which it was sold, before his duties as trustee were ended. Equity will not permit a trustee thus to deal with the trust property, except for the benefit of the *cestui que trust.* Sound policy requires all the skill and efforts of a trustee to be used for the benefit of the *cestui que trust;* and to secure this end his private interest must not be allowed to come in conflict with his duty. If a trustee could be allowed to sell the trust estate, and then immediately to buy it back for his own benefit, his private interests would be in direct conflict with his duty. To enable him to buy cheap he must sell cheap. Instead of making known its good qualities, and its real value, and the true state of the title, he would be influenced to disparage the estate, by concealing, as far as he could, every thing which would enhance its value, and to avoid clearing up any clouds that might hang over the title.

But it is said in defence that this estate was hopelessly insolvent, — that there was absolutely nothing for the residuary clause in the will to operate upon, — and that if the property was sold and bought in for less than its value, the creditors and not the heirs, would be the only persons to complain. But this argument, however specious, is not sound.

The testator seems to have supposed that he would leave to his children an estate worth seven thousand dollars, after paying all his just debts. But at the time of his death an

equity suit was pending against him, growing out of an old land trade, in which judgment was afterwards recovered against the estate for over six thousand dollars. This put a new face upon things, and thenceforth the estate seems to have been managed in a manner quite different from what we may reasonably suppose it would have been, if the suit had terminated favorably to the estate.

The estate was represented as insolvent. Commissioners were appointed. The creditors in the above judgment proved their claim before them, and theirs was the only claim of any magnitude that was proved before the commissioners. Such a claim was not likely to be viewed by the heirs with favor, and henceforth the estate seems to have been managed, not for the purpose of producing the largest, but the smallest dividends possible; and this purpose was so successfully carried into effect, that on settlement of their final account in the Probate Court, there was absolutely nothing for the creditors, and a small balance due the executors. This was not difficult to accomplish. Nearly all of the testator's estate, real and personal, was mortgaged or pledged to his son Billings, (one of the executors,) for a debt of unknown magnitude. From the evidence now before us, we infer that the debt was about four thousand dollars, and that the real and personal estate mortgaged and pledged to secure it, was worth ten thousand dollars. The right, therefore, to redeem this property, as a whole, would be worth about six thousand dollars; and if the right had been sold as a whole, and the amount of Billings's debt had been accurately stated, it is not unlikely that it would have brought very nearly its value. But it was not thus disposed of. The testator's right to redeem the real estate underwent the forms of a sale. But the amount for which it was mortgaged seems not to have been made known. The mortgage was to secure not only present, but all future indebtedness. A purchaser would want to know, not only the amount of the mortgage debt, but also whether any, and if so, how much of that debt was to be satisfied out of the personal

estate pledged. But this question was left unanswered. Again:—the mortgage covered many parcels of real estate to secure a single debt. How could the right to redeem one of these parcels be sold without selling the right to redeem the whole? Impossible. Such a right of redemption is an entire thing, and cannot be divided. A purchaser could buy no right to redeem a single parcel. To redeem one parcel he would be obliged to redeem the whole. Yet the executors undertook to sell, and did go through with the forms of selling, the right to redeem one parcel at a time, and under all the other disadvantages above stated. Such a pretended sale produced of course nothing but nominal bids; and those were by a confidential friend and the legal advisers of the executor who managed the sale. These nominal sums were never paid, but instead, the real estate was all re-conveyed to this same executor.

The purpose was undoubtedly to defeat the judgment recovered against the estate after the testator's death, and save the property indirectly for the heirs. And in this they succeeded completely. The judgment for over six thousand dollars was compromised and settled for a little over three hundred dollars, and was made the basis of claims against others, on which was recovered the sum of six hundred dollars; so that in the end the estate was enlarged instead of diminished by it.

Suppose this is so, say the brothers, will a court of equity decree a distribution among wrongdoers? Can our sister rightfully call upon us to share with her what we have cheated out of the creditors?

The answer is this:—Your sister does not charge you with fraud towards the creditors. For aught that appears their claims have all been settled. She charges you with fraud only in endeavoring to deprive her of her share of her father's estate remaining in your hands after you have satisfied, *not defrauded*, the creditors. She charges you with no fraud towards the creditors, and we will not permit you to

defeat her claim by alleging your own fraud. *Nemo, allegans suam turpitudinem, audiendus est.*

After the recovery of the judgment against the estate in the equity suit for over six thousand dollars, the estate was properly enough represented by the executors as insolvent. But after that judgment had been compromised, and was made the means of recovering of others a sum nearly twice as large as was paid to settle it, there was no propriety in continuing to treat the estate as insolvent. By proper and judicious management we think from five to seven thousand dollars might have been saved out of it for the benefit of the residuary legatees.

We are satisfied that the two brothers have assets in their hands which they ought to account for to their sister, or her personal representative. The real estate sold and re-deeded to Deodat must be regarded as such. The six hundred dollars collected of Crosby & Todd must be regarded as belonging to the trust estate. And all other sums received and not accounted for in the Probate Court.

But before a final decree can be made which will do complete justice between the parties, the case must go to a master, to inquire and report: —

1. What sum, if any, is due upon the mortgage to Billings Brastow. The master should charge him with all sums received, or which, by reasonable diligence, might have been received, on account of the personal securities pledged to him. He should be charged with reasonable rent for all the real estate included in his mortgage. This because he and Deodat both testify that the real estate has been held and occupied by them under the mortgage. He should also be charged with all payments which have in any other way been made upon the mortgage debt. If these sums more than satisfy the mortgage debt, the master will report the amount of such over-payments. The master will allow nothing for improvements, but will inquire and report the present value of any parcels of the real estate on which

permanent improvements have been made, and how much its present value has been increased by such improvements.

2. The master will inquire and report, how much, if anything, is equitably due the brothers from the estate for the support of Mrs. Mary Whiting, under that clause in the testator's will which provides for her support. As the widow waived the provisions of the will providing for her support, and received an allowance made by the Judge of Probate from the estate, no notice will be taken of her support. The settlement of the estate, so far as it progressed in the Probate Court, will not be disturbed.

3. The master will take and return an account between the two brothers and the trust estate; charging them with the real estate before named, at its present value as nearly as it can be ascertained, and with all other property, money, rights, or credits, which have come into their hands, on account of said estate, *not accounted for and settled in the Probate Court;* and crediting them with all just and equitable claims which they may have against said estate, in their said capacity of executors and trustees under the will.

The case will be reserved for further proceedings after the return of the master's report. The foregoing is but an outline of the decree that will be made, sending the case to a master. When the decree comes to be drawn up in form, if the Court shall discover that other and more explicit directions to the master are required to secure a report that will enable them to do complete justice in the premises, they will be inserted.

Bill sustained, case sent to a master.

APPLETON, C. J., DICKERSON, BARROWS and DANFORTH, JJ., concurred.

SAMUEL TAINTER *versus* JAMES A. LOMBARD.

In a sale of personal property by parol, the title may vest in an undisclosed principal for whom the apparent purchaser is negotiating as agent.

In such case, the principal may vindicate his title as against the agent, although the seller of the property has no knowledge of the interest of the principal.

If A negotiate for the purchase of personal property, and, at his request, B pays for it upon the agreement that he is to hold the property as his own, until he is repaid, and the property is delivered to them under this agreement, the title will vest in B.

ON EXCEPTIONS, by plaintiff, to the ruling of APPLETON, C. J.

REPLEVIN for a wagon. The case is stated in the opinion.

A. W. Paine, for plaintiff.

J. A. Peters, for defendant.

BARROWS, J. — The wagon replevied in this suit is claimed by the defendant by virtue of a sale to him from Robert B. Tainter, the plaintiff's son, and the case finds that the only question was one of title whether the wagon was the property of the father or the son. It was bought of Reuben Dunning. The terms of sale were agreed upon between him and the son, and he appears to have supposed that the sale was to the son and testifies accordingly. But he required the father to sign the notes with the son and took a mortgage of the father's oxen as security for the notes, and, upon his delivering the wagon, they together took it and hauled it to a neighboring shop to be repaired. The case finds that plaintiff and his son were living together at this time, the son being a young man possessed of little or no property. The father testified that the son solicited him to purchase the wagon and procured Dunning's terms, and that, before going over to Dunning's to close the trade, it was agreed between them that the father should give his note for the wagon and that the wagon should be *his* until paid for by the son, — that he paid the notes which were given for the wagon and also paid for the repairs, that the son had never repaid these sums, that the wagon was used by the family from the time of the purchase, July 9, 1859, till

Aug. 30, 1862, when the son took it from the father violently while the latter was riding in it on the highway, and sold it to the defendant.

On the part of the defendant, there was testimony tending to show that the son bought the wagon and paid for it and always held it as his own, and that the father merely signed the note with the son as a surety. The Judge instructed the jury that if the father and son, before the delivery of the wagon by Dunning, agreed between themselves that the father should hold the property as security for the payment of the note, and nothing was afterwards done about it, the title would not pass, (to the father,) provided the sale was made by Dunning to the son, the father signing with the son as surety.

This instruction was doubtless correct. The doctrine is simply this, that an agreement to give a mortgage or pledge, not executed, cannot be permitted to take the place of such mortgage or pledge under these circumstances.

The difficulty is that this instruction presents the case only upon the hypothesis that the testimony offered on the part of the defendant, above referred to, was true, and that no instruction was given upon the phase of the case presented by the plaintiff's testimony, although the plaintiff's counsel requested the Court to instruct the jury that, "if by agreement between the father and son, the former was to hold the property of the wagon until the son had paid for it, and the wagon was delivered to them under this agreement, the agreement would be binding and the father would hold the property accordingly." The requested instruction was refused. The Judge is not bound to adopt the language of counsel in communicating the law of the case to the jury, and, provided it appears, or may fairly be presumed from the exceptions, that pertinent and correct instructions as to the points raised by the testimony were in fact given, exceptions will not be sustained on account of his refusal to do so.

In the case at bar, however, the instruction before recited, as given by the Judge, is presented as *the* ruling of the

Court upon the law of the case, and not as an instruction given *inter alia*.

It would seem from the exceptions that no such instructions were given as to the vital question in the case, — viz.: to whom did the property pass upon the sale by Dunning — as the plaintiff in view of his testimony and the requested instruction was entitled to have.

The fault may be in the exceptions, but, having been duly allowed, they are to be considered as presenting the case correctly.

For whom did the son make the bargain with Dunning? For himself, or, as agent, for his father? To whom did the property pass upon that sale? The questions are fairly raised by the plaintiff's testimony and the requested instruction, and it was the duty of the Court to aid the jury in their determination by appropriate instructions upon matters of law.

Upon a sale of personal property by parol or by writing not under seal, it is not unfrequent that the title vests not in the apparent purchaser, but in some undisclosed principal for whom the apparent purchaser was negotiating as agent, and the authorities cited by the plaintiff's counsel in argument, and numerous others, show that the real purchaser, though unknown to the seller, may vindicate by suit in his own name his rights in the property, and also rights under contract made respecting the property by the agent, in *his* own name only, without disclosing his principal, provided only that the seller or party dealing with the agent is not prejudiced by the introduction of the unknown principal in place of the agent.

In the case at bar, although Dunning may have supposed, and honestly testified, that he sold the wagon to the son, this ought not to be permitted to prejudice the rights of the plaintiff, if, in point of fact, in pursuance of the agreement between the father and the son, made pending the bargain, the father became the real purchaser.

Exceptions sustained. — New trial granted.

DAVIS, KENT, DANFORTH, and DICKERSON, J. J., concurred.

GEORGE M. WESTON *versus* NATHAN DANE.

The State Treasurer cannot be required to pay out money received by him in his official capacity without a warrant from the Governor and Council.

ON REPORT by APPLETON, C. J.

ASSUMPSIT for money had and received. The case was submitted to the Court upon substantially the same facts presented in *Weston, Petitioner, &c.* v. *Dane, State Treasurer*, 51 Maine, 461.

A. Libbey, for plaintiff.

Although the money was received and receipted for by the defendant, in his official capacity, it never went into the State Treasury. By the terms of the Resolve, and order of the Council, the plaintiff's commission of twenty per cent. was to be *paid out of the sum received*. A part of it was so paid, and no account of it made on the Treasurer's books.

J. A. Peters, Attorney General, for the defendant.

APPLETON, C. J.—The plaintiff was appointed an agent of the State of Maine to prosecute certain claims upon the government of the United States. His compensation was established at twenty per cent. of the amount received by the State on said claim, and said *compensation to be taken from the amount so received.*

It is agreed that all the money paid by the United States came into the hands of the defendant, as State Treasurer, and was receipted for to the government of the United States by him in his official capacity.

The money being in the defendant's hands, as Treasurer, he cannot legally pay it out without the warrant of the Governor and Council, as required by the constitution. This the plaintiff has failed to obtain.

The plaintiff is an agent of the State for a special purpose. The amount of his compensation is fixed. The different

State officers serve the State for fixed salaries. But neither the plaintiff nor any other public servant can sue the State, however important his services.

Neither can the State Treasurer be held to pay an individual the amount due from the State. He could not legally pay the money without the warrant required by the constitution, and he should not be held individually responsible for acting in accordance with his official obligations. The plaintiff's claim is upon the Legislature, which we are bound to presume will pay a just and proper regard to any equitable claims of the plaintiff, for his meritorious services in behalf of the State.

The defendant has no money in his hands as an individual. For the money in controversy he has given his official bond to the State and he cannot be responsible therefor to the plaintiff. *Weston* v. *Dane*, 51 Maine, 461; *French* v. *Fuller*, 23 Pick., 108. A town treasurer is not liable, in an action for money had and received, to a creditor of the town, for neglecting to pay over money in his hands *appropriaedt* by the town to the payment of the claim of such creditor, and ordered to be so paid by the selectmen; but the remedy of the creditor is by an action against the town. It is the misfortune of the plaintiff, that no action can be brought against the State. *Plaintiff nonsuit.*

CUTTING and DICKERSON, JJ., concurred.

KENT, DAVIS and WALTON, JJ., concurred in the result.

JOSEPH T. GRANT *& als. versus* GEORGE N. BLACK.

Where the last call in a deed describing the territory in township No. 21 was from an undisputed point of departure, "thence southwesterly *by a line to be run* between townships number 21 and number 22 to the place of beginning;" — *Held*, that the call repudiated all former lines between the termini mentioned, and the *line to be run* must be the shortest distance between the points named.

And the subsequent clause, "according to a survey and plan of said township by P & D," will not control or modify the preceding language.

An instruction to the jury that another line admitted to have been run by the proprietors prior to the date of the deed to the plaintiffs, purporting to be the true line between townships 21 and 22, was the controlling monument answering the call, and that the point of departure must be rejected as inconsistent with the other and superior monument referred to in the deed, is erroneous.

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

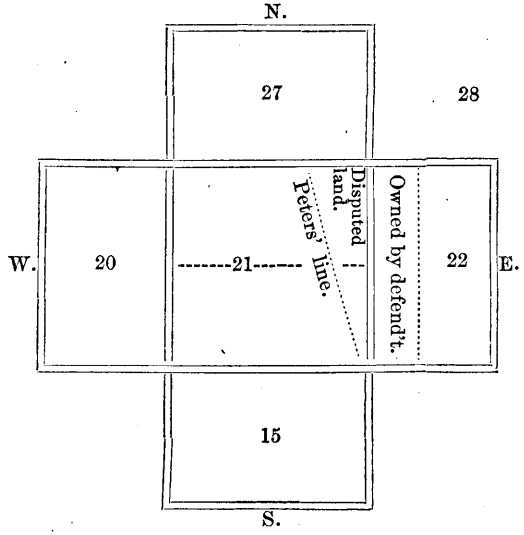
Trover for 1600 pine logs and 800 spruce logs.

The plaintiffs claimed that the logs were cut by the defendant on the eastern part of the north half of township No. 21, middle division, Hancock county.

The defendant alleged that the cutting in question was not on township No. 21 but upon No. 22, which he owned.

The question was as to the construction of the deed from Alexander Baring and others to James Grant, under whom plaintiffs claim as heirs. So much of the deed as is material will be found in the opinion.

The description can be readily understood by referring to the following diagram.



It appeared in evidence that one John Peters, in 1792, run a line for the proprietors, commencing at the N. E.

corner of township No. 15, thence northerly about six miles, coming to a "line running east," which spot he called, in his field notes, "northeast corner of No. 21." This "N. E. corner of No. 21" is about fifty-two rods west of the "southwest corner bounds of township No. 28."

The presiding Judge instructed the jury that much evidence had been introduced as to a line between 21 and 22, existing at the true date of the plaintiffs' deed, which would have been a fact for them to have considered, and of vital importance in the construction of the deed, had not that consideration been withdrawn from them by the admission of the plaintiffs' counsel in his argument, which was clearly authorized by the evidence, that one John Peters, for the proprietors, run a line in 1792, purporting to be the line between 21 and 22, as appears by his field notes. Whereupon the corner of township No. 28 being assumed in favor of the plaintiffs, and the Peters line proved and admitted to have been run as aforesaid, nothing remained but for the Court to construe the deed governed by those assumed and admitted monuments. And thereupon the Judge did instruct the jury that the Peters line was the controlling monument in answering the call in the deed; that the southwest corner of township No. 28 must be rejected as inconsistent with the other and superior monuments referred to in the deed; that the line could not be run from that corner, between townships No. 21 and 22, which as such was to be run without its rejection.

The verdict was for the defendant, and the plaintiffs excepted.

Rowe, for the plaintiffs.

J. A. Peters, for the defendant.

APPLETON, C. J.—On the 1st day of December, 1847, Alexander Baring and others conveyed to the plaintiffs' father the following described premises,—"a certain lot or parcel of land lying and being in the township number

twenty-one, middle division, in the county aforesaid, (Hancock,) and State of Maine, numbered twenty-one, middle division, and butted and bounded as follows; viz., beginning at the northeast corner bounds of township No. 15, M. D., and running by said township westerly to the southeast corner bounds of township No. twenty, M. D., or Mariaville, thence northerly by said township No. twenty, or Mariaville, to the southwest corner bounds of township No. 27, M. D., or Aurora, thence easterly by said township No. 27, *to the southwest* corner bounds of township No. 28, M. D., thence *southwesterly by a line to be run between townships Numbers* 21 *and* 22, *M. D.*, to the place of beginning and containing twenty-three thousand and forty acres more or less, — the part of said township intended to be conveyed by this deed is the north half thereof, reserving therefrom two lots of three hundred and twenty acres each for public uses in said town, three lottery lots containing eight hundred acres, and six lots of one hundred and sixty acres each, sold to settlers, having and containing nine thousand, one hundred and twenty acres more or less, *according to a survey and plan of said town by Peters and Dodge, surveyors*, &c. The line in controversy is that between No. 21 and No. 22.

The meaning and intention of the parties is to be ascertained from the grantors' deed. As the words are of their selection, the construction most favorable to the grantee is to be adopted.

The four corners of the township in question are undisputed. There is no controversy as to three of its sides. By the terms of the deed, the line from the S. W. corner of No. 28, M. D., (about which there is no doubt,) to the N. E. corner of No. 15, M. D. the point of beginning, is a *line to be run*. There might have been a line between No. 21, M. D. and No. 22, M. D., but if there was one, the grantors did not adopt it. They repudiated it. It was a line to be run. The grantee is so informed in and by his deed. There may be ever so many lines between these townships,

but none are to affect him. The point of departure is well ascertained. The point to be reached is equally well fixed. The line to be run must be the shortest distance between these two designated and established corners. The grantors owned the two townships, between which the divisional line was *to be* run. They had an unquestioned right to bound their grants by such limits as they might choose.

After the corners of the townships in the Bingham purchase had been established and the plan made, a line was run by John Peters in 1792, purporting to be the line between No. 21, M. D., and No. 22, M. D. This line the defendants claim to be the line between these townships. But this line was not between the N. E. corner of No. 15, M. D., and the S. W. corner of No. 28, M. D. It is fairly inferrible, from the language of the deed under which the plaintiffs claim, that the grantors therein were aware of the existence of the Peters line. They might, had they deemed it expedient, have affirmed the line run by Peters as the true one. Instead of adopting it, they distinctly and unequivocally ignore any existing line, by requiring one *to be run* from the last corner in the deed to the place of beginning, *by which line to be run* the grantee is specially bounded.

The plaintiffs' deed does not refer to any existing line between No. 21, M. D., and No. 22, M. D., but to one *to be run*. A line run and a line to be run are expressions materially different. The monuments between which the line is to be run are well defined and specially referred to. The line for which the defendant contends is not between these monuments, nor is it referred to. It is a line other than that described in the deed. The grantors of the plaintiff have defined the corners between which the line *is to be run*, and we have no authority to change or alter that line or to adopt a different one.

The adjacent township is owned by the defendant by a deed from the same grantors from whom the plaintiffs derive their title. It is bounded by a line identical with one "*to be run*" from the S. W. corner of No. 28, M. D., to the

N. E. corner of No. 15, M. D. The plan of the survey and location of the Penobscot Bingham purchase makes the line between No. 21 and No. 22 one and the same. There is no gore between them. The defendant's deed from the same grantors excludes the land in controversy from his grant.

The deed under which the plaintiffs claim refers to monuments. Those monuments are found on the face of the earth. They are not disputed. No reference is found in any deed to the Peters line as an existing line, but the reverse. The deed to Grant calls for a line *to be run*. It gives monuments between which the line is *to be run*. The line must be run between them. The line between No. 21 and No. 22, as described in the deed to the defendant, is coincident with the line *to be run*. The monuments must govern.

The ruling of the Court repudiated the monuments to which the deed specially refers, and adopts a line which the deed does not recognize. The line in dispute, according to the ruling to which exception is taken, is obtained by running back on the preceding line fifty rods to a monument *not* referred to in the deed, and thence on the line between No. 21, M. D., and No. 22, M. D., to the place of beginning. The corner in the deed and the line *to be run*, according to the deed, to the place of beginning, and the course of the line are rejected; and preference is given to a corner and a course and a line, of which no mention is made in the deed.

This is the reverse of the manifest intention of the parties and is erroneous.

Nor does the last clause "according to a survey and plan of said town by Peters and Dodge" control or modify the construction given to the preceding language of the deed.

"The first deed and the last will shall operate" is an ancient maxim. 4 Cruise, 244. In accordance with this principle, *if* there be a contradiction between the call of the deed requiring a new line *to be run*, and the clause referring to the survey by Peters and Dodge, the former must prevail.

So the various parts of a deed should be so construed as to reconcile all seeming contradictions and to give effect, as far as may be, to each and every clause. Accordingly the line is *to be run* as first required, and, being run, the survey and plan are to govern as to the other lines.

This gives effect to all the calls, and is in conformity with the intent apparent in the whole deed, and that intent is to govern. *Exceptions sustained.*

DICKERSON, BARROWS and TAPLEY, JJ., concurred.

KENT, J., concurring.—Black or his principals owned both townships. He could deed as he pleased. He did deed by a line *to be* run between two fixed and unquestioned monuments.

At this time, as the case assumes, there was a line run by Peters in '92, as a line between 21 and 22. This was not the line laid down on Putnam's plan. It was not a line existing when the Commonwealth sold. The deed from the State and the plan bound all the towns on the lines and corners, and makes them all continuous, without any gores.

The line of Peters is not, therefore, an original dividing line, but a line run by the owner of the two townships, or by his direction. John Peters, sen'r, seems to have run but a part of the lines of several townships. It was not a line that *ipso facto* and by its own force established forever, and against all deeds, or determinations of the owner, a dividing line between the two townships.

It must be regarded, however, as an existing line on the face of the earth. And if the deed had said, by the dividing line between 21 and 22, this line might have controlled. But the deed does not say this. It seems, on the contrary, to carefully avoid any recognition of an existing line. After a careful examination of the deeds, it strikes me very forcibly that Col. Black did not intend to recognize this line of Peters, but to use language that would in effect exclude it as a monument. Because, 1. In his deed to Grant he starts

from a corner monument, fixed and now conceded to be correct, then he goes to next "corner bound of No. 20, running by line of township No. 15," then by line of No. 20 to "corner of No. 27," then on line of No. 27 to the S. W. corner bounds of No. 28. These corners are undisputed. But here he stops in following any line of townships or between towns. Why did he not say, then on line of 22, or on the line between 21 and 22 as before? He simply says, thence southwesterly by a line to be run between Nos. 21 and 22, to place of beginning,—i. e. to the monument first named.

If there had been no Peters line, there could be no question that the line *to be* run must be a straight line in a general S. W. course to the first monument. The question is, does the fact that there was a line on the earth run by a surveyor, purporting to be and intended by him as the line between the towns, create or fix a monument, to meet which the language of the deed must be construed against its manifest import?

It is clear that Col. Black intended to start from and run to the *corners* of the several towns named, and particularly to the corner of No. 28. This corner is well established on the face of the earth. Now the construction contended for by defendant compels us either to stop short of that fixed, named and manifestly designated monument, fifty rods or more, where there is not and never has been any corner of any township marked and recognized, and confessedly not the corner of No. 28, or else to run to it, as the deed requires, and then run back due west on the identical line just run over as part of the boundary, the fifty rods, and there make a corner, and then run at right angles with the last line to first bounds. Thus making two lines, when but one is called for, and taking back some fifty rods in length which had just before been granted. And yet this is the claim made by the counsel for the defendant in his argument.

2. The language of Col. Black's deed to defendant, which was made subsequently, of the half of the adjoining town-

ship, is also marked by the same apparent intention of disregarding the Peters line. It begins, in the description of the boundaries, at the same corner, (of No. 28,) where the other deed terminated on the north line; it then runs on the line of 28 to the centre of the town, then on the centre line to a corner *on* the north line of No. 16, then to the S. W. corner of this township No. 21, which is fixed and undisputed. Here again the description by lines of townships stops, and the next line is given, not as the dividing line between 21 and 22, or as on the line of township No. 21, but simply, "thence northerly six miles to the bounds first mentioned." This last line must therefore be a straight line between these two monuments, the corner of 21 and 15, and the corner of No. 28, the first bound. It is exactly the same line as the one described in deed to plaintiff, to be run from corner of No. 28 to corner of No. 15.

Now, if the deed to the plaintiff is to be construed as limiting the land conveyed as ½ of No. 22 by the Peters line, must not the deed to defendant be construed as carrying his line up to that line, leaving no gore or undeeded land. The Judge in this case properly said that the proprietors, whilst owners of both townships, might deed as they pleased and make any line or lines they pleased.

If, then, defendant's deed of No. 22 had been first in time, it would have become important to know whether that deed carried the line to the Peters line. If it did, then clearly no after deed or description could convey to another what had been conveyed to defendant.

If the plaintiffs' deed was earliest, then the question is, did that description limit the grant to the Peters line? If it did, and defendant's deed was subsequent, and if that deed does not go to the Peters line, (as seems to be admitted,) then there is a gore of land undisposed of, and the corners do not correspond with the corners named in the deed.

It seems to me that both deeds and all the deeds in the case may be examined to settle the point in question. It being granted that Col. Black might make exactly what line

he pleased, being owner of both, as and for the dividing line between 21 and 22, the question is what line did he choose, and make and designate?

Taking into consideration these deeds, it seems to me that Col. Black knew of this Peters line and his field notes; that he knew that he run a line across, but that he did not come out at or near the corner required to bring the lines together, according to the plans; that he did not, so far as appears, mark any corner, but speaks only of striking a line run before by his son; that he then returned and did nothing more about this line. Col. Black probably knew, by comparing this with other lines, that if it should be adopted as the established divisional line for all time, there would be inequality and difficulty in bringing the lines and corners to correspond, and that the corner of No. 28, which seems to have been carefully guarded and always recognized by him as a very particularly important monument and starting point, must be abandoned and a new and distinct corner of 21 and 22 created, some fifty rods westerly of his long cherished corner. He therefore determined to abide by the corners at all events, and to run beyond this assumed corner or end of Peters line, and fix the end of this northerly line at his old, well known corner of No. 28. He does so in express terms in his deed to plaintiff, and he starts from same corner in his deed to defendant. But how shall he run the line between this and the corner of No. 15, the starting point? If he says by the line between 21 and 22, or by line of 21, then a question may arise at once, what line? It cannot be by Peters' line, for that does not start from corner of No. 28, and you cannot get on to it, unless you run back and make a right angle as before explained. And yet it is the only line ever run on the face of the earth. I must, therefore, he says, at all events, use language that shall not recognize that line, for I know that that line will not make the division I intend. I will, therefore, distinctly indicate the line I intend, as one never yet run, but *to be* run on the basis and data I give; viz., from the fixed corner

of No. 28 to the fixed corner of 15. This is the line I choose, one I designate, and one I deed to and by. The same view and intention is manifest in the deed to defendant, and there is nowhere any evidence, that I see, that Col. Black ever did or ever intended to recognize this running by Peters as final and conclusive, but the contrary is established to my satisfaction.

JAMES C. GROUT *versus* LEMUEL NICHOLS.

It is the province of a Judge, at *Nisi Prius*, to state to the jury the claim set up by each of the parties, as disclosed by the evidence, and to instruct them upon the law applicable thereto.

It is competent for the presiding Judge to instruct the jury as to the legal effect of any one of several facts relied upon to establish a waiver; leaving it to the jury to pass upon the general question from all the evidence in the case.

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

The facts appear in the opinion.

J. Crosby, for the plaintiff.

1. In giving the statement, the presiding Judge wholly omitted all the material circumstances outside of the express testimony of the witnesses.

2. It was the province of the jury to say what the evidence on the part of the parties respectively proved. *Copeland* v. *Hall*, 29 Maine, 93.

3. The Judge should not have stated the case. He might have informed the jury what the parties respectively *contended* for; but to state absolutely the case of the respective parties was assuming the province of the jury.

4. Whether the evidence in a given case establishes a waiver of any legal right by a party, is a question of fact. *Fox* v. *Harding*, 7 Cush., 516; *Hill* v. *Hobart*, 16 Maine,

164; *Smith* v. *Gugerty*, 4 Barb., (S. C.,) 614; *Gerrish* v. *Norris*, 9 Cush., 167; *Thayer* v. *Wadsworth*, 19 Pick., 349.

5. The instruction "that the neglect to call for the wagon on July 1, was not a waiver," took this main fact from among the others, tending to prove a waiver, from the jury.

6. If the instruction was *true* as an *abstract* proposition, it was *erroneous under the circumstances*, because it tended to mislead the jury. *Osgood* v. *Lansil*, 33 Maine, 360; *Woodman* v. *Chesley*, 39 Maine, 45; *Prescott* v. *Hobbs*, 30 Maine, 345; *Jackson* v. *Bowker*, 4 Met., 235; *Allen* v. *Cooper*, 22 Maine, 133; *Mansfield* v. *Corbin*, 2 Cush., 151; *Pond* v. *Williams*, 1 Gray, 630.

Geo. W. Whitney, for the defendant.

DICKERSON, J.—Assumpsit for the price of a wagon and a second count for not accepting a wagon made for defendant, according to a special contract. The bill of exceptions shows that the presiding Judge "stated to the jury, that, *in substance*, the plaintiff's statement of the case was, that he agreed to make for defendant a wagon similar to the one sold to H. K. Dexter, with certain alterations; that no price was fixed; that no particular body was selected by the defendant; that defendant was to have one of five wagon bodies, and that the plaintiff was to get it done as soon as he could;—that defendant's statement of the contract was, that the plaintiff was to make a wagon for him, similar to Dexter's, with certain alterations; that a particular body was selected, and agreed to be finished; that the price was to be the same as for Dexter's wagon, $130, with the addition of the extra expense, except for the couplings, and that it was to be finished by the first day of July; that either bargain, if proved, was mutually binding; that the question for the jury was, which statement was correct, and they could render their verdict accordingly; that, according to the defendant's statement of the case, *time* was of the essence of the contract; that, if they found that the contract was

that the wagon was to be completed by the first day of July, defendant was not liable, unless the plaintiff had the wagon ready for delivery, or the defendant had waived the delivery at that time, and that the neglect of the defendant to call for the wagon on the first day of July would not be a waiver of the condition that the wagon was to be completed on that day."

The verdict was for the defendant, and the plaintiff's counsel filed exceptions to the Judge's statement of the case, and also to his ruling upon the subject of waiver. He complains that the presiding Judge invaded the province of the jury in making a statement of the claims of the respective parties, as indicated by the evidence. The summing up by the presiding Judge upon this point does not purport to comprise the whole of the ground set up and relied upon by the parties, but only *the substance* of it. It is simply a general statement of the theory of both parties, as indicated by the evidence, without intimating an opinion as to the correctness of either theory, or the preponderance of the evidence. Nor is it seriously claimed that this statement is essentially erroneous. Indeed there is sufficient evidence reported in the bill of exceptions to show the substantial correctness of the Judge's statement. The jury were distinctly told that it was for them to determine which statement was correct. The plaintiff and defendant differed as to the *time* when the wagon was to be completed, the one contending that no time was fixed, and the other that it was to be completed on the first day of July. The wagon was not finished on the first day of July; hence, according to the defendant's view of the contract, *time* was material, and the Judge so instructed the jury. It is the province of a Judge at *Nisi Prius* to state to the jury the claims set up by the parties, as disclosed by the evidence, and to instruct them upon the law applicable thereto. Oftentimes, and especially when there is a large amount of evidence, and the questions at issue are somewhat involved, such clear and concise statement by the presiding Judge affords the jury an unerring

guide to the truth. The plaintiff has no cause of complaint in this particular.

Nor do we perceive any error in the instructions upon the subject of waiver. The plaintiff claimed that the defendant waived his right to have the wagon completed on the first day of July, and the Judge instructed the jury that the neglect of the defendant to call for the wagon on that day was not such a waiver. The Judge did not instruct the jury that no waiver was proved, nor that such omission, with the other facts in the case, would not constitute a waiver, but that *this* was no waiver. If the contract stipulated that the wagon should be finished on a specified day, this was a precedent condition which the defendant had a right to insist upon, and the mere omission on his part to demand the wagon on that day was no waiver of this right. There was no stipulation in the contract that the defendant should call for the wagon on the day it was to be finished, nor that it was to be ready at that time provided the defendant should demand it.

The neglect of the defendant to call for the wagon on the day it was to be finished, neither relieved him from the obligation to pay for it, if it was completed at that time, nor the plaintiff from the obligation to have it done as he had stipulated. The omission of a contracting party to do what is not called for, is no waiver of his right to demand the fulfilment of what is stipulated in the contract. Whether there has been a waiver of a right in a given case depends upon the intention of the party at the time of the alleged waiver; and the law will not hold a party to intend the relinquishment of a right, solely from his failure to assert it at the moment it accrues, where such assertion is not required by the contract.

While, in general, it is the province of a jury to determine whether the evidence in a case establishes a waiver of any legal right by a party, cases may arise where the facts are so few and simple, and the acts or admissions of parties are so clear and unequivocal, that it would be the duty of

the Court to give the jury definite instructions with regard to their legal effect. So also, where there are several facts and circumstances relied upon to establish a waiver, it is competent for the Court to instruct the jury as to the legal effect of any *one* of those, leaving it for the jury to pass upon the general question of waiver from all the evidence in the case. This is precisely what the presiding Judge did in the case at bar. If the plaintiff desired further instructions, he should have requested the Judge to give them. *Hill* v. *Hobart*, 16 Maine, 164; *Fox & al.* v. *Harding & al.*, 7 Cush., 516. *Exceptions overruled, and Judgment on the verdict.*

APPLETON, C. J., KENT, BARROWS and TAPLEY, JJ., concurred.

ELLIS FRIEND, *Appellant from the decision of the County Commissioners of Penobscot County.*

By R. S., c. 18, § 35, in cases of appeal from the decision of county commissioners on petitions for laying out, altering or discontinuing any highway, the Court may appoint a committee of three *disinterested* persons, &c.

Where the land over which a road is laid by the county commissioners is owned by a railroad company, a stockholder in said company is not *disinterested*, and cannot be appointed on the committee.

BARROWS, J.—Friend appealed from a decision of the county commissioners laying out a certain road in the town of Etna upon the petition of Moses Abbott & als, and, through his counsel,—without the knowledge or consent of the original petitioners or their counsel, the county commissioners, or county attorney,—procured the appointment of a committee, a majority of whom were objected to by the original petitioners, when they were notified of a hearing before them, as interested by reason of being stockholders in a railroad corporation which was the owner in fee of land over which the road runs.

Friend, Appellant from decision of County Commissioners.

It is admitted that two of the committee at the time of their appointment were, and still continue to be stockholders in such railroad company.

This committee made their report reversing in part the decision of the county commissioners, and it is submitted to this Court to determine upon the above facts whether the committee were disqualified to act in the premises.

There can be no doubt that they were.

Chapter 18, § 35, of the Revised Statutes, provides for the appointment of "a committee of three disinterested persons" to pass upon such cases, and it is well settled that *any* interest, *however small*, is sufficient to render one who is required to act in a judicial capacity incompetent. *Pierce* v. *Atwood*, 13 Mass., 324.

In *Hesketh* v. *Braddock*, 3 Barr., 1847, jurors were held disqualified where the prosecution was for a penalty, which was to be recovered for the use of the corporation of which they were members, though the whole penalty was only £5.

It was decided in *State* v. *Delesdernier*, 2 Fairf., 473, that the owner of land over which a road was located was incompetent to act in laying out the same. The owner of stock in a corporation which owns the land is equally so.

Report rejected.

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

L. Barker, for the appellees.

Wm. H. McCrillis, for the appellant.

DANIEL SOUTHARD *versus* INHABITANTS OF BRADFORD.

By R. S., c. 3, § 4, in case the selectmen unreasonably refuse to call a town meeting, any ten or more legal voters therein may apply to a justice of the peace in the county, who is hereby authorized to issue his warrant for calling such meeting.

If a majority of the selectmen were never requested to call the meeting, it cannot be said they unreasonably refused.

A town meeting, called by a justice of the peace, without an unreasonable refusal by the selectmen, is illegal.

This Court will not presume a town intended to ratify the proceedings of a meeting illegally called, unless it use language so clear and explicit that there can be no doubt of its purpose.

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

CASE for refusal of the selectmen of Bradford to draw an order for a bounty of $100 for the plaintiff, in pursuance of a vote passed at an alleged town meeting held Feb. 21, 1865.

It was proved that the plaintiff was an inhabitant of the defendant town, was drafted and mustered into the U. S. service in March, 1865, credited to the quota of Bradford, and honorably discharged in May, 1865.

It was also proved that the town, at a legal meeting held Jan. 31, 1865, voted "to pay each volunteer enlisting for the town's quota, $400 when mustered into service," also voted to pay each drafted man, &c., $200, when mustered. At the meeting called by the justice, and held Feb. 21, 1865, the town, under a specific article, voted "to pay each drafted man $100 in addition to the $200 voted to be paid Jan. 31, 1865, by a town order payable in one year." In the warrant calling the annual meeting to be holden March 13, 1865, were the following articles, viz., "Art. 5. To see what sum of money the town will raise to pay orders given for town bounties. Art. 14. To see if the town will instruct the selectmen to draw the bounty orders for those who have or may enlist or be drafted on the present town quota payable with interest." Under these respective articles, the town "voted to raise $3000 to pay orders given for

bounties;" and to "instruct the selectmen to draw said orders on interest."

The plaintiff contended that, if the February meeting were illegal, the votes at the March meeting ratified it.

The remaining facts appear in the opinion.

Mace, for the plaintiff.

Wakefield, for the defendants.

APPLETON, C. J.—The rights of the parties depend upon the legality of the town meeting on Feb. 21, 1865, at which the votes relied upon by the plaintiff to maintain his suit were passed.

By R. S., 1857, c. 3, § 4, "in case the selectmen unreasonably refuse to call a meeting, any ten or more legal voters therein may apply to a justice of the peace in the county, who is hereby authorized to issue his warrant for calling such meeting," &c.

The warrant, issued by the justice calling the meeting, does not give the names of the selectmen, whose alleged unreasonable refusal constitutes the justification of his action.

The statute requires certain conditions precedent to give the magistrate jurisdiction. Whether those conditions existed may be a matter of controversy. The magistrate is not finally and in the last resort to determine the question of their existence. He is not to notify parties and hear witnesses. His action in the premises is ministerial, not judicial. He is not constituted a tribunal, whose decision is binding upon the parties. It obviously follows that the existence or non-existence of the conditions essential to give him jurisdiction may be controverted in subsequent proceedings.

The applicants to the justice may not be legal voters in the town. The town is not concluded by his warrant. In *Ladd* v. *Clements*, 4 Cush., 477, the validity of a parish meeting depended upon whether those, by whom the meet-

ing was called, were or were not members of the parish, and evidence on both sides was received. In *Fletcher* v. *Lincolnville*, 20 Maine, 439, a school district meeting was called by the selectmen upon the application of four individuals, who were not described therein as qualified voters residing within the district. The opinion of the Court assumes the admissibility of evidence to prove that they were such qualified voters.

So, too, whether there was a refusal of the selectmen to call a town meeting is an issuable fact. The action of the magistrate was unauthorized without such refusal. The evidence shows that the selectmen never refused unreasonably or otherwise. Two of them, constituting a majority, were never requested, and there cannot be an unreasonable refusal without a request. *Sudbury* v. *Stearns*, 21 Pick., 148.

The vote at the annual town meeting, holden on 13th of March, 1865, does not in terms apply to the proceedings at the alleged town meeting on 21st of February preceding, which we have seen was not duly called. Its language is fully satisfied by regarding it as referring to the proceedings of the town meeting on Jan. 31, the validity of which is not questioned. We cannot presume the town intended to ratify the proceedings of a meeting not legally called. If such was the intention of the town it should have used language so clear and explicit, that there could not be any doubt of its purpose.

The vote on March 13, in the absence of anything to the contrary, must be limited in its application to orders legally issued under the vote of the town on Jan. 31.

It is not pretended that the proceedings of the town at the alleged meeting, on Feb. 21, have been ratified at any other time than on March 13. We have seen they were not then ratified. *Plaintiff nonsuit.*

CUTTING, KENT, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

THOMAS N. EGERY *versus* ANSEL W. DECREW *& al.*

By c. 81, § 111, nothing contained in this chapter shall alter, take away, or lessen the effect of payment of any principal or interest made by any person.

A new promise is implied from the fact of a partial payment of a promissory note.

Such payment need not be indorsed; but it may be proved by parol.

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

The facts will be found in the opinion.

J. A. Peters, for the plaintiff.

A. W. Paine, for the defendants.

Partial payments should be indorsed in order to have the effect of renewing the promise. *Pattee* v. *Blood*, 5 Pick., 54. The holder should not be left to elect afterwards whether he will apply the payment to the note or not. *Haven* v. *Hathaway*, 20 Maine, 345.

Plaintiff had appropriated the collections from Day to the credit on account, and he cannot gainsay it. *Capen* v. *Allen*, 5 Met., 268, 271: *Richardson* v. *Woodbury*, 12 Cush., 279.

TAPLEY, J.—The question presented in this case is, whether the statute of limitations presents a complete defence to the plaintiff's action upon the note in suit, dated Aug. 21, 1856, the writ being dated Dec. 18, 1865.

The proof shows the note was not witnessed, and to obviate the difficulty arising from the lapse of more than six years from the date of the note, the plaintiff offers proof of several payments made upon the note by the defendants, one being made April 20, 1861. To avoid the effect of these as renewals, the defendants urge that, as these payments were not indorsed on the note at the time they were made, it is too late to do it after action brought, and they cannot now avail the plaintiff to take his case out of the statute of limitations.

It is the *payment* that operates as a renewal of the promise and saves the case from the statute, and not the *indorsement* of the amount paid on the note. The indorsement is but evidence of payment, and sufficient evidence only when put upon the note by the party liable to pay the note.

The effect of the payment is in nowise affected by the indorsement. The indorsement may never be made and the effect of the payment be the same.

It is well settled the *payment* may be proved by parol. *Sibley* v. *Lambert*, 30 Maine, 253; *Evans* v. *Smith*, 34 Maine, 33. By the report in the case, it appears that the defendants committed to the hands of the plaintiffs a demand against one Day for collection, "with directions to account for what they should collect upon it, on defendant's note; that, on Oct. 21, 1857, plaintiff collected $11, May 10, 1858, $8, and April 20, 1861, $7,79, all of which sums were passed to defendant's credit on account to be allowed on the note, but were not indorsed on the note."

The defendants committed this claim against Day, for the *specific* purpose of paying in part their note, and for no other purpose. The plaintiff received it upon these conditions and no other. He could apply the proceeds to no other object without the consent of the defendants, and they could not change the appropriation without the consent of the plaintiff. The parties themselves made appropriation of the proceeds of the Day claim. Being so delivered, and so accepted, the money as soon as collected operated as so much payment on the note in suit and takes the case out of the statute. *Haven* v. *Hathaway*, 20 Maine, 345.

Defendants defaulted and damages assessed by allowing as partial payments amounts stated in report.

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

WILLIAM H. HORTON *versus* WILLIAM MCCARTY.

The mere writing of the price and the name of the purchaser of real estate sold at auction, by the auctioneer, upon a slip of paper not connected with any other papers, is not a sufficient signing within the statute of frauds.

To bind the purchaser, a memorandum, containing all of the essential terms of the contract, must be made and signed by the auctioneer at the time of the sale and before the termination of the proceedings.

It is not sufficient for the auctioneer to enter, in the absence of the purchaser, the sale on his book at his office upon his return from the place of sale, he having no sufficient memorandum of the sale, made at the time, from which to make the entry.

The extent of the agency of the auctioneer.

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

The facts appear in the opinion.

F. A. Wilson, for the plaintiff.

The memorandum is sufficient in form. *O'Donnell* v. *Leeman*, 43 Maine, 158; Greenl. on Ev., vol. 1, § 269. Auctioneer agent of both parties. *O'Donnell* v. *Leeman*, *supra*. A memorandum commenced at the time and place of sale and extended afterwards on the books of the auctioneer is sufficient, if done as soon as practicable, and the latter is regarded as the original entry. *Episcopal Church* v. *Seavey*, Riley's Ch., 156.

Charles Hamlin, for the defendant.

KENT, J.—The question in this case is, whether there has been a sufficient compliance with the requirements of the statute of frauds, in the matter of a written memorandum, signed by the party to be charged. The sale was made at auction. It is now fully established law that sales at auction of real estate are within this statute. It is also well settled that the auctioneer is the agent for both parties to a certain extent. He is the agent of the seller in selling, and the agent of the purchaser to perfect the bargain by signing a proper memorandum at a proper time.

These points have, in former days, elicited much discussion and many doubts, but are now too well settled to be discussed.

The real question, in the case before us, is, whether the auctioneer did in fact bind the defendant, by a sufficient memorandum, duly and legally signed by him, for the purchaser. It is admitted that there was a regular sale by the auctioneer, that the lot of land offered was struck off to defendant, he being the highest bidder, and that a deed was duly tendered. But the defendant insists that there has been no contract signed by him, or by his agent, the auctioneer.

The memorandum, which the auctioneer shows in his book of sales of real estate at auction, is undoubtedly sufficient, if seasonably made, to charge the defendant. It contains a description of the premises, the time and place of sale, the name of the seller, the terms, and the name of the defendant as purchaser, and is signed by the auctioneer.

The objection is that this was not made at the time and place of sale, or as a part of the transaction, whilst the parties were present. What was done on the premises? The auctioneer was a witness, and the substance of his testimony is, that he *presumes* he wrote down the *name* of the purchaser and the price on a piece of paper, immediately, on the premises, that he does not know where that paper is, nor can he produce it.

He cannot testify to the fact from any distinct recollection, but he *infers* that he did so, because such was his usual custom. There are two objections to giving effect to this testimony. The first is, that the proof of the fact is not satisfactory; and the second is, that a mere writing down on a slip of paper of the name of the purchaser and the price, the paper containing nothing else and connected with no other papers, is not a signing of a contract, within the meaning of the statute. The rule of law has been sufficiently relaxed by the decisions, but it is not entirely dispensed with. The general rule is, "that the paper or book

signed must contain the essential terms of the contract, with such a degree of certainty that it may be understood, without recourse to parol testimony." Brown on Statute of Frauds, § 347. It is clear that the writing of a name and a sum on a slip of paper, which contains no reference to the sale and its terms, or to the description of the property, is not sufficient. *Freeport* v. *Bartol*, 3 Greenl., 340; *Morton* v. *Deane*, 13 Met., 35.

The question then is reduced to this:—Is it sufficient if the auctioneer enters the sale on his book at his office, soon after, and on his return from the sale, in the absence of the defendant, he having no sufficient memorandum of the sale made at the time, from which to make his entry?

This must depend upon the extent and continuance of the agency of the auctioneer. Does that extend beyond the time and place of sale, or is it limited, so far as the purchaser is concerned, to such time and place? It is undoubtedly true, that, as a general rule, it is not necessary that the signing should be at the moment of making the contract, *when the parties are acting for themselves.* It may be done at any time before action brought. And we see no good reason why the same rule should not apply where the signing is by an agent fully authorized to act at the time of signing. *Williams* v. *Bacon*, 2 Gray, 387.

How far, then, does this agency for the purchaser extend? There is a manifest distinction between the agency for the seller and that for the purchaser. The auctioneer is selected and appointed by the seller, and the purchaser has no voice in the matter. He is undoubtedly the agent of the vendor from the inception to the final consummation of the contract, and the full performance of its terms. His agency for the purchaser does not commence until the sale has been opened and he becomes the highest bidder. Although it is somewhat anomalous to make the agent of one party who desires to sell, the agent of the other who appears to buy *of such agent*, yet it has been decided, after much controversy and many doubts, that he is such agent to a certain extent, and

for a certain time, but not to the same extent as he is agent for the seller.

In the case of *Gill* v. *Bicknell*, 2 Cush., 355, SHAW, C. J., thus states the rule and the reasons therefor. "It is now well settled, by the authorities, that a sale of real estate at auction, where the name of the bidder is entered by the auctioneer, or by his clerk, under his direction, *on the spot*, and such entry is so connected with the subject and terms of the sale as to make part of the memorandum, is a contract in writing, so as to take the case out of the statute of frauds.

"The true reason probably is, that a sale at auction, being open and visible and in presence of witnesses, either competitors or persons present and closely watching the proceedings, there is less danger of fraud or perjury in proving the making and terms of the contract, and so the main reason for requiring a memorandum in writing does not exist. The technical ground is that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk *to put down his name* as the bidder, and thus confers an authority on the auctioneer or his clerk to sign his name, and this is the whole extent of his authority."

To the same effect is the case of *Cleaves* v. *Foss*, 4 Greenl., 1, where it is said:—"Whoever bids does, in effect, authorize the auctioneer to sign his name as purchaser, if no other person bids a higher sum." *O'Donnell* v. *Leeman*, 43 Maine, 158. "A memorandum signed by an auctioneer *at time of sale* is sufficient."

Mr. Justice STORY discusses the questions arising under sales at auction, in *Smith* v. *Arnold*, 5 Mason, 414. On the point we are now considering, he says,—"It has been decided that the memorandum of the auctioneer to bind the *purchaser* must be *cotemporaneous* with the sale. It cannot be made afterwards. The Court, on principles of just policy, have bound up the words of this restriction in order to

prevent men from being ensnared by contracts subsequently reduced to writing by agents,"

Although these latter words may seem to be too general, and to cover all cases of unlimited agency, yet, when applied, as the Court evidently intended they should be, to the point in question, they are just and forcible.

The auctioneer is primarily and actively the special agent of the party selling. His feelings, his sympathies and his interest all unite to make him anxious to sell at the highest possible price, and to hold the bidder to the performance of the contract. In case of any dispute or difference, he would, although an honest man, naturally incline to the side of his employer, against a person with whom he has no other relation than that of a bidder for the property which he, as agent for the owner, has offered at public sale. The law, therefore, when it allows him to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied to the usual cases of agency, and requires that the single act for which, almost from necessity, he is authorized to perform for the buyer, shall be done at the time of sale, and before the termination of the proceedings. This seems to us a reasonable and necessary limitation of this special agency. Without it, there would be danger of injustice and partiality.

The point has been directly decided in England. In the case of *Mews* v. *Carr*, Harls. & Norman, 484, (48 E. L. & Eq., 358,) it was held, that, although "the auctioneer *at the sale* is agent for both seller and buyer, so as to bind them by his signature, yet the moment the sale is over the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only, and the signature of the seller or his agent cannot bind the buyer." See also *Buckmaster* v. *Horrop*, 13 Vesey, 456.

According to the agreement of the parties, the judgment must be *Plaintiff nonsuit.*

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

ALBERT PRATT *& al. versus* EBENEZER D. ROBERTS.

By c. 164, of the Public Laws of 1860, a trial justice has no authority to strike off, on a subsequent day, a nonsuit entered by him on the day to which an action returnable before him had been duly continued.

Sections 9 and 10, of said chapter, authorizing a magistrate to "strike off a nonsuit or default and revive an action," refer to a "nonsuit or default" entered at "the time set in the writ for the trial," and not to a disposition of the cause in either mode at some subsequent day to which it had been continued.

ON EXCEPTIONS to the rulings of CUTTING, J.

This action was returnable April 1, 1865, before a trial justice in and for the county of Penobscot. The action was duly continued to Saturday, May 6, 1865, at 9 o'clock A. M., when the justice, on motion of defendant's counsel, entered a nonsuit, the plaintiffs not appearing except by counsel.

On the following Monday, the justice, on motion of the plaintiffs, struck off the nonsuit, upon terms, and continued the action to May 27, 1865, at 10 o'clock A. M., for trial, of which the defendant was notified by the justice.

On the 27th day of May, the parties appeared; when the defendant's counsel filed a written protest against the justice's assuming jurisdiction over the action after the nonsuit; but said justice overruled the objection, and required the defendant to plead to the action, and, after trial, entered judgment against the defendant; from which judgment the defendant appealed, and duly entered his appeal at the Oct. term, 1865; and, on the second day of said term, filed a motion to dismiss the action for want of jurisdiction in the Court below.

The presiding Judge sustained the motion, and the plaintiffs excepted.

Whitney, for plaintiffs, contended, —

That the "twenty-four hours after judgment on nonsuit or default," mentioned in c. 164, § 10, of Pub. Laws of 1860, did not necessarily refer to the twenty-four hours next after

"the time set in the writ for the trial;" and cited Pub. Laws of 1834, c. 623; *Spencer* v. *Perry*, 17 Maine, 413; R. S., 1841, c. 116, § 14; *Tyler* v. *Reed*, 31 Maine, 336.

D. D. Stewart, *contra*, cited, —

Wiest v. *Critsinger*, 4 Johns., 117; *Green* v. *Angell*, 13 Johns., 469; *Bigelow* v. *Stearns*, 19 Johns., 42; *Smith* v. *Perry*, 17 Maine, 413; *Martin* v. *Fales*, 18 Maine, 23; *Call* v. *Mitchell*, 39 Maine, 465; *State* v. *Hall*, 49 Maine, 412; *Blanchard* v. *Walker*, 4 Cush., 455.

APPLETON, C. J. — The writ in this case was returnable on the first day of April, 1865, at which time the plaintiffs and defendant respectively appeared by their counsel, and the cause was then continued to May 6th, 1865. At the day of adjournment, the parties were again present by their counsel and a nonsuit was entered. On the Monday following, the magistrate before whom the case was triable, claiming the right to revive the action, attempted so to do.

A justice of the peace has no right, except by the provisions of some statute conferring the authority, to set aside a nonsuit or default on a day subsequent to that on which the entry was made.

By the Act of March 7, 1860, c. 16, §§ 9 and 10, it is provided that "one hour from the time set in a writ for the trial of a civil action is allowed to the parties to appear; at the expiration of which time, judgment may be entered by such trial justice, on nonsuit or default, against the party who shall not appear."

§ 10. "Within twenty-four hours after judgment, on nonsuit or default, as provided in the preceding section, the trial justice rendering such judgment may, in his discretion, on motion of either party, strike off such nonsuit or default and *revive* the action on such terms as he may judge reasonable."

These provisions manifestly refer to a nonsuit or default at "the time set in a writ for the trial of a civil cause." They do not refer to a disposition of a cause in either mode

at some subsequent adjournment. They relate only to the possible failure of justice by the non-appearance of the party nonsuited or defaulted at the return day of the writ.

The parties having been present on the return day of the writ and the action having been nonsuited at the day to which it was continued, the jurisdiction of the magistrate was at an end, except to carry into effect the judgment rendered. The statute relied upon gave no authority for further judicial action. *Exceptions overruled.*

CUTTING, KENT, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

WILLIAM A. BERRY *versus* WILLIAM H. JOHNSON.

R. S., c. 67, do not limit the Probate Court, in its selection of guardians, to persons resident in this State.

The decision of a presiding Judge as to matters of fact, in a case referred to him with right to except, is conclusive.

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

The guardian was appointed under clause 2, § 4, c. 67, R. S.

The remaining facts appear in the opinion.

A. Knowles, for the plaintiff.

Chapter 67, § 1, simply defines and regulates the jurisdiction of Judges of Probate in appointing guardians, limiting them to cases where wards, or their property, are in the counties for which they are the respective Judges. Section 9 gives guardians custody of their wards "resident in the State,"—"resident in the State" having reference to the ward. Same section humanely requires the guardian to "inculcate upon his ward habits of sobriety and industry, and may bind him out to labor or employ him in his own service." These requirements demand personal presence

and supervision of the guardian, and could never have been intended to be intrusted to a person beyond the jurisdiction of our Courts. Such guardian might carry his ward and property beyond the jurisdiction. R. S., c. 67, §§ 3, 9.

The Probate Court is real guardian of the ward, guardian its agent. The statute places him entirely under control of the Court, liable at any time to be cited before it for any dereliction of duty or abuse of authority. This authority is of the highest kind. The bond relates only to property, while this conservative power of the Court over the guardian relates to the personal safety and welfare of the ward. Remedy on the bond is subject to the law's delay; power of the Court over the guardian is immediate and available. This power is unavailable when guardian is out of the jurisdiction. By § 18, guardian shall settle his account when cited. If he refuses, he may be attached for contempt. He cannot be cited when out of the jurisdiction. The Court has no authority to thus voluntarily divest itself of such necessary practical power.

Such an appointment robs the ward of the most important provision in the statute, viz., § 25 provides that when a guardian embezzles or converts his ward's property, he shall be fined not "exceeding $5000 or confinement to hard labor for a term not exceeding ten years, or both." Guardian may take ward and property out of the State and embezzle with impunity.

The whole scope and spirit of the statute accords with the humanity of the subject, and contemplates that the guardian shall be within the control of the Court.

W. C. Crosby, for the defendant.

Tapley, J. — This is an action brought against the defendant for a bill of goods sold and delivered to him. The defence set up, that Johnson was under guardianship at the time of the sale, and that the articles were not necessaries.

The action was referred to the Court with the right to except. The presiding Judge found both points for the

defence; as to matters of fact, his finding is conclusive. It appeared in evidence that the guardian when appointed was a resident of Massachusetts, and has ever since and still continued to reside there. The plaintiff contended this appointment was illegal and void, but the presiding Judge ruled otherwise, to which the plaintiff excepts.

The power of appointing guardians over such persons is committed to the Judge of Probate for the county in which the person who is put under guardianship resides. He is not limited in his selection of guardian to residents of the county, or State. The whole power is committed to him to determine, under the circumstances of each case, the propriety of appointment, and the selection and competency of the person, and his doings in this particular are open to revision by this Court only by appeal. 3 Bradford, (N. Y. Surrogate) Rep., 130. *Exceptions overruled.*

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

DICKERSON, J. concurred in the result.

ARAD DUDLEY, *in Eq.*, *versus* LUCY A. BACHELDER *& als.*

By R. S., c. 73, § 11, there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney.

If, in a bill in equity brought to enforce a trust concerning lands, it be stated generally that an agreement or contract was made, the Court will, on demurrer, presume it was a legal contract until the contrary appears.

To establish a resulting trust, it must be clearly proved that the consideration of the purchase belonged to the *cestui que trust*, or was advanced by some other person as a loan or gift to him.

Where several pay the purchase money for the purpose of securing an interest on the part of each, a trust will result in the proportion of the payment of each when paid for some specific part or distinct interest in the estate; but not otherwise.

BILL IN EQUITY.

The facts appear in the opinion.

J. H. Hilliard, for the complainant.

A. W. Paine, for the respondents.

The bill presents the different parcels as somewhat different in principle, but it is believed they are all substantially the same in fact and without the pale of equity.

1. *Tavern stand.* — This part of the case presents facts exactly similar to those in *Fisher* v. *Shaw*, 42 Maine, 32. The arrangement between the parties was one for the purchase and sale of real estate by parol and is therefore void.

2. *As to Lots No.* 8 & 42, the facts are substantially the same in both. The bill presents plaintiff as paying part of the consideration at various times while under bond, but when the deed was made to Pratt, all sums then due, and which really afforded the consideration of the deed then passing, were paid by Pratt's notes and mortgage. Here was the payment, the note being as cash. This brings the case within the same category as the tavern stand, and both are refuted by the case cited.

No authority, it is believed, is necessary to the position that an agreement to convey upon payment afterwards made, has no binding effect, even though the payments be made as agreed.

The plaintiff, however, would seek to recover on the ground of a trust implied from the fact of payment. But, to have the effect, the payment of the consideration must be made at the time or before the conveyance. *Buck* v. *Swazey*, 35 Maine, 41; 2 Johns. Ch., 405; 2. Wash., 175.

Then, too, it must be made and deed taken by trustee without the consent or agreement of the parties. Where the deed is taken by the grantee, named by express understanding and consent, then no trust of the kind exists. The parties having *agreed* must stand or fall by the agreement, and if they have made an invalid agreement they must abide the consequences. *Sumner* v. *Aldrich*, 5 Cush., 431; 6 Johns. Ch., 117; 8 Paige, 222.

The deed in such case should *quoad hoc* be as between strangers in order to raise a trust. Hill on Trustees, §§ 91 and 92.

Some implied breach of duty or moral trust exists, as when a guardian invests the money of his ward, *Oliver* v. *Piatt*, 3 How., 333, or the administrator the money of his estate, or any other person the money of another in his hands. Hill on Trustees, § 92; 3 W. & M., 462, 463.

Where a part of the consideration is paid by another than the grantee then no trust is implied, unless some "aliquot part" is paid for, which was not the case here. *McGowan* v. *McGowan*, 14 Gray, 119, 121; *Kelley* v. *Jenness*, 50 Maine, 467, 468.

APPLETON, C. J., — The complainant in his bill sets forth that, being desirous of purchasing the tavern stand in Milford and not having means sufficient for that purpose, he applied in 1848 to Samuel Pratt, since deceased, (two of the defendants being his children and heirs at law and the other the administrator upon his estate,) to aid him in making said purchase; that, at his request, said Pratt agreed to advance him the money requisite for the first payment toward said stand, and his notes for the balance, as a loan, and take a deed of the land, and the complainant agreed to repay said money thus to be advanced with twelve per cent. interest, and to pay and to take up the several notes given by said Pratt at their maturity; that, in pursuance of said *agreement*, the purchase was made by this complainant, and said Pratt on his account, and, as a *loan* to him, advanced the money and notes for the land and took a deed of the premises in trust for him; that this complainant immediately entered into the possession of the premises thus purchased, and has remained in the occupation of the same to the present time, making repairs and expensive improvements, paying the taxes thereon as the owner of the same; that he paid said Pratt in his lifetime the money advanced by him, with twelve per cent. interest thereon, and took up the notes given by him; that he has demanded a conveyance, &c.

The bill contains a somewhat similar agreement in regard to other land, with the further allegation of a part payment on his part of the purchase money, and concludes with a prayer for a conveyance, to all which the defendant demurs.

By R. S., 1857, c. 73, § 11, "there can be no trust concerning land, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney."

The demurrer admits all the facts set forth in the bill. In *Cozine* v. *Graham*, 2 Paige, 178, it did not distinctly appear by the bill whether the contract, of which performance was sought to be enforced, was reduced to writing and signed, as required by the statute of frauds, or not. In such case, when a demurrer is filed, "if it is stated generally," observes Mr. Chancellor WALWORTH, in the case last cited, "that an agreement or contract was made, the Court will presume it was a legal contract until the contrary appears; and the defendant must either plead the fact, that it was not in writing, or insist upon that defence in his answer. He may then require the production of legal evidence to prove the existence of the contract." These views were affirmed by this Court in *Farnham* v. *Clements*, 51 Maine, 426.

Assuming, therefore, all the facts as alleged to be duly and clearly proved, for courts are stringent in the requirement of unquestionable evidence to establish implied or resulting trusts, the inquiry arises whether the facts set forth and undisputed would constitute a trust of this description. The case, as stated, is a loan by Pratt to the complainant of money and credit, for which in return the complainant either gave his note or entered into a valid agreement, by which he became legally obliged to repay the sums advanced and save harmless said Pratt from the notes given by him, the deed to said Pratt of the land having been given him at the request of and in trust for the complainant.

It is well settled, if A buy land with his own money and take a deed to B, that a trust results to A. But the payment which raises a resulting trust must be part of the transaction and relate to the time when the purchase was made. Any subsequent advance of the funds of another than the purchaser, toward paying the purchase money, will not raise a resulting trust. So, when an estate is conveyed to the grantee as a gift to the *cestui que trust*, the rights of the latter are the same as if paid for by his own money, and will equally receive the protection of a court of equity. *Jarrett* v. *Manini*, 2 Hawaiian, 667. So, a resulting trust may arise from a loan by the trustee to the *cestui que trust*. As in *Boyd* v. *McLean*, 1 Johns. Ch., 583, where the defendant loaned the complainants the money with which the purchase was made and took the conveyance as security for the loan. "The ground upon which the claim of the plaintiffs rests," observes Mr. Chancellor KENT, "is that the $1500 which were paid to Holden in 1807, as a consideration for the purchase of the premises, were the moneys of the plaintiffs, procured from the defendant as a loan; and that the defendant took the deed in his own name, by agreement, and thereby became trustee of the plaintiffs." In *Buck* v. *Pike*, 2 Fairf., 9, Brewer made the bargain with Munroe, the grantor, and gave his notes for the purchase money with Downes as surety, to whom the land was conveyed, and who held the same "as security for what he might have to pay, and for what he might advance. Had Downes lent the money to Brewer to pay Munroe," observes WESTON, C. J., in delivering the opinion of the Court, "and taken the deed in his own name for security, it would have been a payment of the purchase money by Brewer, to whom a trust would have resulted. So it was decided in *Boyd* v. *McLean*, upon such a state of facts. In this case, Downes did not in the first instance lend the money, but lent his name to Brewer as surety. Shall he be held trustee if he lends money, and shall he hold the land free of the trust, if he

only lends his credit? There is no ground in reason or justice for such a distinction." The Court there held Brewer to be the purchaser with his own note, and that Downes, who signed as surety and took the deed, was trustee, and enforced the trust against the grantee of Downes with notice of its existence. In *Page* v. *Page*, 8 N. H., 187, when P bought land and took a deed in the name of L, and L advanced the purchase money and *took the notes* of P for the same, and agreed to convey the land to P on being repaid the money advanced and interest; it was held that the money thus advanced by L might be considered as a loan to P, and the land as purchased with money of P, so as to raise a resulting trust.

If A makes a purchase, and B pays a definite proportion of the purchase money, intending to secure an interest in the land, a trust will result in the proportion of his payment in favor of B. But the payment must be made for some specific part or distinct interest in the estate, else no resulting trust will be implied. *Baker* v. *Vining*, 30 Maine, 121; *McGowan* v. *McGowan*, 14 Gray, 119.

The cases cited by the learned counsel for the defendant, upon examination, will not be found adverse to these views. In *Fisher* v. *Shaw*, 42 Maine, 32, "the money," observes TENNEY, C. J., "was paid by Foss, in consideration of the assignment to him; it was his money, in which Wyman had no interest and was under no obligation to refund it; and it cannot be treated as a loan to him. Consequently there was no trust, which arose or resulted by implication of law, as there might have been if the consideration paid for the assignment had been furnished by Wyman." In *Bottsford* v. *Burr*, 2 Johns. Ch., 405, Mr. Chancellor KENT says, "the whole foundation of the trust is the payment of the money, and that must be clearly proved. If, therefore, the party who sets up a resulting trust *made no payment*, he cannot be permitted to show by parol proof that the purchase was made for his benefit, or on his account. This

would be to overturn the statute of frauds * * nor would a *subsequent* advance of money to the purchaser after the purchase is thus complete and ended, alter the case." The trust must arise upon the conveyance, not by virtue of any contract or agreement made afterwards. *Steere* v. *Steere* 5 Johns. Ch., 1. In *Pinnock* v. *Clough*, 16 Vt., 500, the defendant purchased a farm for the complainant, but there was no written agreement between them, nor did the complainant *pay at the time* any portion of the purchase money or become liable for its payment. The defendant took the deed running to himself, paid a portion of the consideration money and gave security for the remainder. It was held that no such trust was thereby created as could be enforced in chancery. It was not enough that the purchase money was paid to the defendant *after* the purchase, or to a third person in payment of the securities given by the defendant at the time of the purchase. In *Getman* v. *Getman*, 1 Barb. Ch., 499, the defendant agreed to advance the money and take a lien upon the land, giving the complainants time in which to repay, and upon such repayment to convey the land to them. "This Court," observes WILLARD, V. C., "therefore, cannot aid the complainants, unless they prove the agreement as alleged, by some adequate instrument in writing signed by the defendants or by their agents." Upon appeal the decree of the Vice Chancellor was fully sustained. The general doctrine that the consideration of the purchase must belong to the *cestui que trust*, or should be advanced by some other person as a loan or gift *to him*, was fully affirmed. But, inasmuch as the complainants had not given their notes for the purchase money, nor entered into any binding agreement to take the property and pay the amount advanced, it was held that there was no resulting trust.

If, then, the purchase money paid and the notes given for the lands conveyed to Pratt, were the money and notes of Pratt, loaned to this complainant, he having at the time given his notes therefor, or having by some valid contract

agreed to repay the money advanced and interest, and to take up the notes thus given at their maturity, and take a deed of the land, then there would arise a resulting trust in his favor. Whether the evidence will establish such a trust is a matter to be determined upon the hearing of the cause.

Demurrer overruled. — Defendants to answer over.

CUTTING, KENT, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

SETH PATTEE *versus* WILLIAM H. MCCRILLIS.

By c. 44, § 1, of the Public Laws of 1858, the protest of any foreign or inland bill of exchange, &c., duly certified by any notary public under his hand and official seal, shall be legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or indorser, in any court of law.

If a notarial certificate, after stating the date, his official character, demand and refusal, recite that "the draft remaining unpaid, I duly and officially notified the drawer at" his post office address, — naming it, "per mail, requiring payment," it is *prima facie* evidence of notice.

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

The facts sufficiently appear in the opinion.

A. W. Paine, for the plaintiff.

Wm. H. McCrillis, pro se.

Two facts must appear to charge the drawer in this case, viz., presentment at proper time and place, demand and refusal; and that notice of the same was sent by the next post to the drawer. Language of the notice must cover these facts, as that the bill had been protested. *Cayuga Bank* v. *Warren*, 1 Coms., N. Y., 414; *Porter* v. *Judson*, 1 Gray, 177; *Gilbert* v. *Dennis*, 3 Met., 495; *Clark* v. *Eldridge*, 13 Met., 96. Only notice in case at bar was "requiring payment." *Vide notarial certif.* Bailey on Bills, 335.

Notice did not apprize the drawer that payment was required of the bill in question. Bailey on Bills, 335, 336, 337 and 338. The certificate does not state whether the notice to the drawer informed him that payment was required of him as drawer, indorser or acceptor.

The notary is agent of the holder, and if language used leaves a doubt as to its meaning, it must be taken strongly against the party using it. *Verba ambigua fortius accipiuntur contra proferentem.*

APPLETON, C. J.—This is an action against the defendant as drawer of a bill of exchange. To charge him, the plaintiff must show the dishonor of the draft and seasonable notice of such dishonor. In the numerous cases cited in argument, the notices sent by the notary or the holder of the draft to the drawer were before the Court, and in each case the sufficiency of the notice was determined by the language of such notice. It is otherwise in the case under consideration, for the notice sent has not been produced.

By the Act of 1858, c. 44, § 1, "the protest of any foreign bill of exchange or promissory note, or order, duly certified by any notary public under his official seal, shall be legal evidence of the facts stated in such protest, as to the same and also as to the notice given to the drawer or indorser, in any court of law."

The notary, in his protest, after giving the date and his official position, proceeds as follows:—"at the request of the holder, Mace Tisdale, Esq., (I) went with the original bill of exchange, which is hereto annexed, the time limited and grace having elapsed, to the Suffolk Bank and demanding payment was answered that the acceptor had no funds there.

"The draft remaining unpaid, I duly and *officially notified* the drawer at Bangor, Maine, and the indorser at Bangor and at Portland, Maine, *per mail*, requiring payment."

This is the act of a public officer as described in an official certificate made evidence by statute. He notified the parties to the bill duly and officially. It was in writing, *and sent by mail.* The notices were sent on the day of the protest and to the several parties at their respective places of residence. Their seasonable reception is not denied. The notice to the defendant is not produced nor are its contents stated. If insufficient in form the defendant would produce it, or if lost, being a competent witness, would state its contents. But it is not produced, nor are its contents stated. The presumption under such circumstances is that the notary notifying *officially*, his notices were sufficient to charge the parties to be notified.

Such, too, is the entire weight of judicial authority. In *Gallada* v. *Bank of the Union*, 2 Head, (Tenn.,) 57, the only proof of notice was in this sentence in the body of the protest:—"I then notified the drawers and indorsers." The statute of the State provided that, when "the notary shall have certified, either in or on his protest, that he has given notice of demand and payment and refusal, or the dishonor of such bill," &c., "to the indorsers, makers or others concerned, such protest shall be *prima facie* evidence of the fact of notice." "The fact," observes CARUTHERS, J., "is to be stated, by the notary either in or on his protest. But it is said that he must state the time when the notice was given, the postoffice to which it was sent and all the particulars necessary to make out a good legal notice under the law merchant. The Act does not expressly require this. The notary is a public officer, and when he certifies that he has done an official act, it must be presumed that he has done it correctly, unless some statute or rule of law prescribes a particular mode, until the contrary appears. It is only made *prima facie* evidence. It is no hardship on a defendant, who is relying on strict law, and generally without merit, to get clear of a debt, to require him to *rebut* this presumption. It would be easy to prove by the notary, if

he had not done enough to fix the liability." In *Cayuga Bank* v. *Hunt*, 2 Hill, 635, the notarial certificate of protest stated a presentment for payment at the office of the acceptor, on the proper day, and that the office was closed, but was silent with respect to the *hour* of doing the act. "But it is objected," observes COWAN, J., "that the time of day should have been mentioned in the notary's certificate; for perhaps it might have been after the hours of rest. The certificate states it was presented on the third day of grace. This, coming from a witness on the stand, would be deemed *prima facie* evidence of presentment at a proper time in the day; and, if an improper hour were in truth selected, it would lie with the adverse party to show the fact by cross-examination or otherwise. It would not be intended that a late hour was resorted to." These views were again announced and maintained in *De Wolf* v. *Murray*, 2 Sandf., 166. In New Hampshire, there is a statute similar in its terms to the Act of 1858, c. 44. In *Rushworth* v. *Moore*, 36 N. H., 188, the notarial certificate shew that he "duly notified the indorsers." "The notary certifies," remarks FOWLER, J., "that he duly notified the indorsers; whereas it has been contended that he should have set forth how, when and where the notices were given. We do not understand that such is the usual course in notarial protests, or that the statute requires any such recital to make the protest *prima facie* evidence of notice to indorsers."

The decisions in this State are to the same effect. In *Lewiston Bank* v. *Leonard*, 43 Maine, 144, the notarial certificate was that, he "duly notified the indorsers by written notices, sent them by mail," &c. It was held a reasonable inference that the notices sent contained all that was essential to charge the indorser. In *Orono Bank* v. *Wood*, 49 Maine, 26, the certificate of the notary that he had "duly notified the drawer and indorser" was held sufficient, in the absence of contradictory proof.

The protest makes out a *prima facie* case for the plain-

tiff. The presumption, in the absence of proof to the contrary, is that the notice sent was sufficient.

Defendant defaulted.

CUTTING, KENT, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

LUCY A. BACHELDER *& al. versus* DANIEL J. PERLEY *& al.*

An attachment of real estate may be dissolved by an attaching creditor otherwise than is provided in c. 62, of the Public Laws of 1859.

A & B severally attached C's real estate, — one on Sept. 1, and the other Sept. 5, 1860. In Nov. following, prior to any levy, A, for a valuable consideration, executed and delivered to B a release of his attachment "so far that B shall at all times take precedence in any levy he may make on said real estate. B extended his execution on the premises, June, 1861, and subsequently conveyed by deed of quitclaim his "right," &c., to the plaintiffs' ancestor. A extended his execution June, 1863, and subsequently conveyed by deed of quitclaim, reciting the release, to the defendants' grantor. In ejectment: — *Held*, that the release was valid, and that B's levy took precedence.

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

WRIT OF ENTRY.

The facts appear in the opinion.

A. W. Paine, for the plaintiffs.

J. H. Hilliard, for the defendants.

TAPLEY, J. — This is a real action. The origin of the claims of both parties are two separate levies made upon the property, as the property of one Oren Clark, and they hold by subsequent conveyances from the execution creditors.

The demandants' claim originates under a levy made by Nahum Godfrey, June 20, 1861, the original attachment in his suit being made Sept. 25, 1860. The tenant's claim originates under a levy made by Jos. E. Knowlton, June 15, 1863, the original attachment in his suit being made Sept.

21, 1860, some four days prior to the attachment in the Godfrey suit.

On the 19th day of Nov., 1860, before either levy was made, Knowlton made and executed a writing under seal to release his attachment, that Godfrey's levy might take precedence of his, and also covenanted therein, that he would never set up his levy against that of Godfrey.

An attachment of real estate, upon mesne process, creates a lien upon the estate, which may be made available to the creditor after judgment by a levy of the execution thereon.

It is only a lien, and may be released, discharged, lost, or abandoned by the party originally instituting it.

It is created at the instance, and for the benefit of the plaintiff in an action, and may be by him discharged.

Chapter 62 of the Acts of 1859, provides two methods by which such a discharge may be effected.

These do not exclude all other methods, but are additional modes, embracing also within them notice to third parties.

In this case the release was by instrument under seal, and for a valuable consideration.

The instrument consists of two parts; one is the present, actual, executed release, taking effect immediately upon its execution and delivery, and the other is a covenant never to set up any levy that may be made by Knowlton, against any levy which shall be made by Godfrey.

This instrument being of as high a character as required by law to transfer an interest in real estate, and made for a valuable consideration, was effectual to release the attachment as to Godfrey, and was not thereafter revocable by the party making it. The levy of Godfrey being made after the execution of this instrument, and before the levy of Knowlton, was unaffected by the attachment made in the Knowlton suit, and passed all the debtor's interest in the premises on the 25th of Sept., 1860, in the same manner as if the Knowlton suit had never been commenced.

This presents the rights of Godfrey and Knowlton as they existed before any conveyance by either. The present par-

ties hold their rights by *deeds*. The demandants hold by deed from Godfrey. The tenants hold by deed from Knowlton to Smith, and from Smith to them. Neither can hold more than their grantors had, and the deeds must determine what was conveyed.

Godfrey's deed conveyed all that passed by his levy. It is a year earlier in date than that of Knowlton.

Knowlton's deed conveys "all his right, title and interest in and to" the premises, "the attachment on the writ upon which judgment was recovered having been released by me [him] to Nahum Godfrey by an instrument dated Nov. 19, 1860, to which instrument now in the hands of Godfrey I refer and make the same a part of this deed."

This deed, from which the above quotation is made, not only does not purport to convey any interest acquired by attachments, but clearly excludes any such conveyance, or attempt to convey it, and is not only a record notice to Smith and his assigns of the release of the attachment, but is also a notice to them that no such interest or rights were conveyed or designed to be conveyed. A construction of the deed which will make it otherwise would be clearly against the manifest intention of the parties, and as clearly against equity and good conscience. Smith could convey nothing more than he received by his deed from Knowlton, and the tenants could take only that. This view renders it unnecessary to discuss the position that the tenants are estopped, by the covenants in the instrument referred to in and made a part of Knowlton's deed, from setting up the levy against the Godfrey levy. In pursuance of the agreement of the parties, there must be

Judgment for the demandants, and the mesne profits to be assessed by E. C. Brett.

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

JAMES BUSH *versus* SALMON HOLMES.

A verbal agreement for the sale of personal property, for thirty dollars or more, is valid, when a part of the property has been delivered to and accepted by the purchaser under the agreement, although such delivery and acceptance took place several days after the making of the agreement.

Damages for non-delivery of a portion of the property are the difference between price agreed and the value at the time of refusal.

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

The facts appear in the opinion.

A. G. Lebroke, for the plaintiff.

A. Sanborn, for the defendant.

APPLETON, C. J. — This is an action against the defendant for a breach of his contract in not delivering a quantity of potatoes alleged by the plaintiff to have been purchased of him. The case comes before us upon a report of the testimony by the presiding Justice.

The plaintiff offered evidence tending to show that on or about the first of May, 1864, there was a verbal agreement between him and the defendant, by which the latter sold him all the potatoes he had on hand, except what he would need for use on his farm, at fifty-five cents *per* bushel, and estimated at three hundred bushels; that, under said agreement, he subsequently took one load of potatoes and paid for the same; that he went for the balance remaining and that the defendant refused to deliver any at the price agreed upon, claiming that the bargain was but for one load. It was further in proof that the defendant had sold about two hundred and seventy-five bushels of potatoes after this alleged bargain.

The defendant, denying the existence of the contract as above stated, asserts, by way of further defence, that, if proved, it would be void as within the statute of frauds, it not being in writing.

By R. S., 1857, c. 111, § 5, "no contract for the sale of any goods, wares, or merchandize, for thirty dollars or more, shall be valid, unless the purchaser *accepts* and *receives* part of the goods, or gives something in earnest to bind the bargain, or in part *payment thereof*, or some memorandum thereof is made and signed by the party to be charged thereby or by his agent."

A verbal contract for the sale of goods and a delivery of part under said contract is binding, notwithstanding such delivery is subsequent to the time of entering into said agreement. *Marsh* v. *Hyde*, 3 Gray, 331. A verbal agreement for the sale of property, exceeding fifty dollars in value, is valid, when a part of the property has been delivered to the purchaser and accepted by him under the agreement, although such delivery and acceptance took place several months after the making of the verbal agreement. *McKnight* v. *Dunlop*, 1 Selden, 537. In *Richardson* v. *Squires*, 37 Vermont, 640, the plaintiff contracted by parol with the defendant for thirty-one sheep at a stated price, to be delivered as he should want them for butchering. The plaintiff received twenty sheep upon the contract and paid for them when delivered. The defendant refused to deliver the remaining eleven sheep, and the plaintiff brought an action for the damages sustained in consequence of such refusal. It was held that there was both an acceptance and part payment, either of which was sufficient to take the contract out of the statute of frauds and to render it binding as an executory contract. To the same effect is the case of *Danforth* v. *Walker*, 37 Vermont, 239.

To render the defendant liable the plaintiff must prove that the potatoes received by him were delivered and received as part of the goods sold. *Davis* v. *Eastman*, 1 Allen, 422; *Pratt* v. *Chase*, 40 Maine, 269. This is to be determined by the jury.

The damages are the difference between the price agreed to be paid and the value of the potatoes at the time of the

refusal to deliver them. *McKnight* v. *Dunlop*, 1 Selden, 537.

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

CUTTING, KENT, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

ALEXANDER MARTIN *versus* PENOBSCOT MUT. F. INS. CO.

A clause, in an Act incorporating a Mutual Fire Insurance Company, providing that, "in case of loss * * by fire," the insured "shall give notice thereof in writing to the directors * * within thirty days; and the directors shall ascertain and determine the amount of such loss, and, if the party suffering is not satisfied with such determination, * * he may bring an action against said company for said loss, at the next Court, to be holden in and for the county" where said company is established, "and not afterwards" * * neither repeals in express terms, nor by necessary implication, so much of c. 81, § 6, of R. S., as authorizes the plaintiff to maintain his action in the county where he resides.

ON FACTS AGREED.

This was an action by the plaintiff, a resident of Hancock county, against the defendant company, established at Bangor, in Penobscot county, on a policy of insurance.

Section 7, of the Act incorporating the defendants (said Act being annexed to said policy) provides as follows: —

"That in case of any loss or damage by fire happening to any member upon property insured in and with said company, the said member shall give notice thereof in writing to the directors or some one of them or to the secretary of said company, within thirty days from the time such loss or damage may have happened; and the directors upon a view of the same, or in such other way as they may deem proper, shall ascertain and determine the amount of such loss or damage, and, if the party suffering is not satisfied with the determination of the directors, the question may be submit-

ted to referees, or the said party may bring an action against said company for said loss or damage at the next Court to be holden in and for the county of Penobscot, and not afterwards, unless said Court shall be holden within sixty days after said determination; but, if holden within that time, then at the next Court holden in said county thereafter."

The only question raised was whether the action could lawfully be maintained in Hancock county.

Wiswell, for plaintiff.

J. A. Peters, for defendants.

TAPLEY, J.—By the provisions of R. S., c. 81, § 6, corporations of the character and class of the defendants "may sue and be sued in the county in which they have any established place of business, or in that in which the plaintiff or defendant being a natural person lives."

This provision of law, general in its character, it is contended is not applicable to the case at bar, by reason of the provisions of the 7th section of the Act of incorporation of the defendants, which provides, "that in case of any loss or damage by fire, happening to any member upon property insured in and with said company, the said member shall give notice thereof in writing to the directors, or some one of them, or to the secretary of said company, within thirty days from the time such loss or damage may have happened; and the directors upon a view of the same, or in such other way as they may deem proper, shall ascertain *and determine* the amount of such loss or damage, and if the party suffering is *not satisfied* with the *determination* of the directors, the question may be submitted to referees, or the said party may bring an action against said company, for said loss or damage, at the next Court to be holden in and for the county of Penobscot, and not afterwards, unless said Court shall be holden within sixty days after said *determination;* but if holden within that time, then at the next Court holden in said county thereafter," &c., &c.

These provisions are special in their character and application, and are not to be extended by implication.

It is only in a particular class of cases the remedy there provided can be made available.

By the provisions of this section, the defendants, after receiving notice of loss as therein provided, shall proceed in some of the modes there pointed out, and ascertain and *determine* the amount of loss or damage; *then*, if the party suffering is *not satisfied* with the *determination* of the directors, he may seek either remedy there pointed out. The *determination of the damages*, in the manner there provided, is a condition precedent to the application of the remedy therein provided. This is apparent from all the subsequent provisions of the section. They refer to a case where a determination has been made by the directors.

If no other remedy existed, the directors, by refusing thus to determine, might delay at pleasure the payment of the loss, and indeed leave the party remediless upon the contract of insurance if they were disposed to.

This section neither repeals in express terms, or by necessary implication, so much of c. 81, § 6, as authorizes the plaintiff to maintain his action in the county where he resides. How far it would affect the action if the directors had determined the loss, or if commenced in the county of Penobscot, we do not now decide. That question does not necessarily arise here. The proofs exhibit no evidence of such determination by the directors. We are therefore of opinion that the plaintiff may seek his remedy in the county of Hancock, the place of his residence.

Action to stand for trial.

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

NATHAN WALKER *versus* STEPHEN B. OSGOOD *& als.*

In debt on a replevin bond after a judgment for a return, the defendant, who replevied a horse from the plaintiff, an officer, who had seized it on an execution as the property of a third person, is not liable for its value, if the horse died during the pendency of the suit, without the fault of any one, *provided* the replevin suit was commenced in good faith.

ON FACTS AGREED; the full Court to render judgment and assess damages according to law.

The facts will be found in the opinion.

Waterhouse & Emery, for the plaintiff.

If a replevin suit be determined against the plaintiff in replevin, it shows that he had no right to the possession of the property, and his interference therewith was wrongful. *Farnham* v. *Moor*, 21 Maine, 508.

The law considers it a greater wrong to replevy without right from an officer than from a private person, as shown by the interest as damages. R. S., c. 96, § 12.

Melvin v. *Winslow*, 10 Maine, 397, is not opposed to this general principle. Horse died in that suit before judgment in the suit on which it was attached. In case at bar, horse was seized on final process, not to be kept as security, but to be sold after four days in satisfaction of a judgment; and horse did not die until long after the expiration of the four days. *Matterson* v. *Pearce*, 12 Mass., 407, and *Ladd* v. *North*, 2 Mass., 517, recognize the distinction.

Wiswell, for the defendants.

KENT, J.—The single question presented in this case is, whether a party who replevies an animal from the possession of an officer, who had *seized it on execution* as the property of a third party, and, pending the replevin suit, the animal dies, without the fault of any one, is liable on the replevin bond for its value, after judgment for a return. In *Melvin* v. *Winslow*, 10 Maine, 397, it was decided that where a horse had been *attached on mesne process* and replev-

ied by the defendant, and during the pendency of the suit the horse died, without fault, the defendant was not liable on the bond. And, in *Shaw* v. *Laughton*, 20 Maine, 266, it was held that receiptors, who had agreed to return the horse attached on demand, and the horse died a natural death, were exonerated thereby.

We feel bound to regard these decisions as authoritatively determining the points decided, and as settling the case before us, unless there is a distinction in fact and in principle between this case and those cited.

The distinction in fact, is, that in the case at bar the replevin suit was instituted on the day the animal was seized *on execution* by the officer, for the purpose of selling it to satisfy the same. It is urged that this distinction is vital, on the ground that, if the replevin suit had not been interposed, the animal would have been sold in four days and the proceeds thus secured to the creditors, whereas, in the cases cited, the animal was attached on *mesne process* and held only as security to await final judgment, the animal dying before such judgment.

Undoubtedly there is a distinction which fairly calls for consideration, and, if the ground of the former decisions was, as it is contended, that the seizure was on *mesne process* and not on execution, those cases would not be decisive.

The case of *Melvin* v. *Winslow*, 10 Maine, 397, was a case like this, of an attachment by a creditor of a horse as the property of his debtor, and a replevin by a third party. In neither case was it a controversy between two persons, both claiming title in themselves, but a question between an attaching creditor and a third party. The grounds of decision in the reported case, as given by MELLEN, C. J., are, in substance, that the plaintiff in replevin had as good a right to assert his title by action as the creditor had to attach the property, — that in both cases the act of taking was legal and lawful, — that although, if the action of replevin is decided against the plaintiff the law compels him to pay damages, — yet, *until that time*, he was not a wrong-

doer, but lawfully engaged in vindicating his asserted right. It was also held that, if the animal died without fault, whilst in the possession of the officer, and before any writ of replevin had been sued out, the officer would not be responsible.

The same doctrine was affirmed in *Shaw* v. *Laughton*, 20 Maine, 266, which was an action against receiptors to an officer. The defence was that the horse died, without fault, pending the replevin suit, and it was held that "the officer would be excused in such a case and so ought his receiptors to be." The Court say, that "the cases of *Carpenter* v. *Stevens*, 12 Wend., 589, and *Melvin* v. *Winslow*, 10 Maine, were on replevin bonds, but they are analogous in principle."

Carpenter v. *Stevens*, 12 Wend., was a case where, on an action on a replevin bond, it appeared that judgment for a return had been given, but that the animal had died, pending the replevin suit, without fault. It was held that the obligors were not liable. The Court finds the legal reasons for its decision as far back as the time of Lord Coke, 1 Inst., 206, "when the condition of a bond is possible at the time of making it, and, before the same can be performed, it becomes impossible by act of God, or of the law, or of the obligee, then the obligation is saved."

The result from these authorities seems to be, that the writ of replevin is one authorized by law to enable a party who, in good faith, asserts a claim of title or right of possession in a chattel to have this claim investigated and determined judicially.

In the English practice, as we understand it, the officer retains the goods replevied in his own possession, and is not allowed to deliver them to the plaintiff, until the question of property is decided in his favor. 3 Steph. N. P., 2487; *Willard* v. *Kimball*, 10 Allen, 212. In our practice, the sheriff delivers them to the plaintiff on his giving a bond to return them if he fails to establish his title or right. But, in both cases, the goods are, in a certain sense in the custody of the law, held to await the decision between the

claimants. The party who replevies, having given the bond required by the statute, is not a wrongdoer, if he acts fairly, although the result may show that he was mistaken in his belief of his right of property.

When a person, without process of law, undertakes to assert his right to the possession of personal property by seizing it, or taking it from the possession of another, without his consent, he does so at his peril, and is liable for an illegal act at the moment of its perpetration, and the subsequent death of an animal or the destruction of the property cannot avail him in defence.

The law favors an appeal to judicial tribunals to determine questions in controversy, rather than the forcible assertion of assumed rights. It provides in the action of replevin a mode by which a party may obtain possession, and have the question of title afterwards determined, — the rights of both parties being in the meantime protected. There are many cases where both parties are mainly anxious to have the *title* to the specific thing, rather than damages for its value, or for injuries to it, determined at law. It is therefore a lawful act, and not a trespass or wrong in the party suing out the writ, nor is it a trespass in the officer to serve the same, if in due form and with a sufficient bond, although it may be finally determined that the property was not in the plaintiff, and although the replevin suit was not against the rightful owner, and he was no party to the proceedings. *Willard* v. *Kimball*, 10 Allen, 211.

If, then, the law not only authorizes, but favors this mode of bringing the question of title to the peaceful and orderly arbitrament of a judicial tribunal, the right of a party to institute it cannot depend upon the greater or less injury to the other party, claiming the same property. It is true it may be of great pecuniary injury to him. The law provides for damages at least equivalent to interest, and in some cases much beyond simple interest.

In the case before us, the objection is that, by the interposition of the replevin suit, the creditor, who had seized the

property, was prevented from selling it at once, and before the death of the animal. But in almost every case of attachment on *mesne process*, and a replevin of the goods attached, the creditor is delayed in enforcing his judgment by the pendency of the replevin suit. The controversy is almost universally concerning the title to the goods attached, and not on the suit on which they were attached. This is often defaulted at the first or second term, there being no pretence of a defence, and the judgment might have been obtained and the goods sold on execution without delay, if the replevin suit had not been instituted. If the rule now contended for should be established, we see no good reason why, if an animal died after default in the suit on which it was attached and before the decision as to the title in the replevin suit, the obligors in the bond should not be liable for its value. There are many other cases, where the defendant in replevin might be able to establish special or irremediable damages by the delay occasioned by the suit. Indeed it would be very difficult, if not impossible, to draw the line or to establish any better rule than the one which seems to have been established, from the nature of the action, and the remedies which have been provided for the respective parties. As a general rule, property legally replevied may be considered, so far as this question is concerned, as in the custody of the law, awaiting the decision of the Court upon the title in controversy. Every person, who, in good faith claims such title, has a legal right to replevy the property, by the process given by the statute, and in so doing he incurs only the liabilities and duties imposed by law. We have seen that the death of an animal without fault, pending the suit, exonerates from liability.

It will be observed that we assume, as one of the elements in our decision, that the replevin suit was instituted and prosecuted in good faith and in the honest belief of a good title. We are not called upon to determine whether there may not be a different rule applied to cases of malicious suits, or those instituted in bad faith, without any honest

belief of a title in the party, or with the sole design to defeat or delay creditors of another, without any show of right in himself. We should be unwilling to lend any encouragement to the institution of any such "false, groundless or unlawful suits."

Judgment for the plaintiff for the value of the cow only, twenty dollars and interest thereon at 12 per cent. from time of taking, Dec. 5, 1862, and costs.

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

RUFUS CLEMENT *& al. versus* ABIJAH GARLAND.

A judgment creditor cannot commence the levy of an execution while the debtor is under arrest or imprisoned by virtue of the same or a subsequent execution upon the same judgment.

All subsequent proceedings of a levy relate back to the time of its commencement, which is the time of seizure.

Specifications of defence need not contain the technical accuracy of a special plea.

They need only intelligibly disclose the ground of defence relied upon.

APPLETON, C. J. — The plaintiffs having obtained judgment against the defendant, caused him to be arrested on the sixth execution issued thereon. The defendant, on April 11, 1862, upon giving the bond required by statute, was released from arrest. Before the expiration of the time limited in the bond, the defendant "delivered himself into the custody of the keeper of the jail in Ellsworth," by whom he was committed. After such commitment and while in custody, the seventh execution on the plaintiffs' judgment was issued on Oct. 25, 1862, and on the 28th of the same month at half past six o'clock in the morning, the officer to whom the execution had been delivered, seized and took on execution the real estate, upon which the levy, the validity of

which is controverted, was made, and at the same time administered the oath prescribed by statute to the appraisers. On the afternoon of the day of the levy, the debtor was discharged from the custody of the jailer by the verbal directions of the plaintiffs. The sheriff of the county was the keeper of the jail and the officer by whom the levy was made.

The time, when the officer seizes and takes in execution the lands upon which a levy is made, is the commencement of the service of the execution. *French* v. *Allen*, 50 Maine, 437. The oath to the appraisers was administered at the same time the estate of the defendant was seized on execution. The proceedings are to be considered as then commenced, and the debtor's right to redeem begins to run from that date. R. S., 1857, c. 76, § 19.

By R. S., 1857, c. 113, § 33, "a creditor may discharge his debtor from arrest or imprisonment on execution, by giving to the officer or jailer having him in custody a *written* permission to go at large; and it shall have the same effect as a discharge or disclosure." No such written permission was given in the case at bar.

By § 34, "a certificate of discharge on execution in any of the modes hereby authorized, and of the cause of it, shall, at any time, at the creditor's request, be indorsed on the execution by the officer, who had such debtor in custody; and, if it is before the return day of the execution, it may still be levied upon his property; *if after*, it may be renewed like other executions, against his property only; the judgment may be revived or kept in force, with said execution, as judgments in other cases." No certificate is indorsed on the execution upon which the arrest was made. The execution subsequent to such arrest would seem to have been improvidently issued without such certificate. *Miller* v. *Miller*, 25 Maine, 110.

The debtor was in custody when the seizure was made and the appraisers were sworn. The levy relates back to that date. The judgment creditor could not legally pursue

both remedies at the same time; that by arrest or imprisonment and by levy on real estate. Having the debtor imprisoned, the creditor could not levy on his real estate without discharging him from such imprisonment. It would seem from the levy that the debtor was not discharged till after the completion of the levy. It is admitted he was not until after the commencement of the levy, and all subsequent proceedings relate back to that time. The levy is therefore void. *Miller* v. *Miller*, 25 Maine, 110. Imprisonment, while it continues, is a satisfaction of the debt, unless there be some statutory provision to the contrary. An execution, issued while the judgment debtor is imprisoned under a commitment under a prior execution upon the same judgment, is void; and a sale of property under it, though made after the debtor's discharge from imprisonment, and to a purchaser without notice, passes no title. *Kennedy* v. *Duncklee*, 1 Gray, 65.

The specifications of defence negative the title of the demandants in the premises demanded, and allege that their levy of execution upon the same was invalid and passed no title. It is not required that specifications should have the technical accuracy of a special plea. It is sufficient that they should intelligibly disclose the grounds of defence relied upon, and we think that is done in the present case.

Plaintiff nonsuit.

Cutting, Kent, Dickerson, Barrows and Tapley, JJ., concurred.

E. & F. Hale, for the plaintiffs.

Waterhouse & Emery, for the defendant.

EBENEZER C. BLAKE *versus* SOLOMON HAM.

In ejectment, the fact that the defendant has an easement in the demanded premises constitutes no bar to the plaintiff's right of recovery.

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

WRIT OF ENTRY.

This action has previously been before the Court. Vol. 50, p. 311.

The defendant offered to prove:—

1. That he had an easement by prescription in a portion of the demanded premises, as per brief statement; and

2. That part of said premises embraced a public highway called a passageway, in which the defendant had a right to pass, and to occupy the same so as not to obstruct the public travel; all of which was excluded, *pro forma*, and the defendant excepted. Whereupon the defendant was defaulted, the default to be taken off if the above ruling should not be sustained by this Court.

Granger & Madigan, for the plaintiff.

J. Burnham, for the defendant.

APPLETON, C. J.—This is a real action. The defendant claims an easement in the demanded premises. But such easement constitutes no bar to the plaintiff's right to recover.

If disturbed in the enjoyment of his easement, the defendant may enforce his rights by a suit against those by whom the disturbance is caused.

These principles are affirmed by repeated decisions in this State and in Massachusetts. *Thompson* v. *Proprietors of Androscoggin Bridge*, 5 Greenl., 6; *Blake* v. *Clark*, 6 Greenl., 440; *Hancock* v. *Wentworth*, 5 Met., 450; *Morgan* v. *Moore*, 3 Gray, 319.

The plaintiff is entitled to costs.— Default to stand.

CUTTING, KENT, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

CITY OF BELFAST, *Appellants from decision of County Commissioners of Waldo County, on petition of* J. H. KALER *& als.*

By R. S., c. 18, § 35, the committee, appointed in cases of appeal from the decision of county commissioners, "must make their report at the next or second term of the Court after their appointment."

In such cases, the Supreme Judicial Court has no authority to accept a report made subsequently, although the delay in making it was in accordance with the express written agreement of the parties, indorsed on the back of the warrant, at the time of the view and hearing.

Neither can the agreement, so entered into, operate as an estoppel so as to confer jurisdiction upon the Court in the premises.

But in the *execution* of such power they must conform to the provisions of law relating to the laying out of highways.

Chapter 365, of the Special Laws of 1846, providing that "the county commissioners of Waldo county are authorized and empowered to lay out and establish a road over Fish river, in the town of Belfast, if public convenience requires it," simply enlarged the power of the commissioners, without absolving them, while exercising such power, from following the requirements of existing laws in reference to the laying out of ways.

ON FACTS AGREED.

The county commissioners of Waldo county, on petition of J. H. Kaler and others, laid out two highways over tide waters, in the city of Belfast; one on the site of "Nickerson bridge," and the other across "Fish creek."

The city of Belfast appealed, and duly entered their appeal at the October term, 1864, when a committee was duly appointed.

At the succeeding January term, the committee made their report affirming the decision of the commissioners in the "Nickerson bridge" case. Objections were seasonably filed to the acceptance of said report, and it went up to the Law Court. Subsequently to the May term in Waldo, the report of the committee was rejected.

On the warrant to the committee, the following agreement was indorsed: —

"In the matters of inhabitants of Belfast, appellants, be-

fore J. Fowler and others, committee, it is agreed that, if the committee decide to revoke the doings of the commissioners in both cases, their report shall be made at the next term of the Court. In case they decide to affirm said doings, their reports shall be made at next term. But in case they are of opinion that but one of the bridges is required, and thereupon affirm the proceedings in one case, they shall suspend making their report on the other until the question of law which may be raised in the case on which they shall report shall be settled or waived.

"W. G. Crosby, for petitioners.

"A. G. Jewett, City Solicitor."

At the October term, 1865, the committee made their report on the "Fish creek" case. So much of said report as is material is as follows: —

"The undersigned, committee named in the foregoing warrant, having notified the parties, * * met them on the 30th of November, the appellants appearing by A. G. Jewett, City Solicitor, and the original petitioners by W. G. Crosby, their attorney. We then proceeded to view the route * * heard the parties, and decided that the judgment of the county commissioners in the premises should be affirmed in whole.

"The parties having entered into the agreement annexed to this warrant, and which we make a part of this report, we suspended making this report until the question of law raised in the case in which we did report was settled, as by said agreement. And now said question having been settled by the decision of the Supreme Judicial Court, since the term of said Court held on the first Tuesday of May, 1865, we make this our report, that the judgment of the county commissioners in the premises be affirmed in whole."

(Signed by committee.)

"Belfast, Sept. 13, 1865."

To the acceptance of the report, the appellants, by the city solicitor, N. Abbott, Esq., filed objections, of which the following are the only material ones: —

2. Said committee did not make their report at the next or second term of the Court after their appointment.

3. They did not make their report according to the agreement of the attorneys of the parties; and, if they had, the city solicitor had no authority, by agreement, to waive the express requirements of the law.

The warrant, report, agreement between city solicitor, together with the objections filed against the acceptance of the report, were made part of the case; and the Court to render judgment according to the legal rights of the parties.

N. Abbott, for appellants.

W. G. Crosby, for respondents, contended, —

That the report was not made at the second or next term after the committee was appointed, because the parties agreed that, under a certain contingency, it *should not* be. That contingency occurred.

The meaning of the agreement, though hastily and inartificially drawn, is obvious.

Two ways were laid out over tide waters. Both parties agree that but one of them is required. Both agree that the "Nickerson bridge" site is the preferable one; but this location will give rise to questions of law; if those questions be decided adversely to the original petitioners, they ask for an adjudication on the "Fish creek" location; if that adjudication be favorable to them — affirms the doings of the commissioners — they are desirous, and so are appellants, that the committee shall delay making their report until the Court shall have finally decided the questions of law referred to.

The Court decided adversely to original petitioners in that case, and, at the next term thereafter, the committee made their report in this case; and thus carried out the agreement of parties.

The parties were the original petitioners, and the city appellant. The *former* had a right to insist that the committee, appointed on motion of the *latter*, should report at

the second term, at farthest. They waived that right by agreement with appellants, that, in a certain contingency, the report might be made at a later term.

Whether other parties could be bound by such an agreement is not the question; but it seems clear that the parties might bind *themselves*, and having so *bound* themselves, they are estopped from loosing the bond.

By the terms of the report, the Court is to render judgment according to the *legal rights* of the parties.

The appeal should be dismissed; for it is not properly before the Court.

The way was not laid out under the general statute defining their powers; had it so been, an appeal as provided in that statute would have been proper.

It was laid out under special Act of 1846, c. 365, which gave the commissioners an unrestricted, unqualified, *absolute* power to lay out the way, if in *their* judgment "public convenience" required it. They alone could exercise this power subject to the control of no one; and hence this appeal should be dismissed, with costs for respondents.

KENT, J. — This Court has no jurisdiction of matters concerning the determination as to laying out of roads, except on an appeal from the decision of the commissioners, as to the expediency of the laying out or altering such way. In case of the appointment of a committee by this Court, § 35, c. 18, R. S., their report "shall be made at the next or second term of the Court after their appointment." In this case the report was not made, until the third term after their appointment. In the case of *Inhabitants of Windham, petitioners*, 32 Maine, 452, this point was raised and determined. In that case, the report was made and *accepted* by the Court one term too late. C. J. SHEPLEY, says, — "It was one term too late. The Act required it to be made at the June term. The language of the statute is emphatic and admits of no construction. It is, that the committee shall report at the *next* term after their appointment. This pro-

vision, which was made for the purpose of avoiding delay, not having been complied with, all the subsequent proceedings in the District Court were irregular and void."

But it is contended that the parties interested agreed in writing, that the committee might, in a certain contingency, withhold their report beyond the second term. The written agreement is made part of the case. A strict construction of its language must perhaps lead to the conclusion that the contingency contemplated has not occurred. It provides that, in case they determine to revoke the doings of the county commissioners in *both* cases, or in case they decide to affirm said doings, their reports shall be made at the *next* term. They have in fact affirmed the doings of the county commissioners in both cases.

But if a more liberal construction of the paper would leave it as an agreement or assent of both parties, that the report might be delayed beyond the second term, the question arises whether such consent can give jurisdiction or authority to the Court to receive and accept it at the third term.

The statute does not, as it does in many other cases, give authority to the Court to allow an entry or to receive a report after the time prescribed, in cases of mistake or error. It is, as C. J. SHEPLEY says, "emphatic, and admits of no construction."

There is no doubt that, as to matters purely personal, or where a party has some right or privilege, which he may claim, he may waive it,—as notice, or a right to object to a judge or a juror, or exemption from certain duties. But consent of parties cannot confer a jurisdiction, which is excluded by law. *Carlisle* v. *Weston*, 21 Pick., 536; *Smith* v. *Robinson*, 13 Met., 165; *Sargent* v. *Hampden*, 29 Maine, 70. The case of *Windham, pet'r*, 32 Maine, (before cited) establishes the point that the report not having been made at the term named in the statute, the Court had no jurisdiction, and even the acceptance of the report by the Court was of no avail.

It has been held in Massachusetts that, where an appeal from the decree of the commissioners of insolvency was not entered at the next term of the Supreme Court, the Court had *no power* to allow the appeal, even if it was not entered at the proper term through accident or mistake.

The statute was held to be imperative and absolute. *Palmer* v. *Dayton*, 4 Cush., 270. And the same Court held, in a subsequent case of a like nature, where the record showed that "all parties interested waived all objection that the said appeal should have been made to the April term," that "the consent of parties, to the entry of this appeal at a term which was not the time fixed by law for such entry, could not give the Court jurisdiction of the appeal." *Eddy's case*, 6 Cush., 28.

We are of opinion that the agreement cannot avail to avoid the statute requirement. For the same reasons, the party, by signing the paper, is not estopped, so as to confer jurisdiction. Jurisdiction given by statute cannot be established, against the positive provisions of the law, by an estoppel, which might bind a party,—as between himself and another party.

The respondents present another question, which lies behind the report and all the objections to it. It is said that this road was laid out by the county commissioners over tide waters, by virtue of a special law of 1846, c. 365. By that statute, "the county commissioners of Waldo county are authorized and empowered to lay out and establish a road over Fish creek, in the town of Belfast, if public convenience requires it." This is the whole statute.

It is contended that this way was not laid out by the commissioners under the general statute, defining their powers, and that no appeal lies from the decision of the commissioners,—that they could lay it out without following the provisions of any other statute, if in their judgment public convenience required it,—that a new power was conferred on them, unrestricted, unqualified, absolute, which they alone could exercise, and in the exercise of which they were

subjected to the control of no one. This argument, when pressed to its ultimate conclusions, would dispense with the petition, the notices, and hearing and allowance of damages. It would allow the commissioners to lay out the road, without other action than a decision that public convenience required it.

Our opinion is, that the object and effect of the statute was simply to enlarge the jurisdiction and power of the commissioners over tide waters. Without this statute they had no such power. The Legislature intended to give them power to lay out a road over this creek, in the same manner and by the same proceedings that are required in the laying out of other highways. It would require the clearest and most explicit language to lead us to the conclusion that the Legislature intended to dispense with all the usual proceedings and safeguards, and to take this particular case out of the general provisions of the statute on the subject of highways. The special statute simply gives the power to lay out a highway over a spot, where before they could not do it, but in the laying out they must follow the requirements of existing laws in reference to the laying out of ways.

Report not accepted.

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

INHABITANTS OF RICHMOND *versus* WILLIAM T. JOHNSON.

The signature of one selectman to a written contract cannot bind the town.

APPLETON, C. J. — The defendant is sued upon a guaranty for the performance of a contract made by one William Gaslin, on Jan. 31, 1865, with James Carney, chairman of the board of selectmen of the town of Richmond, by which said Gaslin, for a stipulated price, agreed to furnish not less

than twenty, nor more than thirty, three years men for the town of Richmond.

The contract was signed by but one of the selectmen. It does not appear to have been subsequently ratified by the board of selectmen or by the town. There is no proof that Carney had authority to act alone. But one selectman cannot bind the town. The action of the major part was required and without it the town would not be liable. *Damon* v. *Granby*, 2 Pick., 345; *Boothby* v. *Troy*, 48 Maine, 560.

No action can be maintained, on the contract to which we have referred, upon the evidence before us.

Plaintiffs nonsuit.

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

Tallman & Larrabee, for the plaintiffs.

Libbey, for the defendant.

STATE *versus* GEORGE W. SWEETSIR.

By R. S., c. 124, § 4, an indictment for polygamy *may* be found and tried in the county where the offender resides, or where he is apprehended.

This statute is not in derogation of the common law; but only enlarges the jurisdiction, *may* being permissive and not mandatory.

In pleading, judgment will be rendered against the party committing the first error.

Hence where the respondent demurred to a replication to a plea in abatement to an indictment, judgment will be rendered against the respondent if the plea and replication are both bad.

A plea in abatement to an indictment for polygamy, alleging that "at the time of the finding of said indictment, the said respondent did not reside nor was he apprehended in the" county where the indictment was found, "but that he then and for a long time before resided in B.," in a county other than that in which the indictment was found, and was apprehended at said B., is bad.

State *v.* Sweetsir.

A replication, traversing the facts alleged in a plea in abatement, should tender an issue to the country; if it conclude with an offer to verify and prays judgment, it will be adjudged bad.

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

The presiding Judge overruled the demurrer, and the respondent alleged exceptions. The remaining facts appear in the opinion.

Libbey, in support of the exceptions.

J. A. Peters, Attorney General, contra.

DICKERSON, J. — Indictment for polygamy. The indictment was found, and the offence alleged to have been committed in the county of Kennebec. The respondent filed a plea in abatement to the jurisdiction of the Court, alleging that, at the time of the finding of the indictment, he resided in Biddeford in the county of York, and that he was apprehended in said town.

The attorney for the State filed a replication to the plea in abatement, traversing the facts set forth therein, and concluding with an offer to verify the same, and praying judgment, and that the respondent might be held to answer to the indictment. To this replication the respondent demurred, but the Court overruled the demurrer, and the respondent excepted.

It was optional with the attorney for the State to demur to the plea, or file a replication. In the one case the issue would be one of law for the Court, and in the other one of fact for the jury. Having elected to traverse the facts alleged in the plea in abatement, the attorney for the State should have tendered an issue to the country. The question of fact was exclusively for the jury; there was no question of law raised by the pleadings for the Court to pass upon until after the jury had settled the facts. The conclusion of the replication is in the form appropriate for the conclusion to a demurrer. It calls for the judgment of the Court upon an issue of fact which it is the province of the

jury alone to determine. There was no issue tendered to the country. The respondent could not properly join the issue tendered.

But in looking into the plea in abatement, it is found not to contain sufficient ground for abating the indictment, if the facts alleged therein are true. The attorney for the State was not called upon to file a replication to the plea in abatement, but might safely have demurred to it. R. S., c. 124, § 4, provides that "the indictment for such offence *may* be found and tried in the county where the offender resides, or where he is apprehended." This provision of the statute is *permissive* and not *mandatory;* it is not in derogation of the common law right of indictment and trial in the county where the offence is committed, but rather an enlargement of the jurisdiction of the Court. There is no intimation in the statute of any purpose to annul the requirement of the common law in this respect. On the contrary, the use of "*may*" instead of "*must*" or "*shall*" implies an intention, not to deprive the Court of its existing jurisdiction, but to give it enlarged powers over the same subject matter. In construing statutes, *may* is sometimes held to mean *shall*, but this is done only when it is the obvious meaning of the statute to command and not simply to permit a particular thing, or to exclude other rights or remedies, and not to grant additional ones to those already existing. The plea was therefore bad, and judgment must be awarded against the party who committed the first error in pleading.

Exceptions overruled.

Plea and replication bad; —

Respondeas ouster.

APPLETON, C. J., KENT, WALTON, BARROWS and DANFORTH, JJ., concurred.

HENRY A. DINSMORE *versus* JOHN CROSSMAN *& al.*

A bill in equity for the redemption of a mortgage, seeking for answers to allegations in reference to consideration, amounts received for rents and income, and sums paid, is not a bill of discovery, and need not be "verified by oath."

BILL IN EQUITY, heard on demurrer.

The facts appear in the opinion.

Libbey & Snow, in support of the demurrer.

J. Baker, contra.

KENT, J. — A demurrer is interposed to the bill on the ground that it is not verified by oath as required in certain cases, by rule 1 of this Court in chancery cases. 37 Maine, 581. That rule is that "bills of discovery and those praying for an injunction must be verified by oath."

This bill is for a redemption of a mortgage, and is for relief. It seeks also for answers to certain allegations in reference to consideration, amounts received for rents, and income, and sums paid. It has the usual allegation of a demand for an account, &c.

All bills in equity that seek for answers to matters alleged may, in one sense, be said to be bills for discovery, although they seek for relief based on such facts. But there is a distinct bill in chancery practice known as a bill of discovery. It is *that* and nothing else. It seeks only for the discovery of facts resting in the knowledge of the other party, or of deeds and writings or other things in his custody or possession, but seeking no relief in that bill in consequence of the discovery. Bouvier's Law Dict., title Bill in Chancery Practice; Story's Equity Plead., 288.

The question raised in this case seems to have been settled in *Hilton* v. *Lothrop*, 46 Maine, 297.

The bill of discovery, referred to in the rule of Court, is the pure and simple bill of discovery, and not the common

bill which seeks relief, and, to lay the foundation for it, asks for answers to the charging part of the bill.

Demurrers overruled.

Respondents to answer.

APPLETON, C. J., WALTON, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

INHABITANTS OF PITTSFIELD *versus* INHABITANTS OF DETROIT.

By R. S., c. 143, § 20, no insane person shall suffer any of the disabilities incident to pauperism, nor be hereafter deemed a pauper, by reason of having received support in the insane hospital from the State.

An insane person, sent to the insane hospital as a patient by the municipal officers of the town in which he has established his residence, does not thereby lose it, but it continues during his residence in the hospital.

ON FACTS AGREED.

ASSUMPSIT to recover the amount paid for the support of an insane pauper in the insane hospital, from August 31, 1864, to Feb. 28, 1865.

The pauper was a single person, twenty-one years of age, and once had his settlement in Detroit. Nov., 1857, he removed to Pittsfield, where he continued to reside until Nov., 1859, when, upon due examination, being found insane, he was sent to the insane hospital, in Augusta, where he remained until Feb., 1865, when he died. The town of Pittsfield, being liable in the first instance, paid its legal proportion of his support in the hospital, from Aug., 1864 to Feb., 1865, his friends having paid the expenses which accrued prior to that time, the State also paying one dollar per week. The plaintiffs notified the defendants who answered denying settlement.

The Court was to enter nonsuit or default as the legal rights of the parties should require.

George W. Whitney, for the plaintiffs.

1. The pauper did not have his home in Pittsfield five successive years. When he went to the hospital he had no intention of returning, being incapable of having any intention. Although insanity will not prevent the acquisition of a settlement by the sixth mode, as by *Machias* v. *E. Machias*, 33 Maine, 427; *New Vineyard* v. *Harpswell*, 33 Maine, 193; *Gardiner* v. *Farmington*, 45 Maine, 537, still it is evident that the residence of an insane person must be actual and not constructive. Where an insane person actually dwells there he has his residence.

He was in the hospital against his will, and while there was incapable of gaining settlement anywhere.

2. State paid $1 per week after Nov., 1861. Such payment prevented Jenkins from gaining a settlement.

S. S. Hackett, for the defendants.

KENT, J. — The pauper commenced "to dwell and have his home" in Pittsfield, but, before he had so dwelt for five successive years, he was, on due proceedings, "committed to the insane hospital, by the selectmen of said town, as an insane person." He remained, under this commitment, in the hospital until he died. The time he remained in the hospital added to the time he had resided in Pittsfield, before entering it, made up more than five years. The question is, whether his home was, in legal contemplation, in that town whilst he was in the hospital as an insane man, or did he cease to have a continuing home there after his removal to that institution?

Certain general principles have been established by the decisions in our own Court, bearing more or less directly on this question.

When a residence is once established, an absence for a longer or shorter period for temporary purposes does not change such residence. To break up a residence once fixed, there must be a departure with an intention to abandon, or

without an intention to return after a temporary absence. There are limitations and qualifications to be found in some of the cases, but in all of them the *intention* of the party is the controlling fact.

The objection made by the plaintiffs' counsel is, that, as the pauper was actually absent, he had no intention to return, because, being insane, he could have no intention on the subject. But another and preliminary intention is recognized by the law, viz., an intention to *remove*, and to abandon the residence. An insane man could no more have this intention, than he could have an intention to return.

In the case, as stated, this insane man did not even voluntarily remove. Without any assent or action on his part he was removed, by the action of the municipal officers of the town, to the hospital. It has been decided that he did not gain a residence in Augusta. *Smithfield* v. *Belgrade*, 19 Maine, 387; *Yarmouth* v. *N. Yarmouth*, 44 Maine, 352.

In the absence of all other facts, can a person, detained in the insane hospital, under the provisions of the law, be considered as having abandoned his home, or must he be considered as temporarily absent, and as still retaining his home where it was established when he was removed?

No one would probably raise any question in the case of a sane man, who should become a patient in a general hospital in another town or State, or in the case of a convict, committed to the State's prison, or county jail. A person has no residence in a public institution, as distinguished from a residence in some town. *Granby* v. *Amherst*, 7 Mass., 1; *Adams* v. *Wiscasset*, 5 Mass., 328.

If this pauper had recovered and returned to his home, before receiving any supplies as a pauper, could any one question his right to vote, at an election held within three months after his return? If it could be rightly questioned, then every patient, who is sent to the hospital, leaving a home and family, would lose his residence, and be remitted to a new commencing domicil upon his recovery and return to his home.

It has been settled, that a person becoming insane, may gain a settlement by a residence commenced when sane, and continued for five years. *Machias* v. *East Machias*, 33 Maine, 427; *Gardiner* v. *Farmington*, 45 Maine, 537. Having commenced a residence when sane, it continues until abandoned or legally changed. We do not think that a person insane, sent by the officers of his town to the insane hospital, as a patient, thereby loses his residence and home before established in the town. It is worthy of consideration, although perhaps it does not alter the principle, that the establishment of the opposite doctrine would offer some temptation to town officers to send doubtful cases to the hospital, to prevent the gaining of a settlement by a person likely to become a pauper.

There is another point made by the counsel for the plaintiffs, viz.,—that the State having paid one dollar per week for a part of the time included in the five years, that payment must be considered as supplies to Jenkins as a pauper within the statute. This proposition cannot be sustained. The statute, by virtue of which this payment by the State was made, (R. S., c. 143, § 20,) expressly provides that such aid shall not be considered as supplies to a pauper. And further, a person is to be considered as receiving supplies as a pauper, within the meaning of rule 6th, c. 24, § 1, only when he receives such supplies from *the town* where he has his settlement, or where he is found in distress. *Opinion of Justices*, 7 Maine, 497; same in Mass., 11 Pick., 540, and 1 Met., 572; *Veazie* v. *China*, 50 Maine, 518; *Boston* v. *Westport*, 12 Pick., 16. *Plaintiffs nonsuit.*

APPLETON, C. J., WALTON, DICKERSON, BARROWS, DANFORTH and TAPLEY, JJ., concurred.

STATE *versus* BENJAMIN F. BARTLETT *& al.*

Parties to the crime of adultery may be indicted jointly.

INDICTMENT. — ON EXCEPTIONS.

APPLETON, C. J. — The defendants are jointly indicted for the crime of adultery. They demur to the indictment for that cause. The law is well settled that the parties to this crime may be jointly indicted. *Com.* v. *Elwell & al.* 2 Met., 190. *Demurrer overruled.*

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

DANIEL B. ALLEY *versus* INHABITANTS OF EDGECOMB.

It is no part of the corporate duty of towns, as such, to provide for the public defence.

Military service is due from the citizen to the country in which he resides, in its time of need, and is not rendered for or in behalf of his town.

The adoption of town boundaries, as convenient limits of the sub-districts in raising the quota of the State, imposed no new duties upon the municipal corporations which were created for other special purposes.

Hence, if, in conformity with the regulations of the service, a town use the name and appropriate the service of one of its citizens already in the service, without his knowledge or consent, to fill its quota, it does not thereby raise an implied promise to pay for his service.

In December, 1863, the plaintiff enlisted in the navy, served three years and was honorably discharged. In August, 1864, the defendant town, at a meeting legally notified and under a proper article, "voted, that the town shall raise a sum of money sufficient to fill its quota under the call of the President in 1864, provided the men can be procured for $300 each from the town." In an action by the plaintiff to recover the $300; — *Held*, that the vote was prospective and did not apply to those who enlisted prior to the call.

ON FACTS AGREED.

For the facts, see the opinion.

R. K. Sewall, for the plaintiff.

The President demanded of the defendant town its proportion of 500,000 men. Defendants promised each man by its vote $300, and thereupon, without his consent, appropriated plaintiff's service upon its quota, and received credit therefor. The vote of the town was made valid by Act of Feb. 17, 1865. Plaintiff's patriotic zeal in enlisting before the passage of the vote of the town should not injure his claim. His service was his property and should not be taken for public use "without just compensation." Const. U. S., Art. 5. The act was tortious and the town liable in assumpsit. *Webster* v. *Drinkwater*, 5 Maine, 309; *Weston* v. *Davis*, 24 Maine, 347; *Warren* v. *Whitney*, 24 Maine, 475.

Wales Hubbard, for the defendants.

BARROWS, J. — By the agreed statement of facts, it appears that the plaintiff, an inhabitant of Edgecomb, and liable to be drafted into the military service of the United States, prior to the call for men issued by the President in July, 1864, volunteered in the navy. When that call was issued he was actually in the service, and, without his knowledge or consent, was credited upon the quota of the town to which he belonged. He served the full term of his enlistment, and was honorably discharged. He now claims to recover of the town a bounty of $300, by reason of his name being thus used to fill the quota of the town under that call, and upon the strength of the following votes.

At a town meeting, held June 2, 1864, upon an article in the warrant, — "to see what measures the town will take to procure men to fill the quota for said town agreeable to the anticipated call for men from the town of Edgecomb," — it was "*Voted*, to raise the money by subscription to procure the men to fill the abovementioned quota, authorizing the selectmen to procure the men as soon as practicable."

At a town meeting, held August 6, 1864, upon an article in the warrant, — "to see what measures the town will take to fill the quota of said town agreeable to the call of the President for five hundred thousand," — it was "*Voted*, that the town shall raise a sum of money in addition to the sum already subscribed sufficient to fill the town's quota under the last call of the President for five hundred thousand men in 1864, provided they can be procured for $300 per man from the town, and from the subscription."

The town has paid the $300 to each of the volunteers who enlisted and were mustered into the service under the call, but refuses to pay it to the plaintiff, although he was duly credited upon its quota.

And it is now to be determined whether upon this state of facts there are insuperable obstacles to the plaintiff's recovery in this action.

Throughout the protracted struggle for national existence from which we have just emerged, it was generally known and understood, and by none better than by the brave men who went forth to uphold the government against the traitors, that much of the action of towns in their corporate capacity in the way of raising men and money and paying bounties to volunteers and drafted men was, when initiated, without legal sanction. The want of legal authority and the probability of legislative ratification were constantly discussed in the town meetings.

Beyond question or controversy the right of towns to grant or to raise money depends upon authority derived from some statutory provision. Like other corporations they have no powers, that are not either expressly granted or necessarily implied from such as are granted, to enable them to discharge the special functions for which they were created and such duties as are by law imposed upon them. They have no inherent right of legislation like that of the State, but act only by a delegated power which must be measured by the terms of the grant. See remarks of DAGGETT, J., in *Willard* v. *Killingworth*, 8 Conn., 254.

Now, whatever the praiseworthy and exalted sentiment of patriotism may dictate to the individual citizens, it is no part of the *corporate* duty of towns, *as such*, to provide for the public defence. This belongs to the State or Government, and by the constitution of the United States it is devolved upon the National Government, and whether efficiently performed or not, it does not follow that corporations of limited powers, like towns, can take upon themselves the duty and exact money of their citizens for the execution of it. *Stetson* v. *Kempton & al.*, 13 Mass., 271. Chief Justice PARKER, in pronouncing the opinion of the Court in the last named case, remarks as follows: — "To give additional wages, in order to encourage such as may be drafted, may evince the sense of danger and the patriotism of a town, but it does not fall within any duty imposed by law, and it is not certain that it would produce any valuable end. For instead of a uniform and equal payment of all those who in other respects are on a footing of equality, it would probably cause jealousies and dissensions which might be highly injurious to the public service. At any rate, such a tax can in no view be considered as laid for the discharge of necessary town charges."

And it is only under the head of "necessary town charges" that there could be any pretence that power was given by the general statutes defining the powers and duties of towns, to raise money for such a purpose.

Under the President's requisitions for men the quota to be furnished by the State was fixed. To distribute the burden equally throughout the State, it was apportioned among the several districts, and in further detail, for the sake of convenience, the districts were subdivided and a proportionate quota was assigned to each town. But this imposed no duty upon the town, *in its corporate capacity*, to furnish the men. It was because they were citizens of the United States that the plaintiff and others were liable to be called on to do military duty.

Their services were not rendered for or on account of the

towns in which they resided, but because that service was due from *themselves* to the country in which they lived in its time of need. The fact that town boundaries were adopted as convenient limits of the sub-districts in raising the quota of the State, imposed no new duties upon these municipal corporations, which were created for other special purposes.

This view of the case disposes of all that part of the argument of plaintiff's counsel which proceeds upon the idea that *the town* appropriated the services of the plaintiff, and is therefore bound to pay him such compensation as others have received for like services under the vote of the town. And it is upon such supposed implied obligation mainly that the counsel seeks to maintain the plaintiff's claim in argument. Much is said about the want of authority in the town to appropriate the plaintiff's name upon its quota, and the right of the plaintiff to just compensation *in the absence of any special contract*, and about constitutional objections to the appropriation of his property or services without compensation, and the like, all of which is without foundation. For the town had no quota which, *as a town*, it was under obligation to furnish. The plaintiff's services were not for the benefit and on account of *that corporation* against which he now seeks to recover, and the appropriation and crediting of his name to that sub-district was in conformity with law and the regulations of the service, and deprived the plaintiff of nothing to which he could rightfully assert a claim.

Towns can be made liable in cases of this description only by virtue of an express promise made by authority conferred upon them for that purpose by the legislative power of the State, or subsequently ratified and confirmed by an Act of the Legislature.

If we assume that the action of the town of Edgecomb was confirmed and legalized by § 1, c. 298, Laws of 1865, or that it was within the scope of § 6, c. 227, Laws of 1864, how does the plaintiff's case stand?

The vote of June 2, 1864, looks to an individual subscription as the means of filling the quota and binds the town to nobody. If the vote of Aug. 6, 1864, is to be so construed as to bind the town to make up the subscription to an amount equal to $300 per man to all who should be procured to enlist upon the strength of that vote, still the plaintiff having enlisted previous to the call would not be included in the terms of the promise, which contemplates a prospective procurement only.

To hold otherwise would be a perversion of the vote.

It is not for us to wrest the law even in favor of those to whom the community may owe a debt of gratitude.

Plaintiff nonsuit.

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

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

If the deed of an insane person not under guardianship, obtained without fraud and for an adequate consideration, has never been ratified or affirmed, it may be avoided by his heirs, not only as against his immediate grantee, but also as against subsequent *bona fide* purchasers for value and without notice.

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

WRIT OF ENTRY.

Upon the ruling of the presiding Judge, a nonsuit was entered by consent, to be taken off if in the opinion of this Court the ruling was erroneous.

The facts appear in the opinion.

A. Merrill, in support of the exceptions.

H. P. Deane, contra,—

Cited *Arnold* v. *Iron Works*, 1 Gray, 434; *Norton* v. *Norton*, 5 Cush., 530; *Gibson* v. *Soper*, 6 Gray, 280; *Anderson* v. *Roberts*, 18 Johns., 215; *Bean* v. *Smith*, 2 Ma-

son, 252; *Edgall* v. *Lowell*, 4 Verm., 405; *Oriental Bank* v. *Harkins*, 3 Met., 332; *Somes* v. *Brewer*, 2 Pick., 183.

Rand, on same side, contended that,—

Neal was under no legal disability, and hence his deed was only voidable. 2 Kent's Com., 451, and cases cited. *Wait* v. *Maxwell*, 5 Pick., 217; *Allis* v. *Billings*, 6 Met., 415. That it conveyed a seizin to the grantee. The deed may be set aside as between immediate parties, but not as to subsequent *bona fide* purchasers from the grantee for value without notice. *Wood* v. *Mann*, 1 Sumner, 506. Such principles applicable to all voidable deeds. Any other doctrine would destroy all faith in records, set afloat all titles to real estate, and defeat the object of the law.

APPLETON, C. J.—On July 27, 1835, Stephen Neal, then owning the land in controversy, conveyed the same to Samuel E. Crocker, from whom the tenant by various mesne conveyances derives his title.

On Dec. 28, 1836, Stephen Neal died, leaving Lydia Dennett, then wife of Oliver Dennett, his sole heiress at law. On Dec. 18, 1851, Oliver Dennett died.

On July 15, 1858, Lydia Dennett conveyed the demanded premises to the plaintiff.

The plaintiff introduced evidence tending to show that Stephen Neal at the date of his deed to Crocker was insane, and claimed to avoid said deed by reason of such insanity.

After the testimony reported had been introduced, the presiding Justice ruled "that, if Samuel E. Crocker without fraud, for an adequate consideration, purchased the land of Stephen Neal, and afterwards said Crocker and those claiming under him, conveyed said land in good faith until it came into the hands of the tenant, for a valuable consideration, without any knowledge on his part of any defect in the title, or of any right or claim of any other person therein, then Mrs. Dennett or those claiming under her could not avoid her father's deed *as against the defendant*, on the

ground of his unsoundness of mind; and that the tenant would be entitled to a verdict."

If Crocker, "without fraud, for an adequate consideration, purchased the land of Stephen Neal," Neal being sane, his grantees would undoubtedly acquire a good title. The ruling is that, if insane, the same result would follow, the grantees of Crocker being *bona fide* purchasers, and ignorant of the insanity of Neal. The questions therefore arise, (1,) as to the rights of an insane man when restored to sanity, or of his heirs to avoid, as against his immediate grantee, his deed executed and delivered when insane; and, (2,) as to the rights of those deriving a title in good faith without notice, and for a valid consideration from such grantee.

(1.) The deed of an insane man not under guardianship is not void but voidable, and may be confirmed by him if afterwards sane, or by his heirs. If under guardianship, the deed is absolutely void. *Wait* v. *Maxwell*, 5 Pick., 219. The right of avoiding a contract exists, notwithstanding the person with whom the insane man contracted was not apprized of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception. *Seaver* v. *Phelps*, 11 Pick., 304. So an infant may avoid his contract, though the person dealing with him supposed him of age; *Van Winkle* v. *Ketcham*, 3 Caines, 323; or even when he fraudulently and falsely represented himself of age. *Conroe* v. *Birdsall*, 1 Johns. Cases, 127. The deed of an insane man being voidable, he may ratify it after he becomes sane, or his heirs after his decease. *Allis* v. *Billings*, 6 Met., 415. An insane person or his guardian may bring an action to recover land of which a deed was made by him while insane, without first restoring the consideration to the grantee, the deed not having since been ratified nor confirmed. *Gibson* v. *Soper*, 6 Gray, 279. In this case, the remark of SHAW, C. J., in *Arnold* v. *Richmond Iron Works*, 1 Gray, 434, that if "the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself

from a conveyance made during his incapacity, he must first restore the price, if paid, or surrender the contract for it, if unpaid," is limited and restricted by THOMAS, J., "to the case of a grantor having in his possession the notes which were the consideration of the deed and restored to the full possession of his mind." In the deed or other contract of an insane man the consenting mind is wanting. "To say that an insane man," observes THOMAS, J., "before he can avoid a voidable deed, must first put the grantee *in statu quo*, would be to say, in effect, that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming, when with restored intellect he shall seek its annulment." Lunatics and persons *non compos* are not bound by their contracts, though no fraud nor imposition has been practiced on them. *Chew* v. *Bank of Baltimore*, 14 Maryland, 318.

The ruling presupposes a sale without fraud and for an adequate consideration. That a grantor sold his land for a fair price, that the purchase money was fully secured, that in the transaction he evinced by his conduct a knowledge of the value of his property and capacity in its management, would go far to negative an utter incompetency to contract, inferable only from a loss of memory common to old age or from a disregard of the decencies or courtesies of life. So the conversion by a feeble old man past labor, of property unproductive and burdened by taxation, into notes well secured and bringing an annual income, would hardly be deemed proof of utter imbecility, if the price was equal to the fair market value of the property sold.

As the deed of an insane man is voidable only, it follows that it is capable of subsequent ratification by the grantor if he be restored to reason, or by his heirs. The retention

of the notes after such restoration and the receiving payments on them, would be evidence of such ratification. In the analogous case of infancy, it seems that there may be an acquiescence by the grantor under such circumstances as would amount to an equitable estoppel. In *Wallace's Lessee*, v. *Lewis*, 4 Harrington, 75, it was held, that an infant's acquiescence in a conveyance for four years after age and seeing the property extensively improved, would be a confirmation. Though mere lapse of time will not amount to a confirmation, unless continued for twenty years, yet in connection with other circumstances it may amount to a ratification. *Cresinger* v. *Welch*, 15 Ohio, 156; *Wheaton* v. *East*, 5 Yerger, 41. Whether, in the case before us, the deed of Stephen Neal has been affirmed by the reception, by those authorized, of the purchase money for the land, or the heir at law after the death of her husband or the passage of the laws in relation to married women is equitably estopped by her omission to act under circumstances which required action on her part, are questions which at this time are not pressing for consideration.

It is true the English Court adopt a somewhat different doctrine from that of the American Courts as to the right of an insane man when sane, or of his heirs to avoid a deed or contract executed when insane. Thus, in *Selby* v. *Jackson*, 6 Beavan, 200, Lord LANGDALE refused to set aside a deed executed in good faith by an insane man and for an adequate consideration, when the parties could not be reinstated. "There are," observes TUCK, J., in *Chew* v. *Bank of Baltimore*, 14 Maryland, 318, "many cases in England to show that such persons are held by their contracts unless fraud and imposition have been practiced, but to this we cannot assent. The doctrine in this country is the other way, and, as we think, is sustained by better reasoning than the English rule as announced in some of their decisions. The effect in many cases would be to place lunatics on the same footing with persons of sound mind, with less effective means to protect the injured party against the fraud, for at

law, as well as in equity, fraud or imposition may be relied on, without reference to the mental capacity of the parties except so far as such defect may give weight to other facts, from which the fraud may be deduced."

The ruling, however, in the case at bar, is not in accordance with that of the English courts, which require that, in addition to good faith and a full consideration, the person contracting should be apparently of sound mind, and not known to be otherwise to the party with whom he contracts. *Molton* v. *Camroux*, 2 Exch., 487. These elements are not required by the ruling under consideration.

2. It is insisted, even if the deed of Neal might have been avoided as between the original grantor and grantee, that this right of avoidance ceases when the title has passed into the hands of third persons in good faith, for an adequate consideration, and ignorant of any facts tending to impeach such title.

It is apparent that the protection of the insane and the idiotic will be materially diminished, if the heirs cannot follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person.

The acts of lunatics and infants are treated as analogous, and subject to the same rules. *Key* v. *Davis*, 1 Maryland, 32; *Hume* v. *Barton*, 1 Ridg. Pl., 77. "The grants of infants and persons *non compos* are parallel both in law and reason." *Thompson* v. *Leach*, 3 Mod., 310.

The law is well settled that a minor when of age may avoid his deed given when an infant. He may do this not merely against his grantee, but he may follow the title wherever it may be found and recover his land. "It may be objected," observes MARSHALL, J., in *Myers* v. *Sanders' heirs*, 7 Dana, 524, "that these restrictions upon the right of an adult to avoid his deed obtained by fraud are inconsistent with the principle which allows an infant to avoid his deed, into whose hands soever the bill may have passed and without regard to time, except as a statutory bar running

after he becomes of age. But, waiving the inquiry how far the mere acquiescence of an infant grantee after he becomes of age may determine his right of revoking his title from the hands of a purchaser for value, who has acquired it after such acquiescence, we think the analogy between the cases is too slight to have any decisive influence upon the present question. The right of an infant to avoid his deed is an absolute uncontrollable privilege, founded upon an incapacity conclusively fixed by the law to bind himself absolutely by deed or to pass an indefeasible title. These principles are irreversibly fixed by the law, and it enforces them without inquiring into particular circumstances and without regard to consequences. It must do so in order to maintain them. The right of an adult grantor, to avoid his deed for fraud, stands upon an entirely different basis. It grows out of the particular circumstances; it is founded in a regard to justice between man and man; it is given as a remedy for the hardship of his case. In its very foundation and essence, it is limited by the justice which is due to others, and therefore cannot be exercised without a regard to their rights and interests."

"But again, infancy is not, like fraud, a circumstance wholly extraneous from the title. The deed shows who the grantee is; the purchaser knows that an infant grantee cannot pass an indefeasible title; he is bound to know the identity of the person, who assumes to convey the title; and it is not an unreasonable requisition that he shall know whether the grantee, under whom he claims title, is under incapacity or not. In this view of the subject, no purchaser under an infant's deed is innocent in the eye of the law, until the title has been confirmed by the matured consent of the grantor." In *Bool* v. *Mix*, 17 Wend., 119, the suit was against one claiming by a title derived from the grantee of the minor, but the ground was not taken that in consequence thereof the tenant had an indefeasible title. The principles applicable to deeds voidable for the infancy of the grantor are equally applicable where the grantor is insane. When

a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title, — and he does convey such title to all *bona fide* purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee, whose title is thus derived, must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The rights of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee. 1 Amer. Leading Cases, 259. *Exceptions sustained.*

The case to stand for trial.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

JOHN FERRIN *versus* THE CITY OF PORTLAND.

On Feb. 9, 1865, the city of Portland, by its constituted authorities, ordered, that to each person volunteering on its quota there should be paid certain specific bounties, upon being mustered in, "and to any citizen of Portland, mustered in as aforesaid, there shall be paid the additional sum of fifty dollars when mustered out." The order also provided that it "shall be in force and effect, and the treasurer be authorized to pay the bounties it contemplates, as soon as the Legislature shall enact a law, under the operation of which the legality of said bounties shall be unquestioned;" — *Held*, that the order cannot be regarded as within § 1, c. 298, of the Public Laws of 1865, and that the fifty dollar bounty was not thereby made valid.

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

Defendant demurred and the plaintiff joined. The pre-

siding Judge overruled the demurrer, *pro forma*, and the defendant excepted.

The remaining facts appear in the opinion.

Drummond, for the defendants.

Howard & Cleaves, for the plaintiff.

The promise on the part of the city was full and complete, on the day the order was passed. It was to pay as soon as the order was legalized. Actual payment was withheld until legalization. The vote was legalized Feb. 17, 1865, and took effect as of Feb. 9, so that those who enlisted, prior or subsequent to Feb. 17, were entitled to the bounties specified. The order must be considered as "past doings" of the city under § 1, c. 298, Public Laws of 1865, (approved Feb. 17, 1865.) Section 6 does not refer to "past doings," but to future. The defendants' demurrer admits the allegation in the writ that the "vote was legalized" and is conclusive.

APPLETON, C. J.—On the 9th day of February, 1865, the city of Portland, by its constituted authorities, passed the following vote.

"Ordered, that to each man who shall be accepted into the service of the United States, on the quota of this city under the call of December 19, 1864, either personally or by substitute, whether by volunteering or by draft, shall be paid a bounty as follows, to wit, — for one year's service, $300; for two years' service, $400; for three years' service, $500; such bounties to be paid on his being mustered into the service of the United States, and, to any citizen of Portland, who may be mustered into the service, as aforesaid, there shall be paid the additional sum of $50, when said recruit shall be mustered out of the service, or to his legal heirs in case of the death of said recruit in the service.

"The foregoing provision shall be in force and effect, and the treasurer be authorized to pay the bounties, it contem-

plates, *as soon as the Legislature of the State shall enact a law*, under the operation of which, the legality of said bounties shall be unquestioned."

The vote of the city was not absolute. It was prospective and conditional. It did not purport to give any authority, at the date of its passage, to the treasurer to pay any bounties. If an offer, it was not to have any force and effect, until the Legislature should enact a law, by virtue of which "the legality of said bounties shall be unquestioned." Whatever law should be passed on the subject, the vote of the city by its express terms would not be effectual until and after its passage.

By the Act of Feb. 17, 1865, c. 298, § 1, it is enacted that "the past doings of cities, towns and plantations, in offering, paying and agreeing to pay, and in raising and providing means to pay bounties to, and all notes and town orders given by the municipal officers of any city, town or plantation in pursuance of a previous vote, for the benefit of volunteers, drafted men or substitutes of drafted and enrolled men, who have been or shall hereafter be actually mustered into the military or naval service of the United States are hereby made valid."

The vote of the city of Portland can hardly be regarded as within § 1, for it was not to take effect at its passage, but subsequently, when a law authorizing it should have been enacted. It would never take effect if no law authorizing such a vote should be passed, and when passed it would only be effective according to the terms of such law.

By § 6, "authority is *hereby* conferred upon cities, towns and plantations to offer, pay and agree to pay bounties to volunteers, drafted men or substitutes required to fill the quotas under any call for soldiers by the president or government of the United States heretofore made, when such volunteers, drafted men or substitutes have been or shall *hereafter* be actually mustered into the military or naval service of the United States, and to assume and pay to persons or associations, when they have advanced the bounty,

or have by private subscription given a bounty, to such volunteer, drafted man or substitute; *provided*, that no city, town or plantation, *is authorized by the provisions of this Act* to *hereafter* offer, pay or agree to pay as bounty for any volunteer, drafted man or substitute, a sum exceeding three hundred dollars for the first year, the person so enlisted or drafted shall be mustered for, and one hundred dollars for each additional year," &c.

The plaintiff was an inhabitant of Portland, who, on the 6th of March, 1865, was mustered into the service of the United States, in which he remained until he was mustered out on Aug. 11, 1865, when he demanded the fifty dollars to be paid on his being mustered out, which was refused, whereupon he commenced this suit.

The vote of the city was of no force and effect prior to the passage of the Act of Feb. 17, 1865, c. 298. It then first became valid, — and only to the extent it received legislative sanction. But by § 6 a limitation is imposed upon the amount of the bounties to be offered and paid. The vote of the city had no "force or effect" until after the passage of the Act under consideration. The authority conferred was limited to a specific sum, which cities, towns and plantations were prohibited from exceeding. The plaintiff has received the sum the city was authorized to offer at the date of his enlistment. The city of Portland, by the terms of the Act under and by force of which alone their vote has any validity, must be restricted to the sums thereby authorized, and this suit cannot be maintained.

Declaration bad. — Judgment for defendants.

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

ROBERT BRADLEY, *in Equity, versus* MASON G. WEBB.

Where, in a bill in equity praying for an account between partners, the evidence establishes the fact of partnership between the parties and of its dissolution, the complainant is thereby *prima facie* entitled to maintain his bill.

The *onus* is upon the respondent to establish new facts set out in his answer which seek to avoid, rather than respond to, the bill.

BILL IN EQUITY between partners, praying for an account. The case was heard on bill, answer and proofs.

The facts appear in the opinion.

Evans & Putnam, for the complainant.

N. Webb, for the repondent.

APPLETON, C. J. — The evidence on both sides establishes the fact of a partnership between these parties and of its dissolution. This *prima facie* entitles the plaintiff to maintain his bill.

The defendant sets up by way of answer an agreement by which, as he alleges, the plaintiff became the purchaser of the assets of the firm for a stipulated sum and obliged to pay its debts. There is no written evidence on the subject. These allegations of the defendant are utterly denied by the plaintiff. The evidence of the book-keeper rather negatives than sustains the answer. The burthen is upon the defendant, setting out new facts not responsive to the bill, to make out his agreement by a preponderance of proof. This he has failed to do.

Bill maintained, and a master to be appointed to state the accounts between the parties.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

JOHN A. WARREN *& al. versus* HENRY LOVIS.

By R. S., c. 90, § 1, a conveyance appearing on its face to be absolute, with a separate instrument of defeasance, executed at the same time or as a part of the same transaction, constitutes a mortgage.

The deed and instrument of defeasance must pass between the same parties.

And the instrument of defeasance must be of as high a nature as the deed thereby to be defeated.

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

EJECTMENT.

The action was defaulted and thereupon the defendant moved that judgment be entered up as of mortgage, which was resisted by the plaintiffs. The presiding Judge refused to grant the motion and the defendant excepted.

The deed from Holt to the plaintiffs contained the following reservations:—

"Giving and reserving to Henry Lovis the right of redeeming said described premises, at any time within six months from the date of these presents, by paying to the said Warren and Rice, or their heirs or assigns or administrators, the sum of eight hundred and fifty dollars, and interest from the 28th day of Nov., 1864, and all taxes, insurance, bills and costs of deeding from them to the said Lovis, agreeable to the provisions of the bond from said Warren and Rice to said Lovis this day made."

H. H. Smith, for the defendant.

1. Plaintiff had notice of equities between the parties. R. S., c. 73, § 12.

2. Deeds should be so construed as to secure to all parties interested their full rights. *Sanborn* v. *Woodman*, 5 Cush., 36; *Stone* v. *Ellis*, 9 Cush., 95; Washburn on Real Property, vol. 1, p. 478; Adams' Eq., 291, 292, and note 2, and c. c.

3. Holt's deed, expressly "reserving" to the tenant Lovis the right of redeeming, &c., with a covenant of warranty,

agreeable to the provisions of the "bond," should be construed as conveying to the plaintiffs the estate of a mortgagee. R. S. c. 90, §§ 4 and 6; Adams' Eq., *supra*.

D. R. Hastings and C. R. Ayer, for the plaintiffs.

APPLETON, C. J., — On the 3d. Dec., 1864, one Charles E. Holt deeded the premises in controversy to the plaintiffs, who, on the same day, gave the defendant an agreement not under seal to convey said premises to him upon his performance of the conditions therein stated. The deed from Holt to the plaintiffs refers to this agreement and reserves to the tenant his rights under it.

By R. S., 1857, c. 90, § 1, "a conveyance appearing on its face to be absolute, with a separate instrument of defeasance, executed at the same time and as a part of the same transaction," constitute a mortgage.

The deed and bond of defeasance must be between the same parties. *Flagg* v. *Mann*, 14 Pick., 480; *Shaw* v. *Erskine*, 43 Maine, 371. A bond given at the time of the conveyance from the grantee to the grantor and another, conditioned to convey to them, on receiving certain payments therein specified, is not such a defeasance as will constitute a mortgage. *Treat* v. *Strickland*, 23 Maine, 234.

The instrument of defeasance must be of as high a nature as the deed thereby to be defeated. To constitute a mortgage the obligation to reconvey must be under seal. *Jewett* v. *Bailey*, 5 Greenl., 87; *French* v. *Sturdivant*, 8 Greenl., 246. A written agreement to reconvey not under seal, though made at the same time with the deed, does not constitute a mortgage. *Kellerun* v. *Brown*, 4 Mass., 443.

The defendant does not appear to have ever been the owner of the land in dispute. He was never mortgager. He had a right to a deed upon the performance of the conditions set forth in the plaintiffs' agreement with him. He has neglected to comply with those conditions and he does not attempt to show any excuse for his failure.

Whatever may be the equitable rights of the defendant

he fails to show a legal mortgage, and is not entitled to have a conditional judgment entered. *Eaton* v. *Green*, 22 Pick., 527. *Exceptions overruled.*

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

HANNAH G. WING, *in Eq.*, *versus* DANIEL M. AYER *& als.*

A bill in equity brought by a widow to redeem a mortgage given by her husband, in order that she may have dower in the equity of redemption, must distinctly set forth a seizin of the husband during coverture in such an estate as would entitle her to dower.

A bill which, after setting out the deed to, and the mortgage from her husband, alleges "that during her coverture with the said F.," her husband, "the said F. was seized and possessed of the equity of redemption of the" land described; and "that, by reason of the aforesaid conveyances to and from her said husband, she took and had an inchoate right of dower in the equity of redemption of said land;" and "upon the decease of her said husband she became dowable therein," &c., is not sufficient on demurrer.

BILL IN EQUITY, setting forth substantially that the complainant was married to one J. M. Fogg, Dec. 11, 1855, with whom she lived until June 5, 1858, when the said Fogg deceased; that, "during her coverture with said Fogg, he was seized and possessed of the equity of redemption of two certain parcels of land situate in Lewiston, county of Androscoggin, and adjoining each other, the same having been conveyed to the said Fogg during his intermarriage with" the complainant, that one of said parcels described was conveyed to said Fogg by Thomas Nesmith, by deed of warranty dated June 23, 1857; that the parcel described was conveyed to said Fogg by said Nesmith and one A. C. Wheelock by their warranty deed of same date as the former; that said Fogg, on same day, by his deed of mortgage in which the complainant did not join, conveyed in mortgage both said parcels to said Nesmith, conditioned that, if said

Fogg, his heirs, &c., should pay to said Nesmith, his heirs, &c., a sum named, at a time named, then said mortgage should be void, otherwise should remain in full force; that said Fogg thereupon entered into possession, and expended large sums of money in erecting a dwellinghouse and other buildings, and remained in possession until his death; "that, by reason of the aforesaid conveyances to and from her said husband, she took and had an inchoate right of dower in the equity of redemption of both of said parcels of land, and upon the decease of her said husband she became dowable therein and entitled to be endowed of one-third part of said equity and thereby and by reason thereof has the right to redeem the said mortgaged lands in order that she may be let into the enjoyment of her reasonable dower aforesaid;" that, on April 22, 1858, said Fogg mortgaged part of said premises (described) to one David M. Ayer, one of said respondents, to secure $200, in which last named mortgage the complainant did not join, nor in any wise release her right of dower; that, after said Fogg's decease, letters of administration of his estate were granted to one Jones, who, on June 7, 1859, by license from the Judge of Probate, for a consideration named, sold to said Ayer all the right, title and interest which the said Fogg had, at the time of his decease, in and to the whole of both parcels of land aforesaid, and executed and delivered a deed of the same, whereby said Ayer became owner of said Fogg's equity of redemption; that said Ayer thereupon took possession thereof and of the rents and profits; that, on Nov. 4, 1862, said Nesmith executed and delivered an assignment of the former mentioned mortgage to said Ayer, who thereupon took possession under the same, &c.; that, on Nov. 6, 1862, said Ayer, by his deed of warranty, in consideration of $1800, conveyed to Jotham P. Norton, another of the respondents, a part of said mortgaged lands (described); that said Norton thereupon took possession of the same, &c.; that said Norton, on March 29, 1865, conveyed said premises last mentioned, in consideration of $3500, to John Goss, another

of said respondents, who thereupon took possession of same and still holds the same, &c.; that, on Nov. 13, 1865, she made the legal demands in writing of each of said respondents, of a true account of the sum due, &c.; but that they each unreasonably neglected and refused to render such account. She therefore prayed for an account, offering to pay whatever should be found due, &c.

The respondents demurred, and the complainant joined the demurrer.

H. C. Goodenow, for the respondents,—

To the point that the bill did not sufficiently set out such a seizin in the husband as would entitle the complainant to dower, cited R. S., c. 104, §§ 2 and 3; Oliver's Prec. 654; Curtis' Eq. Prac., 58, 87; *Foster* v. *Dwinel*, 49 Maine, 44; *Gammon* v. *Freeman*, 31 Maine, 243; *Freeman* v. *Freeman*, 39 Maine, 426; *Messiter* v. *Wright*, 16 Pick., 151; *May* v. *Parker*, 12 Pick., 24.

S. & J. W. May, for the complainant.

The allegation that, "by reason of the conveyances aforesaid to and from her said husband, she (the complainant) took and had an inchoate right of dower in the equity of redemption in both of said parcels of land," is sufficient on demurrer, since the fact is thereby admitted, that the conveyances were one transaction, otherwise complainant would be entitled to dower in the whole instead of in the equity of redemption. *Tudor* v. *Cambridge Water Works*, 1 Allen, 164.

It is not necessary to set forth minutely the mode of proof of an alleged fact. *Lovell* v. *Farrington*, 50 Maine, 239; *Pratt* v. *Bacon*, 10 Pick., 128; *Wright* v. *Dame*, 22 Pick., 58.

Appleton, C. J.,—The plaintiff, claiming dower in an equity of redemption of certain lands mortgaged by her husband during coverture, brings this bill to redeem, to which the defendants demur.

The bill must affirmatively show that the Court has jurisdiction. It does not distinctly set forth that the husband was seized during coverture of an estate *in fee* or of any estate in which the wife would be dowable in the lands mortgaged. The bill should show such seizin in the husband as would entitle the wife to dower. *Freeman* v. *Freeman*, 39 Maine, 426. *The demurrer is sustained.*

CUTTING, WALTON, DICKERSON and TAPLEY, JJ., concurred.

WILLIAM HASKELL *versus* ASA C. MITCHELL.

An assignment and delivery of a negotiable promissory note before maturity, without the indorsement of the payee, gives to the assignee only the rights of the payee.

And a contemporaneous promise by the payee to indorse, if not complied with until after maturity, will not avoid the defence of a want of consideration at the inception of the note.

A witness who has seen the horse in question and is acquainted with the value of horses, may be asked to state the difference in value between the horse as represented and as actually existing.

What is not such a misconduct on the part of the jury as will set aside a verdict.

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

ASSUMPSIT on a promissory note by the indorsee against the maker.

It appeared that when the note was sold and delivered to the plaintiff, the payee agreed to indorse it without recourse at any time.

The presiding Judge instructed the jury, among other things, that, if the note in suit was sold and delivered to the plaintiff before it became due and payable, but was not indorsed by the payee till after it became payable, the defendant would have the same right to set up fraud or want of

consideration, at the inception of the note, as if the note had remained the property and the suit was in the name of the payee; that a promise to indorse before, if not complied with till after the note became payable, would not avoid such defence.

The verdict was for the defendant, and the plaintiff excepted.

The plaintiff also moved to set aside the verdict, because the foreman, in company with the officer having the jury in charge, came into Court, (leaving the remainder of the jury in their room,) and inquired of the presiding Judge which of the blank verdicts should be used if they found fraud, and that the damage to the defendant, by reason of the fraud, was equal to or more than the amount of the note, and then returned to the jury room.

Fessenden & Frye, for the defendant.

Although the clerical act of indorsing the note was not made until after maturity, still it was promised before and related back to the time of delivery. Chitty on Bills, (7th American ed.,) 116; *Smith* v. *Pickering*, Peake's Cases, 50; 1 Campb., 492; *Rolleston* v. *Herbert*, 3 Tenn., 411; 1 Rose, 14, a; *Baker* v. *Arnold*, 3 Caines' R., 279; *Ranger* v. *Carey*, 1 Met., 369.

The opinion of the witness was not admissible. *Lewis* v. *Brown*, 41 Maine, 451; 1 Greenl. on Ev., (7th ed.,) 575, note; *Robertson* v. *Stark*, 15 N. H., 109; *Rochester* v. *Chester*, 3 N. H., 349; *Peterborough* v. *Jaffrey*, 6 N. H., 462; *Whipple* v. *Walpole*, 10 N. H., 130.

C. Record, for the plaintiff.

Appleton, C. J., — The note in suit was sold and assigned by delivery before and indorsed after its maturity. Before it was indorsed, and up to the time of its indorsement, a suit to enforce its payment must have been brought in the name of the payee. If so brought, it would have been competent for the maker to show fraud or a failure of

consideration by way of defence. The plaintiff, by his purchase, acquired only the rights of an assignee. The indorsement after maturity enables the plaintiff to maintain an action in his own name, but it does not divest the defendant of the defence to which he was entitled prior to such indorsement. Such is the well settled law of this State, though it may be otherwise in England. *Calder* v. *Billington*, 15 Maine, 398; *Savage* v. *King*, 17 Maine, 301.

An exception is taken that a witness was asked in substance to state the difference in value between the horse as represented and as actually existing. No objection is taken that the witness, of whom the inquiry was made, did not know the horse or was not skilled to judge of its value. The question of value is necessarily one of opinion. In *Shaw* v. *Charleston*, 2 Gray, 109, it was held to be well settled law that the value of property, real or personal, when in controversy, might be proved by the testimony of witnesses personally acquainted with the subject, and who are sufficiently familiar with it, to give an opinion of its value. This decision was affirmed in *Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313. Opinions are always admitted as to the value of domestic animals. *Brill* v. *Flagler*, 23 Wend., 354. In *Joy* v. *Hopkins*, 5 Denio, 84, it was held that a witness might be asked what the article would have been worth if it had been of the quality which it was warranted to be. The opinion of a witness who has seen the thing in question and is acquainted with the value of similar articles is competent to be submitted to a jury. *Clark* v. *Baird*, 5 Selden, 183.

No misconduct is shown on the part of the foreman of the jury. The motion to set aside the verdict for alleged misconduct on his part was not relied upon at the argument, and may be regarded as abandoned.

Motion and exceptions overruled.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

GOING HATHORN *versus* MARY P. CALEF *& al., Executors.*

An action on the case includes assumpsit as well as tort.

When a remedy is given by an action on the case, all the facts must be set out in the declaration; but whether in the form of assumpsit or of tort must be determined from the nature of the facts.

Under R. S., c. 46, § 26, assumpsit may be maintained by a creditor of a corporation against a stockholder.

An allegation in a writ against a stockholder, that the officer "did return the execution * * * wholly unsatisfied, for want of attachable corporate property * * * wherewith to satisfy it," is a sufficient statement of a want of attachable corporate property, considering that the statute contemplates this fact is to be proved by the return.

A return by the officer, that he "cannot find corporate property," &c., is all that was required by R. S. of 1841, c. 76, § 18.

And a certificate that he "made diligent search" before his return is a sufficient compliance with the provision in the same section that he must "first ascertain."

The statute does not require, in this respect, the certificate of any officer beside one in the county where the corporation has its place of business, unless one, possibly, in the county where the stockholder resides, although the road of the corporation extends through more than one county.

Nor is the officer required to go out of his precinct; but when he makes a return, it will be understood that what he did was in his own county, unless the contrary appear.

If, when the notice of the "creditor's intention" is given, the execution with the officer's return thereon be shown the stockholder, the latter thereby receives a sufficient evidence of the "amount of the debt or deficiency."

If both demand and notice be made at the same time, and forty-eight hours before suit, the statute requirement is satisfied.

The officer need not necessarily retain the execution, neither need the creditor remain near during the forty-eight hours next after demand; it is only necessary that the conduct of the creditor should not be such as to interfere with the stockholder's right to relieve himself by disclosing corporate property within the time allowed.

If, upon demand, the stockholder declines to disclose corporate property, and gives no intimation of his future intention to do so, or, if he did, where the property would be situated, it would not be unreasonable for the creditor to return home; since, if the officer remained, the stockholder might show the property disclosed to him, whether he retained the execution or not.

If the stockholder had disclosed property, after the return home of the creditor, and the latter had not been in condition to receive it, he alone would have been the loser.

Neither could such defence be set up unless mentioned in the specifications of defence.

When the charter of a corporation is made subject to the liabilities and duties provided in a former general statute, it seems that the general statute does not thereby become a private one so far as the corporation is concerned.

The Legislature has power so to modify and change existing laws as to affect the liabilities of stockholders for the debts of the corporation, having a due regard to existing contracts, and making such modifications prospective.

Act of Feb. 16, 1836, was repealed by Act of 1841, in its application to the Kennebec & Portland Railroad charter, and the Act of 1841, in its turn, was modified by Act of 1855, c. 169.

The Acts passed subsequently to that of Feb. 16, 1836, continued the liability of stockholders, but modified the remedy in some respects.

So far as the contract is concerned, the rights of parties attached when it was made, and no change could be made after that date; but the remedy might be subsequently changed, although it imposed additional burdens upon either party.

The contract is to be construed according to the law in force when it is made; the mode of enforcing it, according to the law, when the remedy is sought.

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

Assumpsit by a creditor of a railroad corporation against one of its stockholders.

D. D. Stewart, submitted an elaborate brief for the plaintiff.

T. M. Hayes, for the defendants, contended,—

1. The action of assumpsit is not maintainable in this suit. It is a statute remedy, prescribed by the charter or some other statute. Such actions have always been a technical action on the case, trespass on the case, or *scire facias*, never assumpsit.

When a statute prescribes a remedy to enforce a right or liability created and defined by a statute, no other remedy will lie. *Kelton* v. *Phillips*, 3 Met., 62; *Knowlton* v. *Archly*, 8 Cush., 97. But if a statute merely imposes a duty or liability, without providing any remedy, an action at common law is proper. *Coggswell* v. *Essex Mill Co.*, 6 Pick., 94; *Heridia* v. *Ayers*, 12 Pick., 334; *Knowlton* v. *Archly*, *ubi supra*.

By Act of 1836, statute remedy was "an action on the case," which so remained till 1855, when *scire facias* was substituted. In 1856, case was made the only remedy, and has ever since continued to be.

Plaintiff cannot frame his action in assumpsit or tort. There are cases where he may sue in assumpsit or trespass on the case, as damages against common carriers, assumpsit for breach of the contract to convey and deliver property intrusted to him, or trespass on the case for wrongful negligence. Actions are different and causes different, and the two cannot be joined.

Assumpsit was formerly an action on the case, but declaration different in modern assumpsit. It is now a substantive form of action. 1 Archibold's Nisi Prius, 537–8.

Actions on the case are for torts only. 1 Arch. N. P., 538. It is sometimes made a statute remedy, and to recover unliquidated damages. 1 Arch. N. P., 594.

The facts do not warrant assumpsit.

II. The facts and evidence do not show proceedings made essential by the laws of this State, in order to fix the defendants' liability to the plaintiff, and the plaintiff's right to maintain this action.

The liability was conditional like that of an indorser.

The conditions have not been performed.

Upon the acceptance of the charter, it became a contract between the State and corporation, which could not be modified or impaired in its obligations without consent of the corporation. *Coffin* v. *Rich*, 45 Maine, 509, and cases there cited.

By the charter the corporation was made "subject to the liabilities and duties provided for by Act of Feb. 16, 1836." This latter Act fixed the liabilities of stockholders and the rights of corporation creditors. By this reference, the stockholders' liability became specific and conditional. The reference had same effect as if the provision had been set out in the charter, *verba illata inesse videntur*. And the

repeal of Act of 1836, would not affect the charter. *Kelton* v. *Phillips*, 3 Met., 61; *Nichols* v. *Bertram*, 3 Pick., 343.

R. S., 1841, c. 76, § 18, substitute for Act of 1836, excepts from its operation, corporations where "otherwise specified in their charters." It was "otherwise specified" in the charter of K. & P. R. R. Co., since by that charter stockholders were made liable for all debts contracted prior to transfer of stock, while by R. S., c. 76, § 18, they were liable only for debts contracted during ownership.

Charter became a contract between State and corporation that stockholders' liability should not be changed without consent. Legislature never attempted to change it by direct legislation; general legislation does not affect it. Stockholders' liability fixed by §§ 3 and 4 of Act of 1836, being part of charter. Not otherwise liable. *Longley* v. *Little*, 26 Maine, 166; *Grose* v. *Hilt*, 36 Maine, 25 and 27; *Stone* v. *Wiggin*, 5 Met., 319.

Declaration does not allege "a deficiency of attachable corporate property or estate," when the demand was made. It simply avers that an officer returned an execution "wholly unsatisfied, for want of attachable corporate property to satisfy it" *wholly*.

The facts and evidence do not show such "deficiency." Not finding corporate property in Kennebec or York counties does not show a deficiency of corporate property. The road did not extend into York county, but did into Cumberland, Sagadahock and Kennebec counties. The officer must "first ascertain and certify that he cannot find corporate property" any where. The officer might not find property in his precinct. R. S., 1841, c. 76, § 18. If property was found beyond the precinct of one officer, it might be transferred to another. *Grose* v. *Hilt*, *ubi supra*, and the proper form of officer's certificate, *Ingalls* v. *Cole*, 47 Maine, 533.

Notice should inform the stockholder of the precise "deficiency," and that the officer intended to levy the execution, &c., unless within forty-eight hours, such stockholder, on demand, should disclose property, &c. Chap. 76,

§ 19. The demand was to be at the termination of the forty-eight hours. He might have found other property, or execution been paid.

Officer should continue to hold execution, else his authority to receive property disclosed would cease. By withdrawing execution and going away himself he might fix liability of every stockholder. No such notice given. Stockholder under no obligation to disclose property until after notice.

The debt to the plaintiff was contracted by the corporation, August and October, 1855. The plaintiff's rights were fixed at that time. No subsequent legislation has enlarged or diminished them.

By the Act of 1855, c. 169, *scire facias* was made the only remedy as to the plaintiff. Act of April 9, 1856, was prospective and did not apply to plaintiff's remedy. Same is true of Act of April 9, 1856, as reënacted in R. S. of 1857, c. 46, §§ 24, 25 and 26.

So that there is now no statute remedy by which creditors of the K. & P. R. R. Co., can enforce their rights under its charter against its stockholders, unless it be *scire facias*.

But Act of 1855, making *scire facias* the only remedy, was repealed by Act of April 9, 1856. But, at time of the repeal, plaintiff had the right, after the proper proceedings, to recover his debt by *scire facias*. And the U. S. Supreme Court has decided in this case that, so far as Act of April, 1856, took away the rights of the plaintiff, it was unconstitutional. *Scire facias* still remains the only remedy of the plaintiff against the defendants.

The statute making *scire facias* the plaintiff's only remedy was revived as to the plaintiff before he commenced his action. Act of March, 1855, was repealed, as a general law, by Act of 1856, after his rights to proceed, by preliminary steps, had accrued. But, by the general repealing Act of 1857, Acts of 1855, from c. 111, to c. 189, were repealed, and among them was c. 169. By § 2, the Acts declared repealed, "remain in force, for the preservation of all rights,

and their remedies existing by virtue of them, and so far as they apply to any * * * contract already affected by them."

Plaintiff has not followed the charter and subsequent Acts, but has followed R. S., 1857, c. 46, the latter of which is prospective and imposed no liability upon stockholders for corporate debts contracted prior to its first enactment. *Coffin* v. *Rich*, 45 Maine, 507; *Hathorn* v. *Towle*, 46 Maine, 302; *Carroll* v. *Hinckley*, 46 Maine, 81; *Thompson* v. *McIntyre*, 48 Maine, 34.

DANFORTH, J.—This case has been before the Supreme Court of the United States, where it was decided that the qualified obligation resting upon the stockholders of the K. & P. R. R. Co., by force of law, to pay the debts of the corporation, is not only a contract as between the stockholder and creditor, but is also an element in the contract between the creditor and the corporation. Hence the Act of April 9th, 1856, was declared unconstitutional so far as it affected such contracts, made before its passage. Therefore the former judgment rendered by this Court was reversed. The action now comes before us upon a report, and it is contended, that, aside from the statute referred to, this action cannot be maintained, because it is unauthorized in form, and the preliminary proceedings of the plaintiff have not been such as the statute requires. The remedy provided by the statute is an "action of the case," the present action is assumpsit.

The only question is, whether an "action of the case" embraces that of assumpsit.

Chitty, in his Treatise on Pleading, p. 95, says,—"at common law also, though no form could be found in the register adapted to the nature of the plaintiff's case, yet he was at liberty to bring a *special action on his own case*." And adds, that the statute of Westminster was passed more effectually to carry out this provision of the common law. This is the origin of the "action on the case" and its distinguishing characteristic would seem to be, that all the

facts upon which the plaintiff relies are to be stated in his declaration. This will apply to assumpsit as well as tort. On page 99 of the same work, referring to assumpsit, the author says, "though founded upon contract this action may be termed an action upon the case." Again, on page 132, he says,—an action on the case, "in its most comprehensive signification, includes assumpsit, as well as an action in form *ex delicto*. He also adds, — "But, at the present time, when an action on the case is mentioned, it is *usually* understood to mean an action in form *ex delicto*." The use of the term usually plainly indicating that it is not always, or necessarily so. So Bacon says, — "Both indebitatus assumpsit and special assumpsit come under the denomination of actions on the case." (Bacon's Abr., Assumpsit.) Stephen, in his work on pleading, pages 18 and 19, attributes the origin of the action to the same source as Chitty, and says, — "It comprises many different species of which the most common is assumpsit and trover." From these authorities, which are believed to be sound, the action on the case includes assumpsit as well as tort, and, when this remedy is provided by statute, we know that all the facts must be set out in the declaration, but whether in the form of assumpsit, or tort, must be decided from the nature of those facts. It may be true that, when an action on the case is mentioned, we usually understand one of tort, for usually violations of statute provisions are tort. It is but seldom that the statute, as in the case at bar, provides a remedy for a cause of action originating in, and founded upon, a contract. But where it does provide such a remedy, its infrequency furnishes no ground of inference that we should violate all the ordinary rules of pleading, when the statute does not require it.

The claim sought to be enforced in the present action is founded upon a contract. There is no element of tort, or active wrong in it. It is simply a failure to fulfil an obligation, such as the law would imply a promise to fulfil, and, as the statute provides an "action on the case" simply, we see no reason why that may not be in assumpsit, and we find

that in similar cases, as in *Fowler* v. *Robinson*, 31 Maine, 189, assumpsit has been maintained. But, were it otherwise, the facts, relied upon by the plaintiff, are all stated in his declaration, and, by striking out the last sentence only it would be an action on the case, and not assumpsit. This sentence neither helps nor hinders a right understanding of the "person and case." It is clear then, that, by our statute, an amendment would not only be allowable, but the Court would be required to grant it, if asked for.

The next question involved in this case is whether the plaintiff has taken the necessary steps in order to enable him to recover. Upon this point, it is contended that the Act of February 16, 1836, which was passed before the charter of the K. & P. R. R. Co., or possibly c. 46, §§ 18, 19, and 20, which was passed before the acceptance of the charter, must control and settle the rights of the parties to this suit. These two Acts are very similar in their provisions, and perhaps it is not very material which governs. Conceding for the present the above proposition, we think the plaintiff has made good his claim under either statute.

No question is made as to the ownership of stock by defendants' testator, or the recovery of the judgments against the corporation, as alleged in the plaintiff's writ, or that the action was commenced within the time allowed.

But it is claimed that no sufficient return has been made upon the executions by the officer, and that the required demand and notice have not been made and given. Also that there is no sufficient allegation in plaintiff's writ of a want of attachable corporate property. We do, however, find in the writ an allegation that the executions were returned unsatisfied for want of attachable corporate property. Considering that the statute contemplates that this fact is to be proved by the return of the officer, we do not perceive why it is not a sufficient statement of the fact, although accompanied with the proof. It certainly cannot weaken the statement, and it seems to be a pretty distinct setting forth that the corporation had no such property. If this fact is

to be proved by testimony other than that obtained from the return of the officer, we find sufficient *prima facie* evidence of it in the statement in the report that the corporation became embarrassed with debt in 1852, and have been insolvent ever since. But, as already indicated, the statute contemplates that this fact shall be proved by the officer's return, and makes it the duty of the officer holding the execution, preliminary to the right of the plaintiff to maintain his action, to appropriate such attachable corporate property as he can find towards its satisfaction, and certify the deficiency. (Act of 1836, c. 200, § 4.) Has the officer made a sufficient return, such as the statute requires? By the R. S. of 1841, (c. 46, § 18,) he is "first to ascertain, and then certify that he cannot find corporate property." He has returned that he cannot find corporate property. This is all that is required in this respect. He has also certified that he made diligent search and this search was made before his return. This would seem to be a sufficient compliance with the provision that he must "first ascertain." This is certainly a very proper, as well as the usual way by which an officer ascertains whether a debtor has property. The statute points out no other way, and no reason is perceived why any other means should have been adopted, and when he says he made diligent search and after that could find no property, it is tantamount to his saying, he first ascertained. It is not easy to perceive how else he could perform this duty so as to be able to make his return under the sanction of an official oath, nor do we perceive that the statute requires, in this respect, the certificate of any officer beside one in the county where the corporation has its place of business, unless possibly one in the county where the stockholder resides. In this case there are returns of officers in each county, nor does it make any difference that the road of the corporation extends through more than one county. The return of one officer was deemed sufficient in *Chaffin* v. *Cummins*, 37 Maine, 76, though that was the case of a corporation whose road extended into two counties.

Nor does the statute require an officer to go out of his precinct. When a duty is required of an officer, as such, it can only be done within his precinct, for the moment he steps out he is no longer an officer. Hence, when he makes a return of his doings, it will be understood that what he did was in his own county, unless the contrary appears, and the words "within my precinct" add nothing whatever to the return.

The notice must be forty-eight hours before commencing the suit, and must convey to the stockholder information of the creditor's intention to take his property, and the amount of the debt or deficiency. The proof is, that when he was notified the execution with the officer's return thereon was shown to him. It is difficult to see how he could have better evidence of the amount of the debt, or deficiency, or how the officer could have complied with the provisions of the statute more literally.

The demand to disclose corporate property was made at the same time the notice was given, and appears to have been in entire conformity with the statute. The law does not prescribe which shall be first in order of time, the demand or notice; nor does it seem to be material. Both must be before the suit. The one forty-eight hours, and, if any inference is to be drawn from the language of the statute, it would be that the demand, as in this case, should be at the same time the notice is given. The only object of the forty-eight hours delay is that the stockholder may have time to find and disclose corporate property, which he would have no occasion to do until the demand was made. Complaint, however, is made that the officer did not retain the execution during the forty-eight hours, and that the creditor did not remain conveniently near, so that during the forty-eight hours neither were in a condition to receive such property as the stockholder might be prepared to disclose. The statute in terms does not require this; still it is undoubtedly requisite that the conduct of the creditor should not be such as unreasonably to interfere with the stock-

holders' right under the statute to protect himself by disclosing corporate property within the time allowed.

It does appear that, when the demand was made, both the creditor and the officer, with the execution, were present ready to receive such property as might be disclosed. But the stockholder then declined to disclose any, and, so far as appears, gave no intimation that he would do so at any future time, or if he did, where the property would be situated. It would not be unreasonable under this state of facts that the creditor should return to his home, which, for ought that appears, is as near to any property which would be likely to be disclosed, as that of the stockholder.

Besides, the officer remained, and the stockholder had the legal right to show him the property, and thereby relieve himself. This right could not be affected by the fact that the officer did not retain the execution. This is a matter which concerns the creditor alone. If the alleged debtor had shown the officer the property, this would have relieved him, and if the creditor by himself, or officer, was not in a situation to avail himself of that property, the loss would have been his own. But no complaint of this kind was made in the specifications, therefore there is no foundation on which it can rest now. The creditor having in the first place complied with the provisions of the law, if the defendants' testator suffered from his subsequent conduct, it would be for them to show it, and to authorize them to do so it must appear in the specifications.

The return of the officer and all the proceedings of the plaintiff seem to be in accordance with those in like cases which have been sustained by the decisions of this Court. *Cole* v. *Butler*, 43 Maine, 401; *Grose* v. *Hilt*, 36 Maine, 22; *Came* v. *Brigham*, 39 Maine, 35; *Stanley* v. *Stanley*, 26 Maine, 191.

It is further suggested that, if the liability of the defendants' testator rests upon the general statutes of the State, then the plaintiff cannot prevail, because his remedy, in that case, would be *scire facias*, and that only. It there-

fore becomes necessary that we should examine the several Acts of the Legislature in reference to this subject, that we may ascertain their application to, and influence upon, the rights of these parties. The first Act was that of February 16th, 1836, (c. 200.) Subsequently to this the charter of the K. & P. R. R. Co. was granted and made subject to the liabilities and duties provided in the former Act, and it is said that by this reference the former Act was made a part of the charter, and the Legislature could not, and have not attempted, to repeal or modify it since.

The Act of February 16, 1836, is general, and applies to all corporations thereafter created by the Legislature, providing for matters, which the Legislature has, with perhaps a very few exceptions, provided for ever since by public and general Acts. Under these circumstances, if the words of reference in the charter of the K. & P. R. R. Co. are material at all, we shall find it difficult to establish the proposition that the Legislature intended to change that Act, from a public to a private one, even so far as this corporation is concerned.

But the words are not material. Without them, the Act applied to and controlled the duties and liabilities of the members of that corporation, as much as with them. By its terms it applied to each and every corporation created thereafter. It therefore applied to this one and controlled the duties of its members as fully as language could make it, though no reference had been made to it in the charter, and it would have been just as competent for the Legislature to have changed or modified it in the one case as in the other. Has, then, the Legislature the power so to modify or change existing laws, as to affect the liability of stockholders for the debts of the corporation? These liabilities are usually provided for by public laws, which is of itself an evidence that the Legislature were to control these matters at will, and those becoming members of corporations could or ought so to understand it. Besides, this is a matter which relates to the liabilities of the members, and in no

way affects the rights or privileges of the corporation. It is not an infringement of the charter, unless there is in the charter an express prohibition of such an interference. Such a right the Legislature of this State has constantly exercised, and we find numerous statutes where the liabilities of members of existing corporations have been both increased and diminished. These laws have been sustained by judicial decision.

In *Stanley* v. *Stanley*, 26 Maine, 196, WHITMAN, C. J., speaking of an Act which had imposed an additional burden upon the owners of stock in an existing corporation, says, — "If the corporation were not satisfied with their individual liabilities, so created, they had it in their power to cease incurring them. We are satisfied, therefore, that it was competent for the Legislature to make such a provision."

This authority is also recognized in *Milliken* v. *Waterhouse*, 49 Maine, 527, and expressly decided in the case at bar, and in *Coffin* v. *Rich*, 45 Maine, 507, and in this respect the authority of these cases have not been shaken, but rather confirmed by the decision of the U. S. Court, from the fact, that in that decision such an authority was not denied, except so far as the exercise of it impaired the obligation of existing contracts. The same rule prevails in Massachusetts.

In *Gray* v. *Coffin & als.*, 9 Cush., 200, where the point was distinctly raised, and the right of the Legislature sustained, SHAW, C. J., says, — "This Act was general in its nature, extending to the members of all corporations, providing to what extent they should be liable to the claims of creditors, and all persons dealing with and becoming creditors of any corporation. It was future and prospective in its operation, regulating the rights of debtor and creditor, as they should afterwards arise, expressly securing any right acquired by any person against a holder of stock in any corporation by force of existing laws. It had no tendency to impair, or in any way to affect, or modify any power, privileges, or immunity, pertaining to the franchise of any cor-

poration, and therefore, seems to be within the just limits of legislative power."

The same principle is recognized in *Peck* v. *Phillips*, 8 Allen, 36, also in Angell & Ames on Corporations, § 612, 8th ed. and note. It would seem too late to deny this power to the Legislature, provided, in the exercise of it, due regard is had to existing contracts, and the laws are made prospective in their operation.

Has the Legislature in this case exercised this power, or has the Act of Feb. 16, 1836, been repealed so far as it applied to the K. & P. R. R. Co.? It is conceded that it was repealed as a public Act, and this would be sufficient, if not incorporated into the charter of the K. & P. R. R. Co., and thereby become a private Act so far as that corporation is concerned. But, if it were so, the Legislature intended still to repeal it. It is said that a private Act is not repealed except it is specially referred to. This may be true, and yet, how can we avoid the conclusion, that this Act, as applicable to the charter of this corporation, is so far referred to as to repeal it. It is not only repealed in terms, but, at the same time, another Act, similar in its provisions, was passed referring to this corporation as well as all others. It includes all corporations created by the Legislature after February 16, 1836. And this being one of those corporations is just as much referred to as though designated by name. The Act of February 16, 1836, then, no longer applies to this corporation, or, if it does, we have two statutes applying to it, not entirely consistent in their provisions. A proposition entirely untenable.

But, it is said, these subsequent laws do not apply to this corporation, because all corporations are exempted where other provisions are made in the charter. The precise words of exception, as found in the R. S. of 1841, c. 46, § 18, are "unless otherwise specified in their charter." Now the Legislature could not have meant to exclude those corporations where provision was made for those liabilities, for we

find, in the Act of April 9, 1856, and in the R. S. of 1857, the additional words, "or by any general law of the State."

Inasmuch, then, as by the law provision is made for the liability of the members of all, or nearly all corporations, if the meaning claimed is the correct one, all corporations would be exempt and the law would be of no effect. Taking the most natural meaning of the language used, and it would exclude from the operation of the law those corporations, and only those, where, by the charter or general law it had been provided that the stockholders should not be liable, or only liable upon certain contingencies. That is, all stockholders shall be liable in case of a deficiency of attachable corporate property, unless they are protected from such liability by existing provisions of law. Hence, we find, in a few instances, corporators thus protected by their charters, and in some others, as in manufacturing corporations, by a general law.

Thus the phrase in question can have its legitimate meaning, and have force in the law, and yet not exempt the K. & P. R. R. Co. On the other hand, if it does exempt this company, it renders null the law itself. It follows that the Act of February 16, 1836, was repealed by the R. S. of 1841, in its application to this corporation, as well as others. And the Act of 1841, in its turn, was modified by the Act of 1855, c. 169. This latter Act was in force when the debt sought to be recovered in this action accrued. So far as this case is concerned, it violates no contract, for that is of a date subsequent to the Act.

It is worthy of note that the liability of the stockholders under all these Acts is substantially the same. The Act of February 16, 1836, was in one respect more onerous to the stockholder, as that makes him liable for all debts contracted prior to the transfer of his stock, while all the subsequent Acts limit it to those contracted during his ownership of stock. In all of them his liability is to the amount of his stock, and only in case of a deficiency of corporate property. The other provisions relate only to the manner of

proceeding on the part of the creditor in order to enforce that liability. It may then fairly be inferred that, as the prior Act was repealed only upon the passage of another, the Legislature intended to continue the stockholder's liability unchanged, but in some respects to modify the remedy.

The obligation of the stockholder to the creditor accrued the moment the debt was contracted by the corporation. So far as the contract is concerned, the rights of both parties attached when it was made, and no change in those rights could be made after that date. But the remedy may be subsequently changed, even though by that change additional burdens may be imposed upon the one party or the other. If the debtor fails to perform his obligation, he cannot complain if a more effectual remedy is provided to enforce that obligation, than existed at the time of the contract. The contract, then, is to be construed according to the laws in force when it is made, the method of enforcing it according to the laws in force when the remedy is sought. Angell & Ames on Corporations, 8th ed., note on page 598, and authorities there cited.

Before this suit was commenced, the law of 1855, providing a remedy by *scire facias*, was repealed, and an action on the case substituted. If, however, that Act was not repealed, then both remedies were open to the creditor, and he could take his choice.

The R. S. of 1857, (c. 46, § 25,) in force when this action was commenced, is more onerous to the plaintiff than that of 1855, which was in force when the contract was made. It is conceded that the proceedings of the plaintiff were in accordance with the provisions of the R. S. of 1857.

It follows that, in any view which we are able to take of this case, the plaintiff is entitled to recover to the amount of the stock owned by the defendants' testator, without interest.

Judgment for plaintiff for $2500.

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

ELBRIDGE BERRY *& al. versus* SAMUEL D. REED.

In assumpsit for the price of logs sold, a letter written, long after the sale, by the defendant to the plaintiffs, complaining of the quality of the logs, is not admissible on the part of the defence.

When parties to a contract of a sale of logs mutually select a sworn surveyor to determine the quantity of each particular quality thereof, who thereupon makes a survey and renders his certificate thereof, his decision of the subject matter is, in the absence of fraud and of any unfair practices by the party claiming to uphold it, conclusive upon the parties.

When a witness is offered as an expert, it is for the presiding Judge to determine, from the testimony adduced respecting him, whether or not he is entitled to be so considered.

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

ASSUMPSIT upon one of several promissory notes given by the defendant to the plaintiffs for logs sold.

The facts appear in the opinion.

J. Baker, in support of the exceptions.

A. Libbey, for the plaintiffs.

BARROWS, J. — Assumpsit upon a promissory note given with others for a lot of logs sold by plaintiffs to defendant in September, 1863, at which time, according to the testimony offered by both parties, they agreed upon the price per M. for merchantable and mill-refuse pine and also upon the price per thousand to be paid for spruce, and that one Palmer, a sworn surveyor, should survey the logs, which he thereupon did, and made out his survey bills, indicating the quantity of each of those particular qualities. It is also undisputed that the defendant received the logs and had manufactured "the great bulk of them" into lumber long before September 25, 1864, when he wrote a letter to the plaintiffs, the exclusion of which forms the ground of the first exception taken to the rulings of the Judge presiding at the trial. The defendant resists payment of the note sued, asserting

that the plaintiffs warranted the logs to be "a good lot of logs," and that they proved to be very rotten inside, though many of them appeared sound on the outside.

His complaints to this effect are spread out with abundance of reiteration in his letter to the plaintiffs of Sept. 25, 1864, and his counsel now claims that this, his own written statement of his case, ought to have been permitted to go to the jury as evidence. To what end? The letter was no part of the transaction. It was written long after he had manufactured "the great bulk" of the logs, and, judging from its tenor, after he had been threatened with a suit upon the note.

He was in Court at the trial with his witnesses, making the same complaint, and offering testimony *under oath* to support it. He could not corroborate that testimony by showing that at a previous time he had made a written statement of similar purport, not under oath, and had transmitted it to the other party.

There was no pretence that any acts, sayings or omissions on the part of the plaintiffs, upon the reception of the missive, could be construed into an admission of its truth. The assertions of a party in his own favor, made in presence of the other party, or communicated to him, derive their force as evidence only from something in the conduct of the other party, and not from any independent virtue in themselves. Where testimony of communications, verbal or written, between the parties, relative to a past transaction which is in controversy, is received in evidence, what is said or written by the party offering them is admissible only so far as it tends to elucidate or make intelligible what is thereupon said or done by the party against whom it is offered. A party cannot be permitted to manufacture testimony in his own favor in the manner proposed by the defendant here. The impudence of a recusant unscrupulous debtor is not allowed to avail him as substantive evidence. It is true that, in the course of the trial, evidence was introduced by the plaintiffs that, *prior to that time*, defendant had not notified plaintiffs

of any dissatisfaction on his part on account of the quality of the logs, but had repeatedly promised to pay his notes. That he did so notify them *at* that time was not denied, and the letter did not tend to contradict the testimony offered by the plaintiffs.

The defendant, among other witnesses, offered one George Duly, who testified that he helped saw the logs for several months, and he described their condition at the time. He also testified that he had worked at sawing lumber ten years or more, and was thereupon asked by the defendant the question,—"how much less, if anything, was the lot of logs, as he found them, worth than if it had been a good lot of logs?" The question was objected to and excluded, and exception taken.

There is a discrepancy in the decisions of different States as to the admissibility of the opinions of witnesses as to the value of property with which they are acquainted where the value properly comes in question.

In New Hampshire, they are never admitted. The general rule that witnesses shall testify to facts and not to opinions, leaving the jury to draw the conclusion from the facts stated, is carried so far as to exclude them altogether. *Rochester* v. *Chester*, 3 N. H., 349; *Peterboro'* v. *Jaffrey*, 6 N. H., 462; *Beard* v. *Kirk*, 11 N. H., 397.

Even the opinion of an experienced teamster, as to the value of horses, harnesses and wagons, which are familiar to him, is not admitted, and the rule is laid down that the opinions of witnesses are not to be received in evidence merely because the witness offered may have had some experience or greater opportunities of observation than others, unless the opinions relate to matters of skill and science. *Robertson* v. *Stark*, 15 N. H., 109.

But in several other States, where the question has arisen, the opinions of witnesses who are acquainted with the property are admitted as to the value of it when the value is a subject of controversy.

It is so settled in Massachusetts. *Vandine* v. *Burpee*,

13 Met., 288, 326, 327; *Shaw* v. *City of Charlestown*, 2 Gray, 107.

So in New York. *Brill* v. *Flagler*, 23 Wend., 354.

It is held in that State that witnesses acquainted with personal property and its value, may testify to their opinion of its value; that the rule that witnesses must state facts and not opinions has no application to such cases. *Rogers* v. *Ackerman*, 22 Barb., 134.

So in Pennsylvania. *Kellogg* v. *Krauser*, 14 Serg. & R., 137, where TILGHMAN, C. J., says, that, though an opinion of the value of land is not strictly a fact, yet "such opinions are every day received as evidence, and it is difficult to conceive how the value of land can be proved without them. It is a kind of evidence so commonly admitted without dispute or objection that I have no doubt of its legality."

Such testimony was received, though objected to, in *Warren* v. *Wheeler*, 21 Maine, 486, and the case is referred to by the Court, in *Vandine* v. *Burpee*, *ubi supra*.

Perhaps it might be said that the question proposed to Duly called for something besides the opinion of the witness as to the value of property with which he was acquainted, and which he had described; that it implied such a knowledge of the lumber trade as would enable him to say what was "a good lot of logs" and what "a good lot" was worth on the river, and that there was no evidence that he was an expert in the trade, though he had been employed as a manual laborer in the manufacture of lumber for some years. It does not appear on what ground the question was excluded. If it were because the Judge presiding at the trial was not satisfied that the knowledge and experience of the witness were sufficient to make his opinion of any value, we should be slow to disturb the verdict for such exclusion, for the Judge before whom the cause is tried, and whose duty it is when a witness is offered as an expert to determine from the testimony adduced respecting him, whether he is entitled to be so considered, is in a much better position to decide whether testimony of this description (which

should always be cautiously received) is more likely to mislead and confuse the jury than to be of service in arriving at the truth, than the law Court can be upon the hearing of exceptions. The doings at *Nisi Prius*, if subject to revision, ought not to be set aside in such case unless palpably erroneous and materially injurious to the excepting party.

In the case at bar, it is plain that the exclusion was entirely immaterial, if the survey is to be deemed conclusive.

It is conceded that Palmer, who surveyed the logs and made out his survey bills indicating the quality of each of the particular qualities, was agreed upon by the parties to perform this service. What was the use or object of such an agreement, unless his decision, in the absence of fraud, was to bind the parties? Surveyors of logs, as appears by R. S., c. 41, § 22, prescribing their duties, are to "*inspect*, survey and measure all mill logs floated or brought to market, or offered for sale in their respective towns, and *divide them into several classes, corresponding to the different quality of boards and other sawed lumber which may be manufactured therefrom;* and they shall give certificates under their hands of the quantity and *quality* thereof to the person at whose request they are surveyed." The word "survey" means something more in the language of the lumber trade than a mere view and admeasurement. It includes a determination of the quality as well as the quantity of the timber or lumber surveyed; plainly not a conclusive determination, *unless the parties agree upon the individual* who shall make it; but when they do thus agree, in the absence of fraud and of stipulations to the contrary, it must be understood to mean that the judgment of the individual agreed upon shall bind the parties as to those matters embraced in the survey.

Thus, in *Robinson* v. *Fiske*, 25 Maine, 401, where there was a contract for the cutting and hauling of the *sound* pine timber *suitable for boards*, on certain tracts of land, to be paid for by the M, the timber to be scaled by one of three persons named, or by some other man to be chosen by the

parties, which was done; and upon suit brought for the price per M, according to the surveyor's returns—the defendants offered to prove that all the logs except ten or twenty were drawn to their mills the same spring, and when they came to manufacture them it was found that over six hundred thousand feet, which had been included in the scale and admeasurement of the scalers, was found to be unsound and totally unfit for boards, and that they had paid more than would be due under the contract for sound pine timber suitable for boards; but the testimony was excluded; and held *rightly* excluded; the Court deciding that "the report of the surveyors, in the absence of fraud or anything tending to show unfairness on the part of the plaintiff in procuring the result, should be conclusive between the parties; and that the evidence offered to impeach it was inadmissible," and rendering judgment for the plaintiff accordingly.

The case is not distinguishable in principle from the one at bar. The plaintiff there, to entitle him to the amount claimed, was as peremptorily required to show that he had hauled *sound* pine timber *suitable for boards*, as he would be, *if he had warranted them such*, in a suit for the price.

It seems to have been considered by the Court that "the object of *agreeing on the surveyors* was to settle conclusively the amount of timber cut, and so what, according to the rate agreed upon, the plaintiff was entitled to receive."

It is the duty of the surveyor so to *inspect* the logs he is called upon to survey as to enable him to determine the quality of boards and other sawed lumber which may be manufactured from them. Doubtless the surveyor agreed upon by the parties in the present case exercised his judgment in making allowance for crooks, rots and other defects, and there is nothing to indicate that it was not honestly exercised in determining, as his duty required, so as to divide them into classes indicating the quantity of each particular quality. For aught that appears, the rotten logs of which the defendant complains may have been rejected in the survey, or allowance made for their defects. But, how-

ever this may be, inasmuch as the parties mutually selected him to determine the quantity of each particular quality, they must abide by his decision as to the quality as well as the quantity, in the absence of fraud and of any unfair practices by the party claiming to uphold that decision. The question whether the plaintiffs had kept their warranty, if they made one, was to be determined then and there, by a tribunal mutually agreed upon.

That the logs were not a good lot of logs, in the opinion and according to the return of the surveyor, is not pretended. Mere errors in judgment which he may have committed cannot here be revised.

It is manifest, from this view of the case, that, in our opinion, the instructions of the Judge presiding at the trial, on this branch of the case, were sufficiently favorable to the defendant. *Exceptions overruled.*

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

JANE D. DAVIS, *Appellant*, *versus* JOHN A. STINSON *& al.*

The several rules in R. S., c. 75, § 1, relating to the descent of real estate, are distinct, and are each to be construed separately and with reference to the conditions therein respectively set forth.

If a person die, leaving no issue, father, mother, brother or sister, but does leave nephews, neices and grand neices, his real property will descend in accordance with the fifth rule, and the grand neice will have no claim.

This case distinguished from *Doan* v. *Freeman*, 45 Maine, 113.

APPEAL from a decree of the Judge of Probate of the county of Sagadahoc, distributing the personal estate of Huldah Greene, deceased, among the nephews and neices of the deceased, to the exclusion of a grand neice.

The reasons assigned for the appeal were as follows:—

1. Because by said decree the personal estate of said de-

ceased, who died intestate, is not ordered to be distributed to the persons who are her heirs, and who are entitled by law to receive the same, the said Jane being one of said heirs, and no part of said personal estate being ordered by said decree to be paid and distributed to her.

2. That said deceased left no child, nor any issue of any deceased child, nor any father, nor any mother; that said deceased had had four brothers and one sister, all of whom died before she died, leaving children and grandchildren, who are still living; that one of her said brothers was Gideon Stinson; that said Gideon died leaving only two children, viz., Mehitable, and Gideon, jr.; that said Gideon Stinson, jr., afterwards, before the death of said Huldah, died, leaving two children only, viz., Ellen M., and Jane D., aforesaid; and that said Jane D. is a grandchild of Gideon Stinson aforesaid, a brother of said Huldah, the deceased, and as such, by right of representation, was entitled to a distributive share of the personal estate of said deceased; but though she claimed her share thereof at the Probate Court held as aforesaid, no portion thereof was ordered to be paid to her, but the whole of said estate was ordered by said decree to be paid to other persons.

Davis & Drummond, for the appellant.

By R. S., 1841, c. 93, § 1, clause *third*, it is provided, that, if one dies intestate, seized of lands, &c., "if he shall leave no issue, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the *children* of any deceased brother," &c.

By c. 295 of the Laws of 1852, the third clause of the section above quoted was amended by inserting the word "grandchildren," giving them the same right of the "parent, he being dead."

In the revision of 1857, c. 75, § 1, the original *third clause*, and the *amendment* are united, the phrase being "children or *grandchildren*."

In both revisions (1841 and 1857,) the *third*, *fourth* and

fifth clauses relate to the same case, in which the intestate leaves no *issue*, nor *father*. The three clauses are to be considered and construed *together*. They are in one and the same *section* of the statute. In the Laws of 1821, c. 38, § 17, they were divided into separate clauses. Such a division cannot change their connection and relation.

Under the statute of 1841, in a case like the present, the *personal* estate being *distributed* to the same persons to whom *real* estate would descend, the appellant would not be entitled to any share. *Quinby* v. *Higgins*, 14 Maine, 309.

But the amendment of 1852 changed this, giving the *grandchild* of a deceased brother or sister, the *child* being dead, the same right that the *child* would have had if living.

And, in a case exactly like the one at bar, within the particular terms of the *fifth* clause, the Court applied to it the amendment of the *third* clause, construing them *together*, and giving the *grandchildren* of a deceased sister the same share collectively, "by representation," that their parent would have had if living. *Doane* v. *Freeman*, 45 Maine, 113.

Tallman & Larrabee, for the appellee.

APPLETON, C. J.—Huldah Green died leaving no issue, nor father, mother, brother or sister. At the time of her decease, her nearest of kin were nephews and neices, to whom the Judge of Probate decreed her estate should descend, from which decree the appellant, a grand niece, appeals.

By R. S., 1857, c. 75, § 1, rule 5, relating to the descent of real estate,—"If no such issue, father, mother, brother or sister, it descends *to his next of kin in equal degree*," &c. By § 8,—"the personal estate of an intestate" with certain specified exceptions, "is to be distributed" "by the rules provided for the distribution of real estate" subject to the provisions which follow. The decree was in accordance with the fifth rule. A grand neice is not related to the deceased

in equal degree, with her nephews and nieces and, unless she is, she cannot claim under this rule.

The case of *Doane* v. *Freeman*, 45 Maine, 113, was decided under the statute of 1852, c. 295, which, except so far as it is embodied in the revision of 1857, has been repealed.

The several rules in c. 75, § 1, are distinct and are each to be construed separately and with reference to the conditions of each rule as therein set forth. The clause in rule 3, "to his or her children or grandchildren *by right of representation*," applies only to that rule. It will be apparent that these words are inapplicable to rules 4 and 5, by appending them thereto.

The decree of the Judge of Probate affirmed with costs.

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

SIMON GAUL *versus* ALBERT BROWN *& als.*

A penal action cannot be maintained after the repeal of the statute creating the penalty sought to be recovered.

And, although the repealing statute creates a similar but a less penalty.

APPLETON, C. J.—By c. 313, §§ 1 and 2, of the Acts of 1865, the taking of menhaden or pogies by seine, within three miles of the shore in any waters, is prohibited under a penalty of "not less than four hundred nor more than one thousand dollars."

This action is brought to recover such penalty, but, since its commencement, the penalty has been reduced by an Act approved Feb. 21, 1866, c. 30, § 1, "to not less than one hundred nor more than five hundred dollars," and by § 6, "all Acts and parts of Acts inconsistent with this Act are repealed."

Upon the above facts, the Justice presiding at *Nisi Prius* ruled that the action was not maintainable.

A penal action cannot be maintained after the repeal of the statute creating the penalty sought to be recovered. The plaintiff cannot recover for the penalty for which he sued, because the statute giving it is repealed. He cannot recover for the new penalty, because there was no statute giving such penalty when he commenced his suit. *Cummings* v. *Chandler*, 26 Maine, 376; *Com.* v. *Kimball*, 21 Pick., 376; *Leighton* v. *Walker*, 9 N. H., 59. Where a penalty is changed by a subsequent act, the statute imposing the original penalty is impliedly repealed. *Nichols* v. *Squire*, 5 Pick., 168, *Plaintiff nonsuit.*

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

Gould, for plaintiff.

Hubbard, for defendant.

JOHN W. SIMPSON, *Adm'r*, *versus* HIRAM PEASE.

The defendant agreed in writing to convey to the plaintiff's intestate certain real estate upon payment of certain specified notes given as the consideration therefor. In an action upon the agreement; — *Held*, that the payment of the notes as they became due was a condition precedent; and that the death of the plaintiff's intestate did not operate as an extension of the time of payment one year from the date of the death.

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

The facts appear in the opinion.

Whitcomb, for the defendant.

A. C. Phillips, for the plaintiff.

The defendant having disabled himself from fulfiling his contract is liable to an action, although the time specified for

its fulfilment had not arrived. Chitty on Con., 631–2; 2 Parsons on Con., 666.

Whatever interest the deceased had under the contract at the time of his death was suspended until an administrator was appointed, and then that interest was vested in the administrator. 1 Parsons on Con., 130, 132; *Jewett* v. *Smith*, 12 Mass., 310; *Lawrence* v. *Wright*, 23 Pick., 128.

APPLETON, C. J. — This is an action on an agreement dated April 3, 1863, signed by the defendant, in and by which he contracted to convey to Freeman Simpson the land therein described, upon payment of certain specified notes, the first of which was payable in March, 1864. Simpson died on Oct. 30, 1863. The first note was not paid at its maturity, and the defendant is not shown in any way to have waived its non-payment. On April 26, 1864, the defendant, not having been paid, and no tender of the amount due having been made, by his deed conveyed the land described in his contract to one Robert K. Hervey.

Subsequent to all this, and on Oct. 4, 1864, the plaintiff took out letters of administration upon the estate of Simpson, and, on April 3, 1865, commenced this suit.

The presiding Justice, *pro forma*, to ascertain the damages, if any, instructed the jury "that, by reason of the death of the plaintiff, intestate, the time for the fulfilment of the contract was extended one year from the date of the death, and, if the defendant conveyed the premises to another within such year, it dispensed with the necessity of a tender."

The instructions given were erroneous. Simpson was entitled to a conveyance upon the performance of a condition precedent, — the payment of the notes given for the land as they should severally become due. The defendant has waived none of his rights. The amount due was never tendered.

"Where the performance of a condition becomes impossible by the act of God, if it is precedent, *no estate* will vest; but, if it be subsequent, the estate becomes absolute." 2

Cruise, Title 13, c. 2, § 21. Nothing but the consent or act of the party entitled to require its performance, will excuse the neglect of a condition precedent. In *Taylor* v. *Bullen*, 6 Cow., 625, it was held, on a promise to warrant the collection of a note from the maker and pay all costs of all suits legally commenced for its collection; the attempt to collect being a condition precedent; that it was no excuse for not making the attempt, that the maker died intestate before the note fell due, and that no one had taken out letters of administration upon his estate.

Indeed, equity will not relieve from the consequences of a condition precedent unperformed. As was remarked by McCoun, V. C., in *Wells* v. *Smith*, 2 Edw. Ch. Rep., 85, "there are no words of grant in the contract itself. It rests merely in covenant on the part of the defendant, and no estate was to arise to him except upon the performance of the condition. This is, therefore, the case of a condition precedent, where no estate vests in law until the condition is performed; Co. Lit., 206, a; *Harvey* v. *Aston*, 1 Atk., 361; S. C. West's R., 33, and Com. Rep., 726."

The defendant was not liable except upon the payment by Simpson of his notes according to their tenor or a waiver of such payment. No Court can justly say that a precedent condition, lawful in itself and one which the party has a right to impose, shall without cause be dispensed with. The defendant is bound only to the extent of his contract.

Exceptions sustained.

Cutting, Walton, Dickerson, Danforth and Tapley, JJ., concurred.

ANDREW J. ORCUTT *versus* KITTERY POINT BRIDGE CO.

In the absence of any special provisions in the charters of toll bridge corporations, there seems to be no essential difference between the obligations and liabilities resting upon such corporations and those of a town charged with the maintenance of a bridge,

Toll bridge corporations are not bound to erect and maintain railings upon their bridges for travellers to lean against or rest upon while they stop to recover from fatigue; and, if a person uses them for such purpose, he does it at his own risk.

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

CASE for damages sustained in consequence of defects in a toll bridge.

When the plaintiff had introduced his testimony, the presiding Judge ruled that the action could not be maintained, and thereupon ordered a nonsuit to be entered, to which ruling the plaintiff alleged exceptions.

The facts sufficiently appear in the opinion.

Kimball, in support of the exceptions, contended that, —

1. The rights and liabilities of towns and toll bridge companies are not the same. The former is a statute and the latter a common law liability. When a traveller pays toll and stops upon the bridge, the company contracts with him for a safe and convenient passage, provided he exercises ordinary care. The toll is the consideration for the implied promise of safe passage, safety and convenience of the bridge. Towns receive no toll for risks assumed, but the statute fixing their liability is simply penal, requiring them to pay for damages occurring solely through their fault.

Toll bridge liability is different. Every one paying toll and conforming to the company's regulations has his person insured against injury in consequence of defects in passing over the bridge, provided he exercises ordinary care and prudence. *Farrar* v. *Greene*, 32 Maine, 574.

Stickney v. *Salem*, 3 Allen, 374, is not sound law; for,

according to the principles laid down there, a man is protected while moving, but when he stops from any cause the protection is withdrawn.

The presiding Judge had no authority to take this case from the jury. It should have been submitted to the jury whether the plaintiff was in the exercise of ordinary care under all the circumstances of the case. *Birge* v. *Gardiner*, 19 Conn., 507. To the point that what is defect under one state of circumstances is not under others, counsel cited *Chamberlain* v. *Enfield*, 43 N. H., 356; *Winship* v. *Enfield*, 42 N. H., 197; *Beers* v. *Housatonic R. R. Co.*, 19 Conn., 566; *Park* v. *O'Brien*, 23 Conn., 339; *Burnham* v. *Hitchcock*, 14 Conn., 361; *Weeks* v. *Conn. & R. I. Turnpike Co.*, 20 Conn., 134. The railing was a trap; prudent men would have leaned against it. *Cobb* v. *Standish*, 14 Maine, 198.

J. A. Peters, contra.

Barrows, J. — Men are liable to various calamities by which they may be deprived of property, health, or even life itself. Some happen in the providence of God by what plainly appears to be inevitable accident, — others are fairly attributable to human agency, culpable or innocent. For some, which can be shown to have occurred through human artifice or negligence, without fault of the injured party contributing thereto, the law furnishes him a remedy against the guilty cause. For others, which are brought about by a combination of causes, even without fault of the person injured, he may be entirely remediless at law, although the culpable negligence of others may have contributed to produce the injury. To apportion the loss and suffering among those who aided in producing them is beyond the power and province of human justice. The attempt to do it, to which we may be incited by natural human sympathy with the suffering party, must inevitably be a failure, and is likely to result in positive injustice. To avoid adding fruitless litigation to other misfortunes, then, it is important

to adhere carefully to all well established rules and principles, by which the existence or non-existence of a legal remedy in this class of cases may be determined.

When a sufferer claims damage on account of the negligence of some other party in the performance of a duty, it becomes necessary that the limits of the duty be clearly ascertained and defined.

The defendant corporation was created in 1836, with authority to build and maintain a bridge over Spruce creek, to be constructed of durable materials, to be of a certain width, "with a railing on each side for the safety of passengers." Their powers and duties were similar to those commonly bestowed and enjoined upon such corporations. What they assumed to do when the franchise was conferred upon them was to construct the bridge in the manner above described, and to use due diligence to keep it in proper condition for the safe passage of travellers, their vehicles and goods, over it, and it is only for *negligence* in so keeping it that they are liable. Their liability is not that of common carriers. *Grigsby* v. *Chappell*, 5 Rich. (So. Car.) They do not insure an absolutely safe transit to every wayfarer who pays his penny to pass over. Other dangers and damages are excepted besides those arising from the act of God, the public enemy, and the fault of the traveller himself. It is for the consequences of their own negligence and want of ordinary care alone that they are responsible, should an accident occur.

In *Baxter* v. *Winooski Turnpike Co.*, 22 Vt., 114, where the charter of the company provided that they should be liable to pay "*all* damages" which should happen to any person from whom toll should be demandable, which might arise from want of repair of their road, it was held that the liability of the corporation was coëxtensive with that of towns, and, accordingly, that they were not liable for damages resulting from the plaintiff's not attempting to travel the road at particular times by reason of its general badness and insufficiency, or from not being able to travel it as ex-

peditiously and carry as large loads as he otherwise might and would have done.

And, in *Mathews* v. *same corporation*, 24 Vt., 480, it was decided that they were bound to keep their road in a state of ordinary safety for the use of travellers day and night, so far as this could be effected by ordinary diligence; and that the same diligence is required of turnpike companies which is demanded of towns to insure the safety of travellers upon the highways.

In *Yale* v. *Hampden & Berkshire Turnpike Corp.*, 18 Pick., 357, a distinction between the legal liability of such corporations and that of towns is made, based, however, upon the language of the general turnpike Act of Massachusetts, passed in 1804, providing that such "corporation shall be liable to pay all damages which may happen to any person from whom toll is demandable, for any damages which shall arise from defect of bridges or want of repair of said turnpike road."

We had formerly in this State, a statute provision substantially similar. R. S. of 1841, c. 80, § 22. But it was omitted in the revision of 1857, and the only statute declaration of liability which we now have in such cases is that contained in § 61, c. 18, applicable alike to "the county, town or *persons* obliged by law to repair" the way or bridge.

In *Williams* v. *The Hingham & Quincy Bridge & Turnpike Corporation*, 4 Pick., 341, it was held that the remedy by action at common law, against a turnpike corporation for an injury sustained by an individual in consequence of neglect to keep the road in repair, was taken away by the statute of 1804, before referred to.

In *Commonwealth* v. *Wilkinson*, 16 Pick., 175, SHAW, C. J., declares that the only difference between a turnpike road and a common highway is that, "instead of being made at the public expense in the first instance, it is authorized and laid out by public authority and made at the expense of individuals in the first instance, and the cost of construction and maintenance is reimbursed by a toll levied by public

authority for the purpose. Every traveller has the same right to use it, paying the toll established by law, as he would have to use any other public highway."

The rights and liabilities of travellers and toll bridge proprietors respectively, seem to depend, not upon the common law principles applicable to analogous contracts, but upon statute regulations, either in the charters of the corporations or in the general laws relating to the subject. And so far as any questions arising in the case before us are concerned, there seems to be no essential difference between the obligations and liabilities resting upon the defendant corporation and those resting upon a town charged with the maintenance of a bridge.

Looking now to the plaintiff's own statement of the manner in which his misfortune occurred, it appears *that*, the captain of the company to which he belonged having called a halt upon the bridge, he leaned his back against the railing to rest and wait further orders, — *that*, when the order to fall in was given, he was "half leaning, half sitting against the railing, — *that*, "his impression was that two or three men were sitting on the railing a short time before, but no one was on it when it broke," and that, as he sprang forward to take his place in the ranks, the railing, being rotten, gave way and he fell off the bridge. It was for the safety of those who should be in the legitimate use of the bridge and its appurtenances as passengers, only, that the corporation was bound to maintain the railing. It is plain from the plaintiff's statement that he was using the railing for no such purpose and that his unauthorized use of it was the immediate cause of the accident.

Bigelow, C. J., in *Stickney* v. *Salem*, 3 Allen, 374, remarks as follows: — "A city or town is not bound by law to erect and maintain railings for persons to sit upon or lean against. They are not intended to be used for the convenience and accommodation of those who seek for a place of rest while they stop in the highway, to lounge, or to recover

from fatigue, or to engage in conversation. If a person uses them for such purposes, he does it at his own risk."

The principle which governed that case, and must control *this*, was previously developed by our own Court in *Stinson* v. *Gardiner*, 42 Maine, 248.

Holding, as we do, that the duties and liabilities of toll bridge corporations and towns are under our laws essentially similar, in cases like the present; these cases are directly in point, and a reference to them saves the necessity of further discussion.

Exceptions overruled. — Nonsuit confirmed.

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

ALLEN LAMBARD, *petitioner for certiorari, versus* COUNTY COMMISSIONERS OF KENNEBEC COUNTY.

If a person, who has, upon due notice, presented to the assessors true and perfect lists of his polls, and all his estates, real and personal, not exempt from taxation, &c., refuses to answer all proper inquiries in relation to the nature and situation of his property, and, if required, to subscribe and make oath to the same, he is thereby barred from applying to the county commissioners for any abatement of his taxes.

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

PETITION FOR CERTIORARI to quash the proceedings of the county commissioners of Kennebec county, in relation to the abatement of his taxes, and for relief in the premises.

The petition substantially alleges that, on Aug. 9, 1864, he presented his petition to said commissioners, therein representing that, on May 2, 1863, he carried in to the assessors of Augusta, in accordance with their notice, a true and correct list, under oath, of all his polls, &c., not exempt, &c.; but the assessors, not regarding said list, un-

justly assessed him for the further sum (named) for which he averred he was not liable to taxation; that the same was to that extent an over and illegal valuation of his estate; that said assessors assessed a tax against him on said valuation, in a certain sum (named,) which he paid to discharge his property from distraint therefor; that he subsequently applied to said assessors for an abatement of the same, which was refused, and he prayed that the commissioners might consider the matter and grant him such relief as he might be legally entitled to; that said petition was duly entered, notice ordered and continued to the next session of said commissioners, when they reported:—"That, notwithstanding said Lambard might have rendered to said assessors, under oath, a true and correct list of his taxable property as required, we are of the opinion and do report, that the petitioner neglected and refused to submit himself to the examination provided by law, when thereto requested by said assessors, and is not therefore entitled to the relief sought for in his application to us," &c., which said report was duly accepted by said commissioners' court and ordered to be recorded, &c.

Upon a hearing, the presiding Judge ordered that the petition be granted, and that the writ be issued; to which ruling and adjudication the respondents alleged exceptions.

L. Clay, Co. Attorney, in support of the exceptions.

A. Libbey, contra, contended,—

That the refusal to answer such questions as the assessors might put to him did not deprive the petitioner of his right of appeal to the commissioners, but only authorized the assessors to assess him for any property they could find owned by him not included in his schedule and subject to taxation. R. S., c. 6, §§ 52, 53 and 55; Pub. Laws of 1862, c. 138; Pub. Laws of 1866, c. 329.

WALTON, J.—No person is entitled to apply to the county commissioners for an abatement of his tax, unless, when

duly notified, he brings in to the assessors a true and perfect list of his taxable estate, or can make it appear that he was unable to do so. (R. S. c. 6, § 52.)

If he brings in what purports to be such a list, and exhibits it on oath, it is not to be taken as true, unless he answers all proper inquiries in relation to the nature and situation of his property, and, if required, subscribes and makes oath to the truth of his answers. (Act of 1862, c. 138.)

In this case the petitioner refused to submit himself to such an examination. His exhibit of his estate cannot therefore be taken to be true. The fair interpretation of the Act of 1862 is that, for all practical purposes, it must be taken to be untrue, because he refused to verify it in the manner provided by law.

Our conclusion therefore is that the petitioner was not entitled to apply to the county commissioners for an abatement of his tax, because he did not bring in to the assessors a list of his taxable property and estate so verified as to entitle it to be treated as true. He refused to submit to the examination which the law had wisely provided to test its truth. After such a refusal he was in no condition to complain if he found himself overrated. It was the result of his own wilful refusal to comply with the reasonable requirements of the law.

Exceptions sustained. — Petition dismissed.

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

IRA ATWOOD *versus* LEVI L. LUCAS.

To support a general count of *indebitatus assumpsit*, for goods sold and delivered, proof of an actual delivery to, and acceptance by, the purchaser of the goods sued for is essential.

If none, or part only of the goods have been accepted by the purchaser, the seller's remedy is an action of special *assumpsit* for goods bargained and sold, and not for goods sold and delivered.

Delivery to and acceptance by the purchaser of any portion of the goods bargained for will satisfy the statute of frauds; but to authorize the maintenance of a suit for goods sold and delivered, there must be a delivery and acceptance of all the goods sued for.

If the purchaser of goods refuses to accept and pay for them, the owner may at once resell them for the most he can get and charge the first purchaser with the difference between the contract price and the price actually obtained.

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

ASSUMPSIT on an account annexed for twenty-three lambs at $3,75 each, with a credit of $50.

The remaining facts appear in the opinion.

Wm. Folsom, for the plaintiff.

Bargain had been struck, statute of frauds complied with, and the property in the lambs transferred to the vendee. But vendee cannot take possession until price paid. 2 Blackstone, 448, cited with approbation by C. J. WHITMAN, in *Wing* v. *Clark*, 24 Maine, 372; Chitty on Con., 377 and 378, and authorities there cited; 2 Kent's Com., 492, 494, 496, 540 and 541.

As between the vendor and vendee no delivery is necessary to vest the property in the vendee. 2 Pick., 602; 7 Pick., 58; 11 Pick., 352; 5 Pick., 525; 19 Pick., 5; 3 Gray, 598; 4 Gray, 311.

A delivery of part is delivery of whole. *Damon* v. *Osborn*, 1 Pick., 476. If property is so situated that vendee is entitled to and can rightfully take possession at his pleasure, although in custody of vendor, it is sufficient. *Means* v. *Williamson*, 37 Maine, 556; *Barrett* v. *Goddard*, 3 Ma-

son, 114; *Hotchkiss* v. *Hunt*, 49 Maine, 22; Long on Sales, 451–2; Brown on Sales, § 648.

Contract was entire, acceptance of part acceptance of all. Authorities before cited.

D. D. Stewart, for the defendant, cited the following authorities. *Thompson* v. *Meirone*, 4 Dowl. & Ryl., 619, (16 Eng. Com. Law, 211;) *Tempest* v. *Fitzgerald*, 3 B. & Ald., 680; *Langfort* v. *Tiller*, 1 Salk., 113; *Kent* v. *Hoskinson*, 3 Bos. & Pul., 233; *Phillips* v. *Hunnewell*, 4 Greenl., 379; *Houdlette* v. *Tallman*, 14 Maine, 400; 1 Pars. on Con., 435, 440, 441, 442; 2 Pars. on Con., 320, 321–2–3–4; *Morton* v. *Tibbett*, 15 Q. B., 428; *Hunt* v. *Hecht*, 20 Eng. L. & Eq., 524; *Frostbury Min. Co.* v. *N. E. Glass Co.*, 9 Cush., 119; Browne on Stat. of Frauds, c. 15; *Dole* v. *Simpson*, 21 Pick., 387; *Shepherd* v. *Pressy*, 32 N. H., 49; *Maxwell* v. *Brown*, 39 Maine, 98–103; *Marsh* v. *Hyde*, 3 Gray, 334; *Thompson* v. *Alger*, 12 Met., 443; *Furlong* v. *Polleys*, 30 Maine, 493; *Hotchkiss* v. *Hunt*, 49 Maine, 219; *Bartlett* v. *Blanchard*, 13 Gray, 430.

WALTON, J. — The plaintiff says that he was the owner of twenty-three lambs; that he offered to sell them to the defendant for $3,75 per head; that the defendant agreed to buy them at that price, and afterwards paid him fifty dollars and took away four of the lambs, but subsequently refused to take the other nineteen, and threatened to bring a suit to recover back the money he had paid; and the question is whether these facts will support a general *indebitatus* assumpsit count for goods sold and delivered. Clearly not. To maintain such a count proof of an actual delivery to and acceptance by the purchaser of the goods sued for is essential. If none or part only of the goods have been accepted by the purchaser, the seller's remedy is an action of special assumpsit for goods *bargained and sold*, not goods *sold and delivered*. "In these cases," says Mr. Chitty, "the declaration should be framed specially on the

contract for not accepting the goods, or for refusing to complete the bargain." 1 Chit. Pl., 345–7; 15 Pick., 171; 7 Gray, 187; 2 Foster, (N. H.,) 172.

It is laid down by Mr. Saunders, that to support an action for goods sold and delivered, the plaintiff must prove, not only such a delivery as will vest the property in the goods in the defendant, but such a delivery as will divest himself of all lien upon the goods, and enable the defendant to maintain trover for them without paying or offering to pay for them. Saund. on Pl. & Ev., 536.

There may be such a delivery as will satisfy the statute of frauds, and yet not such a delivery as will authorize the maintenance of a suit for goods sold and delivered. Delivery to and acceptance by the purchaser of any portion of the goods bargained for will satisfy the statute of frauds, but to authorize the maintenance of a suit for goods sold and delivered there must be a delivery and acceptance of all the goods sued for.

The difficulty in the way of maintaining this suit does not arise out of the statute of frauds, for the defendant actually took and carried away four of the twenty-three lambs bargained for, and so far as the statute of frauds is concerned this was as good a delivery as if he had taken the whole. The difficulty is that he has not adopted a form of action suited to his case. Nineteen of the lambs sued for were never taken by the defendant. They remained upon the premises of the plaintiff and under his care, and were sheared by him the following season, and for aught that appears are still in his possession; and the law is well settled that if any portion of the goods sued for remain undelivered by the seller, or unaccepted by the purchaser, or subject to a lien for the purchase money, the seller must declare specially, and not generally as for goods sold and delivered.

The principal reason for requiring the plaintiff to declare specially is to enable the Court properly to adjust the damages. In an action for goods sold and delivered the measure of damages is the contract price or full value of the goods

sued for, which is unjust if the whole or any portion of the goods still remain the property of the plaintiff and under his control. But if the plaintiff declares specially, setting out first the contract, and then the breaches of it on the part of the defendant, the Court is enabled to adopt such a measure of damages as will do exact justice between the parties.

If the purchaser of goods refuses to accept and pay for them, the owner may at once resell them for the most he can get and charge the first purchaser with the difference between the contract price and the price actually obtained. (*Sands* v. *Taylor*, 5 Johns., 395.) As the defendant paid fifty dollars of the purchase money, and took but four of the twenty-three lambs bargained for, it would seem as if the plaintiff might have indemnified himself against loss, without resorting to an action in any form against the defendant. But whether this was so or not, it is clear that the present action cannot be maintained. Under the agreement by the parties, the judgment must be

Plaintiff nonsuit.

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

HOSEA B. MAYNARD *versus* MOSES TABOR.

A written offer to sell land for cash can never be accepted so as to create a legal obligation to sell on the part of the owner, unless the acceptance is accompanied by a tender of the price.

In reply to a letter from the plaintiff inquiring the lowest cash price of a lot of land owned by the defendant, the latter wrote the former, "having fixed a price on my lot, agreeably to promise, I inform thee that I put it at $3000 cash;" to which the plaintiff rejoined by letter that he would take the land at the price named, and that the defendant might send the deed to his agent to whom he would pay the money and receive the deed. To this the defendant replied, "I have withdrawn my lot from sale;"—*Held*, that the plaintiff's letter agreeing to take the land at the price named, unaccompanied

by tender of the price, was not an acceptance of the defendant's proposition to sell, but a new proposition containing conditions different from those implied in defendant's offer; and that, until a tender was made, the defendant might withdraw his offer without breach of contract.

ON AGREED STATEMENT.

The defendant, a resident of Ohio, was the owner of a tract of timber land situated in Vassalboro', in Kennebec county, which plaintiff, a resident of Maine, desired to purchase, and, on the 25th day of September, 1864, addressed defendant a letter requesting his lowest cash price for said lot, as he was desirous of purchasing the same. On the 2d of October the defendant addressed to plaintiff a letter that he was not then ready to give his lowest terms, but had employed his agent, I. C. Gifford, and one Hiram Pishon, to examine it and make an estimate of the growth, and suggested that plaintiff examine with them; that, as soon as he heard from them, he would write the plaintiff a definite answer. On the 15th of October, plaintiff again wrote to defendant that he had examined the land and requested an early answer as to price, to which the defendant replied that he would give a decisive answer in a few days, as he had arranged for an examination and appraisal of the lot by a man of as large experience and sound judgment in lumbering business as any other man in Maine, and that, on hearing of the result, he would write immediately. On the 19th of October, defendant wrote this letter to plaintiff: — "Having fixed a price on my lot of land in Vassalboro', agreeably to promise, I may inform thee that I put it at $3000 cash." On the 26th of same October, plaintiff wrote to the defendant that he would take his lot of land at the price named, and that he might send the deed to H. Pishon, as soon as possible, and the money should be ready on receipt of the same. On the 31st of October, 1864, the defendant wrote and sent plaintiff the following: — "Thine of 26th inst. is received, and in answer say that I have withdrawn my property in Vassalboro' from sale." The plaintiff claimed that he examined the land according to request of defendant,

procured the money to pay for it at a good deal of expense and was put to great trouble about it and could have sold the same at a large advance.

S. Heath, for the plaintiff, contended,—

That the proceedings disclose a contract of sale, and the three elements necessary for its completeness are proved, viz., the object, price, and the consent of the contracting parties. Pothier on Cont. of Sale, Part 1, § 2.

Should the plaintiff tender the money before action brought? Where? Place not found in the terms of the contract. The property located near the plaintiff. To be paid for only upon delivery of the deed or simultaneously therewith. If the place mentioned was not acceptable to defendant, he should have objected and not repudiated his contract. The law is with plaintiff as to the place. Poth., 30. It would be unreasonable to require plaintiff to go to Ohio when such was not in the offer. Plaintiff need not deposit price at place where land is situated. By repudiating contract, defendant waived tender of price. If instead of withdrawing his land, the defendant had sold to strangers, plaintiff would have right of action without any offer of the price. *Newcomb* v. *Brackett*, 16 Mass., 161. Offer of money unnecessary. *Wheelden* v. *Lowell*, 50 Maine, p. 505, paragraph 2.

WALTON, J. — This is an action of assumpsit to recover damages for an alleged breach of contract. The plaintiff says that the defendant agreed to sell him a certain lot of land for $3000, and then refused to fulfil his agreement.

The case shows that the plaintiff wrote to the defendant inquiring the price of the land, and that the defendant answered that his price was $3000 cash. If such an answer can be fairly construed into a proposition to sell the land for that price, it was a proposition which could be accepted only by an actual tender of the price. An offer to sell for cash can never be accepted so as to create a legal obligation

on the part of the owner to sell, unless the acceptance is accompanied by a tender of the price. Until this is done the owner may withdraw his offer without rendering himself liable for a breach of contract.

In this case the plaintiff wrote the defendant that he would take the land at the price named, but he never tendered the money. He informed the defendant that he might send a deed of the land to a person named and the money should be ready for him, but this was not an acceptance of the defendant's offer. It was a new proposition containing conditions different from those implied in the defendant's offer.

The defendant's offer not being accepted, he had a legal right to withdraw it, and in so doing was not guilty of any breach of contract, for no contract had in fact been concluded between the parties. *Judgment for defendant.*

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

JAMES HERVEY *versus* WILLIAM BANGS.

The verdict settles the amount of debt or damages for which the suit was instituted. If below twenty dollars, (in cases not excepted by the statute,) the verdict shows the cause of action was one within the jurisdiction of a trial justice.

Where, in an action of slander, the plaintiff, after having obtained a verdict for nineteen dollars damages, alleged exceptions which were overruled by the Law Court, and, at the time of rendition of judgment, the verdict, together with the accruing interest thereon, amounted to more than twenty dollars: — *Held*, that the plaintiff is entitled to only quarter costs. The defendant in such a case is not entited to any cost.

CASE. Action of slander. Verdict for plaintiff for $19 damages, at Oct. term, 1864. Exceptions filed by plaintiff. Decision of Law Court received, (overruling the exceptions,) May 18, 1866. The interest on the verdict, after it

was rendered to time of final judgment, was 1,71 cts., so that the whole judgment for damages is 20,71 cts. Plaintiff claimed full costs, which clerk allowed. Defendant appealed to Judge KENT, and also claimed, before the clerk, his costs after verdict, which the clerk disallowed. This case was not entered on the docket of the district.

Whitcomb, for plaintiff.

Phillips, for defendant.

KENT, J. — The case of *Forbes* v. *Bethel*, 28 Maine, 204, would seem to be a direct authority in favor of the defendant to sustain his objection to the taxation of full costs for the plaintiff. It is urged, however, that that case was decided by two Judges only; Mr. Justice TENNEY not sitting, and Mr. Justice SHEPLEY dissenting, and giving his reasons in full for his dissent. It is also said that one of the reasons given for the decision is not now found in the statute. The opinion of the majority refers to the language of the statute of 1841, as leaving it discretionary with the Court to allow interest on verdicts or not. The present statute, c. 77, § 29, seems to be imperative in requiring that interest shall be allowed. But it is evident that this was not the governing reason for the decision in that case.

But it is said that its force has been weakened, if not overthrown, by some subsequent cases. *Lewis* v. *Warren*, 49 Maine, 325; *Lawrence* v. *Ford*, 44 Maine, 427, in which it is said, that the general rule to determine whether the action ought to have been brought before a justice of the peace is the amount of the judgment.

The case of *Andrews* v. *Austin*, 2 Pick., 528, is however strongly corroborative of the case of *Forbes* v. *Bethel*, although it is not referred to in that opinion. In *Andrews* v. *Austin*, it was held, that where the statute provided that, if on appeal by plaintiff he does not *recover* more than $100, he shall recover no costs at court appealed to, and the verdict in the court appealed from was $90, but by reason of

interest after verdict, the final judgment was for a sum over $100, yet that the increase of amount of judgment by reason of accruing interest was not to be taken into account, and plaintiff was denied costs.

The general rule is unquestionably as stated in our recent cases, notwithstanding the change in the language of the statute. By statute of 1821, c. 59, § 30, it was declared that, (except in real actions and appeals,) if, in an action originally brought in the C. P. Court, *judgment shall be recovered* for no more than twenty dollars debt or damage, the plaintiff shall be entitled to one quarter of such debt or damage for his costs. Subsequently it was deemed advisable to extend the class of cases, which might be originally brought in the higher court, and to include in that class cases involving rights of way, or an easement, and other specified cases, and to allow full costs in those cases, although the judgment might be less than twenty dollars, for damages. Instead of naming specifically each of these excepted cases, as in the statute of 1821, the Legislature, in this provision for costs, changed the language from the sum recovered, viz., twenty dollars, and substituted the words, "when it shall appear, on rendition of the judgment, that the action should have originally been brought before a justice of the peace," quarter costs only shall be allowed.

The question, therefore, in every such case, is whether upon the whole facts it *appears* that the action should have been brought before the lower tribunal. The first question to be determined is whether, when the amount of debt or damage is less than twenty dollars, the case is within the exceptions. If not, then the next question is, whether the amount of debt or damage is beyond the jurisdiction of a justice. The case before us is not within the excepted cases, and full costs can only be allowed on the latter ground.

What is the damage intended? Is it the amount of the verdict, where one has been rendered, or is it the amount of

such verdict, increased by the interest *thereon*, after its rendition?

It is very clear that in case of a contract, drawing interest *as part of the contract*, it is not necessary that the plaintiff should have a good cause of action for twenty dollars when he *institutes* his suit,—if, before judgment, obtained and taken without unnecessary delay, the debt, including the interest as a part, amounts to more than twenty dollars. But in an action of *tort*, interest makes no part of the cause of action. It is not allowed *as such* in the damages. Something equivalent, as increased damages for detention or delay in recovering the actual damages, is sometimes allowed by juries, under the direction of the Court.

Now, when a party institutes a suit for an injury to his person, or his reputation, he sues for the actual injury, and claims and is entitled to recover the amount of that injury. If that amount is nineteen dollars, and no more, is it not a case which should have been brought before a justice of the peace? Or, if the verdict includes an additional sum by way of damages for detention, and yet amounts to but nineteen dollars, is it not apparent that the action is one of which such magistrate has exclusive original jurisdiction, so far as this question of cost is concerned? Such, it is not denied, would be the result, and the costs would be limited, if the judgment had been rendered upon the verdict at the term at which it was returned. But it is claimed that, by reason of delay, and by virtue of the provision allowing interest on the verdict, the plaintiff is entited to recover judgment for more than twenty dollars.

It will be observed that this provision for interest on verdicts, and reports of referees is of modern date. Until within a few years, no interest on or increase of the amount of the verdict or report was allowed. Justice seemed to require that, in most cases, such addition should be allowed, as generally the delay is occasioned by the defendant, who interposes exceptions or a motion for a new trial. But in all cases, even those of contract, it is not the interest on

the contract, continued until judgment, but interest on the *verdict* rendered. It is no part of the cause of action, properly speaking. It is rather in the nature of a penalty for delaying the plaintiff in reaping the fruit of the decision in his favor. The verdict settles the amount of damage or debt for which the suit was instituted. If below twenty dollars, (in cases not excepted,) the verdict shows that the cause of action was one within the jurisdiction of a justice.

There is, however, a class of cases, and this one is included in it, where this reason for excluding the interest on a verdict on the question of costs operates still more strongly. It is where the delay has been occasioned by the plaintiff himself. It is true that the statute does not, in terms, exclude the recovery of interest in such a case. It probably was not brought to the consideration of the law makers. If it had been, it is not unlikely that a party, who by his own act delays judgment on a verdict, when the other party is willing that it should be taken, would have been precluded from recovering interest after such time. However this may be, it seems to me that, even in cases of contract where a case has progressed to the point where the defendant interposes no further objection to an immediate judgment for the plaintiff, but the cause is continued after verdict, or default or otherwise, by motion for a new trial, or by exceptions or continuance made by the plaintiff, and the motion or exceptions are overruled, or unavailing, or such continuance for judgment is unnecessary for any purposes of justice, and final judgment is rendered for such verdict, and, in addition thereto, for interest accruing thereon during the delay thus occasioned by the plaintiff, and the verdict is for less than twenty dollars, but by reason of such interest final judgment is for more than that sum, — quarter costs only should be allowed. And I think the same rule should be applied in cases of default, and unnecessary continuances for judgment. Any other rule is but a premium for delay. When a verdict, or the sum due on default and consent to judgment, is near twenty dollars, if by exceptions or motion, or continuances, the

case can be kept on the docket for one or more terms, the plaintiff can thus, against the will or wishes of the other party, obtain a final judgment by accruing interest for more than twenty dollars, and full costs. His temptation to interpose frivolous objections or unnecessary delay would be very great. On the whole, in my opinion, the appeal from the decision of the clerk allowing full costs, is sustained, and one quarter as much cost as damages only is to be allowed. The decision of the clerk disallowing costs to defendant is sustained.

In the decision that quarter costs only in this case could be allowed, —

APPLETON, C. J., WALTON, DICKERSON, DANFORTH and BARROWS, JJ., concurred.

INHABITANTS OF ELLSWORTH *versus* WARREN BROWN.

Logs, timber, etc., designed and intended to be manufactured and sold in some town other than that in which their owner resides, but in which, on the first day of April, he occupies a mill, store or wharf, are rightfully taxable in such town, and not in the town where the owner resides, although they may not, on the first day of April, in the year for which the tax is assessed, have actually arrived within the corporate limits of such town, provided they are in the course of the year brought there and manufactured.

BARROWS, J. — The defendant, in the Spring of 1865, was a resident of Westbrook in the county of Cumberland, and owner of timber-lands in Township No. 33, in Hancock county, and of sawmills in Ellsworth, in which town he also occupied a store and wharf, paying rent therefor. He was also the owner of large quantities of lumber, cut on his lands in Township No. 33 the previous winter, and lying in Union river and its tributaries, not (all of it) within the corporate limits of Ellsworth, on the first day of April, but subsequently during that season driven down there and sawed at his mills. The assessors of Ellsworth taxed him for all this lumber, including the logs, which on the first day of

April had not been driven into the town of Ellsworth. For so much of the tax as was assessed upon logs, not on that day actually within the limits of the town, the defendant gave his note, which is in suit here, and, by the stipulations of the parties, the defendant, if liable for such tax, is to be defaulted, otherwise the plaintiffs are to become nonsuit.

The case calls for a construction of § 10, and the first clause of § 11, of c. 6 of the R. S., and it is our duty to give them such construction as shall be most convenient and likely to insure the collection of a just tax upon all property liable to be assessed, and at the same time shall not injuriously affect the tax-payer by exposing him to a double assessment for the same property.

The statute runs thus:—

"Sec. 10. All personal property within or without this State, except in the cases enumerated in the following section, shall be assessed to the owner in the town where he is an inhabitant on the first day of April in each year.

"Sec. 11. The excepted cases referred to in the preceding section are the following:—1st, All goods, wares and merchandise, all logs, timber, boards and other lumber, and all stock in trade, including stock employed in the business of any of the mechanic arts, in any town within this State, other than where the owners reside, shall be taxed in such town, if the owners occupy any store, shop, mill or wharf therein, and shall not be taxable where the owners reside."

The defendant claims, and certainly not without plausibility, looking merely at the language without heeding the intention of the statute, that the exceptions in section 11, have particular relation to the time specified in section 10, and that these logs not being on the first day of April in any town in which he occupied a mill, store or wharf, were properly taxable to him only in the town where he resided.

The Legislature of Massachusetts seem to have adopted a like construction of their statute—*in pari materia*—for, to a similar statutory provision, they added, by way of supplementary enactment, (Laws of Mass., 1839, c. 139, § 1,) the

following: — "whether the said stocks in trade or the goods, wares, merchandise, or other property composing or forming a part of the same, are within said town on the 1st day of May of the year when the tax is made, or elsewhere."

Doubtless such an addition would make the meaning of our statute more explicit, but we are to determine whether it is necessary in order that the statute may bear the construction for which the plaintiffs contend.

Looking first to the design and origin of these exceptions to the general rule that personal property shall be assessed to the owner in the town where he is an inhabitant, on the 1st day of April, — we find it recited in the general tax act for the Commonwealth of Massachusetts for the year 1805, that, "there are many persons within this Commonwealth engaged in trade who negotiate much business, and hire shops, stores and wharves in towns, &c., other than where they dwell, and whose property and ability can be better known to the assessors of the several towns wherein such business is transacted, than to those of the town, &c., where they may dwell;" and it is *therefore* enacted, that, "for such goods, &c., as are sold, used or improved in the towns, &c., other than those where the owners thereof may dwell, such owners shall be respectively taxed therefor in such town, &c., and not where they dwell or have their home."

The apparent design of the exception is to prevent certain kinds of property, held and managed at a distance from the place of the owner's residence, from thereby escaping taxation, and the method adopted seems to be the substitution of an established place of business, for the personal residence of the owner on the first day of April, to determine the place where certain kinds of property thus situated shall be taxed.

Such a localization of the business is intended to draw after it for the purpose of taxation the property used and employed in that business, in like manner as the residence of the owner draws after it other property not thus situated, without regard to its particular *situs* on the first day of

April. The occupation of the store, shop, mill or wharf, on the first day of April, in the year for which the tax is assessed, is the essential thing, and it must be deemed the true meaning and intent of the statute to except from the operation of § 10 all the property, of the kinds specified, employed in the business there carried on.

It is only by giving it this construction that the statute can be made to further the end for which it was designed, and it is not perceived how the taxpayer who faithfully renders in his list of taxable property can be made to suffer upon this construction.

Upon the construction contended for by the defendant, it would often be in the power of the owner of such property successfully to evade taxation for it any where.

Probably by far the greater part of the logs and timber rightfully falling within the exception contained in the first clause of § 11 would be found, on the first day of April in each year, scattered along the course of the streams by which it is floated to the place of manufacture and sale, in towns and plantations other than that in which the owner occupies a mill or wharf, and far distant from his place of residence. Shall so much of it only as may on that day have arrived at the mill be taxed there, and the remainder in the town where the owner resides?

If so, the provision, which was designed to commit the assessment of taxes upon it to those by whom its quantity and value would be best known, would but add to the difficulty of making any legal assessment upon it, and if it did not escape taxation altogether, controversies as to the place where it should rightfully be assessed would inevitably be more frequent.

Again, in the third clause of the same § 11, setting forth the exceptions to the taxation of personal property in the town where the owner resides, it is provided, that "all mules, horses, neat cattle, &c., shall be taxed in the town where they are kept on the first day of April in each year, to the owner or person who has them in possession at that

time," unless they are in some other town than that in which the owner or possessor resides, for the purpose of pasturing or some other temporary purpose, "on said first day of April," in which case they are to be taxed to the owner or possessor in the town where he resides, &c.

Hence it may fairly be presumed that if the Legislature had intended that the same limitation as to time should extend to the other exceptions they would have so declared in express terms.

Upon the whole, we are of opinion that logs, timber, &c., designed and intended to be manufactured and sold in some town other than that in which their owner resides, but in which, on the first day of April he occupies a mill, store or wharf, are rightfully taxable in such town, and not in the town where the owner resides, although they may not on the first day of April, in the year for which the tax is assessed, have actually arrived within the corporate limits of such town. *Defendant defaulted.*

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

E. Hale, for the plaintiffs.

F. Hale and *Joy*, for the defendant.

INHABITANTS OF MANCHESTER *versus* INHABITANTS OF WEST GARDINER.

By R. S., c. 24, § 1, when part of a town is set off from it and annexed to another, the settlement of a person absent at the time of such annexation is not affected thereby.

Where the Act, annexing a portion of one town to another, provides that, "all persons chargeable as paupers, having a legal settlement in the territory hereby set off, shall, on the passage of this Act, have a legal settlement in the town" to which the new territory is annexed, the settlement of a person not "chargeable as a pauper" "on the passage of the Act" is not affected thereby.

ON FACTS AGREED.

The facts appear in the opinion.

G. C. Vose, for the plaintiffs.

L. Clay, for the defendants.

APPLETON, C. J.—By c. 625 of the special Acts of 1856, a part of the town of Litchfield was set off therefrom and annexed to the defendant town. The pauper, Caroline Howard, whose support is in controversy, "at the time of the passage of the Act had her legal settlement upon the territory set off, but was not then present or residing upon said territory or in either of said towns."

A distinction was early taken between the division of a town and the separation of a part from one and its annexation to another town. In the former case, those absent from the town which is divided at the time of its division, but having their last dwelling-place on the portion constituting the new town, follow the territory and acquire a settlement in the new town thus created, though absent therefrom. In the case of annexation, the settlement of no persons is transferred to the town to which the annexation is made, unless they have a settlement in the town from which the territory is taken, and *actually* dwell on the territory at the time of its separation. *Hallowell* v. *Bowdoin*, 1 Maine, 129; *New Portland* v. *Rumford*, 13 Maine, 299; *Starks* v. *New Sharon*, 39 Maine, 369. In the last case, an attempt was made to overrule the previous decisions on this subject, but the majority of the Court adhered to the doctrine of *stare decisis*.

In the revision of the statutes in 1857 these distinctions are recognized and affirmed. By c. 24, § 1, rule 4, "upon division of a town, a person having a settlement therein, and absent at the time, has his settlement in that town which includes his last dwelling-place in the town divided. When part of a town is set off from it and annexed to another, the settlement of *a person absent at the time of*

such annexation is not affected thereby." Caroline Howard was thus absent, and her settlement is not affected by the set-off, but remains in the town from which the set-off was made, it being admitted that she had acquired previously a settlement therein and had not gained a new one.

The general rule, to which reference has been had, is not changed or modified, so as to affect the settlement of the pauper, by § 4 of the Act by which the set-off is made, which is as follows: — "All persons chargeable as paupers, having a legal settlement on the territory hereby set off, shall *on the passage of this Act* have a legal settlement in the town of West Gardiner." But Caroline Howard was *not* chargeable as a pauper "on the passage of this Act." She was *not* residing in the town from which the set-off was made, nor was she *then* chargeable as a pauper. The design of this section was to fix the settlement of those then *actually* chargeable, as in *Clinton* v. *Benton*, 49 Maine, 550.

A father is not to be made a pauper by supplies furnished a child not a member of his family nor under his control. *Dixmont* v. *Biddeford*, 3 Greenl., 205; *Hallowell* v. *Saco*, 5 Greenl., 143; *Raymond* v. *Harrison*, 2 Fairf., 190; *Bangor* v. *Readfield*, 32 Maine, 60. It does not appear that Caroline Howard has had a family since 1852, or that her son George was under her control, but the reverse we think is fairly inferrible. It is unnecessary to consider the effect of supplies furnished a child, when a part of the family of a widowed mother and under her control, upon her settlement. The facts which might render the examination of such a question important do not exist in the case at bar.

Plaintiff nonsuit.

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

DANFORTH, J., did not sit.

JAMES PAUL *versus* LEVI P. CURRIER.

If the plaintiff allege that the defendant, "intending to injure the plaintiff, carried and set fire to the brush in the defendant's close aforesaid, which * * * being carelessly managed by the defendant, spread and * * * caught the wood in the plaintiff's close," &c.: — *Held*, to be an action at common law, and that the allegation of "intent" must be proved beyond reasonable doubt.

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

CASE, charging that defendant, with intent to injure the plaintiff, kindled a fire on land in his own possession, which being carelessly managed by the defendant, ran on to the land of the plaintiff and burned over his woodland, which is the injury complained of.

Plaintiff's counsel admitted that the burden of proof was on plaintiff in showing that the fire was set and carelessly managed by defendant; but disclaimed any intention or expectation of satisfying the jury that the defendant set the fire with intent to injure the plaintiff; but claimed that it was an action at common law, that the allegation of intent to injure should be regarded as surplusage, and that, if the jury were satisfied that the defendant was not in the exercise of ordinary care and prudence in setting the fire, or in endeavoring to restrain it when notified that it was running on to plaintiff's land, (the testimony tending to show that he was notified of the fact, and advised to stop it or notify the plaintiff;) that the plaintiff was entitled to recover, providing the case was made out in other respects.

But the presiding Judge ruled and instructed the jury, as contended for by the plaintiff, that this was an action at common law and not an action upon the statute; and that inasmuch as the defendant was charged in the writ with a criminal offence, the plaintiff was required to prove his allegation in that particular beyond *a reasonable doubt*.

The verdict was for defendant, and the plaintiff alleged exceptions.

Dyer & Whitcomb, in support of the exceptions.

In all civil actions, a preponderance of testimony is all that is required. 3 Greenl. Ev., § 29. The declaration is in usual form. Am. Prec., 361. In actions for libel, the allegation that defendant "maliciously intending to hurt, injure," &c., is always used. Am. Prec., 395. See also Am. Prec., 373, 424. Statute penalty does not affect the common law remedy. R. S., c. 26, § 18. The words "intending to injure," &c., should be regarded as surplusage. 1 Greenl. on Ev., § 51.

E. F. Pillsbury, for the defendant.

APPLETON, C. J. — The defendant is charged, in the writ, with the commission of a criminal offence. The ruling is in accordance with the opinion of this Court in *Thayer* v. *Boyle*, 30 Maine, 475, and with that of the Court in *Carlisle* v. *McNamara*, 48 Maine, 425.

Exceptions overruled.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

JUDE REED, *Adm'r*, *versus* JOHN REED.

By virtue of the Public Laws of the United States, c. 9, § 6, of 1861, and c. 144, §§ 1 and 3, of 1862, the father, (if resident in the U. S.,) of a deceased volunteer soldier is entitled to his arrears of pay and bounty.

And the soldier had no right to dispose of either by will.

Congress has a right to prescribe and determine what pay and bounty shall be given to a soldier, and to whom, in the case of his death, the arrears shall be paid.

By enlisting after the passage of these laws, the volunteer entered into a contract, the terms of which had been established by Congress, and to which he assented by the act of his enlistment.

ON FACTS AGREED.

ASSUMPSIT by a legatee in the last will and testament of John W. Reed, son of the defendant, to recover the arrears

of pay and bounty of the testator, obtained by the defendant from the U. S. government since the decease.

The testator devised to the plaintiff certain specific property named, "also all money that I may have at my decease," &c. The will was duly proved, approved and allowed.

The remaining facts appear in the opinion.

H. L. Whitcomb, for the plaintiff, contended,—

That the descent of this property should be governed by the laws of this State. Somebody must represent deceased party in obtaining it from the government; and if the deceased had made no different disposition of it by will, the heir might retain it. If the Act of Congress had provided the application should be made by an executor or administrator, it would not be contended he could hold it. Bounty was offered when deceased enlisted, and is an element of the contract, and the arrears and bounty are as much a debt due as if contracted with an individual. The law appoints the father to draw the money to save expense and trouble of taking out letters of administration. Soldier can dispose of his back pay and bounty by will otherwise than the Acts of Congress provide. Sewall on Pensions, Bounty and Prize Laws, 37. The Acts of Congress are unconstitutional. The right of a citizen of Maine to control the disposition of his property after his decease, by will duly executed, &c., was never surrendered to the Federal government.

Philip H. Stubbs, for the defendant.

APPLETON, C. J.—John W. Reed, a son of the defendant, was mustered into the military service of the United States on Aug. 14, 1862, and continued in said service until his death, on Jan. 6, 1863, leaving neither wife nor children. Before his death he left by will all his personal property to the plaintiff. After his decease the defendant received from the government of the United States seventy-five dollars as the proceeds of the pay due his son, exclusive of the expenses of its collection.

By the Act of Congress, approved July 22, 1861, c. 9, § 6, it is provided, "that any volunteer who may be received into the service of the United States under this Act, and who may be wounded or otherwise disabled in the service, shall be entitled to the benefits which have been or may be conferred on persons disabled in the regular service; and the widow, if there be one, and, if not, the legal heirs of such as die or may be killed in service, in addition to all arrears of pay and allowances, shall receive the sum of one hundred dollars."

By the Act approved July 11, 1862, c. 144, § 1, an appropriation is made "for payment of the bounty to widows, children, fathers, mothers, brothers and sisters of such volunteers as may have died or been killed or may die or be killed in the service authorized by the above recited Act; (c. 9, approved July 22, 1861,) provided that said bounty shall be paid to the following persons, and in the order following, and *to no other person*, to wit:—First, to the widow of such deceased soldier, if there be one. Second, if there be no widow, then to the children of such deceased soldier, share and share alike. Third, if such soldier left neither a widow, or child or children, then, and in that case, such bounty shall be paid to the following persons, provided they be residents of the United States, to wit:—First to his father, or, if he shall not be living, or has abandoned the support of his family, then to the mother of such soldier; and if there be neither father nor mother as aforesaid, then such bounty shall be paid to the brothers and sisters of the deceased soldier, resident as aforesaid."

It is provided by § 3, "that that part of the sixth section of the Act above recited (c. 9, approved July 22, 1861,) which *secured* to the widow, if there be one, and, if not, to the legal heirs of such volunteers as die or may be killed in the service, *in addition to all arrears of pay and allowances*, a bounty of one hundred dollars shall be held to apply to those persons who have enlisted in the regular forces since the first day of July, 1861, or shall enlist in the regular

forces during the year 1862, *and be paid to the heirs named in this Act*, and that the bounties herein provided for shall be paid out of any money appropriated for bounty to volunteers."

John W. Reed enlisted as a volunteer after the passage of the Acts to which reference has been had. Congress had the right to prescribe the pay to be given and the time when the payments were to be made, and to whom in case of death the arrears, if any, should be paid. So, too, it had equal right to determine what bounty should be given the soldier, and to whom, in case of his death before his right thereto accrued, it should be paid. Both are placed on the same footing. In all the preceding legislation of Congress in relation to bounties and pensions, the order of descent and distribution has been fixed in the Act giving bounties and granting pensions, with the obvious design of preventing their becoming, in case of death, a part of the assets of the deceased soldier, and thus liable to his debts. This Congress had an unquestioned right to do. By enlisting, the volunteer entered into a contract, the terms of which had been established by Congress, and to which he assented by the act of his enlistment.

The defendant received the several sums for which this suit is brought, in accordance with the Act to which reference has been had, and is entitled to retain them.

Plaintiff nonsuit.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

GEORGE FESSENDEN *versus* CHARLES SAGER.

When, during the progress of a trial, one party's counsel has notice of communications between the other party and some of the jurors before whom the cause is being tried, but goes on with the trial without objection, he thereby consents to abide the result.

ASSUMPSIT for damages occasioned by being thrown from a hearse through the viciousness of the defendant's horse hired by the plaintiff for the purpose of being driven in a hearse. The verdict was for the plaintiff.

The cause came before this Court on a motion to set aside the verdict as against the weight of evidence, and also because of certain communications between the plaintiff and some of the jurors.

The testimony in support of the latter motion was substantially as follows:—

Rufus Sweetsir, sworn.— Was foreman of second jury in case of *Fessenden* v. *Sager*.

Was in Mr. Harlow's store, on Fore street, and Mr. Harlow, one of the jury, or I, proposed that we should go up and see where the accident occurred. We got abreast of the hearse-house, and went in. Several men in there. No one I knew except Fessenden, the plaintiff, and him I never knew before this trial. Some of them were measuring distances. Took no notice of the distances. Some one, can't say who, called my attention to the hearses there. Think Fessenden spoke of the hearses. Can't recollect what he said. I said, I came to see for myself. Have no recollection of what was said.

Question by Rand.—Did Mr. Fessenden make any statements in your hearing?

Answer.—Can't say that he did. Some one did, but I can't recollect what it was. Mr. Fessenden made no statements that I can remember. Am not certain whether he did or not. Can't say they did or did not make any statements about the measurements of distances. We were

there about five minutes. Can't say who came away first. Am not positive that Fessenden said anything, but think he did call our attention to the hearse.

Think we met some other jurymen as we walked up there. Can't say that Mr. Fessenden made any statements to me in reference to this suit. He made some remarks to some one there, not directed to me particularly. Some of them there had measures. Know that Mr. Fessenden, the plaintiff, was there. Think Mr. Fessenden said something about the hearse to some one there, in my hearing.

Am not able to swear that Mr. Fessenden made any statements in reference to this suit, to me or any one in my presence. Don't know that Mr. Fessenden made any in my hearing. Think I heard Mr. Fessenden talk something about the hearse, but haven't the least recollection what it was. As we walked up South street, and turned to the left, some one showed us where the accident occurred. Can't say it was Fessenden. Think he was in the company. Mr. Harlow and I then came to the Court House. We came away before any horse was there.

Nothing that Mr. Fessenden said to me had any influence upon me in regard to my verdict, or anything I heard at the hearse-house.

Edward Harlow, sworn.—Was one of the jury that tried case of *Fessenden* v. *Sager*, and the person referred to who went with Mr. Sweetsir. I was in my place of business in the morning, and Mr. Sweetsir came in. We were in conversation some time, and he was about to leave, when I asked him if he wouldn't like to go up and see where this occurred. We walked up Fore street, and into South street. Didn't see Fessenden before we went. Never spoke to the man or knew his name before. Went to the hearse-house; found these people there. Some of the sextons were there, and Mr. Stillson and Mr. Bunce. Fessenden was there, Sager and Rumery were not there. Fessenden kept his tongue running considerable. I made up my mind not to hear what he said, and I kept away from him. Mr. Sweet-

sir and I came out into South street, and proceeded up to Spring street; got to the rear of Anderson's, and there I think I heard Mr. Fessenden speak about his getting off and going round the horse, same as he testified. We got as far as where they said the accident happened. Fessenden went through Oak street, as far as Free street, with us. He then left us. Fessenden, the only one with us. Don't know what Fessenden was doing when he went into the hearse-house. Don't recollect that they were measuring the wheels at that time. Nothing said there had any influence on my mind. Did not know when I went there any one was there at the hearse-house. Did not see Sager or Rumery there. As we left, heard some one say he would stop and see the horse tackled into the hearse. It was not Fessenden. Think some one measured the wheels while I was there. The size of the wheels had been a matter of testimony before the jury the day before. Went there at nobody's request. Went to gratify my own curiosity. Was acquainted with the location. Mr. Sweetsir was not. Have stated all I recollect that Fessenden said. Either Stillson or Bunce had a rule to measure with. Don't think we were there over five minutes. Know nothing about why Bunce and Stillson came there. Don't recollect of seeing any other of the jury there. Don't know who were there when Rumery went with the horse. Saw no horse there.

John Rand, Esq., sworn.—Recollect of naming to you (Howard) the fact of Mr. Fessenden's having been down there with some of the jurymen. Asked you to ascertain what the facts were. Heard he had been down there with some of the jurymen,—not that he had carried them there, but he had been there. After I spoke to you about it, you went and talked with Mr. Fessenden about it. Mr. Howard, when he came back, said he had frightened his client, and his client said he hadn't said anything of consequence. He had been there. After that I don't recollect you said Mr. Sager had been there with several of the jury, or with the horse. Have no recollection of your telling this to me.

Don't recollect of asking you if you objected. Haven't the slightest recollection of your saying anything about Sager's having been there. Knew Rumery had been there. Don't think you spoke anything to me about this after we came in. Don't remember of the conversation between Mr. Cleaves and myself.

I do remember now of having some conversation with Mr. Cleaves, but cannot tell where it was.

Nathan Cleaves, Esq., sworn. — Mr. Howard spoke to me, and said he had been informed that Mr. Fessenden had been to the hearse-house with some of the jurymen. This was as we were sitting down to the trial. After hearing this, I said to Mr. Rand, " well, I hear Sager has been down, and harnessed the horse in the presence of some of the jury. Have the impression that he spoke to Sager about it, but am not certain. He replied that it was with some of the other jury. I said I guessed neither of them had done anything very improper, and he said, I guess not. The trial immediately proceeded.

George Fessenden, plaintiff, sworn. — On Saturday morning of last week, I went to the hearse-house alone. I went over to measure the shafts, completed that, and was returning, when I saw Mr. Rumery near corner of Oak street with two or three with him. He had a measuring stick in his hand. Rumery is clerk for Mr. Sager, and is the one who was witness. I think a hackman, I cannot call him by name, and another were with him; went back with them. Found Mr. Bunce, Mr. Stillson, Andrew Rich, and several of the undertakers there, and several others, some of whom I did not know. They went to measuring. Think some of the jurymen were there. Don't know who. Didn't know their names; think they were some of the jury who tried this case. Saw the horse there. Didn't see Sager there. Rumery was there. He held the horse. Tillson measured. Saw Harlow and the foreman there. They came while we were in the hearse-house. Didn't know they were coming. Didn't know any jurymen were coming, and had not heard of any

one coming. Think Mr. Harlow addressed me, and said he came over with the foreman to look at the route. First I saw of Mr. Harlow and the foreman they were on corner of Spring and South street.

I walked up the street with them, and when I got opposite the place I stopped and said, "there is where I got off to examine the horse." I was then on my way home. They walked up to the corner of Oak street, to the lamp-post where I struck. I told them where the horse struck, and then he threw me off, and I passed through Oak street and went home. Had no further talk with them than what I have named. Saw the horse there, and saw him harnessed. The same horse I had. Did not see Sager there. The horse was harnessed in by Rumery. The jurymen were not there then. Did not, to my knowledge, say anything to the jury. There were half a dozen, or eight or ten in there, all talking together. Couldn't tell what they said. Had no conversation down there with these two jurymen, or any other, in regard to the case. Heard Sager swear he was down there that morning when the horse was put in.

Had been a witness on the stand before that morning, and told my story. Had stated as a witness where I got off and examined the horse. Had also stated where I was thrown off, and how.

J. & E. M. Rand, for the defendant, contended that the testimony shew an attempt to influence the minds of the jurors, and the verdict should be set aside, and cited *Hilton* v. *Southwick*, 17 Maine, 306; *Studley* v. *Hall*, 22 Maine, 198, and cases there cited.

Howard & Cleaves, for the plaintiff, cited R. S., c. 82, §§ 69, 73 & 75; *McLellan* v. *Crofton*, 6 Maine, 307; *Doloff* v. *Stimpson*, 33 Maine, 546; *Parsons* v. *Huff*, 38 Maine, 137; *Goodwin* v. *Cloudman*, 43 Maine, 577; *Jeffries* v. *Randall*, 14 Mass., 205; *Merrill* v. *Burkshire*, 11 Pick., 269; *Davis* v. *Allen*, 11 Pick., 468; *Orrok* v. *Com. Ins. Co.*, 21 Pick., 471; *White* v. *Woods*, 8 Cush., 414; *Kent*

v. *Charlestown*, 2 Gray, 281; *Allen* v. *Blunt*, 2 W. & M., 148.

DANFORTH, J. — It seems from the testimony reported that, during the progress of the trial, defendant's counsel had notice of some communication between the plaintiff and some of the jurors. This was sufficient, at least, to have put him upon inquiry, and, by consenting to go on with the trial without objection, he consents to abide the result, as the authorities cited for plaintiff abundantly show; especially those of *Hallock* v. *Franklin*, 2 Met., 560, and *Fox* v. *Hazelton*, 10 Pick., 275. The verdict does not appear to be so clearly against the weight of evidence as to authorize us to disturb it. *Motions overruled.*

Judgment on the verdict.

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

STATE *versus* CHARLES G. INNESS.

While no person can be twice lawfully punished for the same offence, yet he may be twice lawfully punished for the same act, when it is of such a character as to constitute two distinct offences.

The fact that a person has been convicted of keeping a drinking house and tippling shop is no bar to an indictment for presuming to be a common seller, although both indictments cover the same period of time and are supported by the same acts of illegal sale.

Distinction between keeping a drinking house and tippling shop, and being a common seller.

Where a demurrer to a special plea of *autrefois convict* is sustained, the judgment will be final for the State.

If the defendant desires to answer further, he must claim the right when he files his demurrer, or obtain leave to plead double at the beginning.

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

INDICTMENT for being a common seller on the first day of

January, 1864, and on divers other days and times between said first day of January aforesaid, and the day of finding of the indictment, last Tuesday of November, 1865.

The respondent pleaded in bar a former conviction of keeping a drinking house and tippling shop, covering the same time mentioned in this indictment, to which plea the County Attorney demurred. The presiding Judge sustained the demurrer, and the respondent alleged exceptions.

Evans & Putnam, for the respondent.

The common law rule applicable to both pleas *autrefois convict* and *autrefois acquit*, is the same; its application is different. *Com.* v. *Roby*, 12 Pick., 503; 1 Chitty's Crim. Law, 457. The counsel also cited *Com.* v. *Squire*, 1 Met., 265; *Com.* v. *Jenks*, 1 Gray, 492. To punish a person twice for the same guilty intent is both "cruel" and "unusual." Const. of Maine, Art. 1, § 9. The offence pleaded and the one charged are of same grade, and hence a conviction of the former is a bar to the latter. *State* v. *Maher*, 35 Maine, 225.

Peters, Attorney General, contra.

WALTON, J.—It is a fundamental rule of law that a person shall not be twice punished for the same offence. But to punish a person for keeping a drinking house and tippling shop, and also for being a common seller of intoxicating liquors, although the same illegal acts contribute to make up each offence, is not a violation of this rule.

It often happens that a person is twice punished for the same act, when the act is of such a character as to constitute two distinct crimes. Thus a man who in company with at least two others commits an assault and battery, or any other illegal act, in a violent and tumultuous manner, may be twice punished, once as a rioter, and again as if he had committed the unlawful act alone. R. S., c. 123, § 2. So where one statute prohibits retailing liquor without a license, and another forbids trading with a negro, it has

been held that by retailing liquors to a negro, the seller incurs two penalties, one for retailing, and one for trading with a negro. *State* v. *Sonnerkalb*, 2 Nott and McCord, 280. So, in the same State, the act of buying goods of a negro, knowing them to be stolen, subjects the purchaser to two punishments, one for trading with a negro, and one for receiving stolen goods. *State* v. *Taylor*, 2 Bailey, 49. So if a person receives from a thief two parcels of goods, one being the property of A, and the other the property of B, a conviction of feloniously receiving one is no bar to a prosecution for feloniously receiving the other, although both parcels were received from the same thief at the same time, and therefore constitute but one act of reception. *Com.* v. *Andrews*, 2 Mass., 409. It has also been said that if a person steal two articles at the same time from the same person, two offences are committed, for each of which the thief may be separately indicted and punished. *Regina* v. *Brettel*, 1 Cor., & Marsh, 609. Lord Hale is an authority to the same effect. Hale's P. C., 241. The principle that when the same act constitutes two distinct offences, the guilty party may be separately punished for each offence, is well illustrated in a case of assault and battery in the presence of a Court, in which the offender was punished for the contempt, and also for the assault and battery. *State* v. *Young*, 1 Carolina Law Repository, 509. BLACKSTONE says that the pleas of former acquittal or former conviction must be upon a prosecution for the same identical *act and crime*. 4 Blacks. Com., 336. And Chief Justice SHAW says that, in considering the identity of the offence, it must appear, by the plea, that the offence charged in both cases are the same *in law* as well as *in fact;* that the plea will be vicious, if the offences charged in the two indictments be perfectly distinct *in point of law*, however nearly they may be connected *in fact*. *Com.* v. *Roby*, 12 Pick., 496.

We thus see that, while it is true that no person can be twice lawfully punished for the same offence, yet he may be

twice lawfully punished for the same act, when the act is of such a character as to constitute two distinct offences.

It has been held in two cases, in this State, that a conviction for presuming to be a common seller of intoxicating liquors, within a specified period, is no bar to a prosecution for a single sale within the same period. *State* v. *Coombs*, 32 Maine, 529; *State* v. *Maher*, 35 Maine, 225. *A fortiori*, the fact that a person has been convicted of keeping a drinking house and tippling shop is no bar to a prosecution for presuming to be a common seller, although both indictments cover the same period of time and are supported by the same acts of illegal sale. In point of law the two offences are entirely distinct. A person may be a common seller and not be guilty of keeping a drinking house and tippling shop; and a person may be guilty of keeping a drinking house and tippling shop and not be a common seller; and a person on trial for either offence can never be convicted of the other. All the tests usually applied, to determine whether a conviction upon one indictment is a bar to another, fail. Mr. Chitty says that if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason as well as repugnant to the rules of law to say that the offences are the same. 1 Chit. Cr. Law, 453. East is an authority to the same effect. 2 East's P. C., 522. And both cite authorities which fully sustain the position.

If a person, intending to engage in the business of selling liquor, fits up a bar in his house or shop, he incurs no penalty, unless he actually begins the business of selling; for an unexecuted intention to do an unlawful act is not of itself a crime. But the moment he commences to sell, although he sell but a single glass, he has committed an offence for which he may be punished; and if he permits the liquor to be drank upon the premises, he is guilty of keeping a drinking house and tippling shop. The law does not require a plurality of sales to constitute this offence.

But a plurality of sales is necessary to constitute the crime of being a common seller. A common seller of intoxicating liquors is one who sells frequently, usually, customarily, habitually. *State* v. *O'Connor*, 49 Maine, 598. The proof need not be direct, it may be circumstantial, but the law is now well settled that, to authorize a verdict of guilty against a person charged with being a common seller, the jury must be satisfied that the defendant has been guilty of more than a single sale.

We thus see how widely different, in point of law, the offence of keeping a drinking house and tippling shop, and the offence of being a common seller, are. In the one case, a single act of selling only is necessary, but that must be in some building, vessel, or boat, and be accompanied with the act of drinking upon the premises. In the other, a plurality of sales must be established, but the sales need not be shown to have been in any building, vessel, or boat, nor to have been accompanied with drinking.

Our conclusion is that the fact that a person has been convicted and sentenced for keeping a drinking house and tippling shop, is no bar to a prosecution for being a common seller of intoxicating liquors, although both indictments cover the same period of time, and are supported by the same acts of illegal sale.

This view of the law disposes of the issue presented in this case. The demurrer is sustained, and the defendant's special plea in bar is adjudged insufficient.

What judgment shall be rendered? Shall it be final for the State, or only *respondeat ouster*? Our conclusion is that it must be final for the State. Otherwise the case would be improperly before the law court. For if the defendant can carry a case to the law court, and thus obtain a year's delay, by simply pleading a special plea, which, if adjudged against him, is followed by no other than a judgment to answer further, he has it in his power, by pleading in succession a sufficient number of such pleas, to postpone the final judgment indefinitely, and perhaps thereby defeat

the prosecution altogether. To guard against a result so disastrous to a prompt and efficient administration of justice, the law provides that when a dilatory plea is overruled, (and all pleas are dilatory which, if overruled, are followed by no other than a judgment to answer further,) and exceptions are taken, the Court shall proceed and close the trial, and that the action shall then be continued and marked law, and not before. R. S., c. 77, § 28. Cases should not therefore be entered in the law court on exceptions until they are in a condition to be finally disposed of if the exceptions are overruled.

In this case, the defendant pleaded specially a former conviction. The government demurred. The presiding Judge sustained the demurrer, and the defendant excepted. If the defendant desired to answer further he should have claimed the right then; or, according to some authorities, he should have obtained leave to plead double at the beginning. Not having done either, but having entered his action in this Court, which he could not rightfully do unless it was in a condition to be finally disposed of if his exceptions should be overruled, his right, if any, to answer further, must be regarded as waived. *Exceptions overruled.*

Judgment final for the State.

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

HORACE CORBETT *versus* MAINE AND UNION BANKS, and OLIVER R. DAVIS *versus* Same.

Where, by the certificate of the appraisers indorsed upon the back of an execution against several debtors, it appears that they appraised certain real estate "as the estate in fee simple of the debtor within named Edmund Smith;" and the officer's return recites that "having given notice * * to the within named Edmund Smith and allowed him a reasonable time * * to choose an appraiser," and having caused three disinterested men, viz., E. T. L., chosen by the creditor, A. W., "chosen by the debtor," and J. G., chosen by myself, to be sworn, &c., and the real estate described in the foregoing certificate of the appraisers having been shown to them and me as the estate in fee simple and in severalty of "Edmund Smith the debtor aforesaid," &c.; — *Held*, that the terms, "the debtor," and "the debtor aforesaid" have an obvious reference to "the debtor within named Edmund Smith," and it is sufficiently certain whose land was levied upon, and which debtor had notice.

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

REAL ACTIONS.

The presiding Judge sustained the levies under which the defendants claim, and the plaintiffs alleged exceptions.

N. Morrill and *A. P. Moore*, for the plaintiffs.

S. & J. W. May, for the defendants.

APPLETON, C. J. — The plaintiffs and defendants severally claim under levies upon the real estate of one Edmund Smith. Those under which the tenants derive title are prior in time. Their title, therefore, depends upon the validity of those levies.

The executions, upon which the levies relied upon by the tenants were made, are against Edmund Smith and two others. The exception taken to their validity is that the officer's return does not show the debtor, upon whose real estate the levy was made, chose an appraiser.

By the certificate of the appraisers, it appears that they appraised certain real estate "as the estate in fee simple of *the debtor within named* Edmund Smith."

The officer in his return uses the following language: — "By virtue of this execution, I this day seized the real estate described in the foregoing certificate of the appraisers, and having given notice thereof to the within named Edmund Smith, and allowed *him* a reasonable specified time within which to choose an appraiser, and having caused three disinterested men, to wit, Edward T. Little of Auburn, chosen by the creditor, Archibald Wakefield, chosen by the debtor, and Jacob Gould of Auburn, chosen by myself, to be duly sworn faithfully and impartially to appraise such real estate as should be shown to them to be taken by force of this execution, and the real estate described in the foregoing certificate of the appraisers now referred to for a description thereof having been shown to them, and to me * * as the estate in fee simple and in severalty of Edmund Smith, the debtor aforesaid," &c., &c.

The appraisal was of the real estate "of the debtor within named Edmund Smith." The notice was "to the within named Edmund Smith" to choose an appraiser and time was given him in which to choose. The choice of an appraiser was by "*the* debtor, and the execution were satisfied by a levy upon the real estate "of Edmund Smith the debtor aforesaid." Edmund Smith is described as the "debtor within named" and "the debtor aforesaid" in officer's return. No reference is made to any other debtor or debtors. The natural and obvious construction of the return is that the debtor, by whom the appraiser was chosen, — "was the debtor within named" whose land was seized and to whom notice was given. The terms "the debtor" and "the debtor aforesaid" have reference to "the debtor within named Edmund Smith."

The case is distinguishable from that of *Harriman* v. *Cummings*, 45 Maine, 351, and from that of *Ware* v. *Barker*, 49 Maine, 358. *Exceptions overruled.*

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

GEORGE W. VINING *& al. versus* SHUBAEL BAKER *& al.*

Possession is *prima facie* evidence of title to personal property.

Plaintiffs in possession may maintain trover against all persons wrongfully interfering with their possession.

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

TROVER for eighty sheep. The plaintiffs contended that the sheep were the exclusive property of one Timothy E. Fogg, while the defendants claimed they were the property of a copartnership alleged to exist between said Fogg and the defendant Baker. It appeared in evidence, that the defendants fraudulently obtained possession of the sheep, drove them to Brighton and sold them; and that the plaintiffs settled with Fogg, and paid him in full for the sheep before bringing this action.

The defendants contended that the action could not be maintained by plaintiffs, but only by Fogg. Upon this point, the presiding Judge instructed the jury that if the sheep were so purchased by Fogg as to render them exclusively his and subject to his exclusive control, and he thereupon left them in the care and custody of the plaintiffs and took from them the writing introduced, they would thereto become his bailees, and have such a property in the sheep as would enable the plaintiffs to maintain trover for their conversion against a stranger or one having no right, title or interest in them, or right of control over them, if, before bringing their suit, the plaintiffs had settled with Fogg and paid him in full for the sheep.

Verdict was for the plaintiffs, and the defendant alleged exceptions.

H. L. Whitcomb, in support of the exceptions.

The evident design of the paper between plaintiffs and Fogg was to prevent defendant Baker, who claimed a partner's interest in the sheep, from obtaining possession of them.

The authorities go to the extent that a mere depositary

may maintain an action for an invasion of his possession against a stranger having no color of title, and there the rule stops. As against a person claiming a right in the property, bare possession is not enough. Naked possession alone is better than no kind of possession or title whatever; but a colorable title is better than bare possession. Plaintiffs were but mere shepherds, and their possession was his. Story on Bailment, § 92.

The bailee may bring an action in his own name when his actual possession is violated. His right to sue in his own name results from the fact of his liability to the owner. Story on Bailment, § 93. A mere custodian is not liable to owner and cannot bring action in his own name, especially where property is fraudulently taken from him without his fault. The writing between Fogg and Vinings is a mere *nudum pactum*. Settlement with Fogg after sheep taken gave plaintiffs no right of action. The instruction misled the jury in conveying to them the idea that, by the settlement, the plaintiffs acquired new rights. The whole transaction grew out of a disagreement between partners, and is a device to evade the law by maintaining a suit at law by one partner, but in the name of other parties, where equity should adjust the business of the firm.

Fessenden & Frye, for the plaintiffs.

APPLETON, C. J. — The plaintiffs, having sold one Fogg the sheep in controversy, gave him the following memorandum: —

"Weld, Oct. 28, 1864.

"Mr. George and Page Vining have sold and delivered to T. E. Fogg eighty sheep, to be kept by said Vining, till called for by the said Fogg personally or by an order in writing; said Fogg to pay all expenses, if any, before they are taken away, for feeding on hay, $320.

"Received Payment, "G. W. Vining,
"Page Vining."

The jury have found the title to the sheep to have been

in Fogg, and that they were wrongfully taken by the defendants from the custody of the plaintiffs, his bailees.

Possession is *prima facie* evidence of title. The plaintiffs being in possession may maintain trover against all persons wrongfully interfering with their possession. In *Nicolls* v. *Bastard*, 2 Cromp., Mees. & Ros., 659, it was decided, that, in case of a simple bailment of a chattel without reward, its value might be recovered in trover by the bailee if taken from his possession. The rulings of the presiding Justice are fully sustained by the authorities. *Little* v. *Fossett*, 34 Maine, 545; *Burton* v. *Hughes*, 2 Bing., 173; *Linscott* v. *Trask*, 35 Maine, 150.

Exceptions overruled.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

OLIVER P. SNOW *versus* OLIVER MOSES *& als.*

Past and future damages, occasioned by the flowing of land for mill purposes, may be satisfied by the payment of a gross sum accompanied by a parol agreement to that effect.

But such an adjustment is good only between the original parties.

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

COMPLAINT FOR FLOWAGE.

The only material question, presented by the report, is whether the fact that the payment of $22,50 by the defendants' grantor to the complainant's grantor, and a paper executed and given by the latter to the former, acknowledging the receipt of the sum named in full for all past and future damages, caused by flowing the land mentioned in the complaint, and agreeing that the defendants' grantor, his heirs and assigns, shall have a perpetual right to flow the lands in question, will constitute any defence to the complaint.

Record, for the complainant.

A. P. Moore, for the respondents.

WALTON, J. — This is a complaint for flowage, and the defence is an alleged payment by the defendants' grantor, (the then owner of the mill,) to the complainant's grantor, (the then owner of the land flowed,) of a gross sum in full for all damages, past and future, and the question is whether such a payment, if proved, will bar the complainant's right to recover.

The right to flow lands for mill purposes is created by statute. No license or conveyance from the owner is necessary. He is entitled to compensation, but his claim being no more than a demand for money, it has been held that it may, like any other pecuniary claim, be waived, satisfied, or extinguished, by parol. *Clement* v. *Durgin*, 5 Maine, 9; *Seymour* v. *Carter*, 2 Met., 520.

But such an adjustment of damages is good only between the original parties. It will not bar the right of a subsequent owner of the land flowed to recover damages. *Fitch* v. *Seymour*, 9 Met., 462; *Seidensparger* v. *Spear*, 17 Maine, 123.

In the last cited case, the Court say that it is so easy a thing for one, who would secure the right to flow another's land, to obtain a deed conveying that right for such length of time, and to such height and extent as may be agreed upon, that it may be regretted that any dispensation with such a requisition should in any degree be tolerated, considering the temptations to misrepresent, or to forget what transpired in years gone by, when the whole rests merely in recollection, without being reduced to writing. The Court say that no extension of the rule should be allowed; that it should go no further than to settle the rights of the original parties to the parol agreement, and should not be allowed to affect the title of a subsequent owner. We regard this as a decisive authority against the defence set up in this case. The alleged payment, if proved, would constitute no bar to

the complainant's right to recover for any injury to his land since he became the owner, caused by the defendant's flowing. *Judgment for complainant. Commissioners to be appointed to appraise the damages.*

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

STATE *versus* THOMAS M. STEVENS.

R. S., c. 132, § 7, does not require warrants issued by judges of police courts to be made returnable before any justice of the peace within the county.

The jury are not judges of the law in criminal cases.

They are bound by the instructions of the presiding Judge in matters of law, to the same extent in criminal as in civil suits.

ON MOTION AND EXCEPTIONS.

WALTON, J. — This is a prosecution under the Act of 1858, for the suppression of drinking houses and tippling shops. The warrant was issued by the judge of the police court of the city of Gardiner, and was made returnable before said court. It is contended in defence that the warrant was void, because it was not made returnable before "any justice of the peace in the county; and the Rev. Stat. c. 132, § 7, is relied on in support of the objection. The statute referred to provides that "warrants issued by justices of the peace shall be made returnable before any justice of the peace in the county." But there is no law providing that warrants issued by judges of police courts shall be made returnable before any justice of the peace in the county; and we think there is neither reason nor authority for so construing the statute as to make it embrace warrants issued by judges of police courts. The motion in arrest of judgment founded on this objection was rightly overruled.

The presiding Judge (RICE) instructed the jury that they

had nothing to do with the constitutionality of the statute on which the prosecution was based; and on request refused to instruct the jury that they were judges of the law, as well as the facts, in the case.

The jury are not judges of the law in criminal cases. They are bound by the instructions of the presiding Judge in matters of law, to the same extent in criminal as in civil suits. See *State* v. *Wright*, where the subject is fully considered.

Exceptions overruled.

Judgment on the verdict.

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

Carleton, for the respondent.

TIMOTHY HOMSTEAD *versus* BRADFORD LOOMIS.

A creditor of a ward may sue him, taking care to have notice of the suit served upon the guardian.

If such notice be not served, the judgment obtained against the ward will be erroneous and liable to be reversed.

A person indebted for property purchased of a guardian cannot be held as trustee in a suit against the ward.

Power and duties of a guardian.

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

Scire facias against the defendant, who was defaulted as trustee in the original action in which the principal defendant was a person under guardianship.

The defendant disclosed that he purchased of Oliver Walker — guardian of the principal defendant in the original action — a pair of yearling steers and a steer calf, for which he agreed to pay thirty-three dollars in one year. The presiding Judge discharged the trustee, and the plaintiff alleged exceptions.

Coburn & Wyman, for the plaintiff.

James Bell, for the defendant.

WALTON, J.—The law confers upon a guardian the entire control of his ward's estate. He is to settle all his accounts, appear for and represent him in all legal proceedings, and demand, sue for, and receive all his dues. We think these rights, duties, and liabilities of the guardian are inconsistent with the right of a creditor to attach the ward's estate in the guardian's hands, or in the hands of those to whom the guardian may have entrusted it. Undoubtedly a creditor may sue the ward, taking care to have notice of the suit served upon the guardian; and perhaps, if his claim is disputed, he ought to have its validity determined in such an action before attempting to compel the guardian to pay it; but it is the duty of the guardian to pay all the just debts of his ward so far as he can without disposing of effects necessary for the use and comfort of the ward and his family; and if he neglects his duty in this respect, the creditor is entitled to an action upon the guardianship bond. *Conant* v. *Kendall*, 21 Pick., 36. And it was said by the Court in *Cole* v. *Eaton*, 8 Cush., 587, that this is the creditor's only remedy.

Our conclusion is that a person indebted for property purchased of a guardian cannot be held as trustee in a suit against the ward, because to do so would deprive the guardian of his rightful authority over the ward's estate. R. S., c. 67, §§ 3, 13.

The exceptions state that the presiding Judge at *Nisi Prius* discharged the defendant as trustee, upon the ground that the original suit should have been against the guardian and not the ward. If the ward was under guardianship when the suit was commenced, notice of the suit should have been given to the guardian, and if this was not done, the judgment is erroneous and liable to be reversed. *White* v. *Palmer*, 4 Mass., 146. And probably this is what the presiding Judge intended to say. But it is of no consequence

what reason was given; for if the ruling was correct, giving a false reason for it does no harm. We think the ruling was correct. The trustee was only indebted for a small amount of personal property purchased of the guardian, and for reasons already given, we think he could not be rightfully charged as trustee of the ward.

Exceptions overruled. — Defendant discharged.

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

WILLIAM MOORE *versus* SAMUEL GIBSON *& al.*

A sawmill, owned by the plaintiff and the defendants' grantor, as tenants in common, was destroyed by fire. Subsequently, the latter called a meeting of the owners, and proceeded to rebuild under R. S., of 1841, c. 86. Having rebuilt, he conveyed to the defendants by deed of warranty, containing the following: — "meaning hereby to convey one-half of the sawmill privilege and all the mill, subject to the claims of William Moore, in said mill, and reserve to myself all my claims and rights of action against the said Moore which I now have:" — *Held*, —

1. That defendants' grantor acquired no title under the mill Act to the half of the mill of which the plaintiff had a deed;

2. That the proceedings under the mill Act, could, at most, give him a lien to be "reimbursed and paid such sums, as he had advanced thereon," &c.;

3. That his deed did not give his grantees a lien on the demanded premises;

4. That the separation of the claim from the security, was a dissolution of the lien; and,

5. That all testimony relating to the proceedings of calling a meeting of the owners, and the proceedings under it are inadmissible under the plea of *nul disseizin* and brief statement setting out those proceedings.

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

DICKERSON, J. — Writ of entry to recover one-half of a sawmill and one-half of a mill privilege, and for mesne profits. The general issue was pleaded and a brief statement filed together with specifications of defence. The plaintiff's title by deed is admitted. The defendants derived their title to the other half of the mill and privilege through sev-

eral mesne conveyances from one Calvin Atwood, who acquired his title by deed from the plaintiff.

The defendants set forth in their brief statement, that Atwood, through whom they claim title, rebuilt the mill in 1854, under the statute of 1841, c. 86, and that the advances he thus made had not been paid; and they claim that they have the same right to defend this action that Atwood would have had, if he had continued to occupy the premises as he did before the sale to his grantees. The defendants introduced testimony upon which they rely to show that Atwood had instituted proceedings necessary to entitle *him* to the benefit of the statute, to which the plaintiff objected. By agreement of the parties, the Court is to decide the case according to the law applicable to such evidence as is legally admissible.

The defendants have filed no disclaimer to the demanded premises, but put in a plea of *nul disseizin*. This plea puts in issue only the question whether the demandant or the tenant has the better title. Under the general issue, thus pleaded, proof of a better title in a third party under whom the tenant holds would be no defence to this action. If the defendants would avoid the effect of the plaintiff's title by deed they must do so by competent proof under their brief statement. Before they can avail themselves of any supposed rights which Atwood may have acquired to the demanded premises under the mill Act of 1841, they must show their claim thereto. The conveyance by Atwood to his grantees was by deed of warranty, which contained this clause, "meaning to convey by this deed one-half of the sawmill privilege, and *all the mill*, subject to the claims of William Moor in the said mill; and reserve to myself all my claims and rights of action against the said Moor which I now have." The only interest Atwood had, if any, to the half of the mill of which the plaintiff has a deed, was what he had acquired under the mill Act of 1841. But that Act gave him no title to the other half of the mill thus erected by him, whatever may have been his action under it; it did

not divest the plaintiff of his *title* and vest it in Atwood, but provides that he "should be reimbursed and paid such sums as he had advanced thereon, with interest for the same, in the mean time, out of said mill or the profits." Atwood could not, if he would, give a valid *title* to the plaintiff's half of the mill. He did not undertake to do so, but made the conveyance subject to the plaintiff's claim, and reserved to himself all claim in the plaintiff for reimbursement. He did not give his grantees a lien on the demanded premises, if any he had; the separation of the claim from the security was a dissolution of the lien.

This construction of the deed is confirmed by the obligation entered into between Atwood and his grantees on the day the deed was given. This obligation recites the fact of the conveyance as "subject to the right of William Moore in the same," and binds Atwood to procure from him a quitclaim deed of his interest in the premises for the benefit of the grantees, or to fully indemnify them for the said claim. As a security for the fulfilment of this stipulation, the obligation provides that one of the notes given in part payment for the conveyance shall be deposited with a third person until Atwood has obtained the deed of release, or given the grantees a bond of indemnity against Moore's claim.

The defendants acquired by their deed no claim whatever to the interest Atwood had, if any, in the plaintiff's half of the mill, by virtue of his alleged proceedings under the mill Act. All testimony, therefore, in regard to those proceedings, is inadmissible.

Plaintiff to have judgment for possession, and mesne profits during the joint occupancy of the mill by the defendants.

George C. Getchell, Esq., of North Anson, to estimate the value of the mesne profits.

APPLETON, C. J., KENT, WALTON, BARROWS and DANFORTH, JJ., concurred.

S. Heath, for the plaintiff.

J. H. Webster, for the defendants.

LESTOCK P. W. DES BRISAY, *in Equity*, *versus* PATRICK HOGAN *& ux.*

When a creditor seeks, by a bill in equity, to obtain payment of his debt from certain real estate paid for by the debtor, but conveyed to his wife, a levy is unnecessary, if the debtor never had any title to the land.

BILL IN EQUITY.

The case was heard on demurrer.

J. Granger, for the complainant.

Chas. R. Whidden, for the respondents, cited *Webster* v. *Clark*, 25 Maine, 313, and cases there cited; *Dockray* v. *Mason*, 48 Maine, 178; R. S., c. 61, § 1.

WALTON, J. — This is a bill in equity in which a creditor seeks to obtain payment of his debt from certain real estate paid for by the debtor, but conveyed to his wife, the debtor never having had any title to it.

It is objected that the bill cannot be maintained, because the creditor did not levy upon the land before asking the aid of the Court.

It was decided in *Corey* v. *Greene*, 51 Maine, 114, that where the debtor never had any title to the land, a levy is unnecessary. It is true that, in that case, the title was held by a stranger, while in this it is held by the debtor's wife. But this makes no difference. It is only when the debtor once had a title to the land and has conveyed it away fraudulently, that a levy can be of any use. In such case, the conveyance being fraudulent, it is as to the creditor *no* conveyance, and he may treat the title as still remaining in the debtor. But when, as in this case, the debtor never had any title, treating the conveyance to his wife as either valid or void will not give *him* a title, — it will be either in the wife or her grantor, — it will not be in the debtor, — and a

levy upon it as his property would be an idle and useless ceremony. No title could possibly be obtained by it.

Demurrer overruled. — Defendants to answer further.

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

THE PRESIDENT, DIRECTORS & CO. *of the Veazie Bank, Appellants from a decree of the Judge of Probate, versus* LEVI YOUNG, *Petitioner.*

By R. S., c. 63, § 19, any person aggrieved by any order, sentence, decree or denial of Judges of Probate, may appeal therefrom.

A party is aggrieved by such decree only when it operates on his property or bears upon his interest directly.

A mere garnishee of a debtor to the estate of a deceased person, has no such interest in the appointment of an administrator upon such estate as enables him to appeal from the decree of the Judge of Probate making such appointment.

When an appeal is taken from the decree of a Judge of Probate by one having no right of appeal, the question of jurisdiction in the Court below cannot be entertained in this Court sitting as the Supreme Court of Probate.

Whether or not an appeal rightfully claimed may be entertained for the purpose of examining and deciding whether the Court below erred in taking jurisdiction, when the want of jurisdiction was not apparent upon the face of the proceedings, *quære.*

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

APPEAL from the decree of the Judge of Probate for the county of Penobscot.

The presiding Judge ruled that the Probate Court had jurisdiction, and that the appellant was not a party aggrieved and had no right of appeal, and affirmed the decree of the Judge of Probate appointing an administrator; and the appellant alleged exceptions.

The remaining facts appear in the opinion.

J. S. Rowe, in support of the exceptions, contended,—

That the bank rests its right of appeal upon the fact that it is a party defendant, in the suit now pending in this Court. *Atkinson* v. *J. P. Veazie and Veazie Bank, trustee.*

Under the term "party" the law includes all directly interested in the subject matter, and had a right to make defence, &c. 1 Greenl. on Ev., §§ 522, 523. Trustees shall be summoned by writ, and may appear in Court by attorney, R. S., c. 86, § 8; shall be entitled to costs as a party, and an execution against the plaintiff, §§ 13 and 21; shall be liable for costs, § 18; that he may, as a party, make issues in law or fact, and try the same before Court and jury, §§ 28, 29, 30 and 31; make an agreement on the docket as a party, § 35; in case of his death, his administrator is to be made a party, § 38; is liable on execution for costs, § 62; and may take exceptions as a party, § 79.

In the common law case, the bank has been the only party defendant that ever appeared; Veazie never appeared, but was defaulted at the first term; issues of law and fact have been made up between plaintiff and trustee, which were referred to the Court with right to except; proof introduced, parties heard, and issues decided in favor of trustee, when case was remanded for further proceedings at *Nisi Prius*. Atkinson had died in the meantime, and now one, claiming to be his administrator, appeared, to which the bank objected.

A trustee is a party defendant. *Boynton* v. *Fly*, 12 Maine, 17. A party has a pecuniary interest in the result of a suit. A trustee being party defendant may move the suit be dismissed, if the representative of deceased plaintiff do not come in and prosecute; and, if one falsely pretends to be such representative, he may show falsity of pretence, and have the cause abated.

When the Probate Court has no jurisdiction, or exceeds its powers, its decrees are held to be entirely and absolutely void and of no effect, and may be set aside, in any collateral proceeding, by plea and proof, although such decree might

also have been appealed from. *Peters* v. *Peters*, 7 Cush., 543; *Cutts* v. *Haskins*, 9 Mass., 543; *Holyoke* v. *Haskin*, 5 Pick., 20, and 9 Pick., 259; *Sigourney* v. *Sibley*, 21 Pick., 101.

Decree being void, Bowman is not administrator; payment by the bank on an execution issued upon a judgment rendered in his favor, as administrator, would be no defence to a suit by principal defendant against bank. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; *Irving* v. *Folger*, 7 Gray, 505, where the decisions are reviewed. Bowman may show, in answer to a claim for costs, that he was never administrator. *Coffin* v. *Cottle*, 9 Pick., 287.

Bank was a party aggrieved. *Bancroft* v. *Andrews*, 6 Cush., 493–496; *Northampton* v. *Smith*, 11 Met., 390.

The appeal was tried on its merits at *Nisi Prius;* no motion to dismiss appeal; appellee having thus submitted to the jurisdiction, and the Court having taken cognizance of it and heard it, whether appellant be regarded as an aggrieved party or as *amicus curiae*, Court should affirm or reverse decree of Judge of Probate.

The doctrine laid down in *White* v. *Riggs*, 27 Maine, 114, should be limited in its application to cases where the want of jurisdiction appears on the face of the decree. Such decrees cannot aggrieve any party, for they will be declared null upon inspection.

"Law and justice" require the decree to be set aside. R. S., c. 63, §§ 19 and 24.

Counsel also cited 6 Pet., 470; *Gomby* v. *McIntosh*, 22 Barb., 371; *Harv. Coll.* v. *Gore*, 5 Pick., 369.

Wakefield, for the appellee.

Barrows, J.—In December, 1857, an action was commenced in the name of one Amos Atkinson of Brookline, Massachusetts, against Jones P. Veazie, in the S. J. Court in this county, wherein such proceedings were afterwards had that judgment was rendered in favor of the plaintiff in the summer of 1859, for debt and costs, upon which

judgment a suit was almost immediately instituted, in which the President, Directors and Company of the Veazie Bank were summoned as trustees. Protracted litigation between the plaintiff and the alleged trustees ensued, pending which Amos Atkinson died. The Judge of Probate for this county, upon the petition of the respondent, by a decree made in September, 1865, granted administration upon the estate of Atkinson to Hollis Bowman, and now the Veazie Bank, the alleged trustee in the suit still pending, assuming the offensive, interposes an appeal from this decree, assigning, as the reason therefor, want of jurisdiction in the Court below, alleging and offering to prove that there was no estate of Amos Atkinson within this county, and that he had no interest in the suit now pending, or in the judgment upon which it was brought.

If these things were so, and the Probate Court in Penobscot county had no jurisdiction to appoint an administrator in this case, it is not easy to see how this appeal, even had it been claimed by a party interested in the subject matter thereof, could be sustained, inasmuch as this Court, as the Supreme Court of Probate, has appellate jurisdiction only in matters that are determinable by the several Judges of Probate. R. S., c. 63, § 19.

It would seem to follow that this Court could have no appellate jurisdiction of a case not cognizable by the Court below for want of jurisdiction, and that the appeal could only be dismissed. See *Osgood* v. *Thurston*, 23 Pick., 110.

This would seem to be the view entertained by our own Court in *White* v. *Riggs*, 27 Maine, 114, which was a case where probate of a will had been decreed by a probate judge at a time and place other than that fixed by law or under the provisions of the statutes then in force. Upon appeal duly claimed by an heir, who denied the capacity of the testator, and the validity of the instrument, it was held that the Court below had no jurisdiction of the question *there*, and SHEPLEY, J., in announcing the conclusion of *this* Court, remarks thus:—"as the supposed decree was *void*

because the Probate Court had no jurisdiction, *the appeal must be dismissed.*"

Perhaps, then, there would be fair grounds for saying that the very reasons of appeal filed in the case at bar are *felo de se*; that, if the Probate Court had no jurisdiction, this Court has no jurisdiction, and can do nothing but dismiss the appeal, and that, assuming the want of jurisdiction in the Probate Court, no action which this Court could take in the premises as the Supreme Court of Probate would be of any avail, either to confirm or reverse an act which was simply *void*.

The learned counsel for the appellant has established, both upon principle and authority, the position that where the Probate Court has no jurisdiction its decrees are entirely and absolutely void and of no effect, and may be set aside in any collateral proceeding by plea and proof.

How any party can be legally aggrieved by an act which is simply void, and of no effect, is not readily apparent.

But it is not necessary for us, in this case, to determine whether or not an appeal rightfully claimed may be entertained for the purpose of examining and deciding whether the Court below erred in taking jurisdiction, where the want of jurisdiction is not apparent upon the face of the proceedings, and nothing herein before said is to be considered as forestalling a decision upon that point when it shall necessarily arise.

The appeal is not claimed, *here*, by any party legitimately entitled to inquire into the correctness of the proceedings before the Judge of Probate. The Veazie Bank, at the best but a mere garnishee of a debtor to the estate of the deceased, has no such interest in the appointment of an administrator upon that estate as enables it, under our statutes, to appeal from the decree of the Probate Judge, making such appointment.

And it ought to be understood that, *in order to entitle him to be heard in this Court*, sitting as the Supreme Court of Probate, it is the duty of every appellant from a decree of

a Probate Judge, *as a preliminary proceeding*, to establish his interest in the subject matter of the decree from which he claims an appeal, and that this is as essential to his standing in Court here, as it is to show that he has duly claimed an appeal and filed his bond and reasons thereupon according to law.

And it is not a mere remote and contingent interest, or a wish dictated by whim or policy, without any pecuniary interest to be directly affected by the decree, that will suffice.

Thus it has been held that a person entitled to a distributive share in the estate of a residuary legatee has no right to appeal from a decree allowing the executor's account, but such appeal must be claimed by the legal representative of such residuary legatee. *Downing* v. *Porter*, 9 Mass., 386.

"A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree," says SHAW, C. J., in *Wiggin, Adm'r*, v. *Swett*, 6 Met., 197.

If it ever could have been seriously supposed that a debtor to the estate of a deceased person could interpose an appeal from a decree granting administration upon the estate, and thus indirectly indefinitely postpone or defeat the assertion of a claim against himself, it was settled in *Swan, App't*, v. *Picquet*, 3 Pick., 443, that he *could not*.

The alleged debtor of a debtor who denies the existence of his indebtment to the debtor of the estate is quite as remote. It will be time enough for him to call in question the jurisdiction of the Court passing a decree appointing an administrator when he is required to answer to the party appointed. He cannot be permitted to volunteer in an independent proceeding not necessarily affecting his own rights. To allow him to do so would be to suffer every individual in the community to intervene, to the embarrassment of probate proceedings,—*quia timet*,—*quia odit*,—or for any one of the various motives that may cause a man to entertain a wish in the premises, aside from a pecuniary interest in the subject matter of the decree.

"In legal acceptation, a party is aggrieved by such decree only when it operates on his property or bears upon his interest directly." *Deering* v. *Adams*, 34 Maine, 44.

And, as in the last named case, the Court held that the various questions embraced in the reasons of appeal were not before them and could not properly be considered, so *here*, for want of parties competent to make a valid appeal, the question of jurisdiction in the Court below cannot be entertained.

The right of appeal must be shown before the decree can be either reversed or affirmed. No case is before us (or was before the Judge at *Nisi Prius*) in which the validity of the decree appealed from could properly be determined. We will not establish a precedent for proceedings so irregular as this appeal, by intimating an opinion here what the decision of the Court might be upon the question which the appellants seek to raise, if presented upon proper plea and proof, in the case of *Bowman, adm'r*, v. *Veazie & trustee*.

Appeal dismissed with costs for the appellee.

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

TAPLEY, J., concurred in the result.

CYNTHIA S. LEATHERS, *Adm'x*, *versus* JAMES GREENACRE.

At common law, a will of personal property, written in the testator's own hand, without seal, though no witnesses were present at its publication, is good; and no particular form of expression is material, if only the testator's intention is manifest.

By R. S., c. 74, § 18, "a soldier in actual service, or mariner at sea, may dispose of his personal estate and wages," as he might have done under the common law.

The terms "in actual service," and "engaged in an expedition," are synonymous.

The term "expedition" is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle.

If, during the late rebellion, — and after he had been mustered into the military service of the United States, but while he remained in barracks, or while thus quartered at any military station in one of the loyal States not exposed to the incursions of the enemy, and before he had crossed over to the seat of war with his regiment to take part in the hostilities existing there, and before he had begun to move under military orders against the foe, — a soldier had made a will without observing the usual statute formalities, it would not be deemed the will of a "soldier in actual service," and therefore not entitled to probate as such.

But having marched into the enemy's country from which he never returned, and encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters and not, at the time of making his will, occupied with any present movement of the troops, but was on some service detached from his own regiment, he would be deemed a "soldier in actual service," and his will be sustained if good at common law.

In August, 1862, J. B. L. enlisted in the first regiment of Maine cavalry, and was thereafterwards, in the same month, mustered into the U. S. military service. March 6, 1863, while lying in camp at Stafford C. H., Va., he wrote a long letter to the defendant, (with whom he had previously deposited the two notes mentioned in his letter,) in which he said: — "As life is uncertain, I will give you my wishes in regard to my property, if I should fall here." "The face of the note that" G. H. L. "owes me and now in your hands, and also the note against" C. S., "and interest, I want you to distribute among my brothers and sisters as you think proper, and all other property to my wife, (naming her) and for her to pay my debts," (signed.) March 2, 1864, he started on a raid to Richmond in company with others under military orders, was captured and died in prison, March 16, following; — *Held*, that J. B. L. was a "soldier in actual service," when he wrote the letter, and that it was a will entitled to probate.

ON FACTS AGREED.

The facts appear in the opinion.

D. D. Stewart, for the plaintiff, submitted an elaborate brief; but owing to the view taken by the Court, a report of but one point becomes necessary.

Prior to writing the letter, Leathers had been in no "actual military service," nor was he in any until the following January, a period of ten months afterwards, and then only in some unimportant raiding.

The English statutes, 29 Car. 2, c. 3, and 1 Vict., c. 26, § 11, are exactly like ours. Under this, the English courts

have invariably held that, to entitle a soldier to claim the benefit of its provisions, he must be, at the time of making his will, actually out upon an expedition. If actually engaged upon an expedition, the will would be valid whether verbal or written. No case can be found where the will of a soldier, not duly drawn and witnessed like those of other persons, has ever been allowed, except when engaged in actual warfare, and out upon an expedition. The word "actual" is significant, and means what the authorities all hold, that the soldier must be engaged in actual warfare, and to be so, he must be out on an expedition. *Drummond* v. *Parish*, 3 Curteis, 522. In the goods of Hill, 1 Robertson, 276. In the goods of Admiral Austin, 18 Eng. L. & Eq., 598; 1 William's Ex'r's, 96, and cases cited; 1 Redfield on Wills, 191, and cases cited; *ex parte* Thompson, 4 Brad. Sur. R., 154. Many authorities hold that the soldier must not only be *in expeditione*, but also *in extremis*. 1 Redfield on Wills, 190; *Hubbard* v. *Hubbard*, 4 Seld., 196.

In *Bowles* v. *Jackson*, 1 Spink's Eccl. & Ad. R., 294, the facts were as follows: — Alfred Jackson, the deceased, was a captain in the 30th regiment infantry, and stationed with his regiment at Neemuch in Bombay, 1839. On Aug. 14, 1839, he received orders to march, on Aug. 22, to attack the citadel of Joadhpore. On Aug. 20, he made and signed his will, but it was attested by only one witness. On Aug. 22, agreeably to orders, he marched with his regiment to attack Joadhpore; and while on the march, was seized with illness and sent back as far as Musserabad, where he died on Oct. 13, following. Sir John Dodson, in delivering the opinion of the Court, said: — "I am of opinion that, in this case, the military privilege does not apply. It cannot be said that, at the time this will was made, this gentleman was *in expeditione*. The orders to march were not immediate; he had full time to make, and he did make a will; but unfortunately, not in accordance with the requisites of the law. Will rejected."

This case is decisive of case at bar. Deceased in camp

when he wrote the letter, in good health, expected to "see fighting in the spring," did not, however, until a year afterwards; he had ample time and opportunity to make a will in conformity with the law. No occasion to allow him privileges not common to others, particularly when such privileges will operate greatly to the disadvantage of his wife and legal heirs.

The exceptions should be applied with great strictness. In the goods of *Henry Corby*, 29 Eng. L. & Eq., 604, and cases above cited. And it is the general policy of the law that wills must be executed in conformity to its provisions or they must be held inoperative. *Tucker* v. *Scammon*, 7 Met., 204; *Thayer* v. *Wellington*, 9 Allen, 283.

J. S. Rowe, for the defendant.

BARROWS, J. — The plaintiff, widow of John B Leathers formerly of St. Albans in this county, having been duly appointed administratrix upon her late husband's estate, brings this action of trover against his brother-in-law under the following circumstances: — John B. Leathers enlisted in the First Maine Cavalry Regiment and was mustered into the service of the United States in August, 1862, and continued in the service until his death, which took place at Richmond, where he was held a prisoner by the rebels, March 16, 1864. A few days after his enlistment, and before he left this State, he entrusted to the defendant two promissory notes payable to himself, with written directions to "collect them and let any one of his friends who needed them most" have the proceeds, in case he gave no further directions. The defenddant collected one of the notes and invested the proceeds in a bond of the city of Bangor which he now holds, together with the other note which, though admitted to be good, has never been collected. Previous to his enlistment, Leathers had been engaged in trade at St. Albans in company with one Tracy, but the business was broken up and the partnership dissolved in the fall of 1861, by the attachment and sale (at the instance of their creditors) of the company

property which proved insufficient to meet their indebtedness, from $300 to $500 of which still remains unpaid. Leathers also owed private debts still unpaid to the amount of at least $600. His entire property, real and personal, aside from this claim against the defendant, according to the appraisal in the inventory, was but a little more than $1000, and no allowance or provision has been made for the widow. After her appointment as administratrix, and before the commencement of this suit, she made a demand upon the defendant for the bond and note, and he declined to give them to her, though then and still in his possession. He bases his defence upon a letter from Leathers written at Stafford Court House, Virginia, March 6, 1863, containing matter of the following tenor.

* * * * * "In regard to the Skinner note want you to do as you think best with the money if paid to you. Most likely you have arranged it before this. In regard to my other affairs at home think Cynthia (the plaintiff) will manage them somehow."

"Stafford Court House, Va., March 6, 1863,

"As life is uncertain I will give you my wishes in regard to my property if I should fall here in the service of my country. The face of the note that Gilbert H. Leathers, my brother, owes me and now in James Greenacre's hands and also one other note, against C. Skinner of St. Albans, and interest, I want you, James Greenacre, to distribute among my brothers and sisters as you think proper, and all other property to go to my wife Cynthia and for her to pay my debts, there being only one debt due from me which is due Alphonso D. Leathers, for other debts are company debts. "John B. Leathers.

"The weather is cool to-day and we are expecting Gen. Hooker to inspect the brigade in a few days, and then we expect to join our regiment, and most likely we will see some fighting this spring as I think the Army of the Potomac are well rested and are anxious to get home.

"John B. Leathers."

Now it is plain that, whether this letter is entitled to probate as a soldier's will or not, inasmuch as it never has been presented to the Probate Court and admitted to probate, it could be of no avail in defence of this suit brought by the legal representative of the deceased, were it not for the stipulations which the parties have seen fit to make in reporting their case. No will of the deceased having been presented for probate, the plaintiff was in good faith duly and regularly appointed administratrix, and gave her bond pursuant to R. S., c. 64, § 14, conditioned among other things, to deliver the letters of administration into the Probate Court in case any will of the deceased should be thereafter duly proved and allowed, — to administer according to law all the goods, chattels, rights and credits of the deceased, — to render her account thereof, and to pay and deliver any balance, or any goods, chattels, rights and credits remaining in her hands upon such settlement to such persons as the Judge of Probate should direct; and while her authority remains unrevoked she not only has the right but *is bound* to use due diligence to secure and collect the outstanding credits belonging to the estate, and the custodian of an alleged will cannot set it up to defeat her lawful claim until it shall have been duly proved and allowed.

It is to be regretted, under the peculiar circumstances of the present case, that we are not at liberty, upon this report, to dispose of it in accordance with this obvious view; for, even if we find that the letter above recited is entitled to probate as a valid will of personal estate, still the claims of the beneficiaries referred to in it must be postponed to those of creditors, and to those of the present plaintiff, the widow of the deceased, should she, as she undoubtedly would, waiving the provision made for her in it, when it shall have been proved and allowed, ask and receive an order of allowance from the Probate Judge. Looking at the condition of the estate, it seems hardly probable that, when these claims shall have been satisfied, anything will remain to be distributed according to the request in the letter. But

the defendant has stipulated and the plaintiff agreed that, if any action by the Probate Court upon the paper above recited would make the defence effectual, the case shall be treated in the same manner as if such action had been had before the commencement of this suit, the defendant binding himself immediately to take the necessary steps in the Probate Court in accordance with the opinion. If the paper had been allowed by the Probate Court as the will of the deceased, it would have become the duty of the plaintiff forthwith to return into the Probate Court her letters of administration, which constitute her authority to commence and prosecute this action, and she could thereafterwards represent the estate only under letters testamentary or letters of administration with the will annexed, neither of which have ever issued to her. Under the foregoing stipulations, it becomes necessary, then, for the Court to determine whether this paper is entitled to probate as the will of John B. Leathers.

No one who reads it can doubt that it falls within the general definition of a will, — which is said upon good authority to be "the declaration of a man's mind as to the manner in which he would have his property or estate disposed of after his death." 1 Jarman on Wills, 1.

It is not attested according to the implied requirements of R. S., c. 74, § 1.

Was the decedent relieved by his peculiar position from observing the formalities required in ordinary cases? Is it a valid will at common law?

Wills are of two sorts — *written* and *verbal*, or *nuncupative* — the latter depending merely upon evidence of the declarations of the testator, made *ore tenus*, in the presence of witnesses and subsequently reduced to writing.

Although Swinburne lays it down, (pt. 1, § 3, pl. 19,) that the naming of an executor is indispensable to the validity of a will, yet that idea has long been abandoned in England, and never was received on this side of the Atlantic; so that we need trouble ourselves with no supposed

distinction between wills and testamentary papers arising from that source. And even while the distinction prevailed in England, such a paper was wont to be held binding upon the administrator under the appellation of a codicil, the ancient definition of which was, according to Swinburne, (pt. 1, § 5, pl. 2,) "a just sentence of one's will touching that which any would have done after their death, *without the appointing of an executor*, — an "unsolemn will,"—differing only from the general definition which the same ancient writer had previously given, (pt. 1, § 2,) of *a will*, in the single point that no executor was named therein. The definition is obsolete. With us it is not uncommon to add a codicil for the purpose of naming an executor where it has been omitted in the will, and a paper of unmistakable testamentary character is none the less a will because no executor is therein named. Our statutes provide for the granting of administration *cum testamento annexo* in such cases.

It is unnecessary to determine whether, if the letter is a valid will, there is a constructive appointment of the plaintiff as executrix of it. She does not sue in that character, and, as we have already seen, if the letter is entitled to probate as the will of Leathers, under the stipulations in this report it is fatal to the plaintiff's suit.

At common law, a will of personal property written in the testator's own hand, though without signature, or seal, or witnesses present at its publication, upon proof of the handwriting, was held good. Nor was any particular form of expression material if only the testator's intention was manifest.

Letters of a character similar to the one produced by the defendant here, and even less definite and intelligible than this, have been repeatedly established as valid wills of personal estate. *Hubberfield* v. *Browning*, 4 Vesey, jr., 200, *in notis;* 3 Dane's Abridgement, c. 90, art. 12, § 1; *Boyd* v. *Boyd*, 6 Gill & Johns., 25.

Before the Statute of Frauds, (29 Car. 2, c. 3,) the ecclesiastical courts, to whose jurisdiction the establishment of

testaments relating to personal estate belonged, required no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. 1 Roberts on Wills, 147, 148.

It is to be observed that the restrictions of that statute did not extend to wills made by any soldier being in actual military service, or any mariner or seaman being at sea. Moreover, as that statute did not extend to the provinces, and never has been adopted in this State, it is no part of our *common law*, although we have statutory provisions in many respects similar, and some of them directly copied from it.

The validity of wills of personal estate, then, is to be determined by the rules and principles of the common law in this State, except so far as it has been changed by our own statutes. And by R. S., c. 74, § 18, soldiers in actual service or mariners at sea are so far relieved from the formalities to be observed by others in the making of their wills, that, either by written will or by nuncupation, they may dispose of their personal estate and wages as they might have done under the common law.

It is true that, since the mass of the people have grown more familiar with the use of the pen, nuncupations have deservedly fallen into disfavor, as being more likely to be the subjects of fraud, perjury, mistake or misrecollection. And in fact it was an attempt to establish a will of this sort, (in the case of *Cole* v. *Mordaunt*, given in note to 4 Vesey, 196,) by means of gross fraud and perjury, that brought about the enactment of the statute 29 Car. 2, c. 3, commonly called the Statute of Frauds, to which we have before referred. And now, in England, by statute, (1 Vict., c. 26,) and in Massachusetts, (General Statutes, c. 92, § 9,) and in New York, by the revised code, the right to make nuncupative wills is confined strictly to the soldier in actual service and the mariner at sea. As to any one belonging to either of these privileged classes, the right to dispose of his personal estate and wages still remains substantially as

under the civil law in the days of Justinian. "*Quoquo enim modo voluntas ejus suprema inveniatur, sive scripta, sive sine scriptura, valet testamentum ex voluntate ejus.*"

And in our State, under R. S., c. 74, § 18, nuncupations may still be made by other citizens under restrictions which have long obtained, and which it is unnecessary in this case to discuss. For whatever may be said of the extraordinary caution which should be exercised by the Courts in the establishment of *nuncupative* testaments, an olographic will, like the one before us in the present case, stands upon a quite different footing, and, proof of its authenticity being made, the main question is, — was the position of the writer such that he might lawfully make a will without observing the customary formalities?

The privileged military testament was first recognized when the army under Julius Cæsar became the ruling power in Rome. As finally confirmed and limited by the edicts and rescripts of that great lawgiver and succeeding emperors, the privilege granted was, (as appears in Cooper's Justinian, Lib. II, Tit. XI., page 118, *et seq.*,) substantially *this*. The strict observance of formalities in the construction and execution of testaments was dispensed with in favor of all military persons, — *propter nimiam imperitiam eorum*, — on account of their unskilfulness in these matters. (Note here the *reason why* the privilege was conferred.) "For although they should neither call the legal number of witnesses nor observe any other solemnity, yet they may make a good testament," — *videlicet, cum in expeditionibus occupati sunt*, — that is to say, "when they are in actual service;" "but when soldiers are not upon an expedition, and live in their own houses or elsewhere, they are by no means entitled to claim this privilege." And again: — "This privilege was granted by the imperial constitutions to military men to be enjoyed," — *quatenus militant et in castris degunt*, — "only during actual service and while they lived in tents. For, if veterans after dismission, or soldiers *out of camp*, would make their testaments, they must pursue the

forms required" of other citizens. "And if a testament be made in camp, and the solemnities of the law are not adhered to, it will continue valid only a year *after dismission from the army.*"

"Officers of the army and soldiers, who are actually in an expedition and not in a condition to observe all the formalities which the law requires in testaments, are relieved from observing those which their present state does not allow them to comply with." Domat's Civil Law, vol. 5, p. 296.

And such substantially is the privilege granted to the soldier under our laws, *propter nimiam imperitiam ejus*, and while he is in such a position that it cannot be reasonably presumed that he might obtain instruction from those learned in the law.

What now is the true meaning of the phrases "engaged in an expedition," "in actual service," (for the decisions recognize them as synonymous)?

That there must be actual warfare, in the prosecution of which the soldier is at the time engaged, is clear.

The will of a soldier, made while he is quartered in barracks at home, must be executed with the formalities required of others. *Drummond* v. *Parish*, 3 Curteis, 522.

And the same is true if, having left home, he is thus quartered in a peaceful colony. *White* v. *Repton*, 3 Curteis, 818.

So; where an officer in command of the Mysore division of the army stationed at Bangalore, a large and strongly fortified town in Southern India, made his will at that place; though he died while on a tour of inspection of the troops under his command. *In the goods of Hill*, 1 Robertson, 276.

And, in the case from 1 Spink's Eccles. & Ad. Reports, 294, *Bowles* v. *Jackson*, which, with such as those just before referred to, plaintiff's counsel claims as decisive in his favor, where the deceased, a captain in the infantry stationed with his regiment at Neemuch in Bombay in 1839, received orders, August 14, to march on August 22, to attack the citadel of Joadhpore, and thereupon made his will,

August 20, duly signed but attested by only one witness, and set out, August 22, upon the expedition as commanded, from which expedition he never returned, dying October 13, at Musserabad, it seems to have been held that the military privilege did not apply; that the officer could not be said to have been *in expeditione* when the will was made; that the orders to march were not immediate; that the deceased had full time to make and did make a will, but unfortunately not in accordance with the requisites of law, and therefore the will was rejected. We have not had access to the volume referred to, and accept the citation as made by the diligent and learned counsel, but it is manifest that the value of that case, as an authority in the present, may depend upon historical and topographical facts not here stated. If the English court viewed Jackson's will as having been made in the peaceful presidency of Bombay, the oldest of the British possessions in India, at Neemuch, where there was a regular cantonment of British troops, many leagues from the contemplated scene of hostilities, and before he departed to take part in the Affghan war, (which broke out in 1839,) or in some movement of the troops designed to quell the insubordination of some petty and distant Rajah, although he was under orders to march at a future day, the case would be simply consonant with *White* v. *Repton*, and other cases which establish beyond question the doctrine that the soldier must be engaged in an actually existing warfare, and not merely belong to a garrison or standing army not employed in hostile operations.

Doubtless if Leathers had written this letter after he had been mustered into the service of the United States, but while he remained in barracks at Augusta, or while thus quartered at any permanent military depot or station in one of the loyal States not exposed to the incursions of the enemy, before he had crossed over into Virginia with his regiment to take part in the hostilities existing there, and before he had begun to move under military orders against

the foe, we should feel bound to say that this was no valid will and that it is not entitled to probate as such.

But having marched into the enemy's country, from which he never returned, being encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters, and not at the time of writing occupied with any present movement of the troops, but was apparently on some service detached from his own regiment, we cannot say that he was not a soldier *in actual service, engaged in the great expedition* which cost so many lives, but which after long delays resulted in reëstablishing the authority of the government over the revolted States. The term expedition is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle.

To limit the soldier's privilege to those excursions from camps or quarters in the enemy's country which are designed to bring on an immediate engagement, would be to defeat it for the most part, except as to mere nuncupations, the proof of which resting in the breasts of those who are similarly exposed may never be made available to the soldier's friends.

A member of the First Maine Cavalry, in camp at Stafford Court House, the deceased was "in actual service" and "engaged on an expedition," though the orders to saddle, mount and ride on the raid toward Richmond, upon which he was taken prisoner, were not received until months afterwards. *Propter nimiam imperitiam ejus*, and because he was in no condition to learn and observe the formalities elsewhere required, *valet testamentum ex voluntate ejus.*

And the military testament is not to be confounded with merely nuncupative dispositions made by those not privileged as soldiers in actual service, or mariners at sea. And so the argument which the counsel for plaintiff bases upon the statements in the letters as to the health and good corporeal condition of the writer, and upon the length of time

that elapsed after the date of the alleged will before his death, cannot avail. If he belonged to the privileged class he might make a valid written testament without being *in extremis*. Whether a nuncupative will made under like circumstances would be good, it is unnecessary here to decide. We have seen that wills made under such circumstances that the privilege attaches are held valid for a year after the soldier quits the service. Leathers remained in the service till his death, and, so far as appears, was a dweller in camp until he became a prisoner.

While it is true that the policy of the law is well settled to regard wills as inoperative unless executed with the formalities which the law requires as safeguards against imposition, it is also true that the exemption of soldiers in actual service and seamen at sea from the observance of these formalities has always been liberally considered; and so it is, as MERLIN states it, that "*their* form was properly to have no form."

Thus where a surgeon in the East India Company's service returned from England to join his regiment in India, in medical charge of recruits, and in July, 1838, when on board ship at Portsmouth, wrote a paper of a testamentary character, but appointing no executor or residuary legatee, and which was moreover unattested, it was determined that administration with the paper annexed passed to the mother of the deceased. *In re Donaldson*, 2 Curteis, 386. And a letter written by an invalided surgeon on his return home on board the regular line of steamers, addressed to his brother, and containing a disposition of his property, was admitted to probate as the will of a seaman made at sea, the writer having died before he reached England. *In re Saunders*, 11 Jurist, N. S., 1827.

See also, *Hubbard* v. *Hubbard*, 4 Selden, 196; *In the goods of Lay*, 2 Curt., 375; *exparte Thompson*, 4 Bradford's Surrogate Reports, 154, for examples of cases, where the privilege was held to attach as to seamen *at sea*.

In consonance with authorities of this description, and

adopting a like liberal construction in behalf of those who went forth in defence of our country in her recent great peril, we cannot hesitate to say that the paper here produced as the will of John B. Leathers must be considered as the privileged testament of a soldier in actual service, and engaged upon an expedition, and that, as such, it is entitled to probate.

In conformity, then, with the stipulations in the report, the entry in this case must be

Plaintiff nonsuit, without costs.

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

SAMUEL A. BARKER *& al. versus* INHABITANTS OF DIXMONT.

Towns were not authorized by chapters 226 or 227 of the Public Laws of 1864, to purchase "marine credits" with which to fill their quotas.

Neither does c. 298 of the Public Laws of 1865 ratify such a purchase.

Under a proper article in the warrant, a vote "to raise six thousand dollars for men to fill our quota, and that W. B. F. be a committee to procure men," &c., does not authorize the committee to purchase "marine credits."

A defendant town voted to "accept, and pay S. A. B. $435 each for ten men for three years' service, that S. A. B. give security that those men shall continue in the army three years, unless sooner discharged, or refund the money;" — *Held*, that the vote applied to "men" and not to "marine credits," and that the giving of security was a condition precedent.

BARROWS, J. — The plaintiffs claim that they made with the defendant town a legal contract, for the breach of which they say they are entitled to recover a considerable sum as damages.

What are the terms of this alleged contract?

What is the evidence offered by the plaintiffs to establish it?

In three several counts the plaintiffs substantially set out a furnishing by them of "ten naval or marine recruits *or*

credits, allowed as so many towards the quota of the defendant town, January 26, 1865, under an agreement on the part of defendants' agent to pay for each recruit *or credit* thus obtained the sum of four hundred and thirty-five dollars.

While it has been determined by this Court, in the case of *Alley* v. *Inhabitants of Edgecomb*, 53 Maine, 446, that it is no part of the corporate duty of towns, as such, to provide for the public defence, or to raise money to pay bounties or additional wages to volunteers or drafted men, and that they have no authority so to do unless by an express delegation of power to them for that purpose from the Legislature, it cannot be doubted that the supreme lawmaking power of the State may rightfully delegate the necessary authority to the towns, or may ratify and confirm such acts of the towns as the public exigency may seem to have required before the grant of such authority.

The validity of the various enactments confirming the acts and contracts of towns in procuring men for the service of the country by the payment of bounties, and for the payment of recruiting expenses, is not here controverted.

Was the contract which the plaintiffs say they made with the defendants' agent within the scope of such authority or ratification? How did the law stand at the time of the alleged contract?

By c. 227, Laws of 1864, provision was made, in § 1 for the payment by the State of a bounty of $300, subject to certain limitations, to each person who should thereafter enlist and be mustered into the service of the United States on the quota of this State, — and, in § 3, that no person should be entitled to receive from the State *or any town in it* any sum in addition to the bounty provided for in that Act, — and, in § 5, that towns and cities might raise, to be used in paying recruiting agents and other expenses of enlistment, a sum not exceeding twenty-five dollars for each man required of them by any call of the President, — and, in § 6, that any town or city might make temporary provision for

and pay to its recruits the bounty of $300 aforesaid, with right of reimbursement from the State; but payment of a greater sum than $300 per man should operate as a forfeiture of such right to reimbursement in the case of each man so overpaid.

Now, if this could be deemed a contract for the procurement of fresh recruits, it is plain that it was not only not authorized by, but was in direct contravention of the existing law, which prohibited, under a penalty, the payment of more than $300 bounty per man, and $25 to recruiting agents and for expenses of enlistment.

Sections 2, 4 and 6 of c. 226, approved Feb. 20, 1864, (cited by plaintiffs' counsel,) apply only to votes and acts of towns and cities between Feb. 21, 1863, and the date of the Act. The subsequent action of towns was intended to be controlled by c. 227, the provisions of which are as above stated, approved the same day.

Is the want of power cured by the Act of 1865, c. 298, approved Feb. 17, 1865?

Passing over the question whether such *prohibited* action of the towns could be made valid by subsequent legislative ratification, does the Act of 1865, c. 298, cover by its terms such a contract as is here alleged?

By § 1, the past acts and doings of towns in offering, paying or agreeing to pay bounties to those who have been or shall hereafter be mustered into the military or naval service of the United States, and in raising or providing the means to pay such bounties, and all notes and town orders duly issued for the benefit of volunteers, drafted men or substitutes of drafted or enrolled men, thus mustered or to be mustered, are made valid. By § 2, all contracts made by the municipal officers with any volunteer, drafted man or substitute, for the payment of any bounty under a vote of the town or city, and all contracts duly made with third persons, corporations or associations, for the purpose of raising means to pay bounties actually voted are made valid. By § 4, all votes of towns or cities to pay expenses of re-

cruiting for their several quotas, and all contracts made in pursuance of such votes are made valid. In § 6, authority is conferred upon towns, &c., to pay or agree to pay bounties to volunteers, drafted men or substitutes, required to fill their quotas under any call from the President or Government of the United States, where they were actually mustered into the service, and to pay to persons or associations, where they have advanced the bounty or by private subscription given a bounty to such men as were thus mustered in, *with certain restrictions*, prominent among which is the following: — "*Nor shall any bounty be paid by any city, town or plantation, for the assignment to such city, town or plantation, of any person heretofore enlisted or drafted and mustered into the service of the United States, except on subsequent re-enlistment, where such enlisted or drafted man has been or may be credited to the State without the payment of such bounty.*"

Upon examining the proof offered by the plaintiffs of a furnishing by them of "recruits *or credits*," the bearing of this restriction is at once apparent.

The allegations in the plaintiffs' declaration and the proof offered in support of them do not present a case to which either of the ratifying Acts passed by the Legislature in 1864, 1865 or 1866, can apply. We cannot overlook the fact that in each of the counts the plaintiffs make no allegation that they furnished recruits to fill the quota of the defendant town, without coupling with it the qualifying phrase, "*or credits.*" The account annexed is for "procuring ten naval or marine recruits *or credits*, &c. In the second count it is alleged that "in consideration that the said plaintiffs agreed and promised the said defendants to procure and have credited to said town in the proper office of the Government ten naval or marine recruits *or credits*, the defendants agreed to pay plaintiffs $435 for each recruit *or credit* thus obtained;" and the third count sets out a bargain on the part of the plaintiffs "to furnish ten naval or marine recruits *or credits*," and on the part of the defendants "to pay

therefor the sum of $435 for each recruit *or credit* thus furnished." The reiteration is remarkable, and cannot be supposed to be without signification. The proof of performance on the part of the plaintiffs consists of the order from the Acting Assistant Provost Marshal General, dated Jan. 26, 1865, by which it appears that "the following enlisted men of the Marine Corps, *ordered by the Provost Marshal General to be credited to the State of Maine under existing calls*, are hereby credited to the Fourth District as specified herein," appended to which are the names of ten men assigned to Dixmont, together with a transcript from the records (of credits) of the Provost Marshal of the Fourth District, substantially similar. No proof is offered that these men were enlisted under the call to which the meetings and votes of the town of Dixmont related, or that the plaintiffs had procured their enlistment or advanced any bounty to them, or become in any way responsible for any bounty to be paid to the enlisted men in case they should be thus assigned. With much to indicate that the case falls within the restriction in § 6, c. 298, no word of evidence is adduced to control these indications. In fine, notwithstanding the strenuous effort of plaintiffs' counsel to repel the imputation of "paper credits," it is impossible to read the plaintiffs' declaration, and look at the testimony offered, without being satisfied that the transaction was in fact the procurement of the reduction of the quota of the defendant town, by the allowance of credits for men already in the naval service of the United States, and "ordered by the Provost Marshal General to be credited to the State of Maine under existing calls, without the payment of any bounty whatever." The plaintiffs' counsel presents the case truly when he urges that "the State of Maine has had them passed to her credit as a part of the '300,000 more' which they were bound to have at the war, — the Fourth District has had them go to reduce their burthen under the same call, — the town of Dixmont has also had them credited on her quota, and thus saved her citizens from the draft which

impended over them." And this is all there is of it. Whether they were credited under such circumstances that a bounty could be legally paid to or for them does not appear. The contract not being authorized by existing laws, it is for the plaintiffs to bring their case clearly within the ratifying Act.

To reduce the quota of the town without adding a man to the effective force in the field, — to save the young and able-bodied citizens of the town from an impending draft by any negotiation except such as would furnish the required number of men, — to substitute the payment of money for the procurement of actual recruits, — it was no part of the design of any of our legislation to compass *such* ends as *these*.

It is needless to remark that towns had, by virtue of their organization in the outset, no power to raise or appropriate money for *such* purposes. No such power was conferred or designed to be conferred by any of the enabling or ratifying Acts respecting the doings of towns and town officers in these matters. Precisely the reverse was contemplated. The sole aim of this species of legislation, throughout the continuance of the rebellion, was to enable the citizens of the State to avail themselves of their municipal organizations to facilitate the ready, full and *faithful performance* of the grave duty which those citizens, collectively and individually, but not in their corporate capacity, owed to the general government. Evasion, commutation, expenditure of money for any other purpose than the procurement of men to fill the army to the required force, were not thought of, — or thought of only to be forbidden. Laws of 1864, c. 226, § 12, — of 1865, c. 298, § 6, above quoted, — of 1866, c. 59, § 4.

Of the men ordered to be credited upon the quota of a State as actually in the service, without the payment of bounty, each district and sub-district was entitled to its due proportion in reduction of its quota, without the payment of money to any person therefor. To open a competition among the sub-districts to secure by means of brokers and

agents the assignment of *more* than this due proportion, in order to avoid the draft, was not only unauthorized by any existing law regulating the powers of municipal corporations, but was directly opposed to the policy of the Acts we have referred to. Towns could enter into no legal or binding contract with any broker or agent for the procurement of such service.

And here the discussion of this case might well cease.

But aside from the want of power in a town to make a valid contract for the performance of such a service as the plaintiffs seem to have rendered here, there are other insuperable obstacles to the maintenance of the suit upon the evidence offered.

There is nothing in the action of the town to indicate that they contemplated the procurement of "credits" merely in reduction of their quota. Everything which they did looks to the procurement of *men*, of *recruits*, — and the alternative provision for "recruits *or credits*" seems to have been introduced by the plaintiffs for the first time, when they came to declare on the contract, in order to correspond with what evidence they had to offer of performance on their own part.

The article in the warrant for the meeting of Jan. 16, 1865, was — "to see if the town will raise *money to pay volunteers or drafted men*, and how much, to fill our quota," &c. And the corresponding vote was — "to raise six thousand dollars for *men to fill our quota*, &c. Chose W. B. Ferguson as *committee to procure men* to fill our quota," &c.

The article in the warrant, for the meeting of Feb. 22, 1865, reads thus, — "to see if the town will raise any further sum of money *to procure volunteer enlistments* to fill the quota of Dixmont under the last call for soldiers." And the town thereupon voted "that we accept, and pay S. A. Barker $435 each for ten *men*," (*not credits*,) "for three years' service; that S. A. Barker give sufficient security that *those men* shall continue in the army three years, unless sooner discharged, or refund the money paid for *those men*;" this latter proviso being utterly inconsistent with the idea

of the procurement of credits for men already in the service. We fear that the mistake as to the name of the contracting party was not the only "misunderstanding" in relation to this matter. Whatever the arrangement between Ferguson and Barker, to furnish ten marine recruits, being enlistments into the marine corps during the war of the rebellion,"—in other words, to furnish and receive "*credits*" in place of recruits, — may have been, it is plain that *the town* was no party to it.

They were prepared to pay $435 each for *ten men* for three years' service, — not for the names of men who had enlisted in the marine corps at some time during the war of the rebellion. Here, in this suit, a claim is made for the furnishing of "ten naval or marine recruits *or credits*," and proof is offered of the furnishing of "*credits*" only. The town may well reply, *non in hæc fœdera veni.*

Moreover the acceptance of the men to be furnished is coupled with a stipulation "that Barker shall give sufficient security that those men shall continue in the army three years, unless sooner discharged, or refund the money" paid for them. This is in the nature of a condition precedent to his receiving the money. It is not even suggested that such security has been offered. This objection, it is true, applies only to the plaintiffs' right to recover upon the strength of the action of the town at the meeting of February 22d, and if the plaintiffs had offered evidence that they had procured, under a contract with Ferguson, *men to fill* the quota of the town, instead of *credits to reduce* it, the action might have been maintained upon the proceedings of the former meeting.

But accepting, as conclusively proved, all that the government records in the case show, in the absence of other evidence, which, (if it existed,) the plaintiffs might readily have produced, the natural presumption is that the names we find upon the list of credits are those of men who were ordered to be credited to the State without the payment of bounty, and so there is an utter failure on the part of the plaintiffs to bring this case within any of the ratifying Acts.

There are two fatal defects in the plaintiffs' case, — want

of proof of an agreement on the part of the town to pay for "credits" instead of men, — and want of power in the town to make a valid contract for the purchase of such credits even had they been so disposed. *Plaintiffs nonsuit.*

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

Paine, for the plaintiffs.

J. A. Peters and *Brown*, for the defendants.

WILLIAM A. FRYE *versus* JOSEPH M. MOOR *& al.*

Where the defendants caused an unnatural accumulation of water in a reservoir above the millpond whence the plaintiff and defendants draw the water to propel their respective mills, and subsequently let it pass into its ordinary channel over the plaintiff's flume; — *Held*, that, if the water was rightfully accumulated, the defendants must exercise ordinary care in letting it out; but if it was retained without legal authority as to the plaintiff, they let it out at their peril.

If the plaintiff's flume was sufficient to withstand the pressure of the natural freshets, it will be no defence that the flow caused by the defendants did not exceed in magnitude some of the accumulations of water arising from natural causes.

A verdict, being an entirety, cannot be set aside as to one count, and retained as to another.

ON MOTION to set aside the verdict as against the weight of evidence, &c.

It appeared that the water which propelled the plaintiff's gristmill and also the defendants' sawmill, was raised by a dam across Sebasticook river, the outlet of, and one hundred rods below, Newport pond; that, in 1854, the defendants erected a reservoir dam directly at the outlet of the pond, the object of which was to produce a flow of water for preservation and use during the season of drought; that the reservoir dam was the defendants' property and under their entire control; that the effect was to flow the shores of the pond to the injury of abutters, causing much complaint

from them at times. At the same time, the large amount of surface thus flowed, from 5000 to 7000 acres, and at the depth of about three feet above its natural level, produced a vast accumulation, which, moderately expended, furnished water sufficient for the season's supply. Care had been taken to so construct the dams, both at the mills and at the outlet, as to meet the contingencies of flood and drought by waste ways and flash boards.

The plaintiff's mill was driven by water taken from the lower dam by a flume.

Early in the season of 1862, the defendants shut down the gates of the reservoir dam, causing a large accumulation of water in the pond. Land owners called for damages for flowage. Plaintiff refused to contribute towards paying said damages, when the defendants notified the plaintiff they should let out the water, and did so, thereby causing the injury sued for in this action.

The verdict was for the defendants, and the plaintiff moved it be set aside as being against evidence.

Whitney & Paine, for the plaintiff.

J. A. Peters, for the defendants.

TAPLEY, J. — The defendants caused an *unnatural* accumulation of water in a reservoir above the mill of the plaintiff. If accumulated rightfully as to this plaintiff, they must at least exercise ordinary care in letting it again pass into its ordinary and accustomed channels over the plaintiff's property. If accumulated wrongfully and without any right or authority as against this plaintiff, if he lets it into its ordinary, and accustomed channels, he does so at his peril, and he must be held responsible for the consequences of his *wrongful* act.

The present accumulation was caused by closing the gates to aid in passing some logs down the stream a short time before the injury occurred. The day of the injury, and a few hours before it occurred, one of the defendants notified plaintiff, that, by directions of his father, (the other defend-

ant,) he should let the water out of the pond if the plaintiff would not pay his proportion of the money for flowage around the pond. The plaintiff refused to pay, and the defendants caused it to be let out by opening *all* the gates in the dam by which it was retained.

Before it reached the plaintiff's property it passed into another reservoir, with which the plaintiff's flume was connected at the lower dam. At this time there were three other places than the plaintiff's flume in the dam, through which the extra *amount* of water might have been safely passed by the defendants, and the danger to plaintiff's property avoided. These places were the "tannery waste way," and the "log sluice and waste way," which the defendant says would vent *more* water than the two gates could supply. The "tannery waste way" was planked up within two feet of the top of the dam, and "the log sluice and waste way were all planked up within three or four inches of the top of the dam." "There was no escape for the water except through the flume or over the dam."

The defendant, George L. Moor, says he told Libby "to go and open the gates, and regulate *the water* on the lower dam *by letting it off through the sluices*," thus clearly recognizing, himself, the *necessity* of giving it other vent than through the plaintiff's flume. Libby *neglected* to do it, and let all the accumulated waters down upon the plaintiff's property, taking *no precautions* to prevent the injury, which almost necessarily and inevitably followed, showing not only a want of ordinary care on his part but gross carelessness, for which the defendants, whose agent he was, and under whose directions he was acting, are responsible. The result was, the plaintiff's flume was injured by the passage of the accumulated water.

These facts are *indisputable*, and *clearly apparent* from the evidence.

To this the defendants present two defences.

1st. That the plaintiff's flume was weak and improperly constructed.

The evidence shows that it was sufficient for all *ordinary contingencies* and flow of water, and sufficient to withstand the pressure of the *natural* accumulations, whether in the one season of the year or another; and if it was weak and known by the defendants, as they assert, there was so much more need of *care* in letting on more than the ordinary pressure of water.

2d. It is said that thus opening the gates did not let down more water than had at times before been seen during the spring freshets. That "the water ran over the dam in the spring freshet of 1862."

This defence assumes the right upon the part of the defendants to create a freshet whenever they please, without incurring responsibility for the injuries it produces, provided it does not exceed in *magnitude* some which have arisen from *natural* causes. Such a defence cannot prevail, and we understand the jury were distinctly so instructed.

The verdict is *manifestly against the evidence, and the weight of evidence and the law applicable thereto.*

No testimony or evidence has been presented to us applicable to the second count in the writ, and defendants' counsel ask that the verdict shall not be set aside as to that count.

The *verdict* being an entirety cannot be *set aside* as to one count, and *retained* as to another. There cannot be more than one *general verdict*, in a case upon which to render judgment. If the verdict was for plaintiff, and was in this particular right, but there was an erroneous assessment of damages, upon a motion for new trial on account of excessive damages, there would seem to be no difficulty in sending the case back for a new assessment of damages alone. Cases may also arise upon exceptions, where the erroneous ruling was *entirely* upon the rule of damages in the case; but the case at bar does not call for a decision of this question and does not present a case where it is practicable to exercise such a power. *Motion sustained.*

Verdict set aside and new trial granted.

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

APPENDIX.

STATE OF MAINE.

EXECUTIVE DEPARTMENT, AUGUSTA, Feb. 15, 1867.

To the Honorable Chief Justice and Associate Justices of the Supreme Judicial Court.

A bill having been reported in the House of Representatives, looking to the assumption by the State of a portion of the municipal debts, a copy of which, House Document, No. 64, I enclose, in view of the probable passage of this bill in some form, embracing the objects and based on the principles indicated therein, in which case my action will be required, I avail myself of the privilege provided by the Constitution, to ask the opinion of the Court upon the question whether the debts contemplated in this bill may properly be regarded as for war purposes, so that the proposed assumption beyond the amount of three hundred thousand dollars may come within the purview of the constitution.

J. L. CHAMBERLAIN, *Governor.*

Bangor, Feb. 18, 1867.

Sir:—The undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answer to the inquiry contained in your communication of Feb. 15th.

Numerous amendments to the original constitution of the State have been adopted, in accordance with its provisions. The sixth amendment, in pursuance of the resolve of July 20, 1847, is in these words:—

Article 6. "The credit of the State shall not be directly or indirectly loaned in any case. The Legislature *shall not create* any debt or debts, liability or liabilities, in behalf of the State, which shall singly, or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed three hundred thousand dollars, *except to suppress insurrection, to repel invasion, or for purposes of war;*

but this amendment shall not be construed to refer to any money that has been or that may be deposited with this State by the government of the United States, or to any fund which the State shall hold in trust for any Indian Tribe."

Prior to this amendment, there was no constitutional limitation to the power of the Legislature to create debts in behalf of the State. The general design was to provide a perpetual check against rashness or improvidence. "The credit of the State shall not be directly or indirectly loaned in any case." This indicates the great purpose of the amendment. But as there may be occasions for indebtedness for State purpose, authority is given to create a debt to the amount of three hundred thousand dollars. Indebtedness on the part of the State is limited to this amount. The object of the amendment cannot be misunderstood. Its binding force cannot be denied. It is the calm and deliberate expression of the popular will, embodied in the solemn form of a constitutional restriction upon legislative action.

But it was obvious that exigencies might occur, that pressing necessities might arise, when the safety and well-being of the State would require that this limitation should be disregarded. The amendment, therefore, is made subject to the following exceptions:—"to suppress insurrection, to repel invasion, or for purposes of war." These exceptions relate to the general duties of government. They authorize the Legislature to *create* a debt, when necessary to discharge obligations arising under the constitution of the United States, or to protect its own citizens in the full enjoyment of life, liberty and happiness.

The debt must be created by the State. It must be to provide for the special objects distinctly set forth in the exceptions in the sixth amendment, and for none other, whenever the constitutional limit has already been exceeded. These are "to suppress insurrection, to repel invasion, or for purposes of war,"—great national emergencies requiring prompt and energetic action. Insurrection must exist, else it cannot be suppressed. The public enemy must have in-

vaded the territory of the State or nation, else he cannot be repelled. There must be a state of war imminent or existing, else there can be no purposes of war. The exception looks to the present — insurrection, invasion or war as actually existing or impending. The government of the United States can rightfully call on the State in any of these contingencies, and it is the duty of the State to respond to the call. The existence of these conditions alone give the Legislature a right to create a debt exceeding in amount the constitutional limitation. The debt thus created must be to meet these exigencies, and not to pay the existing and outstanding liabilities of corporations or individuals.

The Act to which our attention is called, is entitled "An Act to *equalize* the war expenditures of the several cities, towns and plantations." The title of the Act clearly expresses its object — to *equalize* the war expenditures, by relieving some cities, towns and plantations in part from debt voluntarily contracted, and imposing the burden upon the rest.

By section 1, the Governor and Council are "to examine the accounts or claims of the several cities, towns and plantations of this State, for *expenditures made and liabilities incurred* in furnishing soldiers to the State under the several calls of the President of the United States therefor, to suppress the late rebellion, and shall determine the amount which shall be allowed or reimbursed to each respectively, which adjustment shall be made on the following basis, viz.: allowing to each city, town or plantation an amount not exceeding its actual expenditures necessarily incurred, having reference only to the *amount paid as bounty and expenses attending the same*, in which adjustment unnecessary bounties and expenses shall be reduced to a just basis," &c.

By section 2, when the above amounts are ascertained and certified to the Treasurer, "he shall notify the several cities, towns and plantations of the amount allowed each, and shall execute, in due form, the bonds of the State *for*

their benefit, in sums of one thousand, five hundred, and one hundred dollars, to the amount of one third of the whole sum allowed, not exceeding two millions of dollars; but if one-third exceeds two millions, then each shall receive its proportion of that sum. Said bonds shall be payable at any time within twenty years, with interest coupons attached, payable annually, at the rate of six per cent.," &c.

By section 3, "The bonds belonging to any city, town or plantation that votes so to do, shall be sold by the State Treasurer, if they can be sold at par, and the amount so received shall be paid to the treasurer of such cities, towns and plantations, and applied to the payment of the indebtedness thereof, *or if not in debt*, to pay State taxes, current town expenses, or for the support of schools, as the town may vote," &c.

The proposed bill in its very terms negatives the existence of the excepted cases, in which alone the constitutional limitation upon such State indebtedness may be exceeded. There is no insurrection to be suppressed, no invasion to be repelled, no war for the purposes of which money may be needed. The bill is to *create* a debt on the part of the State, with which gratuitously to reimburse the numerous municipal corporations therein for expenditures voluntarily incurred by them, for the payment of which they now are, and the State is not now liable, but is in and by its passage hereafter to be made liable.

During the existence of the rebellion, the Legislature by various Acts created a debt "for the purposes of war." Of such debt, the obligation of payment is as unquestionable, as the right to create it is undoubted. This debt, thus created, largely exceeds the constitutional limitation upon State indebtedness.

The municipal corporations of the State had no legal right to give bounties or contract debts for any such purpose. It was not within the scope of their power. Nevertheless, without legal authority, they attempted to create debts for that object. They were under no obligation to do

so. The Legislature by subsequent enactment ratified their past doings in relation to bounties, and rendered valid what would otherwise have been held invalid. At the same time it empowered them within certain limits to create a future indebtedness for similar purposes. But the indebtedness thus to be created was by and for those corporations. The debts were theirs. They were voluntarily incurred, each corporation acting for itself and determining the amount of its own liability. These debts now exist and are obligatory upon the respective cities, towns and plantations by which they were created. Being debts, they are like other debts, no matter what their origin, nor how generous the purpose of their creation.

The cities, towns and plantations, in their action under the several statutes to which we have referred, were in no respect, either directly or indirectly, the agents of the State, nor did they incur any liability in its behalf. They had no authority express or implied to do that. The Legislature in its various enactments made such provisions, in the way of bounties and of rendering aid to the families of soldiers while in the service, as it deemed just and fitting. The State has honorably discharged all its constitutional obligations. It empowered no municipal corporation to act as its agent — to supplement its deficiencies — to supply its omissions — or to remedy its shortcomings. It did its own work and did it well. It indicated the precise limit within which it would reimburse the several cities, towns and plantations for their expenditures. Outside of those limits, the condition of any municipal corporation was the same as that of any individual, who, not being liable to serve, should procure a substitute or advance funds or do any other act in furtherance of the common cause of the nation.

If the cities, towns and plantations were the agents of the State, (which it is manifest they were not,) then their whole indebtedness incurred for bounties and the expenses attending the same is the present debt of the State, for the payment of which justice would require that immediate

provisions should be made. While the people of Maine have imposed restrictions upon the Legislature, by prescribing limitations upon its power to create a debt, it never repudiates in whole or in part. If these corporations were the agents of the State, and the debt was created by its agents in its behalf, then the act wholly fails to discharge what in such event would be its manifest duty; for assuredly, debts contracted at its own instance, by its agents on its own account, should be held sacred. But such is manifestly not the view of those who favor the passage of the Act under consideration, for its very language repudiates the idea of any present State indebtedness, and proposes to assume a fraction only of the existing liabilities of the cities, towns and plantations of the State.

By section 3, the proceeds of the bonds are to be applied to the payment of the indebtedness of the cities, towns and plantations, and "if not in debt, to pay State taxes, current town expenses, or for the support of schools, as the town may vote." The constitutional limit of three hundred thousand dollars has been passed. The proposition is to still further exceed that limitation. The debt in and by this bill to be created, among other objects is "to pay State taxes, current town expenses, or for the support of schools." Is such a debt *created* to suppress insurrection, to repel invasion, or for the purposes of war? The proposed bill particularly specifies the appropriation to be made of the bonds of the State, or of the funds derived from their sales, and they are for none of the purposes indicated in the exceptions to the sixth amendment to the constitution.

It is not enough that a debt has been created by some corporation or individual for the "purposes of war." If it were, the Legislature might assume the debts of any sister State or of the United States as well as of individuals. They might assume debts thus arising from any of the past wars in which the nation has been engaged. The authority is not given to create a debt to pay debts howsoever and by whomsoever created, though for purposes of war. The

State must by its constituted authorities create the debt in its inception and for the purpose specially excepted from the general prohibition of the amendment. Whatever the State in its corporate capacity expended, or whatever, if it were an individual, it would be bound to pay as a just debt for the purposes of war, may be provided for by creating a debt exceeding in amount the constitutional limitation of three hundred thousand dollars. But a debt *created* by the Legislature for and on account of the State and on its credit differs most essentially from the assumption of a debt created by others and on their account and credit. The constitution authorizes under certain conditions the former, but not the latter.

The bill proposes to create a debt when none now exists. It is not a bill to create a debt to suppress insurrection, to repel invasion, or for the purposes of war. It does not purport to be. It is a bill to create a debt to pay the debt or expenditures of municipal corporations, in the creation of which the State was not a party, in the disbursement of which it was not consulted, and over which it had no control, and for the payment of which it is under no present liability.

The conclusion to which we have arrived, is, that the proposed bill to which you have called our attention, would, if enacted, be in plain violation of the constitution of this State.

JOHN APPLETON,	JONAS CUTTING,
EDW. KENT,	C. W. WALTON,
WILLIAM G. BARROWS,	CHAS. DANFORTH,
RUFUS P. TAPLEY,	J. G. DICKERSON.

TO HON. J. L. CHAMBERLAIN,
Governor of Maine,
Augusta.

TAXATION OF NATIONAL BANKS.

HOUSE OF REPRESENTATIVES, February 26, 1867.

Ordered:—That the Justices of the Supreme Judicial Court are hereby requested to give their opinions upon the following questions:—

1st.—Does the law of Congress creating National Banks and Banking Associations, require that all taxes assessed by virtue of State law on the shares of such banks shall be applied to the use and benefit of the city or town in which the same is located, where shares in such banks are owned in some other city or town in this State?

2d.—Are the provisions contained in sections three and four of a bill entitled "an Act providing for taxation of the property and stock of National Banks and Banking Associations in the State of Maine," now pending before the Legislature, a copy of which bill accompanies this resolve, inconsistent with the existing law of Congress?

"CHAPTER 126.—An Act providing for the taxation of the property and stock of National Banks and Banking Associations in the State of Maine.

"Be it enacted, &c.

"Sect. 3.—It shall be the duty of the assessors of any city or town, in which any National Bank or Banking Association is located, annually to inspect the list of names and residences of all the shareholders in every such bank or association in their respective cities and towns, and the number of shares held by each on the day at which, by law, taxes are required to be assessed; and to assess, upon the shares held by each shareholder, the tax hereinbefore provided for, and to make and deliver, or forward by mail immediately thereafter to the assessors of the respective cities or towns where said shareholders reside, if in this State, and in a city or town other than where such bank or association is located, a certificate under their hands of the taxes so assessed,

upon which shall be stated the residence of the persons, or the place of business of the corporation to whom the same are assessed, the number and value of the shares taxed to each, and the rate per centum of said tax.

"Sect. 4. — Upon receiving such certificate, it shall be the duty of the assessors of the towns so receiving them, as soon thereafter as may be, to issue their warrant for the collection of the same, in like manner as is provided by law for the commitment of other taxes, and the collector shall proceed to collect the same, and when collected, to pay the same to the treasurer of his town for the use of said town, and, in order thereto, shall have the same power and be subject to the same duties and liabilities for the collection of these taxes, as are now provided by law for the collection of other taxes in this State; provided, nevertheless, that, before issuing said warrant, said assessors shall compute what the taxes upon said shares would have been if assessed in such town, and if the same exceeds the sum so computed the excess shall be deducted from the respective assessments as made, and only the balance remaining shall be committed to the collector as aforesaid for collection."

Bangor, March 11, 1867.

To the questions proposed by the order of the House of Representatives under date of February 26th, we have the honor to answer as follows: —

By the Act of Congress of June 3, 1864, "to provide for a national currency," and for the organization of national banking associations, by § 40, it is enacted "that the president and cashier of every such association shall cause to be kept, at all times, a full and correct list of the names and residence of all the shareholders in the association, and the number of shares held by each, in the office where the business is transacted, and such list shall be subject to the inspection of all shareholders and creditors of the association, and the *officers authorized to assess taxes under State authority*, during business hours of each day," &c., &c.

The 41st section of the same Act, after making provision for taxation by the United States, proceeds as follows:— "Provided, that nothing in this Act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, *from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located and* NOT ELSEWHERE," &c.

By reference to the sections just cited, it is obvious that the valuation of shares and assessment and collection of taxes thereon are to be made at the place where the bank is located and by the municipal officers severally appointed for these specific purposes. These sections regard the capital of the bank as located where its business is done—following the rule adopted in this State as established by R. S. of 1857, c. 6, § 11, rule 1.

The *place* referred to is the municipal corporation in which the bank is located, and where the valuation of the shares must be taken, the assessment thereon made, and the amount assessed collected. It is one of the recognized incidents of taxation that the corporation by whose authority taxes are assessed and collected should expend the amount to defray its own necessary expenses and discharge its municipal obligations.

When the owner of shares resides at a place other than where the bank is located, it is obvious that, if the valuation of shares and assessment upon the same were made at the residence of such shareholder, it would be done in the very teeth of the Act, which in express terms prohibits their being done *elsewhere*. But that cannot be done indirectly, which if done directly, would be in clear violation of the Act of Congress.

To the questions proposed, we answer:—

1. The law of Congress creating National Banks and Banking Associations requires that all taxes assessed by virtue of State law on the shares of such banks shall be

applied to the use and benefit of the city and town in which the same is located, when shares in such banks are owned in some other city or town in this State.

2. The provisions contained in §§ 3 and 4, of a bill entitled "an Act providing for the taxation of the property and stock of National Banks and Banking Associations in the State of Maine," approved March 1, 1867, are not consistent with the existing law of Congress.

JOHN APPLETON, JONAS CUTTING,
EDW. KENT, C. W. WALTON,
WILLIAM G. BARROWS, CHAS. DANFORTH.

To HON. EPHRAIM FLINT,
Secretary of State, Augusta.

DISSENTING OPINION.

Belfast, March 28, 1867.

Sir: — The undersigned has the honor to submit his answers to the interrogatories proposed to the Justices of the Supreme Judicial Court by the House of Representatives, Feb. 26, 1867.

Two inquiries are made: —

1st. "Does the law of Congress creating National Banks and Banking Associations *require* that all taxes, assessed by virtue of State law on the shares of such banks, shall be applied to the use and benefit of the city or town in which the same is located, where shares in such banks are owned in some other town or city in this State?"

2d. "Are the provisions contained in sections three and four of a bill entitled 'an Act providing for the taxation of the property and stock of National Banks and Banking Associations in the State of Maine,' approved March 1, 1867, inconsistent with any existing law of Congress?"

These questions limit the field of inquiry to *the requirements* of the national banking law in regard to *the place* entitled to the benefit of the tax therein specified, and to the *consistency* of the enabling Act with the laws of Congress.

The place of valuation and assessment is material only so far as it throws light upon the matters inquired of.

In construing a statute, it should receive that interpretation which will give it effect, if this can be done consistently with its language and the fundamental law. The Legislature is the judge of the policy and necessity of a statute, and, within these limitations, it is the duty of the judiciary to uphold the judgment of the Legislature. When, however, a statute is of doubtful import, or there is an equipoise of meaning, it may receive that construction which best comports with public policy, convenience or necessity. These principles of interpretation should more especially be invoked where the statute of a State relates to an Act of Congress; it being a manifest duty, in such case, to endeavor to harmonize, and not to antagonize State with national legislation. Viewed in the light of these principles, in the judgment of the undersigned, the law of Congress is not of doubtful or difficult interpretation.

The forty-first section of the Act of Congress entitled "an Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, contains the following provisions, to wit:—"Provided that nothing in this Act shall be construed *to prevent* all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is there assessed upon other moneyed capital in the hands of individual citizens of such State. *Provided further*, that the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this Act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located;—*Provided* also, that nothing in this Act *shall exempt* the real estate of associations

from either State, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

The first Act of Congress providing for the organization of national banks, passed Feb. 25, 1863, contained no provision concerning State taxation, but the last section reserved the right of Congress, at any time, to amend, alter or repeal the Act; and the Act of 1864 is a re-enactment of the prior statute with several material amendments, including a recognition of the right of the several States to tax the shares in such associations, as has been decided by the Supreme Court of the United States.

If Congress had intended *to require* that all taxes assessed on the shares of national banks by State authority wherever owned shall enure to the benefit of the town or city where the banks are located, it would have said so in plain and unambiguous language, and not have left so grave a question to be settled by judicial construction. Such certainly is not the obvious meaning of the statute (§ 41.) That section establishes a rule of valuation, and limits the rate of taxation, but it does not designate the place to be benefitted by the tax. This standard requires, (1,) that the valuation shall be taken at the place where the bank is located, and not elsewhere; (2,) that it shall not be higher than that on other moneyed capital at that place; (3,) that the tax assessed thereon shall not exceed the rate imposed upon the shares of State banks in that locality. The obvious design of these provisions is to protect this kind of property against unequal taxation, by placing it on the same footing with similar property at the place where the banks are located, and by requiring that the tax assessed on *any* of the shares of the same bank shall not *exceed* the tax on the shares owned at that place; the rate of taxation on shares owned out of such place shall not *exceed*, though it may be less than the rate there imposed; in other words, the valuation at the place where the bank is located is made the *maximum* standard of valuation, and no higher tax can be imposed upon *any* of the shares of a National Bank than is there assessed on such valuation.

The words of limitation, "*and not elsewhere*," protect the shareholders who do not reside in the place where the bank is located from the liability to a double valuation. The previous language provides for a valuation at the place where the bank is located; this clause negatives the idea of another valuation. Without this restriction there might be two valuations in respect to shareholders residing elsewhere, and a conflict of authority might arise as to which should govern. These words are added to guard against such contingencies. The meaning of both restrictive clauses, taken together, is the same as if the Act had provided in terms, that the valuation, when taken, shall be taken *only* at the place where the bank is located.

In the further requirements in regard to the taxation of real estate, (§ 41,) and the provision that the books of the corporation shall be kept open for the inspection, not only of the assessors of the town or city where the banks are located, but *generally*, "to the officers authorized to assess taxes under State authority," the national banking law assimilates itself to the general theory of taxation. It makes no change in the State law, requiring that the tax on personal property shall be applied to the benefit of the place where the tax payer resides, but leaves it *optional* with the State Legislatures whether so to modify their legislation as to apply the tax of all the shareholders to the use and benefit of the place where the bank is located, as has been done by the Legislature of New York, or to preserve the analogy of the existing law, as is done in the enabling Act of this State, now under consideration, by giving the place where the shareholders reside the benefit of the tax on their shares, and the place where the bank is located that of the tax on the shares of persons residing out of the State.

The somewhat anomalous mode of requiring the valuation to be made in one place, and the tax assessed to be applied to the benefit of another is no argument against the construction contended for, since the Legislature has adopted this mode, and has an undoubted right to do so, unless pro-

hibited by the Act of Congress. Whether such prohibition exists is the question at issue. It is to be observed, however, that the legislation of Congress, in establishing a standard of valuation, has necessitated this action of the Legislature, if it would preserve the analogy of taxation, as far as may be, and protect its citizens from the inequalities arising from the creation of a monopoly of benefits. While this policy does not detract an iota from the protection given to this kind of property by the Act of Congress, it has the merit, at least, of dispensing equal and exact justice to all classes of citizens and to all localities.

The Act of Congress being in limitation of the general right of taxation by State authority must be construed strictly. The rule of strict construction confines a statute to the clear import of its language; to give it effect beyond this by implication is to usurp legislative powers. Authority *to apply* a tax assessed by a *municipal* corporation is not an incident of the power of such corporation to take a valuation or assess a tax, though it *is* incidental to the right of the Legislature to levy taxes. Municipal corporations are the creations of the Legislature, and derive *all* their powers from statute. The several Acts of a municipal corporation in raising money, taking the valuation, assessing, collecting and applying taxes are separate and independent Acts, and must be specifically authorized by statute. Neither power can be inferred or implied from the other; if either link in the chain is wanting, it can be supplied *only* by the Legislature. A mere authority, given to a town or city by statute, to assess a tax, confers no authority to apply it; there must be a special provision of law authorizing the application as well as the assessment. To apply the doctrine of implied powers to municipal corporations is to invest them with legislative functions.

The Act of Congress requires that the valuation and assessments shall be made by the municipality where the banks are located, nothing more, nothing less; it makes no provisions whatever for *the application* of the tax. No infer-

ence or implication is necessary to give effect to these plain provisions; the most unlettered citizen cannot misunderstand them. When Congress is silent, why may not the Legislature speak? The Act of Congress not only contemplates but *requires* State legislation before the State can exercise its right of taxation. Here is no enchanted ground upon which the Legislature may not tread, but the door is thrown wide open, and who shall forbid it to enter therein? That it has authority to enact the provisions in question, unless prohibited by Congress, is unquestioned; there being no Congressional prohibition, there is no legislative disability.

The Act of Congress, moreover, does not assume *to confer* the right to tax the shares of national banks upon the State Legislatures, but recognizes that as an existing right, and provides limitations upon its exercise. The language is "nothing in this Act shall be construed *to prevent* all the shares, &c., from being included in the valuation, &c., and nothing in this Act *shall exempt* the real estate," &c., "from State, county and municipal taxes," &c. These limitations upon State authority, as has been before observed, have exclusive reference to protecting this kind of property from a higher rate of taxation than that imposed upon similar property by the local authorities. This guarded language of the Act is in harmony with the well established doctrine that Congress, under the constitution, has no power to confer the sovereign right of taxation upon a State; nor is it competent for a State to receive the grant of such powers. The legislative powers, exclusively granted to Congress under the constitution, are incapable of being delegated to the States.

As a general principle, the power of taxation under the constitution is a concurrent power. In respect however to the subject matter under consideration, congress by reason of its paramount authority, might undoubtedly exclude the States from the right of taxation.—But, as Congress has withheld the exercise of its right of taxation, the states are left free to exercise that concurrent right within *the*

constitutional limitations imposed by Congress. What constitutional limitations, under these circumstances, can Congress impose upon the right of the States to tax national bank shares? Can it provide any other limitations or restrictions upon State authority in this respect, than such as are necessary to guard the subject matter from excessive and unequal taxation? Is not the right *to apply* taxes a necessary incident of the right to levy them? What is the right of taxation worth, if a power foreign to the tax-imposing authority can designate the localities exclusively entitled to the benefit of the tax levied? If Congress has authority to make such designation, may it not also determine the objects and purposes to which such taxes shall be applied, and the mode of their collection and disbursement? May it not require that all the taxes thus raised from this source in a State, shall be applied for the use and benefit of the capital of such State, or be expended in building railroads, digging canals, or for the purposes of education? What would thus become of the freedom, not to say the right of legislation itself, in the State Legislatures? Will it be pretended that the designation of the places entitled to a monopoly of the benefits of such taxation is necessary to guard the shares of national banks against excessive and unequal taxation? If not, and the Act of Congress establishes such a distribution of benefits, is it not, in this respect, void for unconstitutionality?

Fortunately the legislation of Congress upon this subject is liable to no such objections, and is beset with no such difficulties; all its requirements may be literally complied with, without adopting a construction involving such grave considerations.

The view I have taken gives effect both to the Act of Congress and the enabling Act of the Legislature, and is in harmony with the purpose of Congress in passing it, and with public policy. It was the duty of Congress to protect the corporations of its own creation from unequal burdens. This duty by no means required it to impose the same

inequalities upon others which it sought to save the objects of its own care from. On the contrary, it was legislating upon a subject in respect to which every citizen of the republic might be expected to challenge the strictest impartiality, and so far from having any reason to refuse, Congress had every motive to grant compliance therewith.

No reason exists why all the taxes on the shares of national banks should enure exclusively to the benefit of the town or city where they are located, when a part of the shareholders reside in other places. The appeal to subscribe to the national loan, made by the government, indiscriminately to city and town, millionaires and men of moderate means, was responded to from all quarters, and by all classes of citizens, with an alacrity and unanimity unparalleled in the world's history. A like appeal was subsequently made to invest government securities in national banks, with like success. Good faith toward these patriotic citizens, and respect for the hallowed memories that cluster around their efforts, would seem to require that the taxes imposed upon the money thus loaned and invested, should accrue, as far as may be, to the advantage of the taxpayers and the places of their residence. It is plain, however, that a different construction of the Act of Congress practically excludes those of this class who reside in the rural districts and smaller towns from all participation in such benefits, as national banks are located in the larger towns and cities, where capital is most abundant, and revenue from this source is least needed to defray municipal expenses. The abstraction of so large a portion of the $300,000,000 invested in national banks from the valuation of the suburban towns, and its concentration in the great business centres of the country, cannot but be a serious grievance to those shareholders and the municipalities where they reside. It is not difficult to understand the effect such a discrimination would have had upon the public credit, if it had been coupled with the appeal for government relief. It is scarcely possible that these considerations should have escaped the attention of Con-

gress while legislating upon this subject, or that it should have failed to provide against such inequality, either from accident, inadvertence or design.

I am unable to discover any provisions in the enabling Act which conflict with any existing law of Congress. Its aim, purpose and effect are to enable the State to avail itself of its right of taxation in strict accordance with the limitations prescribed by Congress. The requirements of the Act of Congress in regard to the place where the valuation is to be taken and the tax assessed, that the tax assessed shall not be at a greater rate than at the place where the bank is located, or exceed the rate of taxes on the shares of State banks, or upon other moneyed capital, are scrupulously complied with; and nothing is wanting to give the State jurisdiction over the whole subject.

The computation provided for in section four is in no sense a valuation, but purely an arithmetical process, requiring none of that discretion and judgment which are called into requisition in making a valuation; it is a mere ministerial duty imposed upon the assessors, requiring them, from the data before them, to solve a very simple question in arithmetic. In connection with the contingent provision for a deduction, in the same section, it is simply a mode of abating a portion of the tax, assessed on the shares of national banks, at the place where the banks are located. It is no violation of the Act of Congress that a *less tax is collected* than is *assessed;* it is competent for the Legislature to dispense with the whole tax derivable from this source, if it chooses to do so. There is yet left to the Legislature, I trust, the right to authorize the abatement of taxes assessed by its own authority, and the use of an arithmetic in making the computation.

The same question came before the Court of Appeals in New York, in the case of the city of *Utica* v. *Churchill & als.*, 6 Tiffany, (33 N. Y.,) 243. In that case it was *held* that the *proviso*, (§ 41,) is not *mandatory*, changing the State law as to *the place* of taxing personal property, but *permis-*

sive of the authority of the State to tax the shares of national banks where they are located, or where the shareholders reside, as it shall determine by an enabling Act.

Chief Justice DENIO, in delivering the opinion of the Court, says,—"Our laws, prior to the enabling Act, required that the taxation of personal property shall be in the town, or ward, where the taxpayer resides. I was at first inclined to the opinion that the provision of the national banking law, so often referred to, might be considered as a change of our own law, and might be sustained on account of its relation to the national banks which are within the sphere of national legislation. On further reflection, I have concluded that it would be more correct to hold that the effect of the proviso is *to permit* the States so to shape their laws of taxation as to tax all the shareholders at the place where the bank is situated, as has been done by the enabling Act."

Though the judgment of the Court in that case was reversed by the Supreme Court of the United States, on the ground that the New York enabling Act authorized a tax upon the shares of stockholders in national banks at a greater rate than upon shares in State banks, the correctness of the decision as to the *discretionary* power of the Legislature to designate *the place* of taxation was not questioned by the United States Court. If the State Legislature has authority to fix the place of taxation *a fortiori*, has it not also the right to designate *the place* for whose use the tax shall be applied? The New York Court goes much further in the assertion of State authority than I have deemed it necessary to go, as the enabling Act of this State raises the single question whether the Legislature has the right to determine the application of a tax assessed by its own authority.

I must answer both the interrogatories proposed in the negative.

J. G. DICKERSON.

HON. J. L. CHAMBERLAIN,
Governor of Maine, Augusta.

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ABATEMENT.

See PLEADING.

ACCORD AND SATISFACTION.

1. An agreement or accord which is to operate as a satisfaction of an existing liability, must, before it can have that effect, be fully *executed*.
Bragg v. *Pierce*, 65.
2. It is merely *executory*, so long as by its terms something remains to be done in the future. *Ib.*

ACTION.

1. No action lies for the turning of mere surface water from one's own land upon the land of another when caused by erections authorized by law.
Greeley v. *Maine Central Railroad Co.*, 200.
2. An action on the case includes assumpsit as well as tort.
Hathorn v. *Calef*, 471.
3. When a remedy is given by an action on the case, all the facts must be set out in the declaration; but whether in the form of assumpsit or of tort must be determined from the nature of the facts. *Ib.*
4. A penal action cannot be maintained after the repeal of the statute creating the penalty sought to be recovered. *Gaul* v. *Brown*, 496.
5. And, although the repealing statute creates a similar but a less penalty.
Ib.
6. If the plaintiff allege that the defendant, "intending to injure the plaintiff, carried and set fire to the brush in the defendant's close aforesaid, which * * * being carelessly managed by the defendant, spread and * * * caught the wood in the plaintiff's close," &c.: — *Held*, to be an action at common law, and that the allegation of "intent" must be proved beyond reasonable doubt. *Paul* v. *Currier*, 526.

See ASSUMPSIT. COLLECTOR OF TAXES, 4.

AGENCY.

1. If the defendant receive the plaintiff's money as from the agent of the plaintiff, both of whom are his debtors, without having reason to believe it was sent by the latter, and appropriate it to the credit of the agent, the plaintiff cannot recover it back. *Dwinel* v. *Sawyer*, 24.

2. The distinction between money and other property.
Dwinel v. *Sawyer*, 24.

See SALE, 5, 6. SHIPPING.

AMENDMENT.

1. By R. S., c. 82, § 10, no process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood. *Page* v. *Danforth*, 174.
2. In a suit brought by the assignee of a chose in action, in his own name, a declaration, defective in not alleging a promise to the assignee by the debtor, is amendable. *Ib.*

APPEAL.

See PROBATE COURT, 2, 3, 4, 5, 6.

ASSIGNMENT.

1. The assignee of a chose in action may maintain a suit in his own name upon the promise of the debtor to pay the same to him.
Page v. *Danforth*, 174.
2. A judgment rendered on a declaration, defective in not alleging a promise to the assignee by the debtor, cannot be reversed on error. *Ib.*

See BILLS AND NOTES, 24, 25.

ASSUMPSIT.

1. When money, or specific articles which have since been converted into money have been stolen, the owner may maintain assumpsit for money had and received against the thief. *Howe* v. *Clancy*, 130.
2. The law, as declared in *Foster* v. *Tucker*, 3 Maine, 458, was changed by c. 102, of the Public Laws of 1844, incorporated into R. S., c. 120, § 12.
Ib.
3. In assumpsit for balance for wagons alleged to have been sold to the defendant, the plaintiff may testify that he *intended* to give credit to the defendant when he parted with the wagons, although he charged them on his book to the defendant's son. *Folsom* v. *Skofield*, 171.
4. Under R. S., c. 46, § 26, assumpsit may be maintained by a creditor of a corporation against a stockholder. *Hathorn* v. *Calef*, 471.
5. To support a general count of *indebitatus assumpsit*, for goods sold and delivered, proof of an actual delivery to, and acceptance by, the purchaser of the goods sued for is essential. *Atwood* v. *Lucas*, 508.
6. If none, or part only of the goods have been accepted by the purchaser, the

seller's remedy is an action of special *assumpsit* for goods bargained and sold, and not for goods sold and delivered. *Atwood* v. *Lucas*, 508.

7. Delivery to and acceptance by the purchaser of any portion of the goods bargained for will satisfy the statute of frauds; but to authorize the maintenance of a suit for goods sold and delivered, there must be a delivery and acceptance of all the goods sued for. *Ib.*

8. If the purchaser of goods refuses to accept and pay for them, the owner may at once resell them for the most he can get and charge the first purchaser with the difference between the contract price and the price actually obtained. *Ib.*

See ACTION, 2, 3. BILLS AND NOTES, 4. LOGS AND LUMBER, 1.

ATTACHMENT.

1. An attachment of real estate may be dissolved by an attaching creditor otherwise than is provided in c. 62, of the Public Laws of 1859. *Bachelder* v. *Perley*, 414.

2. A & B severally attached C's real estate, — one on Sept. 1, and the other Sept. 5, 1860. In Nov. following, prior to any levy, A, for a valuable consideration, executed and delivered to B a release of his attachment "so far that B shall at all times take precedence in any levy he may make on said real estate." B extended his execution on the premises, June, 1861, and subsequently conveyed by deed of quitclaim his "right," &c., to the plaintiffs' ancestor. A extended his execution June, 1863, and subsequently conveyed by deed of quitclaim, reciting the release, to the defendants' grantor. In ejectment: — *Held*, that the release was valid, and that B's levy took precedence. *Ib.*

AUCTIONEER.

See STATUTE OF FRAUDS.

BAILMENTS.

1. In case against an innkeeper, the words — "being entertained as a guest therein in the inn of the said" defendant, constitute a sufficient allegation that the defendant was an innkeeper. *Norcross* v. *Norcross*, 163.

2. The possession of a license does not make, nor the want of it prevent a person from being an innholder at common law. *Ib.*

3. Innkeepers are insurers of the property of their guests committed to their care, and are liable for its loss or injury, when not caused by the act of God, the public enemy, or the neglect or fault of the owner or his servants. *Ib.*

4. Upon proof of loss, the *onus* of bringing the case within the exceptions is upon the innkeeper. *Ib.*

5. If a person goes to an inn as a wayfarer and traveller, and the innkeeper receives him as such, the relation of landlord and guest attaches at once

with all of its rights and liabilities, and so continues so long as he sojourns there as a traveller. *Norcross* v. *Norcross*, 163.

6. The liability of innkeeper attaches to goods when they are brought within the inn or otherwise placed within his custody in some customary and reasonable manner. *Ib.*

7. If a guest, in the absence of the landlord and his servants, hang up his coat in the place in an inn allotted for that purpose, it is *infra hospitium*. *Ib.*

BILLS AND NOTES.

1. Any alteration which changes the legal effect of a written instrument, either in its terms or parties, or as an instrument of evidence, is material; and, if made by the holder without the consent of the maker, will invalidate it. *Chadwick* v. *Eastman*, 12.

2. Where a promissory note, given for a partnership debt, uses the following words, "we, or either of us, promise jointly and severally to pay," &c., and it is signed by one of the partners alone; and, subsequently, and without the knowledge of either defendant, the payee altered the note by inserting, immediately above the signature, the words "for E. & W. E——," the names of the firm; in an action upon the note against both members of the firm; — *Held*, such alteration was material and would avail both defendants to avoid the note. *Ib.*

3. Inferences to be drawn from the face of such a note, as to intention and consent of the parties. *Ib.*

4. In assumpsit, by a holder against an indorser of a negotiable promissory note, what circumstances will amount to a waiver of demand and notice. *Robbins* v. *Vose*, 36.

5. Instructions to a jury are to be construed in connection with the evidence in the case. *Casco Bank* v. *Keene*, 103.

6. Thus, in an action by a bank, upon a promissory note, purporting to have been signed by the defendant, the instruction that, — if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security from him who actually wrote the defendant's signature to the note, by his arrest, or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature, is correct when taken in connection with the fact proved, that the defendant knew that the president of the bank went to him for the express purpose of ascertaining whether or not the signature was genuine, and that he thereupon admitted it was. *Ib.*

7. So, also, is the instruction, that if the defendant, knowing that the signature was not genuine, told the president that it was his signature, it was such an adoption of it as would render him liable upon the note, when predicated upon the same facts. *Ib.*

8. A person will be barred by his adoption of a signature, if made with the knowledge that it was a forgery. *Ib.*

9. When a defendant has adopted the signature of the note in suit, knowing it to be a forgery, the rule of damages will be the whole amount of the note. *Ib.*

10. And the same rule applies when the defendant is estopped from denying the signature. *Casco Bank* v. *Keene*, 103.

11. When a negotiable promissory note bears upon its back the names of the payee and another person, — the former above the latter, — the presumption is, in the absence of all controlling proof, that the payee indorsed it to the one whose name is under his, and the latter to some third party. *Sturtevant* v. *Randall*, 149.

12. The contract *implied*, from one's placing his name in blank upon the back of a negotiable promissory note, is not a *written* contract so far complete in itself as to exclude parol evidence to show his connection with such note. *Ib.*

13. As between the original parties to such contract, or those having their rights, parol evidence is admissible to prove the circumstances which will determine its character. *Ib.*

14. When a judgment has been rendered against a person upon the verdict of a jury finding him to be an original promisor of the note in that suit instead of an indorser, as he alleged himself to be in his specifications of defence, he is estopped to deny that relation in any litigation with any other party to the note. *Ib.*

15. Under a count for money had and received and money paid, a note bearing on its back the defendant's name would be admissible under the general issue. *Ib.*

16. And if the jury should find the defendant signed as original promisor instead of indorser, such finding would not be repugnant to the issue. *Ib.*

17. If the notice to the indorser of the dishonor of a bill of exchange is such that he must know what bill is referred to, it is sufficient to charge him. *Wood* v. *Watson*, 300.

18. Mercantile usage in this State has established the damages on a dishonored bill of exchange on London at ten per cent. *Ib.*

19. The Court cannot vary this rule, in a monetary crisis, on account of a depreciation of the currency of the country. (DAVIS, WALTON and BARROWS, JJ., dissenting.) *Ib.*

20. A note payable by its terms to A. C. H., treasurer of the Ministerial and School Fund of C., or his successor, may be sued in the name of him who was the legal treasurer at the date of the writ, if the note was then and always had been the property of the trustees. *Tainter* v. *Winter*, 348.

21. Where one of the signers makes a partial payment of a promissory note, and causes to be indorsed thereon that the payment was made by him, by name, and the holder of the note, relying upon such payment, permits the note to outlaw as to the other makers, the defendant will not be permitted to repudiate the payment as his own, and say it was done for another. *Ib.*

22. By c. 44, § 1, of the Public Laws of 1858, the protest of any foreign or inland bill of exchange, &c., duly certified by any notary public under his hand and official seal, shall be legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or indorser, in any court of law. *Pattee* v. *McCrillis*, 410.

23. If a notarial certificate, after stating the date, his official character, de-

mand and refusal, recite that "the draft remaining unpaid, I duly and officially notified the drawer at" his post office address, — naming it, "per mail, requiring payment," it is *prima facie* evidence of notice.
Pattee v. *McCrillis*, 410.

24. An assignment and delivery of a negotiable promissory note before maturity, without the indorsement of the payee, gives to the assignee only the rights of the payee. *Haskell* v. *Mitchell*, 468.

25. And a contemporaneous promise by the payee to indorse, if not complied with until after maturity, will not avoid the defence of a want of consideration at the inception of the note. *Ib.*

See JUDGMENT, 7.

BOND.

1. A party executing a deed, bond or other instrument, and delivering the same to another, as his deed, knowing that there are blanks in it to be filled, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it.
South Berwick v. *Huntress*, 89.

2. And this principle includes the insertion of the penal sum of a collector's bond. *Ib.*

3. A bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, and also that he has been induced upon the faith of such bond to act to his own prejudice.
State v. *Peck*, 284.

See POOR DEBTORS.

BOUNTIES TO VOLUNTEERS.

1. By c. 170, § 1, of the Public Laws of 1863, the doings of all cities, towns and plantations, in offering and paying bounties and presenting pecuniary inducements respecting volunteers, &c., are hereby made valid in as full and ample manner as though all the proceedings had been authorized by law. *Sanborn* v. *Machias Port*, 82.

2. This statute contemplates only the "*doings*" of meetings legally notified and held. *Ib.*

3. On Feb. 9, 1865, the city of Portland, by its constituted authorities, ordered, that to each person volunteering on its quota there should be paid certain specific bounties, upon being mustered in, "and to any citizen of Portland, mustered in as aforesaid, there shall be paid the additional sum of fifty dollars when mustered out." The order also provided that it "shall be in

force and effect, and the treasurer be authorized to pay the bounties it contemplates, as soon as the Legislature shall enact a law, under the operation of which the legality of said bounties shall be unquestioned;" — *Held*, that the order cannot be regarded as within § 1, c. 298, of the Public Laws of 1865, and that the fifty dollar bounty was not thereby made valid.
Ferrin v. *Portland*, 458.

See Towns.

CASE.

See Action, 2, 3. Bailments.

COLLECTOR OF TAXES.

1. By R. S. of 1841, c. 14, § 63, (R. S. of 1857, c. 3, § 85,) the assessors shall require the collector to give bond for the faithful discharge of his duty, &c., in such sum, and with such sureties, as the selectmen shall approve.
Scarborough v. *Parker*, 252.
2. This section is merely directory; and the giving of such bond is not a condition precedent to the collector's assuming his official duties. *Ib.*
3. By R. S. of 1841, c. 14, § 71, (R. S. of 1857, c. 3, § 93,) collectors are empowered to complete their collections notwithstanding new collectors may have been chosen and sworn. *Ib.*
4. Tax bills, together with a legal warrant for their collection, were duly committed to the defendant, chosen collector in 1856, who, thereupon, without giving bond, entered upon and continued his official duties until 1862, when, upon request, he voluntarily gave a bond, of the latter date, without sureties, to the plaintiffs, reciting, that, whereas he had been appointed collector for the year 1856, conditioned "if he shall well and faithfully discharge all the duties of said office, then said bond to be void, otherwise," &c.; *Held*, —
1. That the bond was good at common law;
2. That it was prospective, and covered no past faults or omissions; and
3. That, after the lapse of a reasonable time, an action would lie for nondiligence in its performance. *Ib.*
5. Damages in such case. *Ib.*

CONSTITUTIONAL LAW.

1. Under the provisions of Article 6 of the amendments to the constitution of this State, limiting the power of the Legislature to create a State debt, except to suppress insurrection, to repel invasion or for purposes of war, it is not competent for the Legislature to pass an Act to equalize the debts of cities and towns, by creating a State debt for the payment of portions of the indebtedness of the local municipalities. *Opinion of Justices*, 587.
2. A State debt, so created, would not be for the excepted purposes, although intended to pay city and town debts incurred during the war. *Ib.*

3. As an Act to pay the expenditures of municipal corporations, to which the State was not a party, over which it had no control, and in the creation and disbursement of which it was not consulted, it would be in plain violation of the constitution. *Opinion of Justices*, 587.

4. The law of Congress creating National Banks, and authorizing the shares in a bank to be taxed in the city or town where it is located, requires that all such taxes shall be applied for the use and benefit of such city or town, although assessed in part on shares owned in some other city or town. (DICKERSON, J., *dissenting.*) *Opinion of Justices*, 594.

5. The assessment and taxation of such shares, in any place other than that where the bank is located, would be a clear violation of the Act of Congress; and an Act of the State Legislature authorizing any such taxes, when collected, to be paid by the city or town where the bank is, to that where the stockholder resides, would be an attempt to do indirectly what cannot be done directly. *Ib.*

See VOLUNTEERS, 7.

CONTRACT.

1. Where the plaintiff, in consideration of $700, conveyed to the defendant's testator a house worth $1800, to which the grantee added an L; and, fifteen months after said conveyance, the grantee gave to the plaintiff a certificate that he "will let" the plaintiff "have" said house "by his paying him within $100 what it cost him;" and the grantee devised said house by will to the defendant; and the defendant, subsequent to the death of the testator, conveyed said house by his quitclaim deed to another; — *Held*, that, in an action against the executor of said grantee, to recover damages for not conveying said house in accordance with said certificate, the presiding Judge properly ordered a nonsuit. *Vantassel* v. *Hathaway*, 18

2. To constitute a contract, there must be a proposition by one party accepted by the other without any modification whatever. *Jenness* v. *Mount Hope Iron Co.*, 20.

3. Where the plaintiff wrote to the defendant — "what will you sell me 450 kegs of nails for, delivered at B, within one month, cash?" — to which he replied — "will sell you 450 kegs common assorted nails, delivered at time and place mentioned, at $3,62 per keg of 100lbs., each, cash;" and plaintiff rejoined — "nails have advanced so much, I am afraid to buy, but you will send me, as soon as possible, 303 kegs, (specifying the kinds,) and I will send you a check on Exchange Bank, Boston;" and, not hearing from the defendant, the plaintiff wrote again, asking the defendant to ship nails, as navigation would soon close; to which defendant replied — he could not get out the nails ordered by the plaintiff that month, on account of previous orders, but promising his order should receive attention when he got to it; — *Held*, the correspondence did not constitute a complete contract; the defendant's proposition to deliver 450 kegs, at $3,62 per keg, not having been accepted by the plaintiff, and the plaintiff's order for 303 kegs not having been accepted by the defendant. *Ib.*

4. An intention to accept a proposition is not an acceptance, unless communicated to the party making it. *Ib.*

5. A contract, required by the statute of frauds and perjuries to be in writing, in order to be binding, can receive no aid from parol evidence.
Jenness v. *Mount Hope Iron Co.*, 20.

6. Where the plaintiff agreed in writing with the defendants, to keep certain specified roads in good repair, for the term of three years, "to the acceptance and approval of the mayor and the joint standing committee on streets and highways for the time being:" — *Held*,
1. That such "acceptance and approval" was a condition precedent to any right to recover payment;
2. That the use of the roads by the public was no acceptance or waiver on the part of the city; and
3. That the plaintiff cannot recover, either under a count on the special contract, or on *quantum meruit*, without procuring, or attempting to procure, such acceptance and approval. *Veazie* v. *Bangor*, 50.

7. The defendant agreed in writing to convey to the plaintiff's intestate certain real estate upon payment of certain specified notes given as the consideration therefor. In an action upon the agreement; — *Held*, that the payment of the notes as they became due was a condition precedent; and that the death of the plaintiff's intestate did not operate as an extension of the time of payment one year from the date of the death.
Simpson v. *Pease*, 497.

8. A written offer to sell land for cash can never be accepted so as to create a legal obligation to sell on the part of the owner, unless the acceptance is accompanied by a tender of the price. *Maynard* v. *Tabor*, 511.

9. In reply to a letter from the plaintiff inquiring the lowest cash price of a lot of land owned by the defendant, the latter wrote the former, "having fixed a price on my lot, agreeably to promise, I inform thee that I put it at $3000 cash;" to which the plaintiff rejoined by letter that he would take the land at the price named, and that the defendant might send the deed to his agent to whom he would pay the money and receive the deed. To this the defendant replied, "I have withdrawn my lot from sale;" — *Held*, that the plaintiff's letter agreeing to take the land at the price named, unaccompanied by tender of the price, was not an acceptance of the defendant's proposition to sell, but a new proposition containing conditions different from those implied in defendant's offer; and that, until a tender was made, the defendant might withdraw his offer without breach of contract. *Ib.*

See CORPORATION, 17, 18. LOGS AND LUMBER, 2.

CORPORATION.

1. Under R. S., c. 46, § 26, assumpsit may be maintained by a creditor of a corporation against a stockholder. *Hathorn* v. *Calef*, 471.

2. An allegation in a writ against a stockholder, that the officer "did return the execution * * * wholly unsatisfied, for want of attachable corporate property * * * wherewith to satisfy it," is a sufficient statement of a want of attachable corporate property, considering that the statute contemplates this fact is to be proved by the return. *Ib.*

3. A return by the officer, that he "cannot find corporate property," &c., is all that was required by R. S. of 1841, c. 76, § 18. *Ib.*

4. And a certificate that he "made diligent search" before his return is a sufficient compliance with the provision in the same section that he must "first ascertain." *Hathorn* v. *Calef*, 471.

5. The statute does not require, in this respect, the certificate of any officer beside one in the county where the corporation has its place of business, unless one, possibly, in the county where the stockholder resides, although the road of the corporation extends through more than one county. *Ib.*

6. Nor is the officer required to go out of his precinct; but when he makes a return, it will be understood that what he did was in his own county, unless the contrary appear. *Ib.*

7. If, when the notice of the "creditor's intention" is given, the execution with the officer's return thereon be shown the stockholder, the latter thereby receives a sufficient evidence of the "amount of the debt or deficiency." *Ib.*

8. If both demand and notice be made at the same time, and forty-eight hours before suit, the statute requirement is satisfied. *Ib.*

9. The officer need not necessarily retain the execution, neither need the creditor remain near during the forty-eight hours next after demand; it is only necessary that the conduct of the creditor should not be such as to interfere with the stockholder's right to relieve himself by disclosing corporate property within the time allowed. *Ib.*

10. If, upon demand, the stockholder declines to disclose corporate property, and gives no intimation of his future intention to do so, or, if he did, where the property would be situated, it would not be unreasonable for the creditor to return home; since, if the officer remained, the stockholder might show the property disclosed to him, whether he retained the execution or not. *Ib.*

11. If the stockholder had disclosed property, after the return home of the creditor, and the latter had not been in condition to receive it, he alone would have been the loser. *Ib.*

12. Neither could such defence be set up unless mentioned in the specifications of defence. *Ib.*

13. When the charter of a corporation is made subject to the liabilities and duties provided in a former general statute, it seems that the general statute does not thereby become a private one so far as the corporation is concerned. *Ib.*

14. The Legislature has power so to modify and change existing laws as to affect the liabilities of stockholders for the debts of the corporation, having a due regard to existing contracts, and making such modifications prospective. *Ib.*

15. Act of Feb. 16, 1836, was repealed by Act of 1841, in its application to the Kennebec & Portland Railroad charter, and the Act of 1841, in its turn, was modified by Act of 1855, c. 169. *Ib.*

16. The Acts passed subsequently to that of Feb. 16, 1836, continued the liability of stockholders, but modified the remedy in some respects. *Ib.*

17. So far as the contract is concerned, the rights of parties attached when it was made, and no change could be made after that date; but the remedy

might be subsequently changed, although it imposed additional burdens upon either party. *Hathorn* v. *Calef*, 471.

18. The contract is to be construed according to the law in force when it is made; the mode of enforcing it, according to the law, when the remedy is sought. *Ib.*

COSTS.

1. The verdict settles the amount of debt or damages for which the suit was instituted. If below twenty dollars, (in cases not excepted by the statute,) the verdict shows the cause of action was one within the jurisdiction of a trial justice. *Hervey* v. *Bangs*, 514.

2. Where, in an action of slander, the plaintiff, after having obtained a verdict for nineteen dollars damages, alleged exceptions which were overruled by the Law Court, and, at the time of rendition of judgment, the verdict, together with the accruing interest thereon, amounted to more than twenty dollars: — *Held*, that the plaintiff is entitled to only quarter costs. The defendant in such a case is not entited to any cost. *Ib.*

See DEVISE AND LEGACY, 2.

COUNTY COMMISSIONERS.

1. By c. 103, § 36, of the Public Laws of 1859, if the judgment of the committee, appointed in cases of appeal from the decisions of County Commissioners, is wholly against the prayer of the original petition, the Commissioners shall proceed no further thereon; but, if the judgment is otherwise, they shall carry it into effect as if made by them. *Harriman* v. *County Commissioners*, 83.

2. By R. S., c. 77, §§ 5 and 6, the Supreme Judicial Court has the general superintendence of all courts of inferior jurisdiction for the prevention and correction of errors and abuses, where the laws do not *expressly* provide any remedy. It may issue writs of error, *certiorari*, *mandamus*, prohibition, *quo warranto*, and all writs and processes necessary for the furtherance of justice, or the execution of the laws. *Ib.*

3. Where County Commissioners refuse to carry into effect a judgment of the Supreme Judicial Court, rendered upon the report of a committee appointed in case of appeal from their decision, refusing to lay out and establish a highway, this Court may issue a writ of *mandamus* on petition by the injured party. *Ib.*

4. And where they not only refuse to carry into effect such judgment, but proceed to appoint an agent to open the way laid out by them on the original petition, contrary to the judgment of the Supreme Judicial Court, a writ of prohibition will be issued by this Court, enjoining such proceedings. *Ib.*

5. An allowance made to a clerk of the Supreme Judicial Court by the County Commissioners, "for expenses and sums paid out," does not have the force of a judgment, and is not conclusive. *State* v. *McIntyre*, 214.

See WAYS.

DAMAGES.

1. Mercantile usage in this State has established the damages on a dishonored bill of exchange on London at ten per cent. *Wood* v. *Watson*, 300.

2. The Court cannot vary this rule, in a monetary crisis, on account of a depreciation of the currency of the country. (DAVIS, WALTON and BARROWS, JJ., dissenting.) *Ib.*

See BILLS AND NOTES, 9, 10. COLLECTOR OF TAXES, 5. SALE, 9.

DEED.

1. Where the premises in a deed were described as the "north half of the double dwellinghouse, situate," &c., "together with the land under the same, and the *land used with it* and belonging thereto, and all out buildings and fences thereon and thereto belonging, being the same premises *heretofore* occupied by me as a dwellinghouse; and there was a barn connected with the house, which had previously been occupied by the grantor; *Held*, —

1. That the words "belonging thereto" refer to the house and not to the grantor.

2. That the words "out buildings thereon," mean the out buildings on "the land used with" the house;

3. That the barn was one of the out buildings; and

4. That the deed conveyed the barn and the land on which it stood.

Woodman v. *Smith*, 79.

2. As between the parties to a deed, a consideration is not necessary. *Laberee* v. *Carleton*, 211.

3. Conditions subsequent are not favored in law, and are raised only by apt and sufficient words. *Ib.*

4. A condition is a qualification or restriction annexed to a conveyance. *Ib.*

5. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it. *Ib.*

6. M. L. conveyed land by deed of warranty to the plaintiff, conditioned that, if the grantor "maintained and supported," the plaintiff, &c., the deed to be void. Subsequently, M. L. having deceased, the plaintiff conveyed the same premises, by deed of quitclaim, to his son M., "in consideration of the conditions to be performed for me and mine by" M., "agreeably to the deed of the late M. L. to me;" — *Held*, that the claim "in consideration of the conditions," &c., did not constitute a condition of the latter deed, but only a description of the consideration. *Ib.*

7. A description in a deed "thence north-easterly as Fore river runs," includes the flats to the middle of Fore river. *Brackett* v. *Persons unknown*, 228.

8. To determine the true construction of a deed, it is proper to look at its origin and the sources of its derivation, as well as to the then existing state of facts. *Abbott* v. *Abbott*, 356.

9. Where several particulars descriptive of the land intended to be conveyed by a deed are named therein, some of which are false, if the true are sufficient to designate the land, the false will be rejected.
Abbott v. *Abbott*, 356.

10. Where the land described was the "west half of lot 284 * * as surveyed by I. B. & J. B., by order of the *Court of Sessions;*" when in fact I. B. & J. B. never surveyed it by order of any court, but as a committee of the *Court of Common Pleas*, duly partitioned said lot assigning the "west half" to the defendant's grantor and the east half to the plaintiff's grantor; — *Held*,
1. That the latter words referred to the partition made by order of the Court of Common Pleas, and not to a former partial survey made by one J. H. at the request of the then owner, but never adopted by him: and
2. That if the latter words were to be rejected as erroneous, then the words "west half of lot 284" are a sufficient description to pass the title. *Ib.*

11. Where the last call in a deed describing the territory in township No. 21 was from an undisputed point of departure, "thence southwesterly *by a line to be run* between townships number 21 and number 22 to the place of beginning;" — *Held*, that the call repudiated all former lines between the termini mentioned, and the *line to be run* must be the shortest distance between the points named. *Grant* v. *Black*, 373.

12. And the subsequent clause, "according to a survey and plan of said township by P & D," will not control or modify the preceding language. *Ib.*

13. An instruction to the jury that another line admitted to have been run by the proprietors prior to the date of the deed to the plaintiffs, purporting to be the true line between townships 21 and 22, was the controlling monument answering the call, and that the point of departure must be rejected as inconsistent with the other and superior monument referred to in the deed, is erroneous. *Ib.*

14. If the deed of an insane person not under guardianship, obtained without fraud and for an adequate consideration, has never been ratified or affirmed, it may be avoided by his heirs, not only as against his immediate grantee, but also as against subsequent *bona fide* purchasers for value and without notice. *Hovey* v. *Hobson*, 451.

See MORTGAGE, 1, 2, 3.

DEMURRER.

1. Where a demurrer to a special plea of *autrefois convict* is sustained, the judgment will be final for the State. *State* v. *Inness*, 536.

2. If the defendant desires to answer further, he must claim the right when he files his demurrer, or obtain leave to plead double at the beginning. *Ib.*

See EQUITY, 22. MORTGAGE, 24. PLEADING.

DEPOSITION.

1. By the 23d Rule of Court, neither party shall be required, *during term*

time, to attend the taking of a deposition, except in the town in which the Court is holden, and at an hour when the Court is not actually in session, unless the Court, upon good cause shown, shall specially order the deposition to be taken. *Holmes* v. *Sawtelle*, 179.

2. "*During term time*" does not cover all the time from the commencement to the final rising of the Court, without regard to the length of intervening adjournments. *Ib.*

3. Where the Court adjourned on the 22d to the 29th of a certain month, and the plaintiff's attorney gave legal notice of his intention to take a deposition, on the 26th of the same month, in the town where the defendant's attorney resided; — *Held*, that the deposition was not taken "during term time," within the meaning of the 23d Rule, and was therefore admissible. *Ib.*

DESCENT.

1. The several rules in R. S., c. 75, § 1, relating to the descent of real estate, are distinct, and are each to be construed separately and with reference to the conditions therein respectively set forth. *Davis* v. *Stinson*, 493.

2. If a person die, leaving no issue, father, mother, brother or sister, but does leave nephews, nieces and grand nieces, his real property will descend in accordance with the fifth rule, and the grand niece will have no claim. *Ib.*

3. This case distinguished from *Doan* v. *Freeman*, 45 Maine, 113. *Ib.*

DEVISE AND LEGACY.

1. I. C. gave and bequeathed to trustees named $40,000, the same to be "kept safely invested for twenty-five years" after the testator's decease, "for the use and benefit of his two grandchildren named," to be paid to them at the end of said twenty-five years; the interest thereon "to be invested and added to the principal, and neither principal nor interest to be distributed till the expiration of the twenty-five years aforesaid," and the trustees to withhold its distribution even then, "if, in their opinion, it would be liable to be wasted or squandered by the improvidence of the person entitled to it, except the interest that may arise therefrom from time to time as needed." In case either of his grandsons should die without lawful issue, before the time of distribution, his share is to go to the survivor; but if both should die "without lawful issue or lineal descendants, before said fund became distributable, said fund is devised over to the testator's brothers, or their lineal descendants." The residue of his property, he devised to a trustee named in trust for the benefit of persons afternamed, subject to certain charges specified, and the "residue, should any remain, is to be distributed in the same manner and to the same persons, and at the same time as the fund called the $40,000 fund;" — *Held*, —

1. That the grandsons named take vested interests in the $40,000 fund, and also in the residue of the estate subject to the charges therein;

2. That the provision directing an accumulation of interest for twenty-five years is invalid, and the interest on the $40,000 fund falls into the residue

and belongs to the trustee of such residue, for the purposes of the trust created therefor; and

3. That the interest on the residue, after discharging all trusts declared, is to be paid over annually to the guardians of said grandsons during their minority, as heirs of undevised estate. *Kimball* v. *Crocker*, 263.

2. Costs in bills of this nature. *Ib.*

DOWER.

1. Where land conveyed to the husband of the complainant during their coverture was mortgaged back to secure a part of the purchase money; and the husband thereafterwards mortgaged a portion of said land to one of the respondents, who, after purchasing, by assignment, the former mortgage and the debt thereby secured, together with the right which the complainant's said husband had of redeeming said land at the time of his decease, conveyed a portion of it by deed of warranty to the other respondent; and the complainant, not having relinquished her right of dower, brought a bill in equity praying for her dower to be set out in the equity; on demurrer, it was *held*, —

1. That the former mortgage should be upheld;

2. That the complainant had a right of dower subject to the former mortgage;

3. That she is not dowable against the first mortgagee or his assigns;

4. That, to the extent of her interest, she stands in the relation of mortgager thereto;

5. That she may redeem the whole mortgage, and hold the whole as security for what she pays more than her proportion;

6. That she may redeem her interest with the consent of the assignee of said mortgage;

7. That, if she would redeem, she must bring her bill as provided by the statute; and

8. That this bill cannot be sustained, because it neither alleges a tender, nor a demand for an account, under R. S., c. 90, § 13; nor under c. 103, § 14, because it does not allege that said mortgage has been discharged. *Wing* v. *Ayer*, 138.

2. A widow is entitled to dower in flats owned by her husband, although they are covered by tide waters and remain unimproved down to the time of his decease. *Brackett* v. *Persons unknown*, 228.

See EQUITY, 14. MORTGAGE, 23, 24.

EQUITY.

1. As a general rule, when by a fair construction of the bill, or at any stage of the proceedings, it becomes certain that the judgment or decree must necessarily be directly against such of the respondents named as reside without the jurisdiction; and, that no judgment or decree can be rendered or made against the respondent before the Court, without embracing and being binding on them or the estate in which they have an interest; the hearing cannot ordinarily proceed without them. *Lawrence* v. *Rokes*, 110.

2. But, if the bill only seeks a remedy and decree against the respondent who appears or is within the jurisdiction, and such judgment or decree will not bind, and cannot be enforced here or elsewhere against, but leaves all questions open as to those residing without the jurisdiction; then, although they would, if before the Court, have an interest in the question, and a decree might be made against them, yet, not being before the Court, the cause may be heard and a decree made affecting, legally or equitably, only the party before the Court, even if it might be apparent that if within the jurisdiction their joinder would be required.
Lawrence v. *Rokes*, 110.

3. *It seems*, that where persons, not within the jurisdiction, are named as parties, the Court *may*, before a hearing on the merits, require *satisfactory* evidence that such parties have actual knowledge of the pendency of the bill against them, and that they can, if they see fit, appear and answer. *Ib.*

4. *Fuller* v. *Benjamin*, 23 Maine, 255, questioned. *Ib.*

5. In 1852, the complainant, by his deed, absolute in its form, but only intended as security, conveyed certain real estate to M. & R., co-partners. In 1858, M. & R. gave him a bond conditioned to reconvey the premises upon payment, within three years, of whatever he should then owe them, which limitation was thereafter waived. Before final settlement, M. died; and, subsequently, the complainant settled with R., as surviving partner, and paid him the full amount due the firm; — *Held*, that the complainant was entitled to a release from the heirs of M., with covenants of warranty against claims by, through or under them. *Hodgkins* v. *Merritt*, 208.

6. If a master in chancery report that he "gave reasonable notice to each and all of the said defendants" of the time and place appointed by him for the hearing of the parties, it is sufficient in the absence of any evidence to the contrary. *State* v. *McIntyre*, 214.

7. If, after reasonable notice, the master proceeds in the absence of the defendant, his report cannot be successfully objected to as being *ex parte*. *Ib.*

8. When a matter of fact, unaccompanied by any evidence, is urged against the acceptance of the report of a master, the decision of the presiding Judge in accepting it, is not subject to exceptions; as that the master had expressed feelings of hostility to the party objecting; or that he had made certain mistakes in estimating the damages. *Ib.*

9. In actions upon the class of bonds in which the Court is required to assess the damages, the presiding Judge may, without the consent of the parties, appoint a master for that purpose. *Ib.*

10. Where the want of proper parties is apparent on the face of a bill in equity, the Court will not proceed to a decree until the proper parties are before it. *Brown* v. *Johnson*, 246.

11. Unless it clearly appear from the report of the master, or otherwise, that he has acted under a mistake, it will be sustained.
Pierce v. *Faunce*, 351.

12. The rule for computing interest upon interest-bearing claims, when partial payments have been made. *Ib.*

13. In stating the account between the parties to a bill in equity to redeem a

mortgage, the master should ascertain the gross amount of rents and profits; and then the costs of reasonable repairs and improvements on the premises; the taxes thereon; together with a suitable compensation for the care and management of the estate; from the gross amount of rents and profits the charges against the estate are to be taken, and, whenever the balance in the hands of the mortgagee exceeds the interest on the mortgage debt at that time, it is to be regarded and deducted as in case of partial payment; and so on from year to year. *Pierce* v. *Faunce*, 351.

14. When an estate is incumbered with dower, the mortgagee, so long as he occupies, may either permit the dowress to enter, or pay her a reasonable compensation for her right during his occupation; and, for such sum thus paid, he should be allowed. *Ib.*

15. He is to be allowed also for all expenses necessary for the protection and preservation of the estate. *Ib.*

16. New erections are not necessarily such. *Ib.*

17. When a mortgagee insures on his own account, he is not, as a matter of course, entitled to charge the premium to the estate. *Ib.*

18. Where the master reported an increased rate of rent, and disallowed a claim for an amount of wood and timber alleged to have been cut from the premises by the mortgagee: — *Held*, that, if erroneous, the burden was upon the respondent to show it. *Ib.*

19. Equity will not permit trust property to be reconveyed to one of several trustees, before his duties as trustee are ended, for the same considerations for which it was sold by them, except for the benefit of the *cestui que trust*. *Boynton* v. *Brastow*, 362.

20. Instructions to the master. *Ib.*

21. By R. S., c. 73, § 11, there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney. *Dudley* v. *Bachelder*, 403.

22. If, in a bill in equity brought to enforce a trust concerning lands, it be stated generally that an agreement or contract was made, the Court will, on demurrer, presume it was a legal contract until the contrary appears. *Ib.*

23. To establish a resulting trust, it must be clearly proved that the consideration of the purchase belonged to the *cestui que trust*, or was advanced by some other person as a loan or gift to him. *Ib.*

24. Where several pay the purchase money for the purpose of securing an interest on the part of each, a trust will result in the proportion of the payment of each when paid for some specific part or distinct interest in the estate; but not otherwise. *Ib.*

25. A bill in equity for the redemption of a mortgage, seeking for answers to allegations in reference to consideration, amounts received for rents and income, and sums paid, is not a bill of discovery, and need not be "verified by oath." *Dinsmore* v. *Crossman*, 441.

26. Where, in a bill in equity praying for an account between partners, the evidence establishes the fact of partnership between the parties and of its

dissolution, the complainant is thereby *prima facie* entitled to maintain his bill. *Bradley* v. *Webb*, 462.

27. The *onus* is upon the respondent to establish new facts set out in his answer which seek to avoid, rather than respond to, the bill. *Ib.*

28. When a creditor seeks, by a bill in equity, to obtain payment of his debt from certain real estate paid for by the debtor, but conveyed to his wife, a levy is unnecessary, if the debtor never had any title to the land. *Des Brisay* v. *Hogan*, 554.

See HUSBAND AND WIFE, 3, 4, 6.

ERROR.

See ASSIGNMENT, 2.

ESTOPPEL.

See BILLS AND NOTES, 10, 14. JUDGMENT, 2. MORTGAGE, 16. PAUPERS, 25, 26. WAYS, 6.

EVIDENCE.

1. If the grounds of a judgment appear by the record, they must be proved by the record alone. *Sturtevant* v. *Randall*, 149.

2. But, if the record need not and does not exhibit the grounds upon which the judgment proceeded, it may be shown, by parol evidence, that matters which might have been admissible under the pleadings were presented and considered in the adjudication. *Ib.*

3. A witness who has seen the horse in question and is acquainted with the value of horses, may be asked to state the difference in value between the horse as represented and as actually existing. *Haskell* v. *Mitchell*, 468.

4. When a witness is offered as an expert, it is for the presiding Judge to determine, from the testimony adduced respecting him, whether or not he is entitled to be so considered. *Berry* v. *Reed*, 487.

See BILLS AND NOTES, 12, 13. CONTRACT, 5. DEPOSITION. JUDGMENT, 2, 3, 7. LIMITATIONS, 4. LOGS AND LUMBER, 1. MILLS, 1. MORTGAGE, 2. POOR DEBTOR, 1. PROPRIETORS OF LANDS, 1, 3, 4, 8, 9. REPLEVIN, 1.

EXECUTION.

1. A judgment creditor cannot commence the levy of an execution while the debtor is under arrest or imprisoned by virtue of the same or a subsequent execution upon the same judgment. *Clement* v. *Garland*, 427.

2. All subsequent proceedings of a levy relate back to the time of its commencement, which is the time of seizure. *Ib.*

3. Where, by the certificate of the appraisers indorsed upon the back of an execution against several debtors, it appears that they appraised certain real

estate "as the estate in fee simple of the debtor within named Edmund Smith;" and the officer's return recites that "having given notice * * to the within named Edmund Smith and allowed him a reasonable time * * to choose an appraiser," and having caused three disinterested men, viz., E. T. L., chosen by the creditor, A. W., "chosen by the debtor," and J. G., chosen by myself, to be sworn, &c., and the real estate described in the foregoing certificate of the appraisers having been shown to them and me as the estate in fee simple and in severalty of "Edmund Smith the debtor aforesaid," &c.; — *Held*, that the terms, "the debtor," and "the debtor aforesaid" have an obvious reference to "the debtor within named Edmund Smith," and it is sufficiently certain whose land was levied upon, and which debtor had notice. *Corbett* v. *Maine and Union Banks*, 542.

See ATTACHMENT, 2. EQUITY, 28. HUSBAND AND WIFE, 3, 4, 5, 6, 7.

EXPERT.

See EVIDENCE, 4.

FENCES.

Where there has been no statutory assignment of a partition fence, between two adjoining lots of land owned by different parties, or between those from whom they respectively derive their title, each is bound to keep his cattle on his own land at his peril. *Bradbury* v. *Gilford*, 99.

FLATS.

See PRESCRIPTION. DEED, 7. DOWER, 2.

FLOWAGE.

1. Past and future damages, occasioned by the flowing of land for mill purposes, may be satisfied by the payment of a gross sum accompanied by a parol agreement to that effect. *Snow* v. *Moses*, 546.

2. But such an adjustment is good only between the original parties. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. In cases of forcible entry and detainer, parties are entitled to a trial by jury only upon the issue of title. *Abbott* v. *Norton*, 158.

2. Of all other matters, the inferior court has exclusive jurisdiction, from whose judgment an appeal lies. *Ib.*

3. Where, in such case, the respondent pleaded the general issue and filed a brief statement of title in a third person, under whom he claimed, and, at the trial at *nisi prius*, waived the brief statement and relied upon the general issue: — *Held*, that the only question open to the respondent was the

question of title; and, when the complainant put in his title deed, the complaint was sustained. *Abbott* v. *Norton*, 158.

GUARDIAN AND WARD.

1. A creditor of a ward may sue him, taking care to have notice of the suit served upon the guardian. *Homstead* v *Loomis*, 549.

2. If such notice be not served, the judgment obtained against the ward will be erroneous and liable to be reversed. *Ib.*

3. A person indebted for property purchased of a guardian cannot be held as trustee in a suit against the ward. *Ib.*

4. Power and duties of a guardian. *Ib.*

See PROBATE COURT, 1.

HUSBAND AND WIFE.

1. (1.) By R. S., c. 61, § 1, when payment was made for property conveyed to a married woman from the property of her husband, or it was conveyed by him to her without a valuable consideration paid therefor, it may be *taken* as the property of her husband to pay his debts contracted before such purchase. *Low* v. *Marco*, 45.

2. (2.) This section does not prescribe the *manner* in which "property, conveyed to a married woman from the property of her husband *may be taken* as the property of her husband. *Ib.*

3. (3.) It may be taken by levy or by process in equity, or by both. *Ib.*

4. (4.) By *levy*, when the title *has once been in the husband*, and he has conveyed it, directly or indirectly, to his wife without a valuable consideration, in fraud of his creditors. *Ib.*

5. (5.) By process in equity, without a levy, when the husband has never had any legal title, but it has been conveyed to the wife with a resulting trust for his benefit. *Ib.*

6. (6.) Or by levy *and* process in equity. *Ib.*

7. But where the husband never had any legal title, the creditor cannot acquire a legal title by a simple levy. *Ib.*

8. The maxim, — "*potior est conditio defendentis*," applies only where the plaintiff fails to establish any *legal* title. *Ib.*

INDICTMENT.

1. When all the counts in an indictment substantially set out the same offence, differing only in the description of the means used to commit it, a general verdict is all that the law requires. *State* v. *Wright*, 328.

2. By R. S., c. 124, § 4, an indictment for polygamy *may* be found and tried in the county where the offender resides, or where he is apprehended. *State* v. *Sweetsir*, 438.

3. This statute is not in derogation of the common law; but only enlarges the jurisdiction, *may* being permissive and not mandatory. *Ib.*

4. Parties to the crime of adultery may be indicted jointly.
State v. *Bartlett*, 446.

See PRACTICE, 3, 4.

INNKEEPER.

See BAILMENTS.

INSANE HOSPITAL.

See PAUPERS, 24, 25, 26, 27, 28.

INSANE PERSON.

See DEED, 14.

INSURANCE.

1. When the declaration on a policy of insurance alleges due notice and proof of the loss, according to the conditions of the policy, and the specifications of defence do not deny such allegations, the plaintiffs need not show that they had notified the defendants of the fire, or that they had furnished them with any proofs or statements of loss or damage, verified by oath or affirmation. *Fox* v. *Conway Ins. Co.*, 107.

2. If the specifications of defence contain no reference to the notice required by c. 34, § 5, of the Public Laws of 1861, and no question in relation thereto is made at the trial at *nisi prius*, the objection cannot be made before the Court *in banc*. *Ib.*

3. It may well be doubted whether more was intended by said section than that the preliminary proof therein set forth, should, in all cases, be deemed sufficient to authorize the plaintiff to maintain his suit. *Ib.*

4. It does not interdict the maintenance of a suit, where the notice required by the conditions of the policy has heen given. *Ib.*

5. In an action on a policy of insurance, the defendants cannot, by way of defence, avail themselves of the condition in the policy, that "no holder of a policy shall be entitled to maintain any action thereon against the company, until he shall have offered to submit his claim to a reference," unless that defence has been set up in their specifications.
Dyer v. *Piscataqua Fire & Marine Ins. Co.*, 118.

6. To render an insurer liable, the peril insured against must be the sole proximate cause of the loss, so causing it and so connected with it that it could not have been otherwise produced. *Ib.*

7. And the loss must be so dependent upon the peril, that it is not only the natural result, but is the necessary and inevitable effect of it. *Ib.*

8. Where a vessel runs upon a reef and is obliged to put into an intermediate port for repairs, and, for want of funds or credit, the master is obliged to sell a portion of the cargo to pay expenses of such repairs, such sale is not the necessary result of the peril at sea. *Ib.*

9. To render property a subject of general average, it must have been sacrificed to avoid an impending peril, and for the benefit of all concerned.
Dyer v. *Piscataqua Fire & Marine Ins. Co.*, 118.

10. A part of a cargo sold by the master at an intermediate port, to make *permanent* repairs of damage, caused by a peril passed, and not for the benefit of all parties, is excluded from general average. *Ib.*

11. A mutual insurance company has no right to assess a premium note for losses occurring after the cancellation of the policy, or for anticipated losses arising from a supposed failure of others to contribute their proportion of losses occurring after such cancellation.
York Co. M. F. Ins. Co. v. *Turner*, 225.

12. A clause, in an Act incorporating a Mutual Fire Insurance Company, providing that, "in case of loss * * by fire," the insured "shall give notice thereof in writing to the directors * * within thirty days; and the directors shall ascertain and determine the amount of such loss, and, if the party suffering is not satisfied with such determination, * * he may bring an action against said company for said loss, at the next Court, to be holden in and for the county" where said company is established, "and not afterwards" * * neither repeals in express terms, nor by necessary implication, so much of c. 81, § 6, of R. S., as authorizes the plaintiff to maintain his action in the county where he resides.
Martin v. *Penobscot Mutual Fire Ins. Co.*, 419.

JUDGMENT.

1. When a fact has been once judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, is conclusive upon the parties. *Walker* v. *Chase*, 258.

2. And, if the fact that a question has been once judicially determined can be shown by the record, the former judgment may be pleaded by way of *estoppel*, or given in evidence under the general issue. *Ib.*

3. But, if the fact cannot be shown by the record, it may be proved by evidence *aliunde*. *Ib.*

4. In either case the former adjudication is conclusive. *Ib.*

5. If a judgment is conclusive in the State in which it is rendered, it is equally conclusive in every State of the Union. *Sweet* v *Brackley*, 346.

6. Whenever a cause of action has passed into a judgment, it is merged so long as the judgment remains in full force and not reversed. *Ib.*

7. Hence, where the indorsee of a witnessed promissory note, given in Maine, sued the present defendant as maker in Massachusetts, — whither the latter had removed; and the defendant, after pleading payment and the statute of limitations, obtained a general verdict in his favor; and subsequently the present plaintiff, as payee, brought this action against the defendant, — he having previously removed back to Maine; — *Held*,
1. That the action could not be maintained; and
2. That evidence that the statute of limitations was the only issue tried in the former action was inadmissible. *Ib.*

JUROR.

1. The jury are not judges of the law in criminal prosecutions. *State* v. *Wright*, 328.

2. By R. S., c. 106, § 3, "all officers of the United States, and coroners," among others, "shall be exempted from serving as jurors, and their names shall not be placed on the lists." *Ib.*

3. Exemption is not disqualification, but a personal privilege of the person exempted which he may waive; and, if he does so, parties have no ground of complaint. *Ib.*

4. Hence, an indictment will not be quashed because one of the grand jurors finding it was a postmaster. *Ib.*

5. Nor will judgment be arrested because one of the traverse jurors was a coroner. *Ib.*

6. When, after examination, no cause of challenge appearing, a juror is peremptorily challenged and discharged, the prisoner has no legal right to recall him and have him sworn. *Ib.*

7. The statute does not require the name of a talesman to be in the jury box. *Ib.*

8. What is not such a misconduct on the part of the jury as will set aside a verdict. *Haskell* v. *Mitchell*, 468.

9. When, during the progress of a trial, one party's counsel has notice of communications between the other party and some of the jurors before whom the cause is being tried, but goes on with the trial without objection, he thereby consents to abide the result. *Fessenden* v. *Sager*, 531.

10. The jury are not judges of the law in criminal cases. *State* v. *Stevens*, 548.

11. They are bound by the instructions of the presiding Judge in matters of law, to the same extent in criminal as in civil suits. *Ib.*

JUSTICES OF PEACE AND POLICE COURTS.

R. S., c. 132, § 7, does not require warrants issued by judges of police courts to be made returnable before any justice of the peace within the county. *State* v. *Stevens*, 548.

LARCENY.

1. A complaint alleging the larceny to have been of "one sheep, of the value of five dollars, the property of another person, unknown to the complainant," &c., is sufficient. *State* v. *Polland*, 124.

2. And if the allegations be proved, the defendant will be deemed guilty of larceny. *Ib.*

LAW AND FACT.

Exceptions to a refusal to give requested instructions will be overruled,

when they call upon the Court to take from the jury the determination of facts; or when the case does not show the facts to which the requested instructions relate. *Brackett* v. *Persons unknown*, 228.

See JUROR, 1, 10, 11. PAUPERS, 8, 9.

LEVY ON LANDS.

See EXECUTION.

LIEN.

See MILLS, 1. RAILROAD, 3, 5, 6.

LIQUORS, SPIRITUOUS AND INTOXICATING.

1. Judgment will not be arrested in case of libel under c. 33, of the Public Laws of 1858, because the officer did not, in accordance with the requirements of the "search and seizure" warrant, arrest, or give any reason for not arresting the person in whose possession the liquors were found. *Heath* v. *Farnham*, 172.
2. While no person can be twice lawfully punished for the same offence, yet he may be twice lawfully punished for the same act, when it is of such a character as to constitute two distinct offences. *State* v. *Inness*, 536.
3. The fact that a person has been convicted of keeping a drinking house and tippling shop is no bar to an indictment for presuming to be a common seller, although both indictments cover the same period of time and are supported by the same acts of illegal sale. *Ib.*
4. Distinction between keeping a drinking house and tippling shop, and being a common seller. *Ib.*

LIMITATIONS.

1. Persons deaf and dumb are *prima facie non compos mentis;* and the statute of limitations does not run against them, unless they are shown to possess sufficient intelligence to know and comprehend their legal rights and liabilities. *Oliver* v. *Berry*, 206.
2. By R. S., c. 81, § 111, nothing contained in this chapter shall alter, take away, or lessen the effect of payment of any principal or interest made by any person. *Egery* v. *Decrew*, 392.
3. A new promise is implied from the fact of a partial payment of a promissory note. *Ib.*
4. Such payment need not be indorsed; but it may be proved by parol. *Ib.*

See BILLS AND NOTES, 21. JUDGMENT, 7.

LOGS AND LUMBER.

1. In assumpsit for the price of logs sold, a letter written, long after the sale, by the defendant to the plaintiffs, complaining of the quality of the logs, is not admissible on the part of the defence. *Berry* v. *Reed*, 487.

2. When parties to a contract of a sale of logs mutually select a sworn surveyor to determine the quantity of each particular quality thereof, who thereupon makes a survey and renders his certificate thereof, his decision of the subject matter is, in the absence of fraud and of any unfair practices by the party claiming to uphold it, conclusive upon the parties. *Ib.*

MANDAMUS.

See COUNTY COMMISSIONERS.

MILLS.

1. A sawmill, owned by the plaintiff and the defendants' grantor, as tenants in common, was destroyed by fire. Subsequently, the latter called a meeting of the owners, and proceeded to rebuild under R. S., of 1841, c. 86. Having rebuilt, he conveyed to the defendants by deed of warranty, containing the following: — "meaning hereby to convey one-half of the sawmill privilege and all the mill, subject to the claims of William Moore, in said mill, and reserve to myself all my claims and rights of action against the said Moore which I now have:" — *Held*, —

1. That defendants' grantor acquired no title under the mill Act to the half of the mill of which the plaintiff had a deed;

2. That the proceedings under the mill Act, could, at most, give him a lien to be "reimbursed and paid such sums, as he had advanced thereon," &c.;

3. That his deed did not give his grantees a lien on the demanded premises;

4. That the separation of the claim from the security, was a dissolution of the lien; and,

5. That all testimony relating to the proceedings of calling a meeting of the owners, and the proceedings under it, are inadmissible under the plea of *nul disseizin* and brief statement setting out those proceedings.

Moore v. *Gibson*, 551.

2. Where the defendants caused an unnatural accumulation of water in a reservoir above the millpond whence the plaintiff and defendants draw the water to propel their respective mills, and subsequently let it pass into its ordinary channel over the plaintiff's flume; — *Held*, that, if the water was rightfully accumulated, the defendants must exercise ordinary care in letting it out; but if it was retained without legal authority as to the plaintiff, they let it out at their peril. *Frye* v. *Moor*, 583.

3. If the plaintiff's flume was sufficient to withstand the pressure of the natural freshets, it will be no defence that the flow caused by the defendants did not exceed in magnitude some of the accumulations of water arising from natural causes. *Ib.*

MISNOMER.

See PRACTICE, 5, 6.

MONEY HAD AND RECEIVED.

See BILLS AND NOTES, 15.

MORTGAGE.

1. By R. S., c. 90, § 1, a deed appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time, or *as part of the same transaction*, constitutes a mortgage. *Brown* v. *Holyoke*, 9.

2. Parol evidence is admissible to prove that a bond and deed of different dates were delivered at the same time and as part of the same transaction. *Ib.*

3. Where the grantee in a deed, absolute in its terms, dated *March* 31, 1858, gave to the grantor a bond, dated *April* 1, 1858, stipulating therein to convey to the obligee, on certain conditions, a tract of land in Brewer, "containing eight and *eighty-six one-hundredths* acres, being a portion of lot No. 4, in the first division; being the same premises *this day* conveyed to said" obligor by said obligee; and the *general* description of the land in the deed is the same, except the fractional part of the acre, which is therein described as being "*sixty-eight* one-hundredths;" — *Held*,
1. That the clerical error in the fractional part of the acre is corrected by the boundaries;
2. That there can be no reasonable doubt but that the deed and bond refer to the same land; and,
3. In such case, there can be no need of compelling the parties to resort to equity to reform the error. *Ib.*

4. By R. S., c. 90, § 20, if any person, to whom a sum of money is tendered to redeem mortgaged lands, receive a larger sum than he is entitled to retain, he shall refund the excess. *Bragg* v. *Pierce*, 65.

5. The unauthorized signing and publishing of a notice of foreclosure, cannot, by a subsequent ratification by the mortgagee, be rendered operative from the time of its first publication. *Treat* v. *Pierce*, 71.

6. When the first publication of a notice is invalid, the foreclosure is void. *Ib.*

7. By R. S., c. 90, § 7, a mortgagee may declare on his own seizin, in a writ of entry, without naming the mortgage; and in all cases, where the tenant is not the mortgagee or a person claiming under him, judgment may be entered as at common law, unless the plaintiff consents to the entry of a conditional judgment. *Ib.*

8. If it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to possession for breach of the condition of the mortgage, the Court shall, on motion of either party, and not otherwise, award the conditional judgment. *Ib.*

9. If *neither* party desires such judgment, then the plaintiff may have judgment for possession on his own seizin, as at common law.
Treat v. *Pierce*, 71.

10. Possession may be restored after redemption under a bill in equity.
Ib.

11. If judgment be given as on mortgage, no judgment for mesne profits can be rendered. *Ib.*

12. *Aliter*, if judgment be rendered as at common law. *Ib.*

13. When a mortgagee, in possession of a part only of the premises mortgaged, declares on his own seizin of the remainder, in a writ of entry against the mortgager, without naming the mortgage or claiming a judgment as on mortgage; and the defendant moves that the plaintiff be restricted to such judgment, the former cannot object that such action was an attempt to foreclose a part only of the premises mortgaged. *Ib.*

14. *It seems* that if a conditional judgment be rendered in such action, the defendant must pay the whole mortgage in order to redeem. *Ib.*

15. An unexecuted verbal agreement made by a mortgagee, for a valuable consideration, to discharge a mortgage by a release, is void by the statute of frauds. *Leavitt* v. *Pratt*, 147.

16. Such an agreement will not constitute an estoppel *in pais*. *Ib.*

17. Where a mortgagee assigns the mortgage and the notes thereby secured as collateral security for his own debt, he must be made a party to a bill to redeem. *Brown* v. *Johnson*, 246.

18. So must the assignee who receives such assignment, although he afterwards makes an absolute assignment of the mortgage to another party.
Ib.

19. Where the want of proper parties is apparent on the face of a bill in equity, the Court will not proceed to a decree until the proper parties are before it. *Ib.*

20. By R. S., c. 90, § 1, a conveyance appearing on its face to be absolute, with a separate instrument of defeasance, executed at the same time or as a part of the same transaction, constitutes a mortgage.
Warren v. *Lovis*, 463.

21. The deed and instrument of defeasance must pass between the same parties. *Ib.*

22. And the instrument of defeasance must be of as high a nature as the deed thereby to be defeated. *Ib.*

23. A bill in equity brought by a widow to redeem a mortgage given by her husband, in order that she may have dower in the equity of redemption, must distinctly set forth a seizin of the husband during coverture in such an estate as would entitle her to dower. *Wing* v. *Ayer*, 465.

24. A bill which, after setting out the deed to, and the mortgage from her husband, alleges "that during her coverture with the said F.," her husband, "the said F. was seized and possessed of the equity of redemption of the" land described; and "that, by reason of the aforesaid conveyances to and from her said husband, she took and had an inchoate right of dower in the

equity of redemption of said land;" and "upon the decease of her said husband she became dowable therein," &c., is not sufficient on demurrer.
Wing v. *Ayer*, 465.

See EQUITY, 13.

OFFICER.

See EXECUTION.

PARTITION.

1. Twenty years' adverse occupation of real estate under recorded deeds is an insuperable bar to the maintenance of a petition for partition, whatever may be the legal title of the petitioners.
Brackett v. *Persons unknown*, 228.

2. In a petition for partition, a sole seizin in the respondent may be established by a possession commenced twenty years *before the trial*, although less than twenty years *before the commencement of the suit*. *Ib.*

PARTNERSHIP.

When the question, whether or not a defendant was a member of a certain firm, has been once judicially determined, the judgment is conclusive in any further action on the same issue between the same parties.
Lynch v. *Swanton*, 100.

See EQUITY, 5, 26.

PAUPERS.

1. The fact that a person is destitute and in need of immediate relief, authorizes and requires the overseers to provide such relief.
Veazie v. *Chester*, 29.

2. If supplies, furnished *bona fide* by overseers to a person destitute, are in fact used for the relief of his destitution, or are received for the purpose of such relief, his unwillingness to receive them as pauper supplies, or his protest against so regarding them, or his declaration that he shall not so regard them, cannot prevent them from being so regarded, and from drawing after them all of their legal consequences. *Ib.*

3. If, when supplies are furnished, the overseers distinctly agree that the supplies are not, and shall not be regarded as pauper supplies, but as a gift or loan to one in need, whether to be returned in kind or paid for, or not, and they are thus received, the party so receiving will not be legally affected thereby, nor will the town acquire any rights thereby in its relation to other towns. *Ib.*

4. Same results would not follow by reason solely of a protest or unwillingness on the part of the person furnished, to receive needed relief, or from

any declaration that he does not or shall not regard the supplies in that character, but simply as a loan to be refunded. *Veazie* v. *Chester*, 29.

5. If supplies are in fact furnished and received as pauper supplies, the statute is complied with, and their legal consequences follow. *Ib.*

6. The promise to repay and the actual repayment do not change the nature of the relief. *Ib.*

7. If supplies, when furnished came within the statute, their character could not be changed by a contingent matter depending upon the voluntary act of the pauper, even if the owners agreed that thereupon the charge should be blotted out, and the supplies should not be regarded as what they were when furnished. *Ib.*

8. Whether or not supplies were furnished and received as pauper relief is a mixed question of law and fact. *Ib.*

9. When such a question is submitted to a jury, it is the duty of the presiding Judge, if requested, to instruct the jury what would or would not constitute furnishing and receiving supplies within the statute. *Ib.*

10. Where supplies are furnished *occasionally* and not continuously, only one notice need be proved to enable the plaintiff town to recover for the supplies furnished three months before such notice down to the date of the writ; *provided* the action be commenced within two years next after the cause of action accrued. *Veazie* v. *Howland*, 38.

11. By R. S., c. 24, § 24, expenses for the relief of paupers, "incurred within three months before notice given to the town chargeable, may be recovered by the town incurring the same, against the town liable, in an action commenced within two years after the cause of action accrued, and not otherwise." *Veazie* v. *Howland*, 39.

12. When no answer is returned by the defendant town, the "cause of action" is deemed to "accrue" at the expiration of two months from the time the notice was given. *Ib.*

13. When an answer denying their liability is returned, the "cause of action" is deemed to "accrue" at the time the answer is received by the plaintiff town. *Ib.*

14. *Cutler* v. *Maker*, 41 Maine, 594, examined and overruled; *Robbinston* v. *Lisbon*, 40 Maine, 287; *Sanford* v. *Lebanon*, 26 Maine, 461; *Camden* v. *Lincolnville*, 16 Maine, 384; and *Belmont* v. *Pittston*, 3 Greenl., 453, reaffirmed. *Ib.*

15. For every new action for supplies furnished by a town, a new notice must be given within two years and two months at most before the suit is commenced, even though a former action between the same parties for the support of the same pauper is still pending. *Ib.*

16. By R. S., c. 24, § 1, a married woman has the settlement of her husband, if he has any in the State. *Howland* v. *Burlington*, 54.

17. Where a man, having his settlement in the defendant town, married a wife in 1844, and, in 1845, abandoned her and removed to Ohio, where he has since remained; and, in 1846, the wife married another man by whom she had several children, for whose support, as well as her own, this action was brought by the town in which, after the second marriage, the parties with

their children resided seven consecutive years; and, in 1849, the former husband obtained a divorce in Ohio; — *Held*,

1. That the former marriage established the settlement of the pauper mother in the defendant town;

2. That the second marriage being void, her settlement remained unchanged thereby;

3. That, notwithstanding the abandonment, she could neither by marriage or residence acquire a new settlement, while her former marriage relations remained unaltered;

4. That the children being illegitimate, had the settlement of their mother at the time of their birth: and

5. That the divorce would not affect the wife's previous settlement.

Howland v. *Burlington*, 54.

18. Where a wife married a second husband after being deserted by a former, who subsequently obtained a divorce, this Court will not presume that there was a remarriage of the second husband and wife, after the divorce of the former, in the absence of proof of knowledge of the divorce on their part, especially when all the events are of recent date. *Ib.*

19. By R. S., c. 24, § 32, towns are to pay expenses *necessarily* incurred for the relief of paupers, by an inhabitant *not liable* for their support, after notice and request to the overseers, until provision is made for them.

Hall v. *Clifton*, 60.

20. By § 9, the father and mother, grandfather and grandmother, children and grandchildren, by consanguinity, living within the State, and of sufficient ability, are to support persons chargeable in proportion to their respective ability. *Ib.*

21. A grandfather not of sufficient ability to support his grandchild, in whole or in part, stands in the same position as other inhabitants of the town in which he resides. *Ib.*

22. If otherwise within § 32, he may recover of the town for the expenses necessarily incurred in relieving his grandchild; and, if he has hired him kept, the expenses *actually* paid out. *Ib.*

23. If of sufficient ability to contribute partial support, he can recover only that part of the support which he cannot supply. *Ib.*

24. By R. S., c. 143, § 20, no person shall suffer any of the disabilities incident to pauperism, nor be thereafter deemed a pauper, by reason of being supported in the insane hospital. *Jay* v. *Carthage*, 128.

25. By R. S., c. 24, § 25, a recovery against a town, for supplies furnished to a pauper, estops such town from disputing the settlement of the pauper with the town recovering, in any future action brought for the support of the same pauper. *Ib.*

26. In an action by one town against another for supplies furnished a pauper, whose settlement is alleged to be in the defendant town, the plaintiffs are estopped by the record of a default in a former suit by the plaintiff against the defendant town, containing a count for the expenses of commitment and support of the alleged pauper at the insane hospital, and also a count in common form for supplies to the same pauper. *Ib.*

27. By R. S., c. 143, § 20, no insane person shall suffer any of the disabilities

incident to pauperism, nor be hereafter deemed a pauper, by reason of having received support in the insane hospital from the State.
Pittsfield v. *Detroit*, 442.

28. An insane person, sent to the insane hospital as a patient by the municipal officers of the town in which he has established his residence, does not thereby lose it, but it continues during his residence in the hospital. *Ib.*

29. By R. S., c. 24, § 1, when part of a town is set off from it and annexed to another, the settlement of a person absent at the time of such annexation is not affected thereby. *Manchester* v. *West Gardiner*, 523.

30. Where the Act, annexing a portion of one town to another, provides that, "all persons chargeable as paupers, having a legal settlement in the territory hereby set off, shall, on the passage of this Act, have a legal settlement in the town" to which the new territory is annexed, the settlement of a person not "chargeable as a pauper" "on the passage of the Act" is not affected thereby. *Ib.*

PAYMENT.

1. An acceptance payable to order is *prima facie* evidence of payment of the account for which it is given. *Paine* v. *Dwinell*, 52.

2. This may be rebutted. *Ib.*

3. As where the vendor of chattels ignorantly takes negotiable paper, not binding on all the vendees, for the price. *Ib.*

PENAL ACTION.

See ACTION, 4, 5.

PLEADING.

1. A brief statement, when made with sufficient precision, becomes to all intents and purposes a substitute for the special plea.
Sturdevant v. *Randall*, 149.

2. In pleading, judgment will be rendered against the party committing the first error. *State* v. *Sweetsir*, 438.

3. Hence where the respondent demurred to a replication to a plea in abatement to an indictment, judgment will be rendered against the respondent if the plea and replication are both bad. *Ib.*

4. A plea in abatement to an indictment for polygamy, alleging that "at the time of the finding of said indictment, the said respondent did not reside nor was he apprehended in the" county where the indictment was found, "but that he then and for a long time before resided in B.," in a county other than that in which the indictment was found, and was apprehended at said B., is bad. *Ib.*

5. A replication, traversing the facts alleged in a plea in abatement, should

tender an issue to the country; if it conclude with an offer to verify and prays judgment, it will be adjudged bad. *State* v. *Sweetsir*, 438.

See DEMURRER. REAL ACTION, 3. SPECIFICATIONS OF DEFENCE.

POOR DEBTORS.

1. In an action of debt against the surety of a bond given by the principal to procure his release from arrest on mesne process, under R. S., c. 113, § 16, evidence of the insolvency of the principal is admissible. *Downes* v. *Reily*, 62.

2. Such bond is a "civil obligation," within R. S., c. 77, § 8, clause 2. *Ib.*

PRACTICE.

1. If there be any legal objection to the Court, it should be seasonably made; and proceeding to trial without objection, if known, is a waiver of it. *Veazie* v. *Bangor*, 50.

2. Requested instructions should be pertinent to the issue. *State* v. *Yeaton*, 125.

3. Therefore, in the trial of an indictment for an unlawful assembly and violently assaulting a member of a lyceum, at the door of a common school house, because he refused to let the defendants enter, the presiding Judge properly refused to instruct the jury that such member had no legal right to exclude the defendants from attending the lyceum, even though they were inhabitants of the district in which the school house was situate. *Ib.*

4. Also, the instruction, that the defendants had a legal right to use sufficient force to enter said school house for the purpose of attending the lyceum, when they attempted it, was properly refused. *Ib.*

5. On an issue joined of *nul tiel record*, a judgment in favor of Thomas Far*row* will not support a declaration in debt on a judgment in favor of Thomas Farr*ar*. *Farrar* v. *Fairbanks*, 143.

6. *It seems* that such misprision may be avoided by an averment that the plaintiff, by the name of Thomas Farr*ow*, recovered such judgment. *Ib.*

7. When the testimony, as reported, does not necessarily establish the position that the jury erred in their verdict, or acted under any undue influence, bias, prejudice or partiality, it will not be set aside as being against evidence. *Folsom* v. *Skofield*, 171.

8. A judgment rendered on a declaration defective in form, but amendable, will not be reversed on error. *Page* v. *Danforth*, 174.

9. It is the province of a Judge, at *Nisi Prius*, to state to the jury the claim set up by each of the parties, as disclosed by the evidence, and to instruct them upon the law applicable thereto. *Grout* v. *Nichols*, 383.

10. It is competent for the presiding Judge to instruct the jury as to the legal effect of any one of several facts relied upon to establish a waiver; leaving it to the jury to pass upon the general question from all the evidence in the case. *Ib.*

11. The decision of a presiding Judge as to matters of fact, in a case referred to him with right to except, is conclusive.
Berry v. *Johnson*, 401.

12. A verdict, being an entirety, cannot be set aside as to one count, and retained as to another. *Frye* v. *Moor*, 583.

See SPECIFICATIONS OF DEFENCE.

PRESCRIPTION.

1. Open, notorious, exclusive and adverse possession of upland adjacent to flats, and of portions of the flats, for twenty years, under a deed duly recorded, gives a title to all the flats fronting such upland and described in the deed. *Brackett* v. *Persons unknown*, 228.

2. As a general rule, the title acquired by an entry under a defective deed, and a continued disseizin for more than twenty years, is the same in extent, as if the conveyance had been valid. *Ib.*

3. No change was made by statute of 1821, c. 62, § 6, as to the effect of an entry under a record title, and a continued disseizin. *Ib.*

4. Open, notorious, exclusive and adverse possession of upland adjacent to flats for twenty years, under a deed duly recorded, gives a title to all the flats fronting such upland and described in the deed. *Ib.*

PROBATE COURT.

1. R. S., c. 67, do not limit the Probate Court, in its selection of guardians, to persons resident in this State. *Berry* v. *Johnson*, 401.

2. By R. S., c. 63, § 19, any person aggrieved by any order, sentence, decree or denial of Judges of Probate, may appeal therefrom.
Veazie Bank v. *Young*, 555.

3. A party is aggrieved by such decree only when it operates on his property or bears upon his interest directly. *Ib.*

4. A mere garnishee of a debtor to the estate of a deceased person, has no such interest in the appointment of an administrator upon such estate as enables him to appeal from the decree of the Judge of Probate making such appointment. *Ib.*

5. When an appeal is taken from the decree of a Judge of Probate by one having no right of appeal, the question of jurisdiction in the Court below cannot be entertained in this Court sitting as the Supreme Court of Probate. *Ib.*

6. Whether or not an appeal rightfully claimed may be entertained for the purpose of examining and deciding whether the Court below erred in taking jurisdiction, when the want of jurisdiction was not apparent upon the face of the proceedings, *quære*. *Ib.*

PROBATE SALE.

1. By R. S., c. 71, § 30, if the validity of a sale of real estate by license from a Probate Court is contested by one claiming adversely to the title of the wife, ward, or deceased aforesaid, or by a title not derived through either, the sale shall not be held void on account of any irregularity in the proceedings, if it appears that the license was granted by a court of competent jurisdiction, and the deed was duly executed and recorded. *Webster* v. *Calden*, 203.

2. The mere fact that lands sold for a very small sum compared with their intrinsic value, is not conclusive evidence of fraud. *Ib.*

PROPRIETORS OF LANDS.

1. A book purporting to be proprietary records, in the handwriting of the clerk, found among his papers after his decease, and remaining ever since in the hands of his executor, is sufficiently proved to justify its admission as evidence, especially when there is no proof that there was ever any other records or clerk. *Brackett* v. *Persons unknown*, 228.

2. The neglect of such clerk to deposit the records with the town clerk, after the proprietary ceases to exist, as required by statute of 1821, c. 4, § 3, does not affect the validity of the previous proceedings of the proprietary. *Ib.*

3. When such records have not been so deposited, the original is admissible in evidence without any certificate of the town clerk to authenticate it. *Ib.*

4. When certain persons assume under that statute to act as a proprietary, describe themselves as such, and keep a record, the legal presumption, after the lapse of thirty years and more, is that they were proprietors; and the admission of evidence, outside of the record, that they were so in fact, affords no legal ground of complaint. *Ib.*

5. The fair construction of a return, that notice had been given "by posting a copy in two public places, in, &c.; and by inserting the same in, &c., more than fourteen days previous" to the time of meeting, "as the law directs," is, that the "*posting*" and "*inserting*" were *both* done fourteen days before the time of the meeting. *Ib.*

6. When a record states, "it was voted," &c., it will be presumed, especially after the lapse of nearly forty years, that the voting was done in the manner provided by law. *Ib.*

7. Although the doings of some meetings of a proprietary are invalid because they are not legally called, the validity of prior or subsequent meetings is not thereby affected. *Ib.*

8. The proceedings of such proprietary, at meetings not legally called, may be given in evidence to show the origin of the possession of land by parties claiming by disseizin and adverse occupation, and to give color of title thereto. *Ib.*

9. For the same purpose, a deed, executed by one as the attorney of another, may be given in evidence, without proving the attorney's authority. *Ib.*

RAILROAD.

1. It is a reasonable regulation for a railroad corporation to fix rates of fare by a tariff posted on their stations, and to allow a uniform discount on these rates to those who purchase tickets before entering the cars.
State v. *Goold*, 279.

2. A passenger, who has thus neglected to purchase a ticket, has no right to claim the discount, whether he had knowledge of the regulation or not; and, if he refuses to pay to the conductor the fare established by the tariff, the conductor is justified in compelling him to leave the train at a regular station. *Ib.*

3. The lien provided for in § 11, c. 450 of the Special Laws of 1860, took effect at the time the liability was incurred, and could not include property not then owned by the company. *Bath* v. *Miller*, 308.

4. Where a railroad company, by virtue of a special Act of the Legislature, mortgaged to the plaintiffs not only all of the property then owned by both the new and the old portions of the road; — *Held*, that wood, subsequently purchased with the earnings and for the use of the whole road, would not pass by said mortgage, and is attachable. *Ib.*

5. Attaching creditors would hold such wood as against any lien of the plaintiffs, claimed by a subsequent taking possession under § 6, c. 450, of the Special Laws of 1860. *Ib.*

6. If the mortgagee of wood, attached as the property of the mortgager, replevy the same from the attaching officer, and permit it to go back into the possession of the mortgager, who burnt it with the knowledge and consent of said mortgagee; the mortgagee thereby waives all lien held by virtue of the mortgage. *Ib.*

See WAYS, 3.

REAL ACTION.

1. In ejectment, the general issue alone admits the defendant to be in possession of the premises described in the declaration.
Chaplin v. *Barker*, 275.

2. In such case, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant. *Ib.*

3. Matter in the nature of a disclaimer must be filed within the time allowed for pleas in abatement. *Ib.*

4. Under the general issue, the defendant may rest upon his possession until the plaintiff has shown some right to disturb it. *Ib.*

5. The defendant may rebut the plaintiff's proof of seizin by any legal evidence. *Ib.*

6. Where the plaintiff's seizin depended upon a sheriff's sale of the defendant's right in equity to redeem the premises from a mortgage, consisting of a warranty deed with a bond of defeasance back; — *Held*, that it was com-

petent for the defendant to prove assignment of said bond prior to the plaintiff's attachment, together with the consideration of said assignment.
Chaplin v. *Barker*, 275.

7. In ejectment, the fact that the defendant has an easement in the demanded premises constitutes no bar to the plaintiff's right of recovery.
Blake v. *Ham*, 430.

REPLEVIN.

1. In an action of replevin for a colt, brought by an executor, the plaintiff will not be permitted to prove the declarations of his testator, made while the colt remained on his premises, with his other stock, tending to show that he claimed to own the colt, to rebut testimony offered by the defendant, tending to show a previous gift by the testator to his son who lived with him and of whom defendant had purchased the colt.
Holmes v. *Sawtelle*, 179.

2. In replevin, a judgment for return is a direct and conclusive adjudication that the defendants' right of possession is superior to the plaintiffs'.
Bath v. *Miller*, 308.

3. In debt on a replevin bond after a judgment for a return, the defendant, who replevied a horse from the plaintiff, an officer, who had seized it on an execution as the property of a third person, is not liable for its value, if the horse died during the pendency of the suit, without the fault of any one, *provided* the replevin suit was commenced in good faith.
Walker v. *Osgood*, 422.

See RAILROAD, 6.

REVIEW.

1. A review will not be granted in a case which has been referred, on the mere ground that the petitioner's counsel was not present, when the report of the referee was offered and accepted in Court, although it was not offered until after the second day of the term. *Crooker* v. *Randall*, 355.

2. A review will not be granted on the ground of newly discovered evidence, when it does not appear that the evidence is admissible, or that it is not cumulative. *Ib.*

SALE.

1. The fact that the article delivered is not in quality what was contracted for, will not excuse the vendee from taking the necessary steps to rescind the sale. *Cutler* v. *Gilbreth*, 176.

2. A party who would rescind a sale must use proper diligence. *Ib.*

3. By R. S., c. 82, § 47, a demand originally payable to the defendant in his own right, founded on a judgment or contract, express or implied, for the price of real or personal estate sold, for money paid or had and received, for services done, for a liquidated sum, or for one ascertainable by calculation, may be set off. *Ib.*

4. If, on account of his own laches in not rescinding a sale, the vendee cannot maintain a count for money paid or had and received for the article delivered, he cannot, under the above statute, set off the claim against the vendor's suit growing out of a distinct transaction. *Cutler* v. *Gilbreth*, 176.

5. In a sale of personal property by parol, the title may vest in an undisclosed principal for whom the apparent purchaser is negotiating as agent. *Tainter* v. *Lombard*, 369.

6. In such case, the principal may vindicate his title as against the agent, although the seller of the property has no knowledge of the interest of the principal. *Ib.*

7. If A negotiate for the purchase of personal property, and, at his request, B pays for it upon the agreement that he is to hold the property as his own, until he is repaid, and the property is delivered to them under this agreement, the title will vest in B. *Ib.*

8. A verbal agreement for the sale of personal property, for thirty dollars or more, is valid, when a part of the property has been delivered to and accepted by the purchaser under the agreement, although such delivery and acceptance took place several days after the making of the agreement. *Bush* v. *Holmes*, 417.

9. Damages for non-delivery of a portion of the property are the difference between price agreed and the value at the time of refusal. *Ib.*

See ASSUMPSIT, 3, 5, 6, 7, 8. CONTRACT.

SET-OFF.

See SALE, 3, 4.

SHIPPING.

Where an agent of the plaintiff, to sell a vessel, paid the proceeds to the defendant, for the use of the plaintiff, the former cannot resist the claim of the latter on the ground that he did not own the vessel, which he authorized his agent to convey. *Jenks* v. *Manson*, 209.

SPECIFICATIONS OF DEFENCE.

1. By the 9th rule of the Supreme Judicial Court, parties filing specifications of the nature and grounds of defence with the clerk, * * shall, in all cases, be confined, on the trial of the action, to the grounds of defence therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial. *Fox* v. *Conway Fire Ins. Co.*, 107.

2. This rule is not repugnant to law; and the Supreme Judicial Court had not only statute, but inherent authority to establish it. *Ib.*

3. Specifications of defence may be amended at the discretion of the presiding Judge. *Ib.*

4. By R. S., c. 82, § 18, in all civil actions, if the defendant appears, he shall, at least fourteen days before the next term after his appearance, file with the clerk a brief specification of the grounds of his defence, with a declaration, signed by him or his attorney, that he believes there is a good defence to all or a part of the plaintiff's claim, and that he intends to make it. *Granite State Bank* v. *Otis*, 133.

5. This statute does not require that the several grounds of defence specified shall be consistent with each other. *Ib.*

6. The defendant may specify as many grounds of defence as he chooses. *Ib.*

7. It is not necessary that each several ground of defence should constitute a valid and sufficient answer to the declaration. *Ib.*

8. If there be one valid ground of defence specified, the defendant cannot be deprived of his right to a jury trial. *Ib.*

9. Specifications of defence need not contain the technical accuracy of a special plea. *Clement* v. *Garland*, 427.

10. They need only intelligibly disclose the ground of defence relied upon. *Ib.*

See INSURANCE, 1, 2, 3, 4, 5.

STATE TREASURER.

1. The discharge of a State Treasurer's bond is *prima facie* a discharge of all claims against the Treasurer, for which he or his sureties were liable on his bond. *State* v. *Dow*, 305.

2. The Court will not take judicial notice of the report to the Legislature of the committee appointed, by the Resolve of March 20, 1860, to settle with the sureties of the then late State Treasurer. *Ib.*

3. The State Treasurer cannot be required to pay out money received by him in his official capacity without a warrant from the Governor and Council. *Weston* v. *Dane*, 372.

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STATUTE OF FRAUDS.

1. The mere writing of the price and the name of the purchaser of real estate

sold at auction, by the auctioneer, upon a slip of paper not connected with any other papers, is not a sufficient signing within the statute of frauds.
Horton v. *McCarty*, 394.

2. To bind the purchaser, a memorandum, containing all of the essential terms of the contract, must be made and signed by the auctioneer at the time of the sale and before the termination of the proceedings. *Ib.*

3. It is not sufficient for the auctioneer to enter, in the absence of the purchaser, the sale on his book at his office upon his return from the place of sale, he having no sufficient memorandum of the sale, made at the time, from which to make the entry. *Ib.*

4. The extent of the agency of the auctioneer. *Ib.*

See ASSUMPSIT, 7. CONTRACT, 5. MORTGAGE, 15.

TAXES.

1. If a person, who has, upon due notice, presented to the assessors true and perfect lists of his polls, and all his estates, real and personal, not exempt from taxation, &c., refuses to answer all proper inquiries in relation to the nature and situation of his property, and, if required, to subscribe and make oath to the same, he is thereby barred from applying to the county commissioners for any abatement of his taxes.
Lambard v. *County Commissioners*, 505.

2. Logs, timber, etc., designed and intended to be manufactured and sold in some town other than that in which their owner resides, but in which, on the first day of April, he occupies a mill, store or wharf, are rightfully taxable in such town, and not in the town where the owner resides, although they may not, on the first day of April, in the year for which the tax is assessed, have actually arrived within the corporate limits of such town, provided they are in the course of the year brought there and manufactured.
Ellsworth v. *Brown*, 519.

See COLLECTORS OF TAXES.

TOLL BRIDGES.

1. In the absence of any special provisions in the charters of toll bridge corporations, there seems to be no essential difference between the obligations and liabilities resting upon such corporations and those of a town charged with the maintenance of a bridge.
Orcutt v. *Kittery Point Bridge Co.*, 500.

2. Toll bridge corporations are not bound to erect and maintain railings upon their bridges for travellers to lean against or rest upon while they stop to recover from fatigue; and, if a person uses them for such purpose, he does it at his own risk. *Ib.*

TOWN LINES.

1. By R. S., c. 3, § 30, when a town petitions the Court, stating that a contro-

versy exists between it and an adjoining one respecting a town line or lines, the Court may appoint commissioners, who shall "*ascertain* and *determine* the line or lines in dispute," and make duplicate returns of their proceedings, one to the Court, and the other to the office of the Secretary of State; and such line or lines, shall be deemed in every court of law, and for every purpose, the true dividing line or lines between such towns. *Lisbon* v. *Bowdoin*, 324.

2. The validity and efficacy of the proceedings of the commissioners must be determined upon the facts appearing on the reports. *Ib.*

3. If the report does not "*ascertain* and determine" the line, the "controversy" is not terminated, and commissioners may be appointed on a new petition. *Ib.*

4. A report declaring that the commissioners do "*award* and determine" that a certain defined line "shall be the true boundary," &c., does not make it certain that they did not establish a *new* line, instead of *ascertaining* and *determining* the *old* one, and hence is insufficient. *Ib.*

TOWN MEETING.

1. By R. S., c. 3, § 4, in case the selectmen unreasonably refuse to call a town meeting, any ten or more legal voters therein may apply to a justice of the peace in the county, who is hereby authorized to issue his warrant for calling such meeting. *Southard* v. *Bradford*, 389.

2. If a majority of the selectmen were never requested to call the meeting, it cannot be said they unreasonably refused. *Ib.*

3. A town meeting, called by a justice of the peace, without an unreasonable refusal by the selectmen, is illegal. *Ib.*

4. This Court will not presume a town intended to ratify the proceedings of a meeting illegally called, unless it use language so clear and explicit that there can be no doubt of its purpose. *Ib.*

TOWNS.

1. The signature of one selectman to a written contract cannot bind the town. *Richmond* v. *Johnson*, 437.

2. It is no part of the corporate duty of towns, as such, to provide for the public defence. *Alley* v. *Edgecomb*, 446.

3. Military service is due from the citizen to the country in which he resides, in its time of need, and is not rendered for or in behalf of his town. *Ib.*

4. The adoption of town boundaries, as convenient limits of the sub-districts in raising the quota of the State, imposed no new duties upon the municipal corporations which were created for other special purposes. *Ib.*

5. Hence, if, in conformity with the regulations of the service, a town use the name and appropriate the service of one of its citizens already in the service, without his knowledge or consent, to fill its quota, it does not thereby raise an implied promise to pay for his service. *Ib.*

6. In December, 1863, the plaintiff enlisted in the navy, served three years

and was honorably discharged. In August, 1864, the defendant town, at a meeting legally notified and under a proper article, "voted, that the town shall raise a sum of money sufficient to fill its quota under the call of the President in 1864, provided the men can be procured for $300 each from the town." In an action by the plaintiff to recover the $300; — *Held*, that the vote was prospective and did not apply to those who enlisted prior to the call. *Alley* v. *Edgecomb*, 446.

7. Towns were not authorized by chapters 226 or 227 of the Public Laws of 1864, to purchase "marine credits" with which to fill their quotas. *Barker* v. *Dixmont*, 575.

8. Neither does c. 298 of the Public Laws of 1865 ratify such a purchase. *Ib.*

9. Under a proper article in the warrant, a vote "to raise six thousand dollars for men to fill our quota, and that W. B. F. be a committee to procure men," &c., does not authorize the committee to purchase "marine credits." *Ib.*

10. A defendant town voted to "accept, and pay S. A. B. $435 each for ten men for three years' service, that S. A. B. give security that those men shall continue in the army three years, unless sooner discharged, or refund the money;" — *Held*, that the vote applied to "men" and not to "marine credits," and that the giving of security was a condition precedent. *Ib.*

TRIAL JUSTICES.

1. By c. 164, of the Public Laws of 1860, a trial justice has no authority to strike off, on a subsequent day, a nonsuit entered by him on the day to which an action returnable before him had been duly continued. *Pratt* v. *Roberts*, 399.

2. Sections 9 and 10, of said chapter, authorizing a magistrate to "strike off a nonsuit or default and revive an action," refer to a "nonsuit or default" entered at "the time set in the writ for the trial," and not to a disposition of the cause in either mode at some subsequent day to which it had been continued. *Ib.*

TROVER.

1. A, owing the plaintiff $60, agreed to build her a wagon worth $85, she to pay the balance when completed. On May 16, 1861, when the wagon was completed, A, also, being indebted to the defendant, gave him a promissory note for $31, payable in thirty days, to which was appended an agreement stipulating that said "note, being given for a side spring wagon, delivered to" the defendant, "it was to remain the property of" the defendant "until said note is paid." On Oct. 12, 1863, the plaintiff, after tender and demand, brought trover: — *Held*, the action may be maintained. *Keen* v. *Jordan*, 144.

2. What is a reasonable amount for storing the wagon is a question of fact; and when referred to the presiding Judge, his decision thereon is final. *Ib.*

3. Possession is *prima facie* evidence of title to personal property. *Vining* v. *Baker*, 544.

4. Plaintiffs in possession may maintain trover against all persons wrongfully interfering with their possession. *Ib.*

TRUST.

See EQUITY, 19, 20, 21, 22, 23, 24.

TRUSTEE PROCESS.

See GUARDIAN AND WARD, 3. VOLUNTEERS, 4.

VENDOR AND PURCHASER.

See ASSUMPSIT, 5, 6, 7, 8. SALE.

VERDICT.

1. When the testimony, as reported, does not necessarily establish the position that the jury erred in their verdict. or acted under any undue influence, bias, prejudice or partiality, it will not be set aside as being against evidence. *Folsom* v. *Skofield*, 171.

2. A verdict, being an entirety, cannot be set aside as to one count, and retained as to another. *Frye* v. *Moor*, 583.

VOLUNTEERS.

1. By c. 106, § 2, of the Public Laws of 1862, personal property to the amount of one thousand dollars * * in addition to that already exempted by law, shall be exempt from attachment, or seizure upon execution, from and after the time a volunteer shall enlist in the service of the United States, and during his term of service, to be designated by the debtor, or his agent or attorney. *Bridgton* v. *Lakin*, 106.

2. If the personal property of a debtor exceed one thousand dollars in value, he must designate what shall be exempted. *Ib.*

3. If it be less, there is no occasion for his making any designation. *Ib.*

4. Bounty money of a volunteer, in the hands of a person summoned as trustee, cannot be attached by trustee process, when the principal debtor's personal property is less than a thousand dollars. *Ib.*

5. By virtue of the Public Laws of the United States, c. 9, § 6, of 1861, and c. 144, §§ 1 and 3, of 1862, the father, (if resident in the U. S.,) of a deceased volunteer soldier is entitled to his arrears of pay and bounty. *Reed* v. *Reed*, 527.

6. And the soldier had no right to dispose of either by will. *Ib.*

7. Congress has a right to prescribe and determine what pay and bounty shall

be given to a soldier and to whom, in the case of his death, the arrears shall be paid. *Reed* v. *Reed*, 527.

8. By enlisting after the passage of these laws, the volunteer entered into a contract, the terms of which had been established by Congress, and to which he assented by the act of his enlistment. *Ib.*

See BOUNTIES TO VOLUNTEERS. TOWNS.

WAYS.

1. If a private way be unlawfully obstructed by the owner of the adjoining land, a person entitled to use the way may pass over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage. *Kent* v. *Judkins*, 160.

2. By R. S., c. 18, § 35, in cases of appeal from the decision of county commissioners on petitions for laying out, altering or discontinuing any highway, the Court may appoint a committee of three *disinterested* persons, &c. *Friend, Appellant*, 387.

3. Where the land over which a road is laid by the county commissioners is owned by a railroad company, a stockholder in said company is not *disinterested*, and cannot be appointed on the committee. *Ib.*

4. By R. S., c. 18, § 35, the committee, appointed in cases of appeal from the decision of county commissioners, "must make their report at the next or second term of the Court after their appointment." *City of Belfast, Appellants*, 431.

5. In such cases, the Supreme Judicial Court has no authority to accept a report made subsequently, although the delay in making it was in accordance with the express written agreement of the parties, indorsed on the back of the warrant, at the time of the view and hearing. *Ib.*

6. Neither can the agreement, so entered into, operate as an estoppel so as to confer jurisdiction upon the Court in the premises. *Ib.*

7. But in the *execution* of such power they must conform to the provisions of law relating to the laying out of highways. *Ib.*

8. Chapter 365, of the Special Laws of 1846, providing that "the county commissioners of Waldo county are authorized and empowered to lay out and establish a road over Fish river, in the town of Belfast, if public convenience requires it," simply enlarged the power of the commissioners, without absolving them, while exercising such power, from following the requirements of existing laws in reference to the laying out of ways. *Ib.*

See COUNTY COMMISSIONERS.

WIDOW'S ALLOWANCE.

1. The allowance to a widow is to be determined by the law of the domicil of her husband. *Gilman* v. *Gilman*, 184.

2. By R. S., c. 63, § 24, the Supreme Court of Probate may reverse or affirm,

in whole or in part, the sentence or act appealed from, pass such decree thereon as the Judge of Probate ought to have passed, remit the case to the Probate Court for further proceedings, or take *any* order therein that law and justice require. *Gilman* v. *Gilman*, 184.

3. An appeal from a decree of the Probate Court, fixing the amount of allowance to a widow, vacates the judgment appealed from; and the whole subject matter of the appeal is, without any statute restriction, open to the appellee in the Supreme Court of Probate. *Ib.*

4. Hence, where one of the heirs of a deceased person appealed from a decree of an allowance to the widow, for the reason that it was "excessive, unreasonable and not necessary, according to the degree and estate of her husband and the state of the family under her care;" — *Held*, that the Supreme Court of Probate might increase the amount decreed below, if, in its opinion, law and justice require it. (CUTTING, J., dissenting.) *Ib.*

5. The circumstances to be considered in fixing the amount of an allowance. *Ib.*

WILLS.

1. At common law, a will of personal property, written in the testator's own hand, without seal, though no witnesses were present at its publication, is good; and no particular form of expression is material, if only the testator's intention is manifest. *Leathers* v. *Greenacre*, 561.

2. By R. S., c. 74, § 18, "a soldier in actual service, or mariner at sea, may dispose of his personal estate and wages," as he might have done under the common law. *Ib.*

3. The terms "in actual service," and "engaged in an expedition," are synonymous. *Ib.*

4. The term "expedition" is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle. *Ib.*

5. If, during the late rebellion, — and after he had been mustered into the military service of the United States, but while he remained in barracks, or while thus quartered at any military station in one of the loyal States not exposed to the incursions of the enemy, and before he had crossed over to the seat of war with his regiment to take part in the hostilities existing there, and before he had begun to move under military orders against the foe, — a soldier had made a will without observing the usual statute formalities, it would not be deemed the will of a "soldier in actual service," and therefore not entitled to probate as such. *Ib.*

6. But having marched into the enemy's country from which he never returned, and encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters and not, at the time of making his will, occupied with any present movement of the troops, but was on some service detached from his own regiment, he would be deemed a "soldier in actual service," and his will be sustained if good at common law. *Ib.*

7. In August, 1862, J. B. L. enlisted in the first regiment of Maine cavalry, and was thereafterwards, in the same month, mustered into the U. S. military service. March 6, 1863, while lying in camp at Stafford C. H., Va., he wrote a long letter to the defendant, (with whom he had previously deposited the two notes mentioned in his letter,) in which he said: — "As life is uncertain, I will give you my wishes in regard to my property, if I should fall here." "The face of the note that" G. H. L. "owes me and now in your hands, and also the note against" C. S., "and interest, I want you to distribute among my brothers and sisters as you think proper, and all other property to my wife, (naming her) and for her to pay my debts," (signed.) March 2, 1864, he started on a raid to Richmond in company with others under military orders, was captured and died in prison, March 16, following; — *Held*, that J. B. L. was a "soldier in actual service," when he wrote the letter, and that it was a will entitled to probate.

Leathers v. *Greenacre*, 561.

ERRATUM.

Page 300, first line, for *William* Watson read *David* Watson.