REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By WM. WIRT VIRGIN,
REPORTER TO THE STATE.

MAINE REPORTS,

VOLUME LIV.

HALLOWELL:
MASTERS, SMITH & CO.
1868.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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, LL. D.,
HON. WILLIAM G. BARROWS,
HON. CHARLES DANFORTH,
HON. RUFUS P. TAPLEY,

} ASSOCIATE JUSTICES.

ATTORNEY GENERAL — HON. WILLIAM. P. FRYE.

ERRATUM.

Page 570, line 14, for "paid *to* the son," read paid *for* the son.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

WILLIAM F. CHADWICK *& als.*, *Ex'rs*, *versus* CHARLES BAKER.

A vessel cannot have two registers at the same time.

"Permanent" and "temporary," when applied to the registers of a vessel, do not imply that they are co-existent, but successive.

Such a sale of a vessel, in whole or in part, as creates a new owner, renders her former registry inoperative and void.

Under Act of Congress of July 29, 1850, a bill of sale of a vessel, whether conditional or absolute, must be recorded in the office from which her last register issued.

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

ASSUMPSIT for money had and received, by the executors of the last will and testament of Samuel Chadwick, to recover one-quarter of the earnings of the ship "Catherine."

It was admitted that the defendant received the earnings from the ship's husband, and that a due demand for the same was made prior to the commencement of the suit.

The plaintiffs read in evidence a mortgage bill of sale of one-half of the ship from John Leavitt to Samuel Chadwick, dated Dec. 4, 1855, and recorded at custom house, Portland, Dec. 7, 1855, and custom house, Boston, October 2, 1861.

The defendant read in evidence a bill of sale of one-quarter of said ship, from John Leavitt to him, dated Dec. 4,

1855, said quarter being part of what was conveyed to Chadwick, and recorded at the custom house, Boston, Feb. 6, 1856.

The last register of the ship was issued from the custom house at Boston, Oct. 17, 1851, as appeared in each bill of sale.

In the mortgage bill of sale to the plaintiffs' testator, the said Leavitt declared himself as the "owner of one-half of ship "Catherine," of Portland,—one-quarter as per register, and one-quarter by virtue of a bill of sale to him from Samuel Chadwick, dated Dec. 4, 1855, and recorded at the custom house, Portland."

The register, as recited in the bills of sale, mentioned John Leavitt and Samuel Chadwick as each owning one-quarter of the ship.

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

McCobb & Kingsbury, for the defendant.

WALTON, J. — An Act of Congress, passed July 29, 1850, declares that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgager, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of the customs *where such vessel is registered or enrolled.*" (Brightly, 833, § 44.)

Both parties claim title to the earnings of the same fourth-part of the ship *Catherine*, the plaintiffs by virtue of a mortgage recorded in the office of the collector of the customs at Portland, and the defendant by virtue of a mortgage recorded in the office of the collector of the customs at Boston; and the question is whether Portland or Boston was the proper place in which to record these mortgages. "*Where such vessel is registered*," is the language of the law.

The vessel in question was first registered in Portland in

1849, and afterwards, in consequence of a partial change of owners, was registered anew in Boston in 1851. The mortgages were executed in 1855. Was Portland or Boston the proper place for recording these mortgages?

We have carefully examined the question, and our conclusion is that Boston was the proper place. We think it was there only that the vessel was legally registered when the mortgages were executed. We think the law does not contemplate, does not allow even, a plurality of registers at the same time. The registry of a vessel is in the nature of a continuing license. It secures to the owners certain privileges so long as the registry continues in force and no longer; and the registry will continue in force so long only as the legal status of the vessel remains unchanged. A sale of the vessel, in whole or in part, changes her legal status, and her former registry thereupon becomes inoperative and void. She is no longer a registered vessel, and can no longer enjoy the privileges of one, unless registered anew. And when by reason of a change of ownership a vessel is registered anew, it is her last registry only that secures to her the privileges of a registered ship; and the office where this last registry was effected, is the only place where (speaking in the present tense) the vessel can properly be said to be registered.

The case is not unlike that of a vessel which is insured upon condition that any change of ownership shall render the policy void; and a change of ownership having taken place, is insured anew at another office. Speaking in the present tense, would any one think of saying that the vessel "is insured" in any other than the office where her last insurance was effected? So with respect to the registry of a vessel. The law expressly declares that such a sale as creates a new owner, renders her former registry inoperative and void; that unless registered anew, "she shall cease to be deemed a ship or vessel of the United States." If she is registered anew, for such a cause, can it be said that she "is registered" in any other than the office where her last

registry was effected? We think not. We think that when the Act of 1850 names the office of the collector of the customs "*where such vessel is registered*" as the proper place for recording a mortgage, the office referred to is the one where her last registry was effected.

None but citizens of the United States are entitled to have their vessels registered. Nor can a vessel be registered until proof of the citizenship of all her owners is placed on record. The reason, therefore, why such a sale of any part of a vessel as creates a new owner renders her former registry inoperative and void is obvious. The record no longer establishes the fact that all her owners are citizens of the United States. It contains neither the name nor the evidence of the citizenship of the new owner. For aught that appears he may be a foreigner. If so, the vessel is not only unregistered, but denationalized, so as to render her incapable of being registered. If the sale is to an American citizen, it does not denationalize her, it only unregisters her, and she may be registered anew upon proof that the new owner is a citizen of the United States. If a vessel is sold at sea to an American citizen, her privileges are not thereby forfeited, "provided, that all the requisites of law in order to the registry of ships or vessels, shall be complied with and a new certificate of registry obtained for such ship or vessel within three days from the time at which the master or other person having the charge or command of such ship or vessel, is required to make his final report upon her first arrival afterwards." (Act March 2, 1803, § 3.) Except the brief extension of the privileges of her former registry here provided for, the sale of a vessel, in whole or in part, instantly unregisters her; and when she has been registered anew, such vessel cannot properly be said to have two registers; it is the fact that her former registry has become inoperative and void, that makes a new registry necessary. (Act Dec. 31, 1792, § 14.)

This view of the law is confirmed by the fact that when a vessel is sold and thereupon registered anew, or sold with-

out being registered anew, her former certificate of registry is to be given up and cancelled. (Act Dec. 31, 1792, § 14.) Also the bond given at the time of granting such register is to be cancelled. (Same Act, § 18.)

Vessels may be registered by the collector of the port where at the time the registry is effected such vessels may be. If a vessel is registered at a port other than that to which she belongs, and she afterwards arrives at her home port, she is to be there registered anew, and her former certificate given up. Hence it is the practice to write upon a certificate obtained at a port other than that to which the vessel belongs, the word "temporary," probably to remind those having charge of the vessel of the necessity of surrendering it and obtaining a new one, when, if ever, the vessel arrives at her home port. It is this practice which seems to have originated the idea that a vessel may be registered in two places at the same time; that her registry at one of these places is permanent and at the other temporary. But such a distinction is neither sanctioned nor recognized in the registry laws; and if it was it would not authorize the conclusion that a vessel has two registers at the same time; for the word "temporary" implies that for a brief season at least the object to which it applies is to serve in place of that which is afterwards to take its place. The words permanent and temporary do not imply co-existences, but successive ones. That which is permanent *follows* that which is temporary. The idea, therefore, that because a registry at one place may be called temporary, and a registry at another permanent, the vessel is therefore registered in two places at the same time, seems to us unwarranted. The phrase "temporary register," fairly construed, implies that it is to be followed by another more permanent, but not that the two are co-existent.

The whole argument for the plaintiffs is based upon the assumption that a vessel is always registered at her home port, and that her registry at any other port is but temporary. In other words, that a vessel may have two registries

at the same time, the one permanent and the other temporary. Hence it is argued, that inasmuch as a vessel is always permanently registered at her home port, and all other registries are but temporary, that the notice intended to be given by the recording of mortgages, will be most effectually accomplished by requiring them to be recorded in the collector's office of the home port, although that may not be the office in which the vessel was *last* registered.

We have already noticed what we regard as one of the fallacies of this argument; namely, the assumption that a vessel may have two registries at the same time. But we think it is also defective in another respect. It assumes that a vessel is always registered at her home port, which we think is not true. It not only may happen, but frequently does happen that a vessel is not registered at her home port.

Take the case provided for in § 11 of the registry Act of 1792. It is there provided that where citizens of the United States become the owners of a vessel entitled to be registered, such vessel being within any district other than that in which they usually reside, such vessel shall be entitled to be registered where she may be. If a vessel thus registered afterwards arrives at her home port, she is to be there registered anew. But suppose she is employed in foreign commerce for many years, and is finally worn out or lost without ever being brought into her home port. If, while thus employed, the vessel is mortgaged, where can the mortgage be legally recorded? The language of the law is, "*where such vessel is registered.*" This cannot refer to her home port, for she has never been there registered; and must refer to the port where she obtained the register under which she has been navigated. Many other cases can be suggested in which a vessel might be mortgaged, and it might be important to have the mortgage recorded, and yet a compliance with the law would be impossible, if the home port of the vessel is the only place where such a record can legally be made. The propositions, therefore,

that "every vessel regularly documented, is registered or enrolled at the port of the district where she belongs, and that this remark is correct, although she may be sailing under a temporary register or enrollment granted at the office of the collector of some other port," cannot be maintained. We think it is clearly demonstrable that a vessel may be regularly documented, so as to secure all the advantages of a registered ship, and yet never be registered at her home port; and we have no doubt that many such cases actually occur.

In support of the proposition that a vessel is always permanently registered or enrolled at her home port, section 3 of the Act of 1792 is cited. That section does not support the proposition. It declares that vessels shall be registered at their home port "*except as is hereinafter provided*," and the cases thereinafter provided for, reduce the law as a whole to simply this, that vessels may be registered at any port, where, at the time such registry is effected, they may happen to be. If they are then at their home port, they must be there registered. If at some other port, then they are to be there registered, and not at their home port, except that if they are afterwards brought into their home port, then they are to be there registered anew. If, however, they are never brought into their home port, then they will never be registered there.

Nor are we satisfied that the argument *ab inconvenienti* is in favor of the home port. Every bill of sale of a vessel, whether absolute or conditional, contains a recital at length of the ship's last register, otherwise she cannot be registered anew. (Act of Dec. 31, 1792, § 14.) The mortgages of the ship Catherine, put into this case, both contain such a recital. The omission of such a recital would be attended with such serious inconvenience, that in practice such a case will never be likely to happen. All therefore a mortgagee has to do is to look at his mortgage to ascertain the office in which the vessel was last registered; or before taking his mortgage, look at the register, a copy of which is to be in-

serted in his mortgage. This will at once direct him to the proper office to look for incumbrances, and to the proper office in which to record his own mortgage. Section *three* of the Act of 1850, (Brightly, 834, § 46,) requires collectors to give certificates, setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, and also the material facts of any existing bill of sale, *mortgage*, &c., upon such vessel, "*recorded since the issuing of the last register or enrollment.*" We think this language clearly implies that mortgages are to be recorded in the office from which the ship's *last* register issued, otherwise a compliance with the provision would be impossible; and we are unable to see why this office cannot be as readily and as conveniently ascertained as the office of the home port of the vessel. We think, therefore, that the argument drawn from the supposed inconvenience that would be likely to attend a search for the office in which the vessel was last registered, is without foundation. We think it can be more conveniently and certainly ascertained than the office of the home port of a vessel; for the home port of a vessel, (which means nothing more than the port at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner, usually resides,) is not always a matter of record, and is liable to be changed every month in the year. (Act Dec. 31, 1792, § 3.)

Our conclusion is that such a sale of a vessel, in whole or in part, as creates a new owner, renders her former registry inoperative and void; and that it is the fact that her former registry is thus rendered inoperative and void, that makes a new registry necessary; that when registered anew for such a cause, the vessel cannot be said to be legally registered (speaking in the present tense) except at the office where her last registry was effected; and that the Act of Congress requiring mortgages, &c., to be recorded in the office of the collector of the customs "*where such vessel is registered or enrolled,*" refers to the office where the vessel was *last* registered or enrolled.

This conclusion is in accordance with the decision of the Supreme Court of Massachusetts in *Potter* v. *Irish*, 10 Gray, 416, in which the question underwent a very careful and thorough examination. It is in conflict with an opinion of Mr. Justice CLIFFORD, published in the Law Reporter for November, 1862, page 22. The question being upon the construction of a United States statute, the plaintiffs' counsel contends that a decision by a United States Court should be held paramount. A decision by the Supreme Court of the United States, should undoubtedly be regarded as conclusive upon the question. The decision of a single Judge of that Court, we do not regard as conclusive, and have therefore felt it to be our duty to examine the question for ourselves, and to be governed by the result to which such examination should lead us.

The mortgage under which the plaintiffs claim, not having been legally recorded till after the mortgage under which the defendant claims was properly recorded, the defendant's title to the earnings of the quarter of the vessel in dispute is superior to that of the plaintiffs.

Judgment for defendant.

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

BARROWS, J., did not concur.

CHRISTOPHER DYER *versus* MOODY F. WALKER.

The partial payment of an account, made within six years, and appropriated toward the payment of the account as a whole and not to any one or more of its particular items, will take the account out of the statute of limitations.

ON REPORT from *Nisi Prius.*

ASSUMPSIT upon an account annexed consisting of items running from March 1, 1850, to June 13, 1858, and amounting to $758,17. There was also a credit by pew rent, from 1851 to 1854, of $30, and by two notes given by the defendant to the plaintiff of $100 each, dated May 19, and Sept. 15, 1856.

Writ was dated June 9, 1862. Plea general issue and the statute of limitations.

An auditor appointed by the Court reported:—

That "the plaintiff proved delivery to the defendant of the articles specified in the account annexed to the writ, at the several dates therein set forth, to the amount in value of $567,93. This embraces all items charged in said account, to the defendant, except the three following, viz.:—

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

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

had been from time to time, and at various times, presented to defendant and payment demanded. I have allowed the amount charged therefor—$186,24. The sums credited by plaintiff to defendant on account, viz.:

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

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

Moody F. Walker to Christopher Dyer, Dr.

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

Christopher Dyer, the plaintiff, testified; "I received from the defendant, in part payment of the account sued, the two notes of one hundred dollars, each, credited in the account; that defendant, just previous to giving the first note, came into my shop, sat down, and there made an examination of said account. He took the bill and looked it over. He made no objections to the bill, said "he would pay it and pay some of it the first of next month." He soon after gave me the first note of one hundred dollars, in part payment of said account, to be credited on it, and which was credited. I took the note and think I had it discounted. He made me another payment of an hundred dollars on

account, by his note, which was given me in September, 1856. I did the same with this note as I did with the other."

Cross examination. — "Cannot state the year or time of year he looked at the bill. Perhaps I could by referring to the papers. Walker had the same bill now annexed to the writ, in our shop, and there looked it over. I laid it before him, on the desk. We had no discussions of the items on the bill. Walker has since got other items, which have been added to the account. I afterwards presented the bill to Walker, and tried to get him to give me a note for the account. Walker has traded with me for nearly thirty years. No credit agreed upon with him. Can't tell any year in which I presented the bill and demanded payment. Our business was a cash business. We tried to make it so. The bill which I showed him in my store was not the same piece of paper annexed to the writ, but it is a copy of it, as far as it went, but he afterwards got other goods, which are added on the account sued."

The defendant relied upon the statute of limitations in defence.

The case was withdrawn from the jury, and submitted to the full Court, to be decided by the Court according to the legal rights of the parties upon the testimony.

F. Fox, for the plaintiff, cited

R. S., c. 81, § 111; *Sibley* v. *Lambert*, 30 Maine, 254; *Ilsley* v. *Jewett*, 2 Met., 168; *Evans* v. *Daveis*, 4 A. & E., 840; *Worthington* v. *Gunsditch*, 53 English C. L. Rep.; *Walker* v. *Butler*, 6 E. & B., 506.

Strout & Gage, for the defendant.

If plaintiff's construction of R. S., c. 81, § 111, prevails, it operates a virtual repeal of the statute of limitations. Formerly so slight evidence of acknowledgment avoided the statute, that the Legislature provided that the acknowledgment should be "in writing and signed," &c. Statute of limitation should be a "statute of repose." *Bell* v. *Morrison*, 1 Peters, 360; *McClung* v. *Silliman*, 3 Peters, 270.

Section 111 does not apply to an account of many items, each constituting a single contract, but on an account containing a single item, or several items delivered at one time, and hence constituting one contract.

Declarations of Walker were not in writing and hence fall within § 108. The $100 payment did not admit any further indebtedness. Refusing to give a note for the balance when asked, is evidence that defendant regarded plaintiff paid, and is not an admission of indebtedness.

In *Walker* v. *Butler*, cited by plaintiff, the payment was upon an ascertained account and an agreed amount, and hence not applicable to case at bar. Defendant's promise to pay "some of the account the first of the next month" was more than six years from date of the writ. Nothing was said when second note was given, — no account shown defendant Sept., 1856, and no receipt given as in *Walker* v. *Butler*, *ubi supra*. And after first note was given, defendant had other items constituting other accounts before the second note was given. The second note might have been in payment of the late account.

Partial payment is an acknowledgment of a larger debt and a promise to pay, the application of the principle resting upon certain facts, (1.) That the payment is unequivocally made upon a known, ascertained and larger debt, and is intended by the payer to be applied to such debt. If there are various accounts and demands, and no application is made by the payer, the naked payment does not take any of the accounts out of the statute. *Brun* v. *Boulton*, 52 Eng. C. L., 474; *Tippets* v. *Heane*, 1 Cromp. M. & R., 253. A payment on an account not ascertained and agreed, is no admission of the amount of the debt. *Brun* v. *Boulton*, *supra; Pond* v. *Williams*, 1 Gray, 635; *Ilsley* v. *Jewett*, 2 Met., 173; *Haren* v. *Hathaway*, 20 Maine, 347; *Leson* v. *Smith*, 30 Eng. C. L., 575; *Mills* v. *Fowkes*, 35 Eng. C. L., 175—180; *Collyer* v. *Wilcock*, 13 Eng. C. L., 519; *Long* v. *Greville*, 10 Eng. C. L., 15; *Bell* v. *Morrison*, 1 Peters, 362; *Clementson* v. *Williams*, 1

Cranch, 72; *Wainman* v. *Kynman*, 1 Exch., 118; *Waugh* v. *Cope*, 6 Mees. & W., 824.

The plaintiff seeks to avoid the statute and has the burden. His proof fails to show that the defendant intended that his payments should be applied to the whole mass of items, understanding it at the time, and intending to admit the existence of his indebtedness to the whole amount of the items claimed.

DANFORTH, J.—This is a suit upon an account running from March 1, 1850, to June 13, 1858. The defendant relies upon the statute of limitations. To this plea the plaintiff replies that, on the 15th of September, 1856, defendant, by his note, paid him one hundred dollars; and the only question involved, is as to the effect of this payment. It is now well settled that a partial payment of a preëxisting debt, made within six years, unconditional and unqualified, creates a new promise and removes the bar arising from the statute of limitations. The payment here was unconditional, and within six years of the date of the writ. If made upon the account generally, it was a partial payment of a larger demand. The evidence is clear that it was made upon an account, and, as it does not appear that plaintiff had any other account than the one in suit, the presumption is that the payment was upon that. If not so, the burden is upon the defendant to show it. *Woodbridge* v. *Allen*, 12 Met., 475.

But it is said the account in suit is made up of many items, each one of which is a contract of itself, and it does not appear to which of them the payment was intended to apply. It is true there are many items, and each may be considered a contract; but it is also true, that there is but one account. The items are the elements of which the account is made up, and while singly they are many, taken together they constitute one. It is also true, that the defendant might have appropriated his payment to any one or more of the items, but there is no proof tending to show that he did

so. On the other hand, the testimony is clear and uncontroverted, that the payment was appropriated toward the payment of the account as a whole, and not to any one or any number of items. The report of the auditor so finds, and the testimony of the plaintiff is to the same effect. If it were not so, the defendant could have so testified. The admission of the defendant as to the correctness of the bill, and his promise to pay it, cannot be taken to prove a new promise, but it is important testimony to show the object and appropriation of the payments subsequently made. For whatever it may have formerly been supposed that the law was, or whatever it may now be in England, it is well settled in this State and in Massachusetts that payments may be proved by parol. *Williams* v. *Gridley*, 9 Met., 482; *Sibley* v. *Lumbert*, 30 Maine, 253.

In the latter case three notes were sued, all of which were payable more than six years before the suit. The defendant made two payments in part satisfaction of the notes. "No direction was made by him, upon which of the notes he would have the payments applied, nor were they indorsed upon either of the notes."

The Court held the payments sufficient to take them all out of the statute. It would be difficult to distinguish the case at bar, in principle from that. In this the payment was made in part satisfaction of the account as a whole. No direction was given by defendant upon which of the items it should be applied, and no application of it was made to either, but it was credited to the whole indebtedness.

Judgment for plaintiff for balance found due by the auditor, five hundred twenty-four dollars $\frac{17}{100}$ ($524,17,) *and interest from the date of the writ.*

WALTON, J. — I concur, there being no conflict between the foregoing opinion and that in *Dyer* v. *Walker*, 51 Maine, 104. The question there decided was what constitutes an "open and mutual account current" within the 99th section of the statute of limitations. The question here is

what is the effect of payment referred to in the 111th section of the same statute.

DICKERSON, BARROWS and TAPLEY, JJ., concurring.

STATE *versus* JOHN A. STOYELL.

Proof that the defendant, by false representations, persuaded an unmarried female to go with him to a neighboring town, and there, having induced partial intoxication, had repeated sexual intercourse with her, will not support an indictment for enticing her away "for the purpose of prostitution," based on c. 4, of the Public Laws of 1861.*

INDICTMENT for a violation of c. 4, of the Public Laws of 1861.

The case came before the full Court on demurrer to the evidence.

It was proved that the unmarried female named in the indictment, was, on March 2, 1866, residing in her father's family, in this county; that she then went to the railroad station to meet her music teacher, where she met the defendant, with whom she had slight acquaintance; that the defendant urged her to go with him by the cars, then about starting, to a neighboring town for a ride, promising her, as an inducement, that he would bring her back in a carriage in two hours; that, suspecting no intention on the defendant's part, and having none herself, other than the avowed one of taking a ride, she consented to accompany him. When they arrived at the station in the neighboring town, they took a carriage to a hotel, where he engaged a private room, and conducted her to it; that, when they had entered the room, he locked the door and put the key in his pocket; that she at once asked to go home, and demanded a fulfilment of his promise to take her home, but that she

* See opinion.

was quieted with assurances that she should be returned in a short time; that the defendant then left the room, locking the door behind him, and after a short absence returned followed by a servant bringing a bottle and glasses; that the servant immediately retired, whereupon the defendant again locked the door and urged her to drink of the contents of the bottle, a glass full of which he offered her; that, after assurances that it would not injure her, she finally drank what was offered; that she did not know what the liquid was, but that it produced a degree of intoxication; that he induced her to drink a second time and then he had sexual connection with her; that she did not remember whether the connection was on the bed or sofa; that she asked again to be taken home, when the defendant promised to get a carriage soon; that she then told the defendant that in the morning she had no thought of ever being in her then present condition, that he replied he did, and had thought of it for a week; that, after a while, he took her down to supper, she being unable to walk without support; that, after supper, he conducted her to the private room, gave her more drink and again had connection with her; that, after repeated requests on her part, he, through the interposition of a young man, whom they together went to see, procured a horse and carriage and drove with her to her father's house; that she expressed her fears of her inability to account to her parents for her absence, and he told her she could fabricate a story that would satisfy them; that they arrived at her father's late at night and found a light burning in the house; that she told the defendant she was afraid to go into the house, and he said she must return to their hotel, which she declared herself unwilling to do, but while she was talking he turned the carriage and started back to their hotel where they arrived after midnight; that they were unable to obtain admittance to their hotel, and then went to another, obtained admittance, took a room together and occupied the same bed; that, in the night and the next morning, the defendant again had connection with her; that, in

the forenoon of the next day, they returned by cars; that the defendant urged her to go with him to Portland and stay a few days, saying she might as well be hung for a sheep as a lamb, but she refused and went home.

It was also proved that, on or about Nov. 8, following, she gave birth to a living child.

It also appeared in evidence that, on the first day of March aforesaid, the defendant called at her father's and inquired for her; that, on being told she was out, he left word for her, that a female friend of hers would pass through town on the noon train of the next day and would like to see her at the station; that she did not go to the station, but her father went and saw the defendant in waiting.

It also appeared that no other person than the defendant had any connection with her while absent from home with him, and that no pay was given to her.

The evidence was reported to the full Court, who were to determine whether the facts proved constituted the offence alleged; if they did, the case was to stand for trial; if not, a *nolle prosequi* to be entered.

J. A. Peters, *Attorney General*, for the State.

H. L. Whitcomb and *Davis & Drummond*, for defendant.

APPLETON, C. J.—The defendant is indicted for a violation of c. 4, § 1, of the Acts of 1861.

By R. S., 1857, c. 124, § 6, "if an unmarried man commits fornication with an unmarried woman, they shall each be punished by imprisonment not more than sixty days and by fine not exceeding one hundred dollars."

By c. 4, § 1, of the Acts of 1861, "whoever fraudulently and deceitfully entices or takes away an unmarried female from her father's house, or wherever else she may be found, *for the purpose of prostitution*, at a house of ill-fame, assignation or elsewhere, and whoever aids and assists in such abduction or secretes such female for such purpose, shall be punished by imprisonment in the state prison not less than one year nor more than ten years."

These sections are for different purposes. They create different offences and impose different punishments. A person may be guilty of one offence and not of the other. He may commit fornication with a female without intending to induce such female to become a prostitute. He may entice one away from her father's house for the purpose of prostitution, he may induce her to become a prostitute without committing fornication with her. Indeed, persons of either sex may entice away females for the purpose of supplying brothels and houses of ill-fame.

The offence set forth in the statute under which this indictment is found, is the fraudulently and deceitfully enticing away an unmarried female from her father's house, or wherever she may be found, *for the purpose of prostitution*, at a house of ill-fame, assignation or elsewhere, &c. Worcester defines prostitution thus, "to offer to a common, lewd use; to make a prostitute of; to corrupt. 'Do not prostitute thy daughter.' Lev. xix. 29." A prostitute is a female given to indiscriminate lewdness for gain. In its most general sense, prostitution is the setting one's self to sale, or of devoting to infamous purposes what is in one's power. In its more restricted sense, it is the practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female. *Carpenter* v. *People*, 8 Barb., 603. In *Com.* v. *Cook*, 12 Met., 93, a statute similar in its language and its object to that of this State now under consideration, received a judicial construction—and it was there held, that it did not apply to the case of a man's enticing a woman to leave her place of abode for the *sole* purpose of illicit sexual intercourse with him.

It appears in proof that the defendant, by false representations, procured the complainant to go with him to Bath, and there, having induced partial intoxication, had repeated sexual intercourse with her. Sexual intercourse, the evidence shows, was the whole object he had in view. Nothing indicates a design on his part to make her a common prostitute. His only purpose was sexual gratification. However

infamous the conduct of the defendant—however deserving of punishment he may be, he cannot be legally convicted of, nor punished for a crime he has never committed. The evidence on the part of the government fails to sustain the allegations of this indictment, while it abundantly proves him guilty of another and different offence—that is, fornication.

The facts on the part of the government are uncontradicted. No further evidence is attainable. To send the cause to a jury would only delay its decision, without changing the result. By the agreement of parties the case stands as on a demurrer to the evidence—an obsolete form of procedure, though sometimes recognized, as in *State* v. *Soper*, 16 Maine, 293. Upon the facts as proved, the defendant cannot legally be convicted of the offence for which he is indicted, and the county attorney may very properly enter a *nolle prosequi*.

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

ROBERT RANKIN *& al., in review, versus* JOHN GODDARD.

A foreign judgment is not conclusive upon the parties in an action here involving the same subject matter.

But the jurisdiction of the foreign court, its power over the parties and the matters in controversy, may be inquired into; and it may be impeached for fraud.

ON FACTS AGREED.

WRIT OF REVIEW.

The facts were reported with an agreement that, if the effect of the judgment in New Brunswick between the parties concluded the defendant from maintaining his original action against the plaintiffs, the Court were to render the proper judgment for the plaintiffs; otherwise the case was to stand for trial.

The record of the foreign judgment was set forth *in extenso* in the agreed statement.

W. H. McCrillis, for the plaintiffs.

A foreign judgment is conclusive to show by way of defence that a subject matter has once passed "*in rem judicatam.*" *Barney* v. *Patterson*, 6 Har. & Johns., 182, 202, 203; *James* v. *Allen*, 1 Dall., 188; *Thompson* v. *Tolumic*, 4 Johns. Ch. Rep., 460; *Embree* v. *Harmon*, 5 Johns., 101; *Bissell* v. *Briggs*, 9 Mass. 462, 468; *Homer* v. *Parker*, 3 Mason, 247, 251; 8 Cowan, 311; *Crandson* v. *Leonard*, 4 Cranch, 434, 441–2; *Smith* v. *Lewis*, 3 Johns., 168.

The distinction between the effect of a foreign judgment in a suit directly upon it, and when it is relied upon in defence "*exceptio rei judicata*" has existed since the time of Lord NOTTINGHAM. 2 Kent's Com., 119; Story's Conflict of Laws, § 598; *Smith* v. *Lewis*, *ubi supra*; *Andrews* v. *Herriot*, 4 Cowan, 520, note; *Phillips* v. *Hunter*, 2 H. Blackstone, 410.

The judgment must be a bar to this suit, or there will be two adverse recoveries, one in favor of the plaintiffs, on the ground that they were entitled to the delivery of the timber, and it had not been delivered, and the other in favor of the defendant, on the ground that he had delivered the timber and plaintiffs had not paid for it. A judgment is invariably conclusive of the fact of its own rendition, and the legal consequences of such judgment follow, one of which is, that Goddard did not deliver the timber. The judgment was a final adjustment of all the claims of both parties relating to the timber, and a merger of the contract.

A judgment in favor of a vendee for non-delivery of wheat is a bar to an action by the vendor for the price, although the damages in the first case were for too much. *Day* v. *Dix*, 9 Wend., 129. So a judgment in favor of a vendor for the price of a part only of the goods, is a bar to a subsequent suit by the vendor for non-delivery. *Lawrence* v. *Hunt*, 10 Wend., 80. See also *Stevens* v. *Teft*,

8 Gray, 419; *Sawyer* v. *Woodbury*, 7 Gray, 501; *Merriman* v. *Whittemore*, 5 Gray, 316; *Barrett* v. *Smith*, 4 Gray, 50; *McDowell* v. *Langdon*, 3 Gray, 513; *Foote* v. *Gibbs*, 1 Gray, 413; *Gilbert* v. *Thompson*, 9 Cush., 348; *Dalton* v. *Woodman*, 9 Cush., 260; *Eastman* v. *Cooper*, 15 Cush., 276.

Goddard cannot sustain his suit on grounds which would have constituted a sufficient defence to the action of Rankin and als. against him. *Maret* v. *Hampton*, 7 Durn. & East, 265; *LeQueen* v. *Governeur*, 1 Johns., 436; *Emberry* v. *Carver*, 3 Coms., 522; *Vorhees* v. *Bank of U. S.*, 10 Pet., 449; *Ethridge* v. *Osborne*, 12 Wend., 399. The exceptions to this rule, mentioned in *LeQueen* v. *Governeur*, *supra*, *Whitcomb* v. *Williams*, 4 Pick., 228, *Fowler* v. *Shearer*, 7 Mass., 14, and *Rowe* v. *Smith*, 16 Mass., 306, do not apply to this case.

Evidence *aliunde* to explain a record is admissible. Whether any matters have been tried between the same parties is a fact depending partly upon parol testimony and partly upon the record. *Cist* v. *Zeigler*, 16 Sergt. & Rawle, 282, 285; *Parker* v. *Thompson*, 3 Pick., 429, 433, 434; *Gardner* v. *Buckler*, 3 Cow., 120; *Doty* v. *Brown*, 4 Comst., 71; *Taylor* v. *Dunton*, 43 N. H., 495; *Bridge* v. *Grey*, 14 Pick., 55; *Lord Bagot* v. *Williams*, 3 Barn. & Cres., 239.

It is immaterial whether the former is pleaded in bar or given in evidence. *Marsh* v. *Pier*, 4 Rawl., 273. In this State and Massachusetts, it is sufficient if the brief statement set forth the former judgment. *Gilbert* v. *Thompson*, 9 Cush., 348.

There is no difference between foreign judgments and judgments of neighboring States of the Union. Appearance in a court, where proceedings are according to the common law, confers jurisdiction. Goddard appeared without objection to the jurisdiction. If the origin of the foreign court do not appear, it will be deemed legitimate. *Snell*

v. *Fausatt*, 1 Wash. C. C. Rep., 271, 274; *Yrissarri* v. *Clement*, 2 Carr. & P., 223.

Drummond, for the defendant.

APPLETON, C. J.—On the 20th Dec. 1855, the defendant Goddard, at St. John, N. B., sold the plaintiffs in review eight hundred tons of merchantable white pine timber, "to be delivered by Josiah Adams," for the price of which he received their acceptance on three months, which was paid at maturity.

After the sale, the plaintiffs in review demanded of Adams the timber sold, who failing to deliver any, they commenced an action in the Supreme Court of New Brunswick for damages for its non-delivery. In their writ they duly set forth their contract with Goddard, that they had paid for the lumber, and that, upon demand, the same was not delivered. Upon a trial before the jury, they recovered a verdict for the damages by them sustained. *Rankin* v. *Goddard*, 4 Allen, (N. B.,) 155.

Subsequently, the defendant Goddard sued Rankin & Co. for the above mentioned timber in this State, recovered judgment for the price thereof, and satisfied the execution issued upon such judgment by a levy on the real estate of the judgment debtors.

The plaintiffs in review being afterwards advised of these proceedings, petitioned this Court for a review of the action, Goddard against them, which being granted, they sued out this writ of review.

The contract between these parties was made in New Brunswick. The rights of the parties under it are to be determined by the law of that Province. The courts there established had jurisdiction of the subject matter of the suit, *Rankin* v. *Goddard*, for the non-delivery of the lumber and of the parties thereto. Goddard appeared and contested the suit, but it was decided adversely to him. The respective rights of the parties have received a final adjudication in the jurisdiction in which they originated.

The action reviewed was for lumber sold and delivered, but Goddard could not recover therefor in New Brunswick, because it was there conclusively settled in a suit between these parties, that the timber was never delivered, though its price had been paid Goddard by these plaintiffs.

The general rule of damages for the non-delivery of goods, is the difference between the contract price and the market value of the article at the time and place, where by the terms of the contract it should have been delivered, if no money has been paid by the vendee. If the price has been paid in advance, the vendee may recover in addition the money advanced and interest thereon. If, then, the price of the goods has not been paid, it is to be shown in reduction of damages. In *Day* v. *Dix & al.*, 9 Wend., 129, where a vendee brought an action against a vendor for the non-delivery of a large quantity of wheat, which the latter had contracted to sell to the former at a stipulated price, and a recovery had for the full value of the wheat, although but a nominal sum to bind the bargain had been paid, and the vendor subsequently brought his action to recover the price of the wheat as stipulated in the contract, *it was held* that the action would not lie; that the plaintiff ought in the former action to have insisted that he was only liable for the difference between the contract price and the value of the article, and, having omitted to do so, he could not bring a cross suit for the price.

It was proved in the suit in New Brunswick for the non-delivery of the timber that the price therefor had been paid to Goddard. It is to be presumed that proper instructions as to the legal rights of the parties were given.

If the price had not been paid Goddard, it was his duty to show that fact in reduction of damages. He could not, if he neglected doing it, make it the basis of an action on his part, according to the principles of law established in *Day* v. *Dix*.

In the Province of New Brunswick, Goddard would be concluded by the judgment recovered in the suit brought

by these plaintiffs against him. The inclination of English courts seems to be to sustain the conclusiveness of foreign judgments, where, as in the present case, the court by which the judgment was rendered has jurisdiction of the subject matter of the suit and of the parties thereto. The general doctrine of the American courts is, that they are *prima facie* evidence, but that they may be impeached. *Jordan* v. *Robinson*, 15 Maine, 167. The authorities here go to this extent, that the jurisdiction of the court, and its power over the parties and the matters in controversy may be inquired into; and that the judgment may be impeached for fraud.

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

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

STATE by WM. B. IRISH, *Libellant, versus Intoxicating liquors and* THOMAS L. SMITH, *Claimant.*

In criminal cases, this Court, sitting *in banc*, has no jurisdiction of a motion to set aside a verdict as being against the weight of evidence.

Such motion must be decided by the Judge who presided at the trial at *Nisi Prius.*

The *jurat* to a complaint for search and seizure under c. 33 of the Public Laws of 1858, containing the name of only one of the witnesses, may be amended after service by inserting the names of the other witnesses which were inadvertently omitted.

In the trial of a libel against certain intoxicating liquors, the claimant requested the presiding Judge to instruct the jury that, if they should find the "item of ten barrels of rum are not rum, but a different article, the libel cannot be maintained for that item." The Judge instructed the jury to "confine their inquiries entirely to the liquors specified in the claim and mentioned in the libel; that, if liquors were seized and not libelled, the owner must seek his remedy in another suit; and that, if liquors were li-

belled and not claimed, the law will dispose of them;" — *Held*, that the claimant had no cause for complaint.

The refusal of a motion to quash a complaint is not a subject of exceptions.

On Exceptions and Motion to set aside the verdict as being against the evidence, and to quash proceedings under the complaint.

Libel filed under c. 33 of the Public Laws of 1858.

The facts sufficiently appear in the opinion.

Putnam, for the claimant.

The statute requires three witnesses to make the oath. The *jurat* shew but one. The complaint being thus defective, the warrant was illegally issued, and offered no justification for the seizure. And the seizure being illegal and void, all subsequent proceedings founded upon it are void also. The warrant should show on its face the jurisdiction of the magistrate who issued it. Under Acts of 1852 and 1853, search warrants held illegal, unless it appears in them that the testimony of three witnesses required was *taken in writing*, and an additional examination to the one upon which other warrants issued. *State* v. *Staples*, 37 Maine, 228; *State* v. *Spencer*, 38 Maine, 30.

The warrant in the case at bar, connected with the complaint, bore on its face the fullest evidence that the magistrate had no jurisdiction in the case. It was void for every purpose. *Guenther* v. *Day*, 6 Gray, 490.

When the seizure was made on this void process, the right of the claimant and of all parties became fixed. The wrong had been done and the remedy became vested. No subsequent alteration or amendment could give validity to a void act — an unjustifiable invasion of private right.

It could not in a mere question of property between individuals. *Porter* v. *Haskell*, 11 Maine, 177.

A fortiori — not to enforce a penalty. Strict compliance with the provisions of the statute is indispensable. This is familiar law.

In the case against Bradley, this same objection was sustained by the presiding Judge, and the proceedings quashed.

If the objection was valid there it is equally so here.

2. The 5th requested instruction should have been given.

Among the liquors seized were 10bbls. "*pure spirits*," or "Cologne spirits." The claim filed covered *all* the liquors seized, consequently it covered this 10bbls. They were not however libelled as spirits. The libel describes 10bbls. *rum*. Rum and spirits are different articles, by the evidence.

Under the libel, the spirits could not be ordered forfeit and should have been restored. The question was whether they were rum or spirits, and this should have been found by the jury; but the ruling excluded it from their consideration. The reason given was erroneous. The claimant was entitled to a return, without being compelled to resort to another action. The libel was defective. It did not describe the liquors intended correctly, and should not have been sustained, so far as these 10bbls. are concerned. It was essential therefore to ascertain by the verdict of the jury whether the liquors were in fact "rum" or "spirits." Upon that depended whether they should be liable to forfeiture or restored to claimant; but the ruling excluded the finding either way altogether.

It is not a case where liquors are not libelled at all—and where, of course, they could not be claimed—for it is admitted no claim can be made where there is no libel. But it is a case of a *defective* libel—which fails because it is defective—and failing, the claimant is entitled to restoration.

The defect existing in the case was not amendable under § 32 of the Act, which gives the right only in "*matters of form*." The defect was matter of *substance*—analogous to want of a seal. *Bailey* v. *Smith*, 12 Maine, 196; *Tibbets* v. *Shaw*, 19 Maine, 184; *Witherell* v. *Randall*, 30 Maine, 168.

These proceedings, it has been said, are criminal in their nature, and the strictness and precision required in criminal cases are required here.

Geo. F. Shepley, also for claimant.

Liquors can be libelled only when "so seized." Pub. Laws, of 1858, c. 33, § 15. The libel declares that he has by a warrant duly issued, &c. The Court could not issue the libel upon the fact that the oath had been taken, but it must be upon the record. It could not issue it upon what was in the Court's mind.

J. A. Peters, Atty. General, for the State.

TAPLEY, J.—This is a libel filed under the provisions of c. 33, Acts of 1858, commonly called the Liquor Law.

The proceedings originated in the Municipal Court for the city of Portland and comes to this Court by appeal.

The libel was filed the 23d day of August, 1865, and the claimant appeared the 7th day of September, 1865.

On the 12th of September, 1865, a hearing was had upon the claim, and judgment adverse to the claimant was rendered, from which he has appealed to this Court.

At the March term of this Court a trial was had before the jury, and a verdict rendered against the claimant.

The claimant now moves to set aside the verdict, and excepts to the ruling of the presiding Judge upon the sufficiency of the proceedings in the Court below, and his refusal to give, in the terms requested, the 5th requested instruction.

1. The motion to set aside the verdict and for a new trial is not properly addressed to this Court sitting as a Law Court. It should be addressed to, and heard and determined by the Judge sitting for the trial of jury causes. *State* v. *Hill*, 48 Maine, 241.

2. The refusal of the motion to quash is not a subject of exceptions. The granting or refusing such a motion is a discretionary act of the Court and forms no basis of exception.

3. From the report it appears that a complaint, under the provisions of the 14th sec. of the Act of 1858, c. 33, was made upon the 18th day of August, 1865, to the Judge

of the Municipal Court for the city of Portland by three persons competent to be witnesses in civil suits upon their several oaths, as required by the statute.

That, upon the same day, the Judge issued his warrant in due form of law, and that, upon the same day, it was served by search, and seizing a quantity of intoxicating liquors, and due return thereof made to said Court by Wm. B. Irish, a constable of the city of Portland.

That, upon the 23d day of August, 1865, William B. Irish, under the provisions of section 15 of said Act, libelled the liquors thus seized.

That, under the provisions of section 16, Thomas L. Smith, on the 7th day of September, 1865, appeared as a claimant and duly filed his claim. From the judgment upon the trial of this claim, the said Smith claimed his appeal. On the trial in this Court, the government introduced the original complaint and warrant. The claimant objected to the admission of these "on the ground that the alteration of the *jurat* avoided and annulled them, and also because, as the *jurat* was not completed when the warrant issued and the seizure was made, the seizure was illegal."

From the report it appears that the complainants were duly sworn to the complaint before the issuing of the warrant, but the magistrate's certificate of the fact was imperfectly made until after the seizure, when it was amended in accordance with the fact, in open Court.

The warrant was returned to the Court August 22, 1865, with the person of Bradley, against whom it was issued. By the record it appears to have been continued to the 29th of August, 1865. By the same record it appears that a motion was made on the 7th of September alleging the amendment to have been made between the 22d and 29th days of August. The particular time when it was made does not distinctly appear. The record recites that it was amended after service, while the Court was in regular session.

If made before the 29th and while the Court was in regu-

lar session, it must have been made upon the 22d, and the evidence, such as it is, leads us to that conclusion.

1. Did the amendment of the magistrate's certificate in anywise affect the proceedings?

The amendment of the certificate consisted in the insertion of two names inadvertently omitted when it was made.

As a general rule, criminal processes cannot be amended except by consent of the party against whom it is issued. This is a rule existing from necessity; all criminal proceedings being required to be presented under the oath of the party presenting it.

If a complaint duly sworn to should be changed after it was issued, it would no longer be the complaint of the party verified by his oath.

If an indictment should be changed by amendment after it is returned to and filed in Court, it is no longer the presentment of the grand jury duly sworn; hence the rule applicable to criminal cases. This rule applies only to such matters as are required to be stated under the oath of the party making the complaint or presentment;—as to all other matters, they are subject to such rules of practice as long experience has shown are calculated to promote justice.

If an officer, having made return of the prisoner into Court, should discover during the progress of the trial that he had incorrectly written the year or month in which he had arrested the party, there can be no doubt the Court could allow him to amend his return in conformity with the truth and fact. It is no part of the allegation against the prisoner. No part of the charge. If he had erroneously stated the name of the magistrate, or trial justice, before whom he returned the prisoner, it cannot be doubted he could be allowed to amend it conformably with the truth. If he had omitted the name of the magistrate or Court before whom he had returned the prisoner, it is equally clear he might amend by inserting; because there is not only no rule, but no reason forbidding it. Citations of authorities upon such points are unnecessary, the propositions are so

manifestly just. All these amendments might be necessary in order that the record should *disclose* the jurisdiction of the Court, but not to give it jurisdiction. They confer no rights or power. These are obtained by other means, and precedent acts. It is only a mode of evidencing what already exists. The jurisdiction, the right to proceed, is as perfect and extensive without, as with the amendments.

So we find the case at bar. Everything which was necessary to give the Court jurisdiction had been done. The complaint of three persons, competent to be witnesses in civil cases, had been made under oath, to a magistrate duly authorized to receive and act upon it. In preparing the evidence of it, he inadvertently omitted the names of two of them, and before the trial he corrected the matter by inserting them. To this there can be no objection in this case. The Court had jurisdiction of the subject matter, and was authorized to issue the warrant without it. It was necessary that the oath should be adminstered to all before the warrant was issued, but it was not necessary to make the certificate of that fact before it was issued. The authority to issue such warrants is conferred by the statute, and it nowhere requires the oath shall be certified before the warrant is issued. It is undoubtedly the proper evidence of the existence of the facts it recites. Had it never been made, and the officer sued in an action of trespass, he might have failed in his justification for the want of proper proof of the authority of the magistrate to issue the warrant. That question does not here arise. Before the officer is called upon to justify, the evidence is properly furnished, by a legitimate amendment of the certificate.

2. The amendment was one of form and not of substance. It was not even a *formal allegation;* it was merely amending a certificate of the existence of a fact.

No one, we think, will doubt the certificate could have been amended after the warrant was issued and *before service.* If so, it was a process legally amendable, and if it

needed legislative sanction to amend *after service*, it may be found in § 32 of the Act of 1858, which authorizes it to be made "at any time before final judgment."

The claimant requested the Court to instruct the jury that, if they should find "the item of ten barrels of rum are not rum, but a different article, the libel cannot be maintained for that item."

The Court, upon this point, instructed the jury to confine their inquiries entirely to the liquors which are specified in the claimant's claim and also mentioned in the libel. That, if liquors were seized and not libelled, the owner must seek his remedy in another suit, and if liquors were libelled and not claimed in this claim the law will provide for their disposition.

We see no cause of complaint here for the claimant.

What was libelled was a question for the Court and not for the jury. It must be determined by the libel. It was "ten barrels containing about forty gallons each" that was libelled. If the officer has not those liquors to respond to the decree when made *he* must be held answerable for them. If he has another and different kind of liquor instead of it, it is apparent they have not been libelled and, of course, no decree can be made concerning them.

There is nothing subject to decree except that which is *described* in the libel, and everything which is *described* is subject to it. Whether the officer has in his possession liquors not described was not a material inquiry.

The inquiries were confined exclusively to those which were described.

The true proposition is this, if the ten barrels seized did not contain rum they are not libelled; if they did, they are.

The jury being required to confine their inquiries to the matters described in the libel, could only (as to this item) act upon ten barrels containing rum, and the decree of for-

feiture or return can only be for ten barrels containing rum. It will apply to nothing else.

Motion and exceptions overruled, and Judgment on the verdict.

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

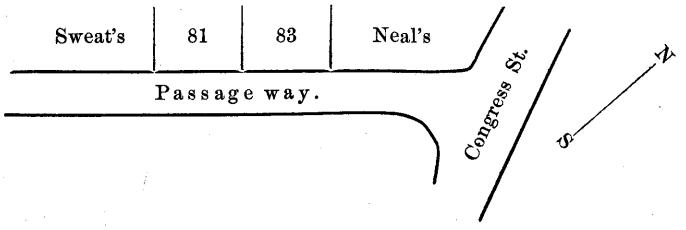
MARTIN GORE *versus* SIMON FITCH.

A grant of a "perpetual right of way into and through a passage way twelve feet in width, lying in the rear of houses numbered 81 and 83, into Congress street," conveys, in the absence of other controlling evidence, a right of way twelve feet wide, one line of which is identical with the rear line of lots 81 and 83, extended to Congress street.

And no part of such line can be subsequently changed by the grantor alone.

ON REPORT from *Nisi Prius*, the full Court to render judgment by nonsuit or default, according to the legal rights of the parties.

CASE, for obstructing an alleged right of way. Prior to May 19, 1849, the premises of both parties were owned by John Neal, who then conveyed to L. D. M. Sweat the lot now owned by the plaintiff, "and a perpetual right of way into and through a passage way twelve feet in width, lying in the rear of houses No. 81 and 83, into Congress street." Then the passage way was in the following form:—

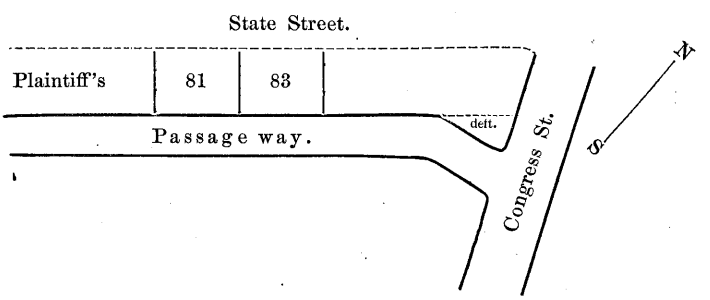


the passage way being 12 feet wide in the rear of houses

81 and 83, but 30 to 40 feet wide at its outlet into Congress street.

From Sweat, through sundry mesne conveyances, the premises came to the plaintiff, with the right of way expressed in the same words.

In May, 1860, Neal conveyed to C. R. & L. E. Frost, the defendant's immediate grantors, a small piece of land at the north-west side of the outlet of said passage way, bounded easterly "by said passage way, now changed." Frosts fenced the lot thus purchased, when the passage way assumed the following form:—



The remaining material facts sufficiently appear in the opinion.

F. Fox, for the plaintiff, cited Washburn on Easements, 169; *Bannon* v. *Angier*, 2 Allen, 128.

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

None of the deeds refer to any plan indicating any particular shape for the passage way, whether it shall be parallel with State street or not. The easterly line of the passage way was never parallel with State street. There was no laying out of the way in this particular course or shape, otherwise than by Neal's permitting it to so remain, with an outlet twice as wide as the deeds call for.

After the outlet was fenced on the west it remained of a uniform width of twelve feet. Plaintiff still has what his deed gives him, a passage way twelve feet wide, lying in

the rear of houses 81 and 83, and extending to Congress street. He claims one, a portion of which is 30 to 40 feet wide, basing his claim upon the mere circumstance, that Neal has unnecessarily permitted a portion to be of that extra width. Nothing but the width and general direction are given in the deeds. Why cannot Neal fence off the surplus on one side, as well as on the other? If on neither, then a twelve foot conveyance will pass thirty feet. Same surface is used now as formerly. The grantees can enjoy by the grant but a twelve foot passage way in the rear of houses 81 and 83 to Congress street, all of which the plaintiff daily uses.

TAPLEY, J.—This is an action on the case for a disturbance of a right of way. The defendant claims to own the premises in question free from any incumbrance. Both parties claim their rights under the same grantor, John Neal.

The plaintiff claims under a deed from said Neal to L. D. M. Sweat, dated May 19, 1849, and through several mesne conveyances to himself.

The defendant claims under a deed from said Neal to Charles R. and Luther E. Frost, dated May 4, 1860, and from said Frosts to himself dated February 17, 1863.

The deed of Neal to L. D. M. Sweat of May 19, 1849, conveys "a perpetual right of way into and through a passage way, twelve feet in width, lying in the rear of houses numbered 81 and 83, into Congress Street." The rights of the parties depend upon the construction of this deed.

In the absence of any other controlling evidence, this deed conveys a right of passage *immediately* in the rear of lots 81 and 83, and extended in the *same* direction to Congress Street; the grantor owning the land over which it passed.

There is no rule which authorizes any other construction. There is no more authority for departing to the right of the straight line of lots 81 and 83, than there is for departing to the left. It is a way 12 feet wide in the rear of, and on the extended line of, lots 81 and 83, to Congress street.

No angles or distances from points of departure are mentioned, or in any way indicated in the deed, and, looking to the deed alone, there is no other construction to be given it.

Is there any ambiguity in the deed requiring the aid of parol evidence? If so it may be resorted to. *French* v. *Hayes*, 43 N. H., 30. The description of the right of way conveyed, is through a "passage way" *lying* in rear of houses numbers 81 and 83, into Congress street. There is some indication in this phraseology, that the "passage way" was an *existing* passage way at the time, and the conveyance of a "perpetual right of way," was through the then *existing* "passage way."

Certain evidence has been offered tending to show the construction put upon the conveyance by the parties immediately after the execution of the deed, and at a period later by John Neal, the grantor.

The evidence shows there was an *existing* way in the rear of houses 81 and 83, extending to Congress street, when the deed was made, and that the *westerly line* of the way was a continuation, in the *same* direction, of the line of lots 81 and 83, and *parallel with State street*, to Congress street. This is not denied by defendant's counsel. The easterly side line of the way conveyed could be easily ascertained by measuring 12 feet easterly from the westerly line.

In 1857, John Neal, the grantor, in a deed made to Wm. Chase, describes "the most westerly side line of said passage way, as the fence now runs in a line *parallel with State street* thirty-eight feet, more or less, to the southerly line of Congress street." This describes the westerly line after it leaves lots 81 and 83. Again, in 1858, John Neal, in another deed to William Chase, describes this line "by a fence now thereon standing *parallel with State street.*"

The testimony of the plaintiffs, L. D. M. Sweat, C. H. Howe and John Neal, all show the fence "thereon standing" was *parallel with State street*," and extended to Congress street. At the mouth of the passage way, on Congress street, the curb stone is champered so as to more easily admit

carriages, for a space of some 18 feet, measuring from this westerly line, and is not champered to what is now the easterly line. John Neal testifies, that he caused it to be done for the purpose of running in carriages. All these matters contemporaneous with, and long continued after the conveyance, clearly establish the purpose and intent of the parties, or at least show what they regarded as the westerly line of the passage way. If more was needed, it may be found in the deed of Neal to Frost of the premises in question, made in 1860, wherein he bounds the piece conveyed "by said passage way *now changed*."

The westerly line up to, and at this time, was well understood and recognized by Neal, and by the Frosts, the defendant's immediate grantors.

What was now claimed, was the right to change it from its well understood position to a new one, without the consent of the plaintiff, who held under a title older than the Frosts', and originating with the same grantor.

It will be perceived that, whether the deed be construed with or without the aid of contemporaneous occurrences and facts, the result is the same in the discovery of the westerly line.

The remaining question is, could John Neal, without the consent of the plaintiff, change the westerly line of the way so as to carry the plaintiff out where he is now obliged to go?

We think he could not, for evident reasons.

The deed of Neal to Sweat, in 1849, conveyed a right of way, and operated *in presenti*. The day after its execution the rights of the grantee were the same as the plaintiff's rights to-day. Whatever was conveyed could not be reclaimed and new rights substituted. The conveyance left nothing optional with the grantor. It was absolute; it was unchangeable by him alone.

The defendant, having encroached upon the plaintiff's way

and erected permanent obstructions thereon, is guilty of a disturbance of the way and must answer in damages therefor. *Defendant defaulted. Damages to be assessed by Judge at Nisi Prius.*

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

CITY OF PORTLAND *versus* CHARLES RICHARDSON *& al.*

P. recovered judgment against the plaintiffs for damages occasioned by a defect in one of their highways. The defect complained of was an excavation caused by the defendants, who were duly notified of the pendency of the former suit. In an action by the plaintiffs against the defendants to recover the amount of such judgment; — *Held*,

1. That the verdict and judgment were conclusive evidence of the existence of the defect, the injury to P. while in the exercise of due care, and the amount of the injury; and

2. That it was incompetent for the defendants to prove that, in making the excavation, they were guilty of no negligence, and that they properly guarded and covered the same, at the time of leaving off work, on the night of the alleged injury.

If a private citizen be guilty of a nuisance in making an excavation in a public highway, he will be responsible for injuries arising therefrom during its continuance.

ON REPORT.

CASE to recover amount paid out by the plaintiffs on a judgment recovered against them by one Partridge.

These defendants were verbally notified of the pendency of the former suit, and were present as witnesses and otherwise aiding at the trial of the former suit. The excavation was made in the sidewalk on Silver street, in front of the defendants' buildings.

Drummond, for the plaintiffs.

E. & F. Fox, for the defendants.

APPLETON, C. J.—It is in proof, that one Joseph G. Partridge recovered judgment against the city of Portland for a defect in one of its highways, the defect being an excavation therein made by these defendants without authority—that they were notified of the pendency of said suit and were present at the trial. They are concluded by the judgment, as far as parties are ever concluded, by such notice and judgment.

In the suit against the plaintiffs the jury must have found, that the excavation was a defect, that it was the cause of the injury to Partridge, that it was not properly guarded and covered at the time of the accident, that the plaintiffs had notice of the existence of the defect, and that Partridge was in no fault.

In an action, by the town, against those by whom the excavation was made, after notice, the verdict and judgment are conclusive evidence of the existence of the defect in the highway, the injury to the individual while he was in the exercise of due care, and the amount of the injury. *Milford* v. *Holbrook*, 9 Allen, 17.

The defendants were guilty of a nuisance in making an excavation in a public highway. They were responsible for injuries arising therefrom during its continuance. If left properly guarded and covered, they were bound it should so continue. The responsibility of the excavation, as long as it should exist, was theirs. They were bound at their peril to make and keep the road as safe, at all times, as it would have been without their interference. *Congreve* v. *Smith*, 18 N. Y., 79; *Congreve* v. *Morgan*, 18 N. Y., 84.

The jury have found, that the excavation was a defect and was not properly covered and guarded when the accident occurred. It was the very question submitted to them, and it cannot now be re-tried. The admission, that the excavation was made by the defendants exonerates the plaintiffs from proving that fact. The evidence offered was inadmissible, because it was directly to contradict the facts established by the verdict. *Veazie* v. *Penobscot R. R. Co.*, 49 Maine, 117.

The plaintiffs and defendants are not in *pari delicto*. As was remarked by HOAR, J., in *Milford* v. *Holbrook*, "the only fault or negligence which could be imputed to the town, on the facts shown, was a failure to remedy a nuisance which the defendants had caused. This is no bar to their claim for indemnity. *Lowell* v. *Boston & Lowell R. R. Co.*, 23 Pick., 24; *Lowell* v. *Short*, 4 Cush., 275."

Defendants defaulted.

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

FRANCIS O. J. SMITH *versus* LEVI MORRILL.

A blank indorsement of a negotiable promissory note is, as between the immediate parties thereto, only *prima facie* evidence of the contract implied by law; and it is competent to prove by parol evidence, the agreement which was in fact made at the time of the indorsement.

As to third persons, without notice of any other contract, the one implied by law is conclusive.

In an action by one indorser who had paid the note, against another for contribution, it is competent for the plaintiff to prove, that it was "verbally agreed by all the indorsers, previous to indorsing, that their indorsements should be joint and not several; and that, in the event of liability thereon, and the payment thereof by either, of the whole amount of the note, each should pay to the one thus paying, his equal proportion of the amount thus paid, as joint and not as several indorsers."

Proof of such agreement would make the indorsers, as between themselves, co-sureties, and payment of the whole debt by one, would authorize the maintenance of suits by the one so paying, against each of the others for their proportional parts, upon counts for money paid for their use.

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

ASSUMPSIT for money paid.

The plaintiff introduced three notes, signed by the treasurer of the York and Cumberland Railroad Company, payable to Daniel Hayes, and indorsed by the latter, plaintiff, defendant and others. It was proved that one Williams recovered, at a previous term, several judgments on said notes

against the several indorsers, and collected the whole amount of the plaintiff. The plaintiff claimed to recover of the defendant contribution, upon the ground that the indorsers were joint and not several, and offered to prove that it was "verbally agreed by and between all the indorsers, previous to indorsing, that their indorsements should be joint and not several; and that, in the event of liability thereon, and the payment thereof by either, of the whole amount of said notes, each should pay to the one thus paying his equal proportion of the amount thus paid, as joint indorsers and not as several."

The case was withdrawn from the jury and submitted to the full Court, with the agreement that, if the evidence offered was admissible, the case was to stand for trial.

F. O. J. Smith, pro se.

S. C. Strout, for the defendant.

WALTON, J.—The indorsement of a note in blank is *prima facie* evidence of a contract between the indorser and the indorsee, the terms of which are tolerably well defined in law, and generally understood among business men. There are many *dicta* to the effect that the contract implied in a blank indorsement is to be regarded as a written contract, not to be varied by parol evidence; but an examination of adjudged cases will show that this is true only to a limited extent. *Prima facie* the instrument is presumed to exhibit truly the rights and liabilities of all the parties to it, but this presumption is not always conclusive: it may sometimes be controlled by evidence, written or verbal, *dehors* the instrument. Perhaps it would have been better, had it been uniformly held, that blank indorsements, like contracts written out in full, have a fixed legal character, not depending, for their meaning, upon the vague and often uncertain recollection of witnesses, and imperfect understanding of the parties. But this has not been done. A strong desire to decide each particular case according to its

apparent equity, has had the effect to establish a different doctrine; namely, "that, as between the immediate parties, a blank indorsement is *prima facie* evidence only of the contract which they have made."

In *Smith* v. *Barber*, 1 Root, 207, the first question made was whether parol evidence might be admitted to explain the blank indorsement and the intent of the parties therein, and the Court held the evidence admissible; that a blank indorsement, until it is filled up, has no certain import; that it may be for one purpose or another, or none at all. In *Brewster* v. *Dana*, 1 Root, 267, it is said by the Court, that a blank indorsement has no certain import until filled up. In *Barker* v. *Prentiss*, 6 Mass., 430, the indorsement was in blank, which implies, *prima facie*, an absolute transfer of the note, but the Court held that parol evidence was admissible to show what the real contract was, and that the note was indorsed for collection only. The same doctrine was advanced in *Herrick* v. *Carman*, 10 Johns., 224. Same in *Lawrence* v. *Stonington Bank*, 6 Con., 521. In *Boyd* v. *Cleveland*, 4 Pick., 525, the plaintiff was permitted to show by parol evidence that, at the time of the indorsement of the note to him, the defendant agreed to pay it if the maker did not, and that the implied conditions requiring demand and notice were dispensed with. Same in this State; *Fullerton* v. *Rundlett*, 27 Maine, 31.

In *Weston* v. *Chamberlain*, 7 Cush., 404, the precise question was determined which is raised in this case; namely, whether a prior indorser of a promissory note, can maintain an action for contribution against a subsequent indorser, on proving that, by an oral agreement between the indorsers at the time of indorsing the note, they were, as between themselves, co-sureties; and the Court held that he could. The same doctrine was affirmed in *Clap* v. *Rice*, 13 Gray, 403. Also in *Phillips* v. *Preston*, 5 How., U. S. R., 278; (16 Curtis, 396.) And in *Talcott* v. *Cogswell*, 3 Day, 512, where a note already indorsed by the payee for the accommodation of the maker, was objected to without another

name on the back, and the plaintiff thereupon indorsed his name under that of the payee, and the note was afterwards discounted at a bank, and the maker failed to take it up, and both indorsers were notified, and each went separately to the bank and paid one half of the note, and the second indorser sued the first to recover the one half of the amount of the note which he had paid, the Court were of opinion that *the circumstances of the case* furnished sufficient evidence that the indorsement was *joint;* and that each having paid what, in that case, each would be compellable to pay, the verdict ought to be for the defendant. The jury, however, although sent out three times, persisted in finding a verdict for the plaintiff.

It is idle to attempt to reconcile these decisions with the doctrine that a blank indorsement is in effect a contract in writing not to be varied by parol, and that in these cases it is not varied. In all these cases the contracts, implied in the blank indorsements, are varied, in fact swallowed up and extinguished, so far as they are in conflict, by the express verbal agreements. So far as both are alike, or not in conflict, both are permitted to stand. But when they are in conflict, the implied contract yields, and the express contract, whether written or verbal, prevails.

In *Taunton Bank* v. *Richardson*, 5 Pick., 436, the plaintiffs offered to prove that, by a verbal agreement, made prior to the indorsement of the note in suit, demand and notice had been dispensed with. This was resisted upon the ground that it would vary the written contract created by the blank indorsement. The answer of the Court was "that the evidence did not attempt to change the contract, but to show that a condition beneficial for the defendants had been *waived* by them; that they had agreed to dispense with notice, not that by the contract itself notice would not be necessary." It is not surprising that legal minds should not rest satisfied with the logic of this decision. If by a previous or contemporaneous verbal agreement an important condition of a written contract is waived, is not the written con-

tract *varied* by the verbal agreement? And is not the rule violated, which holds that all previous and contemporaneous negotiation and discussion on the subject, are merged, or extinguished, by the writing, and cannot be shown to vary it? If not, then one condition after another might in this way be waived, until nothing would be left of the written contract, and yet the rule referred to would not be violated. Conditions in written contracts may unquestionably be waived by subsequent verbal agreements, without violating any rule of law, but not by previous or contemporaneous ones; a distinction which seems to have been overlooked in the case just noticed.

The only rational ground on which to justify the admission of evidence of a verbal agreement to control the contract implied by law in a blank indorsement, is that laid down by Mr. Justice WASHINGTON in *Susquehanna Bridge Co.* v. *Evans*, 4 Wash. C. C. 480, (U. S. D. p. 396, § 2132,) namely, "The reasons which forbid the admission of parol evidence, to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand." "The evidence is offered in conformity with the familiar rule, that the law does not imply a contract where an express one has been made. *Expressum facit, cessare tacitum.*" *Perkins* v. *Catlin*, 11 Conn., on page, 226, a case in which this question is very fully and ably discussed, and the conclusion reached that a blank indorsement is not a contract in writing: that the law implies a contract, as in a great variety of other cases, simply because the parties have failed to make an express one, and because otherwise the indorsement would be meaningless; that a blank indorsement is only *prima facie* evidence of the contract implied by law; and that it is competent, as between the parties to the indorsement, to prove, by parol evidence, the agreement which was in fact made, at the time of the indorsement.

This is certainly a much more rational and satisfactory

view of the law than that which concedes that a blank indorsement creates a written contract, embracing in its terms just what the law implies, and then denying that the verbal agreement made at the time of the indorsement varies it. Arguing that that which converts a conditional promise into an absolute one, does not vary it!

The doctrine of equitable estoppel prevents such express verbal agreements from operating injuriously upon the interests of *bona fide* holders having no notice of them. It is only as between the parties to them that verbal agreements can be set up to vary those implied by law. As between the parties, the instrument itself is *prima facie* evidence of the contract implied by law; as regards third persons having no notice of any other, it is *conclusive*. By permitting their paper to go into circulation, with no evidence upon it of any other contract than that implied by law, parties in effect represent to *bona fide* holders, and as against them will be estopped to deny that the implied contract is the true one. This is upon the familiar principle that if one party induces another to act upon the supposition that a certain state of facts exists, he shall not afterwards be permitted to deny the existence of those facts, to the injury of the other; and not upon the principle that contracts implied by law are to be regarded as written contracts, not to be varied by parol. It is the rule of law applicable to estoppels, and not to written contracts, that protects the parties in such cases.

Thus, in *Williams* v. *Smith*, 48 Maine, 138, when the defendant offered to show that the several persons, whose names were upon the back of the note as *successive* indorsers, were, by virtue of a verbal agreement between themselves, to be regarded as *joint* indorsers, the Court would not permit him to do it; because Williams was not a party to the agreement, and it did not appear that he had any notice of its existence, and he had taken the note upon the implied representation of the defendant and the other indorsers, that they were holden *successively* and not *jointly*.

But, in this case, the plaintiff offers "to prove that it was understood and agreed verbally by and between all the indorsers upon said notes (*including himself and the defendant,*) previous to indorsing, that their indorsements should be *joint* and not *several*, and that in the event of liability thereon, and the payment thereof by either, of the whole amount of said notes, each should pay to the one thus paying, his equal proportion of the amount thus paid, as joint indorsers and not as several."

This is a suit against the defendant for contribution, *founded on this alleged agreement.* If such an agreement was actually made, it ought in justice to be enforced; and it would be a harsh rule of law that would prevent it. Upon the authority of *Weston* v. *Chamberlain*, 7 Cush., 404, *Clap* v. *Rice*, 13 Gray, 403, *Phillips* v. *Preston*, 5 Howard, 278, (16 Curtis, 396,) which are directly in point, and many other decisions not distinguishable in principle, we think the proof offered was admissible.

We have not overlooked the point taken in defence, that the proof offered would not support the declaration, "because there is no count in the writ setting out any such collateral contract." The special counts in the declaration do not appear to be founded on the collateral agreement, but on an alleged joint indorsement in fact. But there is also a count for *money paid*, and "where a debt has been paid by one of several debtors, or by one of several sureties, the payment is sufficient evidence in support of this count against the others for contribution." 2 Greenl., on Ev., § 114. Proof of the alleged agreement in this case would make the indorsers, as between themselves, co-sureties; and payment of the whole debt by one would authorize the maintenance of suits by the one so paying, against each of the others for their proportional parts, *upon counts for money paid*, for their use. *Case to stand for trial.*

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

Albert Stephenson *& al. versus* Piscataqua Fire & Marine Insurance Co.

In an action upon a policy of marine insurance stipulating, that in case any dispute shall arise in relation to any alleged loss, it shall be referred to and determined by referees to be mutually chosen by the parties; that no policy holder shall maintain any action thereon until he shall have offered to submit his claim to such reference; and that in case any suit shall be commenced without such offer, the claim shall be released and discharged, and the company exempted from all liability under it; — *Held*, such stipulations are void.

Such a policy, causing "S. & Co. to be insured, for whom it concerns, in the sum of $700, on schooner 'Arbutus,' of," &c., "at and from," &c., "the above to cover their claim for supplies furnished said vessel;" — *Held*,

1. That the policy does not apply to the supplies only; and

2. That any conversation between the owner and the plaintiffs tending to show authority from the former to the latter to take out this policy is admissible.

And when the policy provides that the defendant company is, in case of prior insurance, answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk; — *Held*, that the jury, if they found for the plaintiffs, should ascertain the value of the schooner at the time of the loss; and, if they should find the whole amount of insurance did not exceed such value, and the loss a total loss, they might assess as damages the amount insured by the defendants with interest from the time it was payable.

In case of a sale from necessity by the master, the salvage belongs to the insurers; and the assured is entitled to recover the full amount of his claim, irrespective of the amount of salvage received by the insurers.

An alleged copy of a survey, not made by order of a court of admiralty or under the sanction of an oath, is not admissible in evidence, though certified and stamped by the American consul at the port where the survey was made.

No exception lies to the refusal of the presiding Judge to order a nonsuit.

A policy of marine insurance covers not only losses that result from injuries caused by extraordinary perils of the sea which become immediately known, but such also as result from latent injuries.

The authority of a master to sell the vessel and cargo in case of marine disaster, rests exclusively upon the ground of necessity, the burden being upon the assured.

What will not constitute the requisite moral necessity.

On Exceptions and motion to set aside the verdict as be-

ing against law, and manifestly against the weight of evidence.

ASSUMPSIT on a policy of insurance, dated Dec. 16, 1861, causing "Stephenson & Co. * * to be insured * * for whom it concerns, loss, if any, payable to Stephenson & Co., in the sum of seven hundred dollars, on schooner 'Arbutus' of," &c., "at and from Portland, Me., to Cardenas, and at and from thence back to a port of discharge in the United States. The above is to cover their claim for supplies furnished said vessel." The policy also contained the following among other stipulations:—

"It is hereby agreed that, if the insured shall have made any other insurance upon the schooner aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another," &c. * * * "Property insured by this company, and damaged so that the company are liable, shall not be sold without the consent of the company, unless positive proof can be produced that a further loss would be sustained by waiting for such advice," &c. * * * * * * * * * * * * * *

"In case any difference or dispute shall arise in relation to any loss sustained, or alleged to be sustained, by any person insured under a policy issued by this Company, the same shall be referred to, and determined by referees, to be chosen mutually by the assured and the Board of Directors; said referees to be governed by the rules and customs of insurance in Boston, when not conflicting with the terms of the policy; and 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 such 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."

Albert Stephenson, called by plaintiffs, testified—"that the firm of Stephenson & Co. consisting of self and Alexander B. Stephenson, were ship-chandlers, in Portland, in 1861; that plaintiffs held mortgage on schooner "Arbutus" to secure the note of Capt. Rogers for $1,199,97, dated June 15, 1861, given for ship-chandlery furnished the "Arbutus;" that they furnished $200 worth of supplies to Capt. Rogers in the fall of 1861; that the witness, in accordance with directions from Rogers, took out this policy, and upon informing him of it on his return, he approved it. [The defendants' counsel seasonably objected to witness' conversations with Rogers, in the absence of the defendants, but the presiding Judge admitted all such conversations tending to show authority to effect the insurance.] He further testified that Stephenson & Co.'s note did not include the $200 for supplies, and that the other policies, amounting in all to $4000, run to Stephenson & Co. "for whom it concerns."

James C. Rogers, called by plaintiffs, testified:—"I have been a mariner for twenty-five years, and for over twenty years have been a master of most all kinds of vessels, from seventy-five to six hundred tons burthen. I built the "Arbutus," and launched her in 1861. I first got her to sea in August, 1861. Went, in December, 1861, to Cardenas. Schooner was in good order, to all appearance. She carried box-shooks, and had a crew of five, all told. We were thirty days on the passage. The usual time is from fifteen to thirty days. Twenty days is a fair passage. This was the roughest passage I ever made. The deck load was well secured when I left, and was lost on the trip, and the mate was washed overboard. It was seventeen days after sailing before we got into pleasant weather. There was a complete gale of wind all that time. We arrived at Cardenas January 15 or 16, discharged cargo, and sailed on our return February 17 or 18. We were in Cardenas about thirty days. The vessel was there painted two coats, and the decks were tarred. I put on new tarpaulins and took such

care of vessel as was usual. Tried the pumps twice a day, and found little or no water. I discovered no leaks or defects while in port, and nothing needing more repairs than I made. Schooner sailed from Cardenas loaded with molasses and honey—bound for Boston. She was loaded by a merchant named Parravicine, who owned cargo. I had $1,000 insurance on her, and then knew of no other. I had not been informed of any other. Had conversed with Stephenson before I left about insuring her. He had not informed me of any. Had a crew of five on our return. Left Cardenas at 5, A. M. Fair wind. Had a pilot out, who left us near Stone Key, about eighteen or twenty miles from our anchorage, between 10 and 11, A. M. I was on deck till after pilot left, and then went to cabin to shift my clothes. All the others were on deck. I was in cabin about twenty minutes. I went down about eleven o'clock, and we were then a mile or two from Stone Key. I went on deck then, as the pump did not suck, and I was somewhat alarmed. I never was below again. The pump worked, but didn't suck dry. There was still water in her. After working both pumps thirty minutes I found eighteen inches of water in the hold. In half or three-quarters of an hour I sounded again and found two feet of water. We still kept on our course, and in one hour I found two feet and eight inches of water in her. Both pumps were going all the time. The vessel, when I went to sea, drew nine and a half feet. I hove her round then, a little after two, P. M., about fifteen miles from Stone Key, and tried to get back to Cardenas. We were thirty-five or forty miles from Cardenas when I hove round. She was then crank, and water was pretty near up to decks. Was quite rough. Headed her to get back to Stone Key, but found it was no use, she made so much leeway and slow at that. We run on that course about three-quarters of an hour. Nearest land was about ten miles east of Stone Key. Then put her on the other tack to get into smooth water under the islands. Run on that course about two hours, and struck on a shoal. When I found her in shoal water I haul-

ed her round on the other tack. She run five or ten minutes and struck, and stuck fast. The tide rises some twelve to eighteen inches. Set signals of distress. When waves left her, and when they returned, she rolled under water up to her hatches. I remained there till dusk—about an hour and a half. Were some small vessels in sight, eight or ten miles off; none came up to us. When schooner rolled down, water came almost to the hatches. None of the cargo started. I and the crew left at sunset. Had one boat. We took it and rowed to Stone Key. I applied for assistance but it was refused. Then we left for Cardenas, and arrived there about four, A. M.,—about daylight. I went aboard a brig, when I got to Cardenas, stayed there till light; went ashore with the captain at about six, A. M. Went first to Parravicine's and called him up. He went with me to the American consul's. We tried to obtain a lighter. I informed the consul. Consul and I went immediately after a lighter, but couldn't find one. They were all engaged. We kept looking for one till 9, A. M. It was necessary to get a permit to take the lighter out. No permits are issued till after 10, A. M. Parravicine went with me for a lighter. I next saw the Arbutus in Cardenas harbor, at noon the same day. Went on board. Pilots were in possession, and there were some half dozen persons aboard. Water was up to decks then. There was three and a half feet or more of water in her, and they were at the pumps all the time. A survey was held on her that same afternoon. The consul took possession of her and called the survey. Captains Collins and Runnells were the surveyors. I noted a protest same afternoon. Vessel was not pumped out before survey, nor discharged, nor the hatches opened. Surveyors could not have examined the bottom of the vessel. Saw no holes below water's edge. Plug was not driven in, but was out about four inches. It was an old pine plug. First saw it after the survey. I have no knowledge of any holes being bored in the vessel after she left Portland. The holes in the ceiling did not occasion the loss of the vessel. The plug which was in the hole was

a little over half an inch in diameter. That hole, if open, would not have admitted one-eighth as much water as the pumps would have discharged. I saw no other hole in the outer planking. Those who brought the Arbutus in claimed of the consul and myself one-third, as salvage. I took advice as to the claim, from merchants and ship-masters. It was a valid claim, and was allowed by the consul and myself. There was no chance to repair the vessel in Cardenas, or to heave her down. There was no dock. In some places we could have got her within a quarter of a mile of the shore. There were no facilities for discharging, which had to be done with lighters. It would have cost twice its value to have discharged cargo and stored it. I had no funds, and raised none on vessel, and had no funds at home to draw on. I attempted to raise funds with Parravicine, and all the principal merchants, on bottomry. Consul went with me. I got no funds. Advertised for bottomry. Finding I couldn't obtain funds, I advertised the vessel and sold her at auction, the consul acting as auctioneer. She was sold for $2,100, on February 28. The cargo was sold and reshipped to another vessel. I could have repaired vessel at Havana, but it would have cost too much. I did not communicate with defendants before the sale. I didn't think it was necessary, and didn't communicate with Ocean Insurance Co. The salvage was settled by the consul and myself, for one-third of the proceeds of the sale. The remainder was sent by the consul to the Alliance Insurance Co., contrary to my orders. I took the advice of the consul. When I left, the consul's bill was $56."

On cross-examination, testified:—"I am fifty-three years old, and have always lived in Freeport—have been to the West Indies a dozen voyages—have not been to sea since the Arbutus was lost. I arrived here in March, 1862, on my return from Cardenas. I have not tried to get a vessel since, but have been farming. Am not interested in any other vessel. Have been ship-master off and on for thirty years. The Arbutus was ready for sea at Cardenas. Cargo

all in on Friday afternoon, I think, and sailed on Tuesday, February 18. I laid there one day, to get provisions and clear the vessel. We tried the pumps twice a day, and they always sucked. When I sailed from Cardenas there was only $1,000 insurance on vessel, to my knowledge. I requested plaintiffs to get other insurance on her. When I sailed from Portland she was worth $5,600. $1,000 was all the insurance I thought necessary, as I was going in her myself. I probably owed $2,000 besides what I owed Stephenson & Co. We tried the pumps the morning we left Cardenas and they sucked. One pump was rigged and tried, and drew water before I went below. There was not more than five or ten minutes pumping before I went below. I went down to the cabin and did not go into the forecastle, at all, the day we left Cardenas. About half an hour after I returned to the deck I sounded the pumps. I had about twenty hogsheads as deck load but not a full deck load, as she was loaded by the head. Hatches were well secured. February 18 was Tuesday, and I sailed from Cardenas on that day. I sent the man down into the forecastle to see what was the cause of the leak. Before I left Cardenas for sea, the decks were fourteen inches above the level of the water. I sent men down to bring up the gear of the other pump. They couldn't discover leak—every thing seemed to be all right. Between the top of upper tier of casks and the deck was about six inches or a foot. There was not room enough to get through and examine."

Witness produced log book.

"I took this book from schooner when I left her and went to Cardenas. The mate got it from below. I did not go down into the hold, at all, after the schooner began to make water. I could not get in. A plank partition separated the hold from the forecastle. Some of the planks were off. The space left between the hogsheads and the beams was not over eight inches. I helped stow the cargo. Had no mate at Cardenas. I gave my bill of lading to the Consul at Cardenas to send all the papers to the Ocean In-

surance Company. I remained in Cardenas twelve or fifteen days after returning there, and then came to Portland. I left the schooner to get assistance. Left no one on board. I don't suppose I had over 125 hogsheads on board. To the best of my recollection there were 125 or 130 hogsheads. After the schooner struck I tried to back her off by her sails. That was all I could do. At 11, A. M., next day, (Feb. 19,) I saw the Arbutus coming into Cardenas. She came in under her own sail. I had left her thirty-five or forty miles from Cardenas, at about 6, P. M., and arrived at Cardenas at 4, A. M. Was in my boat all that time except three-quarters of an hour on board the Alliance, where I got rested. I went on board the Arbutus at 3, P. M., that day. She was lying within a quarter of a mile of the wharves. I entered a protest—all the men went with me to make it."

Witness identified copy of protest.

"I had a survey called. Collins and Runnels were the surveyors. *I have no doubt* that the paper now shown to me is a copy of the report of surveyors. I went on board the Arbutus and stayed till night. I wanted the crew to go off with me and was thinking of buying her in. I was looking around the vessel. There was nothing out of shape about her. I was aboard the next day. Those who had brought her in had left her after plundering her. They took all my provisions and clothing. I went on board every day until she was sold, on February 28 or 29. There was no opportunity to repair her at Cardenas. They don't repair vessel's bottoms at Cardenas. I was in Cardenas once, ten or twelve years ago. I applied to James M. Churchill, and talked with him personally, and with others, and attempted to have the Arbutus repaired. They all told me that she could not be repaired there. The cargo could not have been discharged. There was no chance to land or store it. The shore was all occupied. Can't tell what it would have cost to have landed it, but we calculated that it would have eaten up its value, and twice as much more. It

would have cost $2 per cask to have landed it on the shore. I think there was a mail between Cardenas and New York once a fortnight. In selling the vessel at Cardenas I acted for all concerned. Had there been a chance it could have been stored in the city. Would have cost $5 per cask to have landed and stored it."

Defendant moved for a nonsuit, on the ground that the policy, by its terms, applied only to Stephenson & Co.'s claim for supplies — which was not an insurable interest — and also because the plaintiffs had not, before bringing suit, offered to refer the claim as required by conditions of policy.

But the presiding Judge *ruled that action was maintainable*, and refused to order a nonsuit.

James M. Churchill, called by defendants, testified: — "I have been a merchant at Cardenas from 1847 to May, 1865. The Arbutus was consigned to me in 1861. I did not load her. I saw her several times after she was brought into Cardenas, after being ashore. It was very easy to land the cargo. It would have cost seventy-five cents a cask to have landed it. A vessel having holes in her bottom, in the second wale, twelve or fifteen feet from her stem, could easily have been repaired at Cardenas. It is usual there to heave vessels down to examine their bottoms. There would have been no trouble in heaving down the Arbutus. I think there would have been no difficulty in heaving her down by any of the wharves in Cardenas. Facilities for repairing would depend on what was to be done."

On cross examination, testified: — "The crop season in Cuba lasts six months — from Christmas to May or June. It is the constant custom to repair coasters of from 60 to 175 tons burthen, by heaving them down, in Cardenas. She could not be hove down till discharged. Could not have been beached."

The defendants read in evidence a duly certified copy of the protest made by the captain at Cardenas.

The defendants offered in evidence a copy of the appointment of surveyors by the consul at Cardenas, and of the

report of the survey called by the captain at Cardenas, said copy being duly certified by the American consul under his official seal, and the same paper referred to by the captain in his testimony, which was objected to by plaintiffs and excluded by the Court.

The defendants read, in evidence, the account of sales of schooner Arbutus and cargo, at Cardenas.

The Court instructed the jury, among other things not excepted to, that the policy authorized plaintiffs to show by parol evidence who were "the concerned;" that, if plaintiffs effected the insurance for the owner and master, and the owner and master ratified it, plaintiffs are entitled to recover, if no other objection; that during a voyage the insured must keep a vessel in suitable condition for the voyage and business. If he does not, and a loss occurs by his failure to do so, the insurers are discharged; if vessel becomes unseaworthy, he must repair, if he has reason to suppose her unseaworthy—he must use ordinary care in keeping himself acquainted with the condition of the vessel. That, to justify a sale of a vessel by a master, there must be an absolute and extreme necessity; that jury will determine whether, in this case, there was such an extreme necessity, and whether captain acted with good faith, judgment and discretion—if so, the sale was authorized, and constituted a constructive, total loss; that the whole amount of insurance upon the vessel was $4,700, and, if jury find vessel to have been worth $4,700, the plaintiffs are entitled to recover the $700 insured by this policy, with interest from the time it was payable.

The defendants requested the Court to instruct the jury that the policy declared upon, by its terms, applies only to the claim of Stephenson & Co., for supplies furnished the schooner Arbutus; that, upon the testimony in the case, there is no sufficient evidence that the vessel was damaged by any of the perils insured against; that, if the jury find that there was a constructive total loss, the amount of the vessel's proportion of the salvage is to be deducted from the

amount of the loss; that the defendants are liable for only so much of the loss, (not exceeding $700,) either total or partial, as is not covered by the prior insurance in the Pacific and Ocean offices, to the amount of $3,000, after deducting the vessel's proportion of the salvage; that, by the terms and conditions of the policy, no action can be maintained thereon without a previous offer to refer the claim to referees, to be chosen mutually by the assured and the directors of defendant corporation.

All which requested instructions the Court declined to give. But the Court did instruct the jury, that by the terms of this policy it was agreed that, if the assured shall have made any other insurance upon the schooner prior in date to this policy, then this insurance company should be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, and that they would therefore ascertain the value of the schooner at the time of the loss, and with the proofs in the case assess the damage upon this rule established by the parties, if they should find for the plaintiffs; and that, if they should find the whole amount of insurance upon the schooner did not exceed $4,700, and that she was worth that sum when she was lost, if the loss was a total loss, they would assess the damages at $700, and would be authorized to add to this sum by way of damage, if they found the plaintiffs suffered it, a sum equal to lawful interest on the $700 from the time the loss was payable, by the terms of the policy, which was in 60 days after proof and adjustment of loss, to the present time.

The jury returned a verdict for plaintiffs for $780,50, which defendants moved be set aside.

And to the foregoing rulings and instructions, and refusal to instruct, the defendants excepted.

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

Verdict for plaintiff for total loss is not warranted by the evidence, and should be set aside.

Schooner built in Aug., 1861,—a first class, hard wood vessel—sailed in Dec., 1861,—arrived at Cardenas Jan. 15, having sustained no damage on the voyage—sailed from Cardenas for Boston, with molasses, Feb. 18, at 6, A. M.—After passing Light found the vessel settling,—tacked ship to return, but run her ashore and abandoned her, and captain and crew arrived at Cardenas in boat at 4, A. M. of Feb. 19—the pilots found the vessel derelict, and brought her into Cardenas before noon, of Feb. 19. The master then sold vessel at public auction without communicating with insurers.

Vessel met with no stress of weather, or accident of any kind, but without any apparent cause, begins to fill when only a short distance from port and by the time she reached the light. She had been fully loaded from Friday afternoon to Tuesday morning, and had not leaked any of any consequence, as pumps always sucked,—and pumps sucked the morning they sailed.

It was the duty of the owner to have the vessel seaworthy when she sailed, and yet it is apparent from facts that she could not have been so, for, without sustaining any injury of any kind, she fills with water. Now, if this filling with water led to a constructive total loss, the insurers are not liable, because the vessel was not seaworthy, and the verdict should be set aside. *Talcot* v. *Insurance Company*, 2 Johns., 124.

But the filling with water was neither an actual nor constructive total loss, it did not destroy nor materially injure the vessel; she is in a few hours brought back to Cardenas and anchored in port.

What authority then had the captain to sell, and turn a trifling, (if any,) partial loss into a constructive total loss? True, there was a claim for salvage, but that gave no authority to sell without communicating with insurers, when such communication was practicable within a reasonable time. And certainly, in this case, he had no authority to sell without consulting insurers, as it was expressly stipulated in the policy that property insured and damaged should

not be sold "without consent of the company, unless," &c. And there is no such proof.

These are well settled elementary principles to be found in the text books. And how can it be pretended that there was a total loss, even constructive, of the schooner by the perils of the sea? And how can the verdict be sustained?

Had the vessel been damaged and needed repairs, the Court will perceive, by the testimony of Churchill, that she could have been repaired at Cardenas. And, if the captain had no funds, he should have raised some or communicated with insurers before sale.

But the captain says "there was nothing out of shape about her. I was thinking of buying her in." Selling and buying her in! Could not raise money to pay salvage or to repair, but could raise money to "buy her in."

The whole transaction and the whole evidence shows that the company should not have been held liable for a total loss, and the verdict was not warranted and should be set aside. *Robinson* v. *Gorges Insurance Co.*, 17 Maine, 131; *Hale* v. *Franklin Insurance Co.*, 9 Pick., 466; *Stephenson* v. *Pacific Insurance Co.*, 7 Allen, 232.

Salvage on the vessel was $1125,31, and yet no notice was taken of this by the Court or by the jury.

The master (and owner) should have received the salvage on the vessel, as there was no abandonment, and the amount should have been deducted in determining the amount for which the insurers were liable. The master allowed it to be taken by the consul and no part came to the defendants. Under such circumstances the plaintiff is to be charged with it, and it is to be deducted. 2 Phil. on Ins., § 1714, 1798.

There was no abandonment, and if, (as defendants contend,) the sale was not justifiable, abandonment was necessary in order to recover for a total loss.

The conversations between the plaintiffs and Rogers, respecting insurance, were not admissible in evidence, even upon the principle on which the Court admitted them, because they did not tend to show an authority to insure.

But the policy, by its terms, applied only to Stephenson's bill for $200, of supplies. The defendants caused Stephenson & Co. "to be insured, for whom it concerns, loss, (if any,) payable to Stephenson & Co." The policy then declares that "the above is to cover their claim for supplies furnished said vessel;" meaning, of course, that the above insurance or policy is to cover their claim for supplies.

The Arbutus being a domestic vessel, Stephenson had no lien for supplies, and consequently had no insurable interest. The policy was void, and the nonsuit moved for by defendants should have been ordered.

But, even if the policy could be held to have attached, it covered only Stephenson's claim.

A policy in the name of A, "for whom it concerns," will be applied to the interest of the party only for whom it was intended. 1 Phil. on Ins., 213, 214. The intention of the party ordering the policy determines who are the "concerned." 1 Arnold on Ins., 170, note 2. And certainly, when the policy itself declares what it is intended to cover and who are the "concerned," the policy is conclusive upon this point, and the instruction of the Court, that plaintiffs might show by parol who were "the concerned," was erroneous; it allowed plaintiffs, by parol evidence, to vary and contradict the plain words of the policy.

Can anything be plainer as to the intention of the parties, who and what they insured, than the words of the policy? And on what principle is it varied by parol? The policy covered only Stephenson's claim for supplies. Had it been intended to cover anything more and only to pay Stephenson his bill out of the amount received for Rogers, and upon Rogers' interest, different words would have been used.

Under the instruction and ruling of the Court, the words "the above is to cover," &c., are, in legal effect, stricken out of the policy.

The report of the surveyors called by the captain and owner, certified by the American consul, and proved by tes-

timony of the captain, should have been admitted in evidence.

The instructions requested by defendants should have been given upon all the points on which we have given our views.

Upon the facts shown in evidence, it is apparent that gross injustice has been done to the insurance company, by charging them with a total loss, and that, upon the testimony of a master and owner, who, upon his return to the United States, was arrested and almost indicted for wilfully casting his vessel away.

Evans & Putnam, for the plaintiffs.

DICKERSON, J. — Assumpsit on a policy of marine insurance on schooner "Arbutus," of Freeport, Maine, "at and from Portland to Cardenas, and at and from thence back to a port of discharge in the United States." The insurance was effected "for whom it concerns," and the loss made payable to the plaintiffs. The vessel was owned by James C. Rogers, who was also master.

The plaintiffs are met, *in limine*, with the objection that this action cannot be maintained because of their non-compliance with the following clause in the policy: — "In case any difference or dispute shall arise in relation to any loss sustained or alleged to be sustained, by any person insured under a policy issued by this company, the same shall be referred to and determined by referees to be chosen mutually by the assured and the board of directors, * * * and 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 such 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."

For every breach of a valid contract, the law provides a remedy as a necessary incident of the contract. The law supplies the omission to specify the remedy in the contract

and makes it part and parcel of, and inseparable from it. While parties may impose, as a condition precedent to application to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the courts for their remedy, in a given case, than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void. *Livingston* v. *Ralli*, 30 Eng. L. & Eq., 279; *Scott* v. *Avery*, 20 Eng. Law & Eq., 336; 36 Eng. Law & Eq., 336; *Nute* v. *Insurance Co.*, 11 Exch., 180, 181.

The policy in the case at bar first gives the plaintiffs a perfect right, and then provides that, in case differences shall arise under it, the whole subject, including both the right to recover and the amount of damages shall be determined by referees. This stipulation does not prescribe a particular mode of ascertaining the damages as preliminary to the commencement of an action, but is purely a condition subsequent to the claim or right, and precedent to the institution of proceedings for its enforcement. It therefore relates to the remedy, and comes within the principles above stated. An offer of the insured to refer is made a condition precedent to bringing an action, while an offer made by them and accepted by the company, makes the referees final judges of the matter in controversy. In either case, the court is divested of its jurisdiction. This clause in the policy, in effect, if not in terms, commands the court to order a nonsuit, if the assured shall presume to bring an action before he has offered to submit his claim to a reference; and such seems to have been the construction put upon this provision of the policy by the learned counsel for the defendants, when he submitted his motion for a nonsuit, though he seems to have waived the point in his

argument. If anything further is needed to illustrate the obvious groundlessness of this motion, it may be found in the manifest impropriety of holding a party to submit to ordinary arbitration the grave and complicated questions of law which arise in this case. The provision in question being repugnant to the rights secured by the contract, and aiming to divest the court of its jurisdiction, is void, as a condition precedent to the maintenance of this action; and the presiding Judge very properly so ruled.

The argument of the learned counsel for the plaintiffs is a conclusive answer to the position taken by the defendants' counsel in his request for instruction, that the policy applied only to the claim for supplies. In terms, the insurance was effected upon, and the valuation made of, the vessel only. The subsequent clause in the policy that "the above is to cover their claim for supplies furnished the vessel," cannot, nor does it purport to change the insurance effected on the vessel by a previous clause, and put it upon the supplies. The loss was obviously made payable to the plaintiffs to enable them to indemnify themselves against the loss of their claim for supplies, and this paragraph was inserted to indicate their authority and purpose to do so. Besides, the supplies only amounted to $200, whereas insurance was effected for $700. The defendants have no cause of complaint that the instructions requested on this point were refused.

By another clause in the policy the company is made "answerable," in case of prior insurance on the vessel, "only for so much as the amount of such prior insurance may be deficient toward fully covering the property at risk." Although this is a valued policy and the value of the vessel is fixed, yet this provision of the policy restricts the right of the plaintiffs to recover the excess of the value of the vessel, when lost, over the amount of the prior insurance, not exceeding $700. In order to give effect to this provision, it became necessary to ascertain the value of the vessel at the time and place of the loss, and there was no

error in so instructing the jury. This is the rule in analogous cases. *Patapsco Ins. Co.* v. *Southgate*, 5 Peters, 490.

The instructions in regard to the amount of prior insurance to be allowed, were given as requested. The requested instruction that, if the jury should find that there was a constructive total loss, the amount of the vessel's portion of the salvage should be deducted from the amount of the loss, was refused. Such salvage in case of abandonment to the underwriters or a sale from necessity by the master belongs to the insurers. It is not the duty of the assured to take part in the litigation which may arise among the several parties who have risks on the property for the due apportionment of the salvage among themselves. The assured is entitled to recover the full amount of his claim irrespective of such apportionment or of the amount of salvage received by the insurers. But for the argument of counsel, it would be difficult to perceive the ground upon which this request is to be placed. It there appears to be based upon the assumption that the plaintiffs have received the salvage belonging to the vessel. In that case the principle contended for would undoubtedly be applicable; but we do not understand that the plaintiffs have ever received any part of the salvage. The sale of the vessel and the remittance of the salvage to the Alliance Company took place without their knowledge, authority or consent. Neither they nor any one over whom they had control, received any part of the salvage. On the contrary, the auctioneer sent the vessel's part of the salvage to the Alliance Company against the remonstrance of the master. The requested instructions were rightfully refused.

The insurance having been effected "for whom it concerned," it was competent for the plaintiffs to show who had the insurable interest, and the authority they had for procuring the insurance. Evidence of statements made by Rogers, the owner, to the plaintiffs, tending to show this, was clearly admissible, as the presiding Judge held it to be.

So, also, the ruling excluding the alleged copy of the report of the surveyors was unobjectionable. The survey was not made by order of a court of admiralty; nor is there any evidence that the surveyors acted under the sanction of an oath. The master had no control over them, nor is he responsible for their acts, declarations or opinions. He had no opportunity to examine them. There is no law or usage recognized by courts by which the certificate of an American consul stamps such a paper with the authority and character of a deposition, or makes a copy equivalent to the original. The assured is not bound to produce the survey, if called for by the underwriters, nor can it be read in defence against his objection. If the defendants would avail themselves of the facts disclosed in the report of the surveyors, they should have taken their depositions or had them present as witnesses at the trial. The rules of law do not invest evidence of this description with special immunities. Neither plaintiff nor defendant can use such a document in evidence without consent of parties. *Hall* v. *Franklin Ins. Co.*, 9 Pick., 466; *Mitchell* v. *New England Mar. Ins. Co.*, 6 Pick., 117; Phillips on Ins., § 2096.

No exception lies to the ruling of a Judge in refusing to order a nonsuit, and the question of seaworthiness was properly submitted to the jury.

In every contract of marine insurance against sea perils, during a certain voyage, the assured impliedly warrants that his vessel is in a suitable condition to proceed on the voyage, and to meet all the common perils and dangers incident thereto with safety. This warranty is a condition precedent to the obligation of insurance; and if, at the inception of the risk, the vessel is lacking in any of the essential requisites of seaworthiness, the policy is void. This rule of law applies, as well where the unseaworthiness is neither known nor could be known to the assured, as where it was known or caused by him. The question of good faith on the part of the assured in this respect is immaterial when the fact of

unseaworthiness is proved. If the vessel is seaworthy at the commencement of the risk, the condition of warranty is fulfilled, though she becomes unfit for sea, and goes to the bottom in twenty-four hours afterwards. But if a ship sails on a voyage, and within a day or two becomes leaky, or founders, or is obliged to return to port without encountering stress of weather or any visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed; though no such presumption exists, where it is proved affirmatively that the ship was seaworthy when she left port, and that she encountered perils such as might disable a staunch and well manned vessel. The question whether a ship was seaworthy at the commencement of the risk on a voyage, when not otherwise ascertained, must be decided by rational inference from the circumstances in proof. Her age, the materials of which she was built, the skill and fidelity of her architects, the climatic tests to which she has been subjected, the kind of cargoes she has carried, the nature of the perils she has encountered, and the proximity in time between the inception of the risk and the disaster, for the most part, make up the magazine of facts from which the conclusion as to seaworthiness is to be drawn. The question of seaworthiness is to be determined by the jury. The burden of proof, however, is on the insurer to establish the fact of unseaworthiness, the presumption of law being that the ship was seaworthy. *Treadwell* v. *Union Ins. Co.*, 6 Dow, 273; *Paddock* v. *Franklin Ins. Co.*, 11 Pick., 226; *Watson* v. *Clark*, 1 Dow, 344; *Munroe* v. *Vandam*, 1 Park. Ins., 333; *Parker* v. *Potts*, 3 Dow, 23; *Walsh* v. *Washington Mar. Ins. Co.*, 32 N. Y., 427; *Patrick* v. *Hallett & al.*, 1 Johns., 341; *Talcot* v. *Am. Ins. Co.*, 2 Johns., 124, 467; Arnould on Ins., (Perkins,) § 245.

The theory of the defence is, that the evidence manifestly overcomes both the presumption and the proof of the seaworthiness of the "Arbutus," and also raises the presumption of her unseaworthiness. The principal fact relied upon

in support of this position, is the occurrence of the disaster, in the absence of extraordinary sea perils and all other causes sufficient to produce such an effect, within a few hours after she sailed from Cardenas. This argument would undoubtedly be entitled to grave consideration if the risk commenced at Cardenas; but the risk attached at Portland, some sixty days prior to the disaster. Her seaworthiness, when she sailed from Portland, is not only to be presumed, but it is proved. She had been built only a few months, of hard wood materials, and was pronounced a first class vessel by her architects. This was her second voyage, and there is no evidence that she was damaged on her first voyage, or that she did not then prove to be a sound, tight and staunch vessel. On her outward passage to Cardenas, she experienced rough weather, encountering a "gale of wind for seventeen days," and losing her deckload. This was a peril covered by the policy, and such as might well disable a seaworthy ship. The consideration that the effects of these perils on the "Arbutus" were not discovered at the time she fell in with them, is by no means conclusive proof that she was not injured by them, nor does it absolve the insurers from liability if the final disaster actually arose from this cause. A marine insurance policy covers not only losses that result from injuries caused by extraordinary perils of the sea which are immediately known, but also losses that result from latent injuries. The frowning waves which a ship seems to mock at unharmed, or the storm that she proudly outrides in apparent safety, may give her a death wound; and, though the hour of her dissolution be far distant, and, when it comes, it may be in the very calm that betokens immunity to her faithful mariners, yet her destiny is not the less certain from the remoteness of the injury, nor the damages the less severe in their consequences that they were not apparent at their inception. A bolt may be loosened or a timber started in a storm, without being perceived until the subsequent action of the water, or the climate, or the greater strain of a different cargo has so augmented the injury as to cause the

loss of the vessel. The most skilful, experienced and energetic navigator cannot go into the hold of his ship, and overhaul her cargo to note the effect the storm is producing upon her hull; his presence in such cases is required upon the quarter deck. If the pumps "suck dry" all the while the storm is raging, all below decks is presumed to be well. In numberless instances of marine disasters, from the nature of the case, the injury complained of does not happen simultaneously with the particular peril that caused it. To restrict the insurers' liability to cases where such coincidence occurs, would be to deprive the assured of all remedy in a vast number of cases, where every rational inference points to some previous peril of the sea, as the actual cause of the loss, though the particular effects are not experienced or perceived until a long time thereafter. It is in some degree to remedy this difficulty, that the law arms the assured with the presumption that his ship, in a given case, was seaworthy; and, having proved that she met with perils of the sea adequate to disable a seaworthy ship, and that she has received an injury which such perils ordinarily occasion, he is entitled to recover as for a loss by the perils of the sea, unless the contrary appears, if the jury are satisfied that the damage originated from previous perils.

It was this inference that the jury doubtless drew in regard to the cause of the disaster to the "Arbutus." Nothing happened to her after she sailed from Cardenas to cause her to fill with water so suddenly, unless she had previously sustained some latent injury. Finding that she was seaworthy when she left Portland, the jury would naturally look to the perils of the sea which swept away her deck load on her outward passage, as the cause of her disaster. Her exposure to the climate of Cardenas for thirty days, and the change in her cargo, in the estimation of the jury, may have accounted for the sudden development of the latent injuries inflicted upon her by those perils. We are not prepared to say this inference is an irrational one.

The counsel for the defendants further argues that the

evidence fails to show that the master had authority to sell the vessel and thereby turn a trifling, partial loss into a constructive total loss. The authority of a master to sell a vessel or cargo in case of marine disaster rests exclusively upon the ground of necessity. In kind, the necessity is not a legal or physical necessity, but a moral one; and though different courts and jurists use various epithets to intensify the degree of the requisite necessity, these add little significance to the simple language, moral necessity. The necessity need not be actual, for the next wave that comes may deliver the ship from her perils, but it must be apparent from the surrounding circumstances, and the master must act from a conviction of its actuality. Viewed from his stand point, the facts and circumstances must exclude every rational theory that the interests of those he represents would be subserved in any other way than by a sale; or, in other words, to refrain from selling, to a man of ordinary maritime experience and intelligence as a shipmaster, must seem to be the violation of a manifest moral duty. *Prince* v. *Ocean Insurance Co.*, 40 Maine, 481; *Butler* v. *Murray*, 30 N. Y., 88.

The questions which force themselves upon a master in case of disaster to his vessel are, what is the extent of the injury? Is it a partial loss, or a technical or constructive total loss? What are the dangers of further damage? What means of rescue are at hand, and what are the facilities for using them? What are the chances and cost of repairing the vessel where she lies? If she cannot be there repaired, can she be taken to another port, and what are the opportunities and probable expense of repairing her at such port? What are the nature and condition of her cargo and the means and expense of transhipping or landing it? What are the available channels of communication with the owners or insurers? If a claim of salvage has intervened, what effect ought that consideration to have in determining his course? The duty of the shipmaster to sacrifice a part and oftentimes the greater part of the value of the ship by sale,

in order to save the balance, is not always easily discernible; but when it is, it is as obligatory as his duty to engage the most advantageous freights, seek the best markets, or make the quickest despatch.

The fact that the master was, also, owner of the vessel, does not materially change his rights, duties and obligations in the premises. The burden of proof is upon the plaintiffs to establish the necessity for the sale, and that the master acted in good faith. It is also incumbent on them to show, in the language of the policy, "by positive proof, that a further loss would have been sustained by waiting for advice" from the defendants, the master not having advised them of the condition of the vessel, or of his intention to sell.

Was there a moral necessity for the sale? In such cases, the master acts for the owners or for the insurers because they cannot act personally for themselves. It is their right to have the vessel sold, or to repair her; and if she can be kept safely until they can be consulted in regard to the sale, the necessity to act for them ceases. The damage to the "Arbutus" was not very serious. The master was on board of her every day for ten days after the disaster, "looking around her and saw nothing out of shape" except a plug hole which was not filled when she left Cardenas. She had been rescued from peril and taken into Cardenas harbor, forty miles from the place of her disaster, in a few hours afterward, under her own sails, and lay only a quarter of a mile from the wharf. According to the testimony of Mr. Churchill, an experienced merchant of Cardenas, and consignee of the "Arbutus'" outward cargo, the vessel might have been hove down by any of the wharves in Cardenas, and her bottom examined, and the injury to her wale repaired, as was the custom with vessels of her class. The same witness, also, testified, the total expense of landing her cargo would not have exceeded a hundred dollars, though the master's estimate exceeds twice that sum. The expense of keeping the vessel in case of delay, would have

been the trifling wages of one or two shipkeepers which must in any event have been borne by the insurers, and she would meanwhile have remained at their risk. She did lie there in safety for ten days prior to the sale, and there is no evidence that she might not have continued there without further damage for an indefinite period. The mail left Cardenas for New York once a fortnight. The alternatives of letting the vessel remain in safety and with small expense, of discharging her cargo at trifling cost, of having her examined to ascertain the extent of the injury, and of repairing her without difficulty, if her damage should be found not very serious, and of communicating with the insurers, were thus all open to the master and seemed not only to invite but to command him to consult them. How then can it be said, in the language of the policy stipulating for notice to the underwriters, "that there was positive proof that a further loss would have been sustained by waiting for advice" from them? Most certainly the *spes recuperandi* was worth as much to them as to the purchaser, and they were entitled to the benefit of an election whether to sell or repair the vessel. If they had had the opportunity to make this election, there can be no doubt but they would have adopted the latter alternative. The burden is on the plaintiffs to prove the necessity for a sale, but the proof adduced most emphatically negatives the existence of such necessity. *Patapsco Ins. Co.*, v. *Southgate*, 5 Pet., 490; *Hall* v. *Franklin Ins. Co.*, 9 Pick., 466.

Nor is the plaintiffs' case relieved by the claim for salvage. The sale was not compulsory; no appeal had been made to a court of admiralty. A compulsory sale could only have been made upon judgment of such court. Proceedings in admiralty are necessarily attended with delay; and before an order of sale could have been obtained, there would ordinarily have been time to consult the insurers. Besides, in case of sale under legal process, the additional expense would be more than compensated by the guaranty of good faith it would have afforded. Under the circum-

stances of this case, too, the proximity of the disaster to Cardenas, and the trifling danger, difficulty and expense of relieving the vessel, and taking her into port, it is apparent that a court of admiralty would have disallowed no inconsiderable part of the exorbitant claim for salvage, though the master allowed it without cavil, or question, or even submitting it to arbitration. The salvors were bound to take due care of the vessel and to afford every requisite facility for improving its condition, on peril of losing their claim. There is not a scintilla of evidence to show that it would have cost anything like fifty per cent. of the value of the vessel to repair her, a rule which courts have adopted as indicative of the necessity for abandonment. Ship-owners hold title to their ships by a frail tenure, if they are to be thus divested of it, and insurers in vain stipulate, in their policies, for notice of disasters, if these are to be thus disregarded.

In order to justify a sale by the master, necessity and good faith must concur. The necessity cannot be inferred from good faith, for the master's judgment may have been at fault; but it must be determined from the circumstances as they existed at the time. Nor can good faith be inferred from necessity; for the master may have colluded with the purchaser in the sale; but the inquiry whether a prudent owner, then and there present, and uninsured, would have done as the master did, may aid the jury in determining whether good faith had been maintained. The master's good judgment will not make that a case of necessity which would not otherwise be, nor his bad judgment prevent that from being necessary which would otherwise be necessary. The authorities concur in the doctrine that if the damage sustained was of trivial amount, and could have been repaired at the place where the ship is, or may be readily taken, there is no necessity for the sale, whatever may have been the judgment or faith of the master. *Win* v. *Columbia Ins. Co.*, 12 Pick., 279; 7 Sergt. & Lowb., 275; *Clark* v. *Mass. M. and F. Ins. Co.*, 2 Pick., 104.

Were it necessary for us to pass upon the question of the master's good faith, we should say that his neglect to ascertain the extent of the injury and to notify the insurers, under the circumstances of the case, and his allowance of the exorbitant claim for salvage, without awaiting the judgment of a court of admiralty or submitting the matter to arbitration, indicate, at least, a lack of judgment, if not of good faith. But it is unnecessary for us to decide that question.

The power of sale is liable to such great abuse, that it should be carefully watched; and it is the duty of courts to take care that the safeguards which the law has thrown around the rights of owners and insurers should not be entirely swept away by the failure of the jury to make a proper application of them. If the sale had been necessary, the plaintiffs would be entitled to recover for a total loss without abandonment, but the sale being unauthorized, the plaintiffs have put it out of their power, by the sale, to make the abandonment necessary in case of a constructive total loss, and can recover only for a partial loss.

Exceptions overruled, — *Motion sustained,* — *Verdict set aside, and new trial granted.*

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

WILLIAM CUTLER, (*by Guardian & prochein ami,*) *versus* HELEN E. CURRIER, *Adm'x.*

Public Laws of 1848, c. 61, § 1,* (R. S., c. 95, § 16,) has changed the common law respecting the remedies of tenants in common, and it applies as well to cases of personal occupancy by a co-tenant, as to the receipt of rent by a sub-tenant.

The action may be maintained under this statute, although the defendant did not occupy all the joint estate.

* See opinion.

Cutler *v.* Currier.

A refusal of the presiding Judge to order a nonsuit, affords no ground for exceptions.

By the ninth rule of this Court and the law applicable to specifications of defence, all matters set forth in the writ and declaration, and not specifically denied, are regarded as admitted for the purposes of the trial.

In an action founded upon the statute of 1848, c. 61, § 1, brought by a minor against the administratrix of a deceased co-tenant, the plaintiff alleged a tenancy in common of the premises described, in equal shares between himself, one E. B. R. and the defendant's intestate; the taking of the whole of the rents, profits and income of the estate by said intestate till his death, without the plaintiff's consent and against his objection; and a demand on said intestate, in his lifetime, and a refusal, and a demand on the defendant. The defendant, in her specifications of defence, alleged, (1,) the statute of limitations, (2,) the consent of the plaintiff and his guardian, and (3,) the expenditure on the premises of more than the value of the rents, &c.; — *Held*,

1. That the tenancy in common, caption of the profits, and the demand and refusal were admitted by the pleadings; —

2. That neither the objection that the said intestate occupied the premises as executor, nor that the plaintiff's father was tenant by courtesy of the same, is open to the defendant; — and,

3. If they were, she could not avail herself of them on exceptions to the refusal of the presiding Judge to order a nonsuit.

In the trial of such an action, an instruction, that the plaintiff, being a minor and without a guardian during the whole time covered by the claim, was incapable of giving consent to the occupancy by his co-tenant, and that the minority of the plaintiff and the fact that he had no guardian, were sufficient evidence of a want of consent, is unobjectionable.

So is an instruction that, if the defendant neglects, for two months, to make any answer to a written demand or to do anything about the matter, such will be sufficient evidence of a demand and refusal, though she did not expressly decline to account; and that the demand on her, without evidence of a demand on the intestate in his lifetime, would be sufficient.

R. S., c. 81, § 100, gives minors six years, after they become of age, to bring actions of assumpsit for causes of action which accrued during their minority.

On Exceptions from *Nisi Prius*.

Special assumpsit by one of three tenants in common against the administratrix of the estate of one of the other co-tenants for the plaintiff's share of the rents, profits and income of the joint estate, which accrued between June, 1853, and Oct., 1859, when the defendant's intestate deceased.

It appeared that William Currier died March 7, 1847,

leaving certain real estate including that described in the writ. The real estate descended, in equal shares, to his three children, viz.: Thomas, (defendant's intestate,) Eliza B. Reed, and Mary Cutler, mother of the minor plaintiff. Mary was married to Henry Cutler, (father of the plaintiff,) June, 1846. The plaintiff was born July 4, 1847. Mary died Jan., 1848. Her husband was living at the time of the trial of this action. The writ was dated October 30, 1863.

James H. Tripp, called by the plaintiff, testified, that he served the following notice upon the defendant in accordance with his return, and that he also read it to her.

"To Helen E. Currier.—As your late husband, Thomas Currier, of whose estate you are the administratrix, took (without the consent of his co-tenants) more than his share of the income, rents and profits of the estate belonging to the heirs of his father, William Currier, and, as neither he the said Thomas in his lifetime, nor you since his decease, though repeatedly requested, have paid to the co-tenants their share of the income, rents and profits accruing from the joint estate above referred to, nor rendered to said co-tenants any account of their shares of such income, rents and profits, this is to demand of you, (as you are the administratrix of the estate of said Thomas,) payment of the sums due to Eliza B. Reed and William H. Cutler, as their share of the income, rents and profits of said joint estate, received by your late husband. Unless payment be made to us or to our attorneys, Messrs. Tapley and Smith, of Saco, Maine, on or before the 28th day of August, current, our said attorneys are directed to commence an action against you to recover our said shares of the income, rents and profits aforesaid. "Samuel G. Reed, Guardian

"for William H. Cutler.

"Eliza B. Reed.

"Kennebunkport, August 22, A. D. 1863. At 9 o'clock, P. M.—Pursuant to the within, I gave to Mrs. Helen Cur-

rier the original notice of which the within is a true and exact copy. "James H. Tripp, Constable of "the town of Kennebunkport."

After the plaintiff's testimony was all in, he rested his case; when the defendant, before offering any testimony, moved for a nonsuit, on the ground that the father of the minor plaintiff was tenant by the curtesy, and he being still alien was entitled to the rents, profits and income claimed, from the decease (1853) of the widow of his grandfather, William Currier; and again, that the plaintiff's remedy, if he had any, was upon the executor's bond of the intestate defendant. But the presiding Judge overruled both motions, and the defendant alleged exceptions.

The defendant then put in his testimony, which it is not essential to report.

Defendant's counsel contended,—

1. That the common law, as it respects this case, was unchanged; but the presiding Judge ruled otherwise.

2. That the word "take" in the statute meant taking or receiving from some one else; but the presiding Judge instructed the jury, that it was not necessary that the occupation should be by some person other than the defendant, and the rents and income taken from such person, but, if the defendant's intestate received more than his share of the rents, profits and income, by personally occupying and using the estate, it would be sufficient.

3. That the defendant's intestate must have taken all, or more than his share of all the rents, profits and income of all the estate, but the presiding Judge instructed the jury that, if the defendant's intestate had received more than his share of all rents, profits and income which the estate yielded, it was sufficient; and that, if any part of the estate which descended to the tenants in common was not occupied by either of them, it would not enter into the computation, and that the objection that the defendant's intestate did not occupy all the property left by his father would not

go to the maintenance of the action, but only to the amount to be recovered.

4. That the phrase "without the consent," in the statute, was equivalent to positive objection, and that, in the absence of objection, consent was to be presumed from each of the other co-tenants; but the presiding Judge instructed the jury that the plaintiff being a minor and without a guardian during the whole time covered by the claim, a valid consent could not be presumed as to him, for there was no one capable of giving a valid consent; that it was the duty of any person owning property in common with a minor, to see that he had a guardian, if he would claim that the occupation was by consent, and that the minority of the plaintiff and the fact that he had no guardian, were sufficient evidence of a want of consent.

5. That a demand and refusal were not proved by a mere demand of payment; but the Judge instructed the jury that, if the paper in the case purporting to be a demand, was delivered to defendant, August 22, 1863, as testified to, and she neglected to make any answer thereto or to do anything about the matter until the commencement of the action, Oct. 30, 1863, it was sufficient evidence of a demand and refusal, though she had not expressly declined to account, and that the demand on her would be sufficient without proof of demand upon her intestate, in his lifetime.

6. That, notwithstanding the minority of the plaintiff, the claim was principally barred by the statute of limitations; but the Judge ruled otherwise.

The verdict was for the plaintiff and the defendant alleged exceptions.

The remaining facts sufficiently appear in the opinion.

Dane and Bourne, for the defendant.

Specifications of defence do not state that the defendant occupied the premises described in the writ, but "certain premises," &c. The report shows there was other land owned in common. Specifications, therefore, do not confine the admission to the land described in the writ. Plaintiff did

not rely on any such admission, but has waived advantage by proving the occupancy and executorship of the defendant's intestate. Defendant being sued as administratrix of Thomas, she must be cited before Judge of Probate to settle his account of administration on his father's estate before she becomes liable to this action. *Nowell* v. *Nowell*, 2 Greenl., 75. Thomas may have accounted for these rents in his probate account. The estate may be indebted to him. The land may have been sold for payment of debts. It is an administrator's right to be cited before probate court and "have a decision there, in a manner the least expensive." *Potter* v. *Cummings*, 18 Maine, 58. Same reasons apply to this case.

The instruction that "the objection that the defendant's intestate did not occupy all the property left by his father, would not go to the maintenance of the action, but to the amount to be recovered," was erroneous. There was other land. The plaintiff must prove affirmatively that the defendant's intestate has received more than his share of the whole. For all that appears the estate not described may yield more income than all the other property, and the defendant's intestate not have received his share. *Shepherd* v. *Richards*, 2 Gray, 427. This case cited with approbation in *Moses* v. *Ross*, 41 Maine, 360–2. It must also appear "that a balance is due to the plaintiff and not to the other co-tenants." *Moses* v. *Ross*, *supra*. Second instruction was erroneous. "Take" means actual receiving from some one else. *Moses* v. *Ross*, *supra*. Fifth instruction was erroneous, the statute being in derrogation of common law rights is to be construed strictly. It does not change the common law, but provides a new remedy in certain cases. No remedy until after demand. This statute makes no provision for proceedings against the administrator of a co-tenant, and because an express provision is made in R. S., c. 64, § 49. Court should not extend the stat. of 1848 beyond its express provisions. The administrator cannot

be presumed to know that his intestate occupied without consent.

The law presumes men act rightfully and in the exercise of legal rights. No demand having been made upon the deceased in his lifetime, it must be presumed he occupied in accordance with his common law rights. The paper containing the demand is too general, fixing no time, nature or amount, number of tenants or their shares. No demand made by any person authorized. *Miles* v. *Boyden*, 3 Pick., 219. The demand is defective because coupled with another demand for another person. *Corre* v. *Calloway*, 1 Esp. R., 115. Mrs. Reed having joined in the demand should have joined in the suit. Public Laws of 1848, c. 61, § 2.

E. B. Smith, for the plaintiff, contended that—

The grounds for the motion to nonsuit were abandoned, and, as no requests for instructions were made, exceptions would not lie therefor. *Stowell* v. *Goodenow*, 31 Maine, 538; *Osgood* v. *Lansil*, 33 Maine, 360; *State* v. *Straw*, 33 Maine, 554; *Rogers* v. *K. & P. R. R. Co.*, 38 Maine, 227; *Purington* v. *Pierce*, 38 Maine, 447; *Stone* v. *Rodman*, 38 Maine, 578; *Gardner* v. *Gooch*, 48 Maine, 487.

That mere occupation, at common law, would not sustain the action. 4 Kent's Com., *369, 370.

In construing statutes, must consider, (1,) what the law was; (2,) its needs; (3,) nature and reason of the remedy. 1 Blacks. Com., *86; *Winslow* v. *Kimball*, 25 Maine, 493. Exclusive occupation the remedy needed. Title to be considered in construing statutes. Dwar. St., 501; *Rex* v. *Cartwright*, 4 T. R., 390; *Rex* v. *Greenop*, 3 T. R., 133; *United States* v. *Fisher*, 2 Cranch, 386; *United States* v. *Daveis*, 38. To be so construed as to effect the intention of the Legislature. *Winslow* v. *Kimball, ubi supra; State* v. *Stinson*, 17 Maine, 157; *Minor* v. *Bank*, 1 Pet., 64; *Wilkinson* v. *Leland*, 2 Pet., 662; *People* v. *Utica Ins. Co.*, 15 Johns., 358; *Crocker* v. *Crane*, 21 Wend., 211; *Catlin* v. *Hall*, 21 Vt., 152; *Rawson* v. *State*, 19 Conn., 192; *Gore* v. *Brazier*, 3 Mass., 380; *Stanwood* v. *Pierce*,

7 Mass., 458; *Somerset* v. *Dighton*, 12 Mass., 384; *Gibson* v. *Jenny*, 15 Mass., 205; *Holbrook* v. *Holbrook*, 1 Pick., 248; *Mendon* v. *Worcester*, 10 Pick., 235; *Com.* v. *Cambridge*, 20 Pick., 267. Not to be so construed as to defeat the purpose. The *Emily* v. The *Caroline*, 9 Wheat., 381; *Cook* v. *Comm's*, 6 McLean, 112. To be so construed that no word shall be void or insignificant. *James* v. *Dubois*, 1 Harr., 285; *Hutchins* v. *Niblo*, 4 Blackf., 148; Opinion, 22 Pick., 571; *United States* v. *Warner*, 4 McLean, 463. Words to be taken in ordinary sense. Opinion, 7 Mass., 524; *Conger* v. *Conger*, 5 Barb., (S. C.,) 525. Unless used in a peculiar sense. *Exparte Hall*, 1 Pick., 261, and cases *infra*. To "take a profit" has peculiar legal meaning, and is to be construed accordingly. *United States* v. *Sarchet*, Gilp., 273; *United States* v. 112 *casks of sugar*, 8 Pet., 277; *Elliott* v. *Swartwout*, 10 Pet., 137; 200 *chests of tea*, 9 Wheat., 430; *Curtis* v. *Martin*, 3 How., 106; *U. S.* v. *Breed*, 1 Sumn., 159; *Lawrence* v. *Allen*, 1 How., 785; *Bacon* v. *Bancroft*, 1 Story, 341; *Lee* v. *Lincoln*, 1 Story, 610. "Take" implies an act, if anything is "received," the recipient is passive. The words are antithetical. One "receives" rent and "takes" a profit; "pays" cash and "delivers" articles. If one gathers the products and sells them so that he cannot "deliver" them in specie, the Act provides he shall pay "the just proceeds of the same."

R. S., c. 95, § 16, not intended to change, but only to condense stat. of 1848. *Taylor* v. *Delany*, 2 Caines Cas., 151, cited in *Hughes* v. *Farrar*, 45 Maine, 72; *Mooers* v. *Bunker*, 9 N. H., 420. Statute is remedial and to be liberally construed. 1 Blacks. Com., *86—92; *Smith* v. *Moffat*, 1 Barb., 65; *Walcott* v. *Pond*, 19 Conn., 597; *State* v. *Stephenson*, 2 Bailey, 334; *Neal* v. *Moultrie*, 12 Ga., 104. And benefit those whom they concern. 1 Blacks. Com., *88; *Cummings* v. *Fryer*, Dudley, (Ga.,) 182; Bac. Abr., I, 7, 9. And to do substantial justice. *Russell* v. *Smith*, 9 Mees. & W., 818. The action is maintainable. *Dyer* v. *Wilbur*, 48 Maine, 287. Former cases, viz., *Buck*

v. *Spofford*, 31 Maine, 34; *Gowen* v. *Shaw*, 40 Maine, 56; *Moses* v. *Ross*, 41 Maine, 360, brought before the passage of the statute of 1848.

Maxim "*qui tacet, consentire videtur*," to be cautiously applied. 1 Greenl. on Ev., §§ 197 & 199. Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary conduct. *Ibid.* "*Impotentia excuset legem.*" Co. Lit., 29, b. "*Lex neminem cogit ad vana, seu inutilia.*" *Ibid.*, 127, b; 3 Johns., 598. "*Lex non cogit ad impossibilia.*" Co. Lit., 231, b.

DICKERSON, J. — This is an action of special assumpsit under the statute, to recover the rents, profits and income alleged to be due the plaintiff from the defendant's intestate, for the occupancy of certain land in Kennebunkport. The plaintiff alleged a tenancy in common of the demanded premises, in three equal shares, between himself, Eliza B. Reed and the defendant's intestate, Thomas Currier; and that said Currier took the whole of the rents, profits and income of the estate till his death, against the plaintiff's objection. The plaintiff also avers a demand on said Currier in his lifetime, and a refusal, and a demand on the defendant.

The defendant, in her specifications of defence alleges — (1,) the statute of limitations, (2,) the consent of the plaintiff and his guardian to the occupancy and taking of the profits of certain real estate without recourse, (3,) the expenditure on the premises by her intestate of more than the value of the rents and profits, and (4,) that Eliza B. Reed is the real plaintiff in this action. By a rule of Court and the law applicable to specifications of defence, all matters set forth in the writ and declaration and not specifically denied in the specifications of defence, are regarded as admitted for the purposes of the trial. IX Rule of Court; *Day* v. *Frye*, 41 Maine, 326; *Hart* v. *Hardy*, 42 Maine, 196; *Clough* v. *Crossman*, 47 Maine, 349; *Skillings* v. *Norris*, 50 Maine, 72.

The tenancy in common, caption of the profits and the demand and refusal are admitted by the pleadings. Neither the objection that Thomas Currier occupied the premises as executor, nor that Henry Cutler, father of the plaintiff, was tenant by curtesy of the same, is open to the defendant. The limits she has prescribed for herself preclude her from setting up any such grounds of defence. Even if these objections were open to her, she could not avail herself of them on exceptions to the refusal of the presiding Judge to order a nonsuit on her motion, since such refusal is a matter of discretion and affords no ground of exception. *French* v. *Stanley*, 21 Maine, 518; *Bragdon* v. *Appleton Mut. F. Ins. Co.*, 42 Maine, 259.

1. The presiding Judge instructed the jury that § 1, c. 61, of the Public Laws of 1848, changed the common law in reference to this case. The Act is entitled "An Act giving further remedies to tenants in common." It provides that "whenever any joint tenant or tenant in common shall take and receive the whole of the rents, profits or income of the estate, or more than his share of the same, without the consent of his co-tenant, and shall refuse, within a reasonable time after demand, to deliver and pay to such co-tenant his share of such rents, profits or income, or of the joint proceeds of the same, the said co-tenant, so deprived of his share as aforesaid, may have and maintain an action of special assumpsit to recover his said share against the tenant withholding the same." This provision is reënacted in the revised code. R. S., c. 95, § 16.

It was a familiar principle of the common law, older than Lord Coke, that one tenant in common could not maintain an action against his co-tenant for taking the whole profits of the joint estate. Co. Lit., Lib. 3, § 323; 2 Black. Com., 194.

By statute 4 of Anne, c. 16, however, it was provided that an action of account might be brought by one joint tenant or tenant in common against the other, as bailiff, for receiving more than his joint share or proportion of the

rents and profits. In construing this statute, Lord HOLT held that *indebitatus assumpsit* lies when the action of account may be maintained; and this equitable construction has been continued by succeeding Judges, until the action of account has been substantially superseded by the action on the case in the nature of account, or for money had and received. The application of this doctrine, however, has been restricted to cases where the money has been actually received, and the liability to account has resulted in a duty to pay money, or where the defendant holds the share as bailiff of the plaintiff, or the occupation has been by consent. *Brigham* v. *Eveleth*, 9 Mass., 538; *Munroe* v. *Luke*, 1 Met., 459; *Jones* v. *Harriden*, 9 Mass., note, 539; *Buck* v. *Spofford*, 31 Maine, 34; *Gowen* v. *Shaw*, 40 Maine, 56; *Dyer* v. *Wilbur*, 48 Maine, 287.

In the case at bar the evidence negatives all these conditions. Whatever advantage the defendant's intestate derived from the premises was received from his personal occupancy of them. We have seen that neither the ancient common law, nor the statute of 4 Ann, as incorporated into the common law, affords any remedy in such cases. The statute of 1848, c. 61, § 1, was passed to meet this omission in the common law. The statute is remedial, and should be construed so as to give effect to the remedy, provided such construction is not inconsistent with the language used or the fundamental law.

The words "taking and receiving the rents, profits or income," have no technical or recondite signification, but are to be understood according to their ordinary acceptation. A farmer "takes" or "receives" the products of his farm. He "takes" them by his own efforts, and "receives" them from the hand of mother earth. He is an actor or a recipient, as he sustains the one or the other of these relations. Receiving is one of the modes of taking. These words are oftentimes used synonymously, and have substantially the same meaning in the statute, though, in strict verbal accuracy, the one more appropriately expresses the idea of ac-

cepting rents and the other that of gathering crops. The construction contended for by the counsel for the defendant would render the statute nugatory in the very particular in which it was intended to remedy the defect of the common law. The presiding Judge correctly held that the statute changed the common law in respect to this case, and that it applies as well to the cases of personal occupancy by the co-tenant as where he receives rent from a sub-tenant.

2. Nor was it error in the Judge at *Nisi Prius*, to rule that the action might be maintained, though the defendant's intestate did not occupy all the joint estate. The language of the statute is—"the whole of the rents, profits or income of the joint estate," not of all the joint estate. If the joint estate consists of several distinct parcels, each parcel is "the joint estate" of the co-tenants though it does not embrace all their joint estate. Its character, as joint estate, is not affected by its quantity. To deny, for instance, that a dwellinghouse is the joint estate of several co-tenants, because they own other real estate in common, would be absurd. To withhold the statute remedy from a party, because his co-tenant had not "taken and received the rents, profits or income" of all the joint estate, would be to sanction the lesser and punish the greater wrong, and to deny to the injured party all remedy in numerous cases.

3. The instruction that the plaintiff, being a minor, was incapable of giving consent to the occupancy of the defendant's intestate, is unobjectionable. The minority of the plaintiff, and the proof that he had no guardian, were sufficient evidence of a want of consent, even if the burden of proof to show that fact had been upon the plaintiff. The law does not involve the inconsistency of presuming the consent of a party against his interest, when, at the same time, it holds such party incapable of giving his consent.

After a careful examination, we are unable to discover any error in the instructions of the presiding Judge upon the subject of demand and refusal, or the effect of the statute of limitations. No demand upon the defendant's intes-

tate was necessary; and demand upon the defendant was sufficient. The neglect of the defendant to make answer to the demand made upon her, for so long a time, was properly construed to be a refusal to account.

Chapter 81, § 100, of the Revised Statutes, giving minors six years after they become of age to bring actions of assumpsit, is a perfect answer to the defendant's objection in regard to the statute of limitations.

The instructions of the Judge at *Nisi Prius* are full upon the matters presented in the requested instructions, and correctly present the rules of law applicable to all the points raised in the case. So far, therefore, as the requested instructions differ from the instructions given, they were properly refused. *Exceptions overruled.*

Judgment on the verdict.

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

SAMUEL B. GILPATRICK *versus* CITY OF BIDDEFORD.

R. S., c. 18, § 62,* assumes the existence of a way or bridge in actual use for travel.

It was not the intention of this section to authorize street commissioners, on their own motion, to bind their town or city, by constructing a way in whole or in part where none previously existed.

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

CASE, for damages caused by a defect in a highway. The verdict was for the plaintiff. The facts appear in the opinion.

J. M. Goodwin, for the defendants.

T. M. Hayes, for the plaintiff.

* See opinion.

APPLETON, C. J. — The plaintiff while travelling over an alleged highway in the defendant city received an injury in consequence of a defect therein.

It appeared that the way in question had never been located. The plaintiff claimed to hold the city of Biddeford responsible by virtue of R. S., 1857, c. 18, § 62, in these words: — "When it appears, on trial of any such action or indictment, that the party defendant has, within six years before the injury, made repairs on the way or bridge, it shall not be competent for him to deny the location thereof."

This section assumes the existence of a way or bridge in actual use for travel. It relates not to the original making of the road, but to its subsequent reparation.

In this case the counsel for the defendant requested the presiding Judge to instruct the jury "that the street commissioners entering upon land reserved by private individuals for a way and constructing or partially constructing a road or way where none existed before, would not be making repairs upon a way within the meaning of the statute."

This instruction the presiding Judge declined to give. The denial of this requested instruction was erroneous. The object of § 62 was to obviate the necessity of strict proof of the location of a way and to estop the town from denying such location, however defective, if it had made repairs thereon, and that this estoppel should be binding upon it for the term of six years. It gave no new powers to the officers of the town in regard to the location of highways. It assuredly was not the intention of this section to authorize highway surveyors or street commissioners, on their own motion, to bind the town or city by which they were elected, by constructing a way in whole or in part where none previously existed. *Exceptions sustained.*

New trial granted.

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

NATHAN DANE *& als., petitioners for mandamus, versus* SILAS DERBY *& als.*

In this State, if, to an alternative writ of mandamus, the respondents return a legally sufficient cause, though false in fact, the Court will decline to proceed further.

If the return be falsified in an action on the case, or by criminal information for a false return, the Court will then issue a peremptory writ.

Neither the statute of 9 Ann, c. 20,* nor any similar statute has ever been adopted in this State.

The respondent cannot demur to the petition and the writ; but, if the writ be defective or do not contain allegations of all such facts as are necessary to show that the prosecutor is legally entitled to the relief prayed for, it may be quashed on motion, or the defects may be taken advantage of in the return.

If the original return be sufficient, the filing of an additional one, in the nature of a demurrer, will not affect the sufficiency of the former.

The writ must be executed in the form in which it has been issued, or not at all.

The granting of a writ of mandamus is a matter of discretion, and not of right.

The Court will not grant a peremptory writ against municipal officers elected for one year only, ordering a new election, because of the fraudulent voting practiced at the election at which they were declared to be elected, if such officers have returned a sufficient cause to the alternative writ.

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

PETITION FOR MANDAMUS.

The presiding Judge overruled the demurrer and ordered the peremptory writ to issue. The writ, return and other facts sufficiently appear in the opinion.

Drew & Hamilton, for the respondents.

Dane & Bourne, for the petitioners.

The demurrer admits the facts stated in the alternative writ. The writ once issued stands by itself, independent of the other papers. The relator must set forth in the al-

* See opinion.

ternative writ the facts upon which he relies for relief. Angel & Ames on Corp., (6th ed.,) § 720.

The facts stated in the writ are such by law as entitle the relators to the peremptory writ. The facts alleged and admitted by the demurrer are sufficient to establish the proposition that the respondents were not duly elected. As to the effect of votes illegally received, counsel cited Angel & Ames on Corp., § 136; as to the effect of the improper rejection of legal votes, Angel & Ames on Corp., § 138. The writ alleged sufficient to bring this case within the authorities cited.

Mandamus is the proper remedy. *Rex* v. *Barker*, 3 Burrows, 1267; *Baker* v. *Johnson*, 41 Maine, 20; Tapping on Mandamus, 19; Angel & Ames on Corp., § 700; *Rex* v. *St. Margaret*, 4 Maul. & Sel., 250; *Rex* v. *Damarest*, 5 A. & E., 584; Tap. on Mand., 257, 258, 308, 314, 19; *Rex* v. *Mayor of Cambridge*, 4 Bur., 2008; *Borough of Boffing*, 2 Strange, 1003.

The relators' interest is sufficient to entitle them to this remedy. *Wellington, pet'r*, 16 Pick., 105; Angel & Ames on Corp., § 698.

The petitioners have no remedy under R. S., c. 3, § 4. This statute does not apply to meetings for the election of officers, but to such as relate to ordinary business. This appears from the clause requiring the selectmen to insert the article "in the next warrant," &c. Preceding sections provide for meetings affecting organizations of towns.

Quo warranto is not the remedy. That remedy relates to persons seeking an office upon the ground that some other person had usurped the office that the relators were entitled to. Relators here contend that the respondents were not elected, and they call for a new election, which is not within the scope of *quo warranto*. *Strong, pet'r*, 20 Pick., 496; *Howard* v. *Gage*, 6 Mass., 462; *Woodbury, petitioner*, 40 Maine, 304.

The clerk and treasurer need not have notice. They could not have been joined as parties. Tapping's Mandamus, 357;

3 Bacon's Abr., 540–1; *Pease* v. *Mayor of Leeds*, 2 Str., 640; *Rex* v. *Mayor of Abington*, 2 Salk., 431; *Regina* v. *Mayor of Hereford*, 2 Salk., 699, 701.

The answer was waived when the demurrer was joined. If not, the return is insufficient in law, inasmuch as the respondents were estopped to set up such facts to sustain their election. The return shows they were the very board of selectmen who held the judicial session to adjudge upon the qualifications of voters at their election. They are estopped to deny their own finding in this respect. The names of these voters named in the return,—"Linscott, Conant and Smith,"—as non-residents, were placed upon the lists by the respondents, and necessarily remained there when they voted. For the moderator cannot receive a vote until he has found the voter's name and marked it. R. S., c. 4, § 21. For the legal effect of the adjudication of the selectmen, *Harris* v. *Whitcomb*, 4 Gray, 433. Relators are not estopped by selectmen's finding as to the qualification of the minor's right to vote.

I. S. Kimball, for the respondents, in reply.

APPLETON, C. J.—It appears by the records of the town of Alfred that, at a legal meeting of its inhabitants, holden on 12th March, 1866, Silas Derby, Timothy Gary and Nathaniel H. Russell were chosen selectmen, George L. Came, town clerk, and John R. Tripp, treasurer. They severally had three votes more than the opposing candidates for the town offices to which they were respectively elected, with the exception of Silas Derby who had but two more.

The relators in their application for the writ of mandamus allege that neither the individuals above named nor any others were elected to these offices, by reason of the double voting of two persons named in said application and the wrongful voting of a minor:—that there having been no legal election, on the 31st March, they informed the respondents of these facts and requested them, "then and there being the acting selectmen of the said town of Alfred,

forthwith to issue their warrant, in due form of law, for a meeting of the inhabitants of said town qualified to vote in town affairs, to be holden in ten days from the date thereof, for the choice of town clerk, three selectmen, assessors and overseers of the poor, and a treasurer of said town;"—that the said respondents neglected and refused to issue said warrant;—wherefore they pray that a rule may issue to the said Derby, Gary and Russell, commanding them to appear at such time and place as the Court may appoint "to show cause, if any they have, why they have neglected and refused to issue their warrant for another meeting of the inhabitants of said town qualified by law to vote in town affairs, for the choice of town clerk, three selectmen, assessors and overseers of the poor and treasurer of said town; and why the election of the said George L. Came for town clerk, Silas Derby, Timothy Gary and Nathaniel H. Russell for selectmen, and John R. Tripp for town treasurer, as declared by said moderator and as recorded in said town books as aforesaid, should not be declared null and void;" and why a writ of mandamus should not issue to said Derby, Gary and Russell, "commanding them to issue another warrant in due form of law, for another meeting of the said inhabitants of said town of Alfred qualified by law to vote in town affairs, to choose a clerk, selectmen, assessors, overseers of the poor and treasurer of said town."

The rule having been served upon the respondents, they appeared at the time and place appointed and were heard, and upon and after such hearing an alternative mandamus was issued returnable at Alfred, in this county, on the fourth Tuesday of May, then next, commanding them to issue "their warrant in due form of law for a town meeting of the inhabitants of said town of Alfred, qualified by law to vote in said town, to choose a clerk, selectmen, assessors and overseers of the poor and treasurer of said town," or show cause why they do not.

On the seventh day of the term to which the writ was returnable, the respondents file their return, in which they

allege (1st,) that at a legal town meeting of the inhabitants of Alfred, holden on 12th March, 1866, they were duly elected selectmen, assessors and overseers of the poor for the political year commencing on said 12th March;—that, on the same day, they were sworn into said offices and have ever since been and now are exercising and discharging the duties of said offices. (2,) That the persons named in said writ as having deposited two ballots at said election in their favor did not so deposit them. Leave being granted, they filed an amendment to their return on the tenth day of the term, in which they set forth that three ballots given for the opposing candidates, received and counted by the moderator, were cast by persons not legally nor constitutionally qualified to vote in town affairs, and they give the names of the persons thus wrongfully voting.

This return, if true, obviously affords sufficient reasons against the issuing of a peremptory mandamus. It was placed on file, where it still remains. Its legal effect is to be considered.

At common law, if the defendant returns a legally sufficient cause, though false in fact, the Court will not try its truth, but, assuming it to be true, will decline to proceed further on the mandamus. A return to the mandamus is not traversable. The prosecutor is estopped by the return. The only remedy left open is an action for a false return. If the writ has not been brought in respect of private right, and the public interests are involved, the Court will grant a criminal information against all the parties who made the false return, in order that the disputed facts may be tried. Tapping on Mandamus, 460. If the return be falsified in an action on the case, or by criminal information for a false return, the Court will then grant a peremptory mandamus. 6 Bac. Abr., Mandamus, M, 452.

The proceedings by common law being dilatory and expensive, a remedy was provided specially applicable to the case of municipal officers, by stat. 9 Ann, c. 20. By this Act the "persons prosecuting this writ may plead to or trav-

erse all or any of the material facts contained within the return, to which the persons making such return, shall reply, take issue or demur; and, if any issue shall be joined on such proceeding, the persons suing out such writ shall try the same in such place, as an issue joined in such action on the case should have been had; and, in case a verdict should be found, or judgment given for them upon demurrer, or by *nihil dicit*, or for want of a replication, or other pleading, they shall recover damage and costs, and a peremptory writ of mandamus shall be granted without delay for them for whom judgment shall be given, as might have been given if such return had been adjudged insufficient," &c.

The statute of 9 Ann does not extend to the mass of the subjects of mandamus, which remain to be disposed of according to the course of the common law. The cases, to which we have been referred, were mainly, if not entirely, within the purview of that statute.

But the statute 9 Ann, c. 20, has never been adopted in this State. *Gage* v. *Howard*, 6 Mass., 462. Nor has any statute similar in its provisions been enacted. It is, however, otherwise in several of the States. Consequently, if the return, whether true or false, is sufficient, the writ of peremptory mandamus cannot at present issue. If true, it never can. If false, it cannot until after judgment shall have been obtained in an action or information against these defendants for a false return.

It appears that after the return and the amended return had been filed, the defendants demurred to the petition for the writ of mandamus and the relators joined in the demurrer, both returns meanwhile remaining on file and constituting part of the record. The presiding Judge overruled the demurrer.

This ruling was correct. The defendants could not legally demur. "If the writ is defective either in form or in substance," observes Chancellor WALWORTH, in *Commercial Bank* v. *Canal Commissioners*, 10 Wend., 25, "the defendant may move to quash it." *The King* v. *The Bishop of Oxford*, 7 East, 345; *The People* v. *The Judges of*

Westchester, 4 Cow., 73. If the writ is not quashed, the defendant must make a return thereto unless he thinks proper to put an end to the controversy by doing the act required. If he makes a return, he must either deny the facts stated in the writ on which the claim of the relator is founded, or must state other facts sufficient in law to defeat the relator's claim. It seems, however, that he may take advantage of the insufficiency of the writ in his return. "As the defendant cannot demur, so he may, by his return, submit that he is not bound by law to execute it, which submission being in the nature of a demurrer, should be treated accordingly; that is, a *concilium* obtained and the point argued." Tapping on Mandamus, 362.

The return, it may be observed, like that of a sheriff or any other officer, becomes part of the record, and hence is not traversable. If short, it may be indorsed on the writ. If of any length, it may be upon a separate paper, to which the writ or a copy should be annexed.

The defendant may return as many causes as he pleases, provided they are not repugnant and inconsistent. "In order to support a return consisting of several causes, it is not necessary that every one of them should be good, provided the whole of them are neither repugnant nor inconsistent." Tapping on Mandamus, 360. If, therefore, the original return was sufficient, the filing an additional one in the nature of a demurrer would not weaken nor destroy the sufficiency of the returns on file and constituting a part of the record.

The rules of pleading are applicable to the writ of mandamus. "The writ should contain allegations of all such facts as are necessary to show that the prosecutor is legally entitled to the relief he prays, otherwise it is liable to be quashed." Tapping on Mandamus, 320. "Therefore, when a mandamus is awarded for purposes partly legal and partly not, as when a writ exceeds an obligation imposed on the defendant by an Act of parliament, &c., the Court will not in part enforce it by a peremptory writ limiting its effect,

but will quash it, for, although the Court will, for the purposes of justice, mould the rule for the writ, yet it cannot mould the writ itself; also, the writ must be executed in the form in which it has issued or not at all." Ib., 327.

The defendants are commanded to issue a warrant for a meeting of the inhabitants of Alfred, to choose a *clerk*, selectmen, assessors and overseers of the poor, and *treasurer* of said town.

But no notice has been given the clerk and the treasurer of the pendency of this process. They are officers *de facto*. They are officers according to the records of the town, duly chosen at a legal meeting. Their election has never been adjudged to be null and void, and it cannot, without a manifest disregard of the first principles of justice, be so adjudged, without notice to them and an opportunity on their part to show cause why there should be no such adjudication. *Strong, pet'r*, 20 Pick., 484.

It does not appear who were chosen assessors and overseers of the poor. Whoever they may be, no notice has been given them. There is no allegation of any vacancy in those offices, nor, if there was any election of individuals to fill them, of fraud or illegality in such election. In short, no reason whatever is given for ordering an election of persons to fill those offices. There is, then, nothing in the writ to justify or authorize the mandatory clause to its full extent, and we have seen that the writ must be executed in the form in which it has issued or not at all.

The most important duties of these defendants as selectmen have probably been performed by them; the taxes have been assessed, and the list of voters for the fall elections prepared. They are officers *de facto* and clothed with apparent right. Their acts in the past would be binding. A peremptory mandamus cannot issue until after judgment against them for a false return. But before that time, their official existence will have terminated. The granting of a writ of mandamus is matter of discretion and not of right. *Woodman* v. *County Com'rs*, 24 Maine, 151.

If there has been double voting or those not qualified by law have voted, the statutes of the State afford ample provisions for their punishment. Under such circumstances it would seem to be a proper and more fit exercise of discretion to deny rather than to grant the writ.

In *Com.* v. *Athearn*, 3 Mass., 285, the Court refused to grant an information in the nature of a *quo warranto* against a town officer who is elected for one year, PARSONS, C. J., remarking that, to do so, "would not be a decent and proper exercise of their authority." In *Gage* v. *Howard*, 6 Mass., 463, each party claimed to be elected as county treasurer. The plaintiff moved for a rule on the defendant to show cause why a mandamus should not go to admit him to the office of county treasurer, he having been duly elected. "The Court," observes PARSONS, C. J., "could not grant a peremptory mandamus until the return was falsified. And, if it might be granted after the return was falsified by verdict, in an action by Howard against the justices, yet such verdict could not in some counties, and probably would not in any county, be found until after the expiration of the year, for which the party complaining was chosen."

In New York, and for the same reason, the Court declined as matter of discretion to allow the attorney general to file an information in the nature of a *quo warranto*, against an officer holding by annual election. *The People* v. *Sweating*, 2 Johns., 184. So in this State, in *Woodbury* v. *Co. Com'rs*, 40 Maine, 315, it was held that the granting the writ of mandamus was matter of judicial discretion, and that it would not be granted, when, if granted, it would be unavailing, as in case of annual officers.

It becomes unnecessary to consider or determine the various other questions, which the learned counsel for the parties to this litigation have so ably and elaborately discussed. *Peremptory mandamus denied.*

WALTON, DICKERSON and DANFORTH, JJ., concurred.
CUTTING and TAPLEY, JJ., concurred in the result.

HARRISON G. OTIS *& al. versus* { MARSHALL FORD AND JOHN NASH, *Trustee.*

Same *versus* Same.

If a person contract to perform a job for another at a stipulated price, payable when completed, the employer cannot be held as trustee to the employed if the latter abandon the work before its completion.

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

TRUSTEE PROCESS.

The alleged trustee disclosed — that he contracted with the principal defendant to repair the sills of a store on Main street, in Lewiston, and remove it to a lot on Lisbon street, place it in its proper position, and to level and plumb it; for which the defendant was to receive $300 when the work was completed and not before. That, in pursuance of said contract, the defendant removed the building in two parts upon the lot in Lisbon street, but did not place the separate parts thereof in proper place or position, and level and plumb the building according to the contract, but left the two parts not in a line with each other, but out of position, and without leveling or plumbing the same. While the building was in this condition the alleged trustee was served with the writ in these actions, whereupon the defendant abandoned the work and refused to complete the same; by reason of which the alleged trustee was obliged to procure and did procure other persons to complete it.

The presiding Judge charged the trustee upon his disclosure and the latter alleged exceptions.

S. & J. W. May, in support of the exceptions, cited *Faxon* v. *Mansfield & Trustee*, 2 Mass., 147; *Marshall* v. *Jones*, 11 Maine 54.

C. W. Goddard, for the plaintiff.

DICKERSON, J. — Exceptions to the ruling of the presiding Judge, charging the trustee. Both cases depend upon

substantially the same facts. The disclosure of the trustee, being uncontradicted, must be taken as true. The trustee contracted with the principal defendant to do a job of work for him at a stipulated price, to be paid upon the completion of the work. The trustee process was served upon the trustee while the principal defendant was in the act of performing the contract, and before he had completed it. Thereupon he abandoned the work, and refused to complete it. Subsequently to this the trustee finished the work himself.

By the terms of the contract the price was payable upon the completion of the work. There was, therefore, nothing due from the trustee to the principal defendant, when service of the trustee process was made upon him; *non constat* that there ever would be. Ford could not maintain an action against Nash, either on the express contract, because he had not performed his part of it, or upon a *quantum meruit*, since, at the time of the service of the trustee process, there had been no abandonment of the contract by the principal defendant, and no acceptance of the work by the trustee.

Exceptions sustained.
Trustee discharged.

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

CLARK S. EDWARDS *versus* GRAND TRUNK RAILWAY OF CANADA.

A parol agreement by a railroad company to take all the wood the plaintiff would put on that season, at the same price paid him for that purchased before, and more, if the wood was better, is within the statute of frauds.

To constitute an acceptance of goods, something more than mere words are necessary; there must be some act of the parties amounting to a transfer of the possession, and an actual receipt by the purchaser, so that the seller no longer retains a lien for the price.

Edwards *v.* Grand Trunk Railway of Canada.

ON EXCEPTIONS from *Nisi Prius*.

ASSUMPSIT for two hundred and fifty cords of wood at $2,25 per cord. General issue and statute of frauds pleaded.

It appeared in evidence that one Corser was, at the time the alleged contract was made and during the time of its performance, the general wood agent of the defendants; that one Haskell had, for several years prior to and up to the time of making the contract, made numerous purchases for the defendants, of wood landed upon the line of the defendants' road, that the defendants had invariably received and paid for the wood so purchased, and that the plaintiff had knowledge of these facts.

The plaintiff then offered to prove that he made a verbal contract with said Haskell for the purchase and future delivery of wood to the defendants, in June, 1855; but the Judge excluded the evidence.

The plaintiff then testified, that he had sold to the defendants several hundred cords of wood, in the spring of 1855, at $2,25 per cord; that in June of that year he saw Corser and told him he (plaintiff) had a $500 note to meet, and would like to put on some wood for the defendants; that Corser replied, he would take all he would put on that season, at the same price paid him for that purchased in the spring, if the wood was as good, and would pay more if the wood was better; that he might put on as much or as little as he pleased; that no number of cords was agreed upon; that he spoke of cutting and hauling the wood from his own land, and that a certain location was named containing some maple growth; that the wood was to be landed at the same place as that purchased in the spring, which place was about a mile below the Bethel depot, and within the limits of the road; that he commenced cutting and hauling the wood as agreed, and landed it as drawn, and continued so to do, until about the first of the following September, when he had got on two hundred cords or more; that, during the whole of this time, said Corser was passing up

and down the road, and by the wood once or twice a week, and saw the wood as landed within the lines of the road, and at the place agreed upon — spoke to plaintiff frequently about the wood, and asked him how he was getting along with it; and never made any objection to the kind or quality of the wood, nor to the place or manner of landing it; that the wood was of the same kinds of that sold the spring prior, and of as good, and, he thought, of a better quality, and was cut from the same tract of land; that, about the first of September, when he had got on two hundred cords or more, he called on Corser to have the wood measured, who replied that he would send M. Hotchkins up from Poland and have the wood measured the next week; that Hotchkins did not come and he again called on Corser to have it measured, and that he replied he was about to have some wood measured for Mr. Chapman, and that he would have plaintiff's wood measured immediately; that he called on Corser as many as three times and that at each time he agreed to have the wood measured, but never did; that he then made out a bill for two hundred cords of wood, and sent it to Portland for payment but that it was not paid; that he then went to Portland and presented the bill to the defendants' paymaster, said Haskell, for payment, who replied that he could not pay for the wood until it was measured; that he then called on Corser who informed him that he was no longer wood agent, but that Mr. Barrett was, and told him he had better go and get Barrett to buy the wood; that he called on Barrett about it, who replied that he would fulfil any agreement Mr. Corser had made about it, but did not pay him for it; that the wood lay at the place of landing for two or three years, became greatly damaged, a portion burnt up by fire from defendants' engines; and the balance was attached for his (plaintiff's) debts and sold at from six to ten cents a cord.

B. M. Edwards, called by the plaintiff, testified, that he helped plaintiff measure the wood, soon after it was landed, and that there were 250 cords of it. The Judge ruled that

the evidence was insufficient to authorize the jury to find an acceptance of the wood by the defendants, and, on motion of defendant's counsel, ordered a nonsuit.

The plaintiff's counsel contended that the contract as proved was not one for the sale of goods, wares or merchandise, to the amount of thirty dollars or more, but that it might be for a less amount, and therefore not within the statute, but the Judge ruled otherwise, to all of which rulings and order of the Judge, the plaintiff excepted.

D. Hammons, for the plaintiff.

1. The contract, by its terms, was for as many separate cords of wood, as the plaintiff saw fit to deliver. To bring the contract within § 5, c. 111, R. S., it must be for the sale of goods amounting to at least $30. "If the thing promised may be performed within the year, the contract is not within clause 5 in relation to time of performance." *Linscott* v. *McIntire*, 15 Maine, 201. Why, then, is one which may not be for the amount of $30, without § 5. Plaintiff was to put on one or one thousand cords, as he pleased.

2. It was for the manufacture of wood. Plaintiff was to cut the wood from his own land, and a certain lot of maple mentioned. The price being $2,50, shows that nearly the whole value consisted in its manufacture and delivery. Cutting, splitting, hauling and piling would cost $2,25. When the principal value of an article consists of the labor necessarily expended in its preparation and delivery, the contract should be regarded as one of manufacture and not of sale. "The statute of frauds does not prevent persons from contracting verbally for the manufacture and delivery of articles." *Hight* v. *Ripley*, 19 Maine, 139; *Towers* v. *Osborne*, *infra*.

An agreement to procure and deliver at a time and place fixed, a vessel frame, to be hewn and prepared according to certain moulds, is not within the statute. *Abbott* v. *Gilchrist*, 38 Maine, 260.

Kent says, in 2 Kent's Com., 512, "if the article sold ex-

isted at the time *in solido* and was capable of delivery, the contract was within the statute; but, if the article was to be afterwards manufactured or prepared by work and labor for delivery, it is not within the statute." He cites *Rondeau* v. *Wyatt*, 2 H. Blacks., 63; *Cooper* v. *Elston*, 7 T. R., 14; *Bennett* v. *Hull*, 10 Johns., 364; *Crookshank* v. *Burrett*, 18 Johns., 58; *Sewall* v. *Fitch*, 8 Cow., 215. See, also, *Spencer* v. *Cone*, 1 Met., 283; *Mixer* v. *Howarth*, 21 Pick., 205. If the contract states or implies that the thing is to be made by the seller, and blends together the price of the thing and compensation for work, labor, skill and materials, so that they cannot be discriminated, it is not a contract of sale, but of hiring and service and not within the statute. 2 Pars. on Con., 333, 334, note f, and cases there cited.

Growing wood is not wares and merchandize, and hence not within the statute. 8 Met., 34.

3. Wood was accepted by Corser and Barrett. Acceptance is an agreement to proposals in commerce by which a bargain is concluded and the parties bound. Webster's Dict. An agreement to receive something offered. Bouv. Law Dict. Acceptance waives rights the party receiving had. Ibid. Acceptance is express, as when it is openly declared by the party to be bound by it; or implied, as when he acts as if he had accepted. Bouv. Law Dict., under "Assent." See, also, 6 Wend., 103; 10 Wend., 185.

The wood was cut from the land agreed upon; within the time; landed upon the spot designated, within the limits of the defendants' road; their agent saw it repeatedly, as it was landed; talked with the plaintiff, made no objections of any kind, and hence wood was received.

4. It was accepted. Plaintiff had done everything he was to do. Defendants agreed three several times to send surveyor. Wood was delivered under Corser's general supervision. Barrett indorsed everything Corser had agreed to do. This is acceptance. 2 Pars. on Con., 321. It is always a question for the jury. Ibid., 322. There may be an acceptance without the buyer's examining the goods.

Merton v. *Tebbetts*, 152, B, quoted in a note to 2 Pars. on Cont., 325, note p. See, also, *Moore* v. *Small*, 19 Penn., 461, and Story's Eq., § 330. The statute to prevent fraud should not be so administered as to cover fraud.

P. Barnes, for defendants, cited, on the point of acceptance, Browne on Stat. of Frauds, § 329; on Manufacture, Ibid., chapters xii. and xv.

APPLETON, C. J.—This is an action of assumpsit for two hundred and fifty cords of wood, at $2,25 per cord.

The plaintiff offered evidence proving a parol agreement with the defendant corporation, through its agent, for the purchase of a quantity of cord wood. To avoid the statute of frauds, R. S., c. 111, § 5, upon which the defendants rely, the plaintiff insists that the contract was one for the manufacture of cord wood and not for its sale.

In *Garbutt* v. *Watson*, 5 B. & A., 613, there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which at the time was not prepared and in a state capable of delivery; and it was held that this was a contract for the sale of goods within the statute of frauds. In *Waterman* v. *Meigs*, 4 Cush., 497, an agreement for the delivery of a quantity of planks for ship building, at a future time, and for a specified price, was held to be a contract for the sale of goods within the statute of frauds. The principles of these decisions was fully affirmed when this case was before us, in 48 Maine, 380.

In delivering the opinion of the Court, in 48 Maine, 381, Mr. Justice KENT remarks as follows:—"In the case before us, there was no agreement for any particular wood; no stipulation that it was to be cut from plaintiff's land, and no limitation of time when it should be cut. The contract might be fulfilled by the delivery of wood already cut or bought of another person." The plaintiff testified that no quantity of acres nor price therefor was agreed upon, that "he spoke of cutting and hauling the wood from his own land, and that a certain location was named, containing

some maple growth," from which the wood was hauled. But this statement presents no material alteration of the facts. Speaking about cutting wood on a certain lot is very different from contracting that the wood should be cut on a certain lot. There was no bargain as to any specific lot, from which the wood was to be taken. The contract, as stated by the plaintiff, did not require, for its fulfilment, wood from any particular or definite lot of land. The plaintiff might have bought it anywhere, without the violation of his agreement.

The plaintiff entirely fails in showing any acceptance of the wood by the defendants, or by any agent of theirs. As long as the seller's lien on goods for their price remains, and the buyer cannot maintain trover for their detention, there is no acceptance within the statute. To constitute a delivery and acceptance, something more than mere words is necessary. There must be some act of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer. *Shindler* v. *Houston*, 1 Coms., 261. The defendants were not, from any act of theirs, precluded from excepting to the quality of the wood. *Maxwell* v. *Brown*, 39 Maine, 98. In *Holmes* v. *Hoskins*, 28 Eng. Law & Eq., 54, the defendant verbally agreed to purchase of the plaintiff some cattle then in the field. After the bargain was concluded, the defendant felt in his pocket for his check book, in order to pay for the cattle, but finding it was not there, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days and that the defendant should feed them with the plaintiff's hay, which was done. It was held that there was no evidence of acceptance within the statute of frauds. "The statute says," observes MARTIN, B., "that no contract of this sort shall be binding, unless the buyer shall accept part of the goods and actually receive the same, or unless there be a payment or note in writing. In this case none of these requisites have

been complied with. Neither party intended the plaintiff should have the cattle till he paid for them."

The wood was never measured by any assent of the defendants, nor did they in any way take possession or control of the wood. To take the case out of the statute, actual receipt by the buyer of goods verbally bargained for must be shown. *Shepherd* v. *Pressy*, 32 N. H., 49; *Gilman* v. *Hill*, 36 N. H., 311. This the plaintiff utterly fails in doing.

If this were the case of a manufactured article, it has been held that, to pass the title, there must be an acceptance, either express or implied, to transfer the title and enable the manufacturer to recover its price. *Moody* v. *Brown*, 34 Maine, 107.

The nonsuit was properly ordered and the exceptions must be overruled.

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

EZEKIEL TREAT *versus* CURTIS SMITH *& als.*

Where, in an action on a promissory note, by the payee against the principal and surety, the plaintiff testified, and the surety in cross-examination admitted, that the latter requested the plaintiff "to wait on the principal as long as he could;" and subsequently the plaintiff gave the principal a written extension for one year; — *Held*, that whether the delay granted was by the request or with the consent of the surety was a fact for the jury.

A valid agreement for delay, between the principal debtor and creditor will not discharge the surety, if made with his consent and approval.

ON EXCEPTIONS from *Nisi Prius.*

ASSUMPSIT on a promissory note, brought by the payee against the principal and surety.

The verdict was for the defendants and the plaintiff alleged exceptions. The remaining material facts appear in the opinion.

E. F. Pillsbury, for the plaintiff, contended

That a jury would be authorized from the facts to find that the surety assented to or authorized the extension, and that it was for the jury to determine this issue, and cited *Linscott* v. *Trask*, 35 Maine, 150; *Whipple* v. *Wing*, 39 Maine, 424; *Cook* v. *Brown*, 39 Maine, 443.

H. L. Whitcomb, for the defendants.

APPLETON, C. J. — The note in suit was signed by the defendant Wm. H. Josselyn, as surety for the other defendants.

On Feb. 22, 1862, and after the maturity of the note, the plaintiff, for a valuable consideration, extended the time of payment by a written agreement in the following words:

"This is to certify that whereas I hold a note signed by Curtis Smith and Wm. H. Josselyn, dated June 1, 1860, and I agree to extend payment to Feb. 22, 1863, on said note, by agreement of parties. "Ezekiel Treat."

This contract, being on good consideration, was binding upon the plaintiff. By it, the time of payment was extended. In such case, the surety is discharged, unless such extension was with his consent or at his request.

A valid agreement for delay, though made after the maturity of the note or after judgment in a suit upon it, discharges the surety, unless he agrees thereto. *Turrill* v. *Boynton*, 23 Verm., 142; *Bangs* v. *Strong*, 4 Coms., 316.

But if the contract, between the principal debtor and the creditor, for delay, is made with the assent of the surety, he is not discharged thereby, though it may operate to extend the time of payment. *Wright* v. *Paine*, 6 Bosworth, 600; *Crosby* v. *Wyatt*, 10 N. H., 318. *Ex parte Harvey*, 27 Eng. L. & E., 280.

The concurrence or assent of the surety for delay may be shown by parol. *Wyke* v. *Rogers*, 12 Eng. L. & E., 162. It may be proved by circumstances or inferred from the usages of trade. *Crosby* v. *Wyatt*, 10 N. H., 318. A

knowledge of the arrangement for delay while it is being negotiated, taking part in it or encouraging it, will justify a finding that the surety assented to it. *Woodford* v. *Oxford & Worcester Railway Co.*, 21 Eng. L. & Eq., 285. The surety is not discharged if there be evidence of tacit assent on his part to the giving delay to the principal. *Solomon* v. *Gregory*, 4 Harr., (N. J.,) 112.

In the present case, the plaintiff testified that Josselyn requested him to wait on Smith as long as he could. Josselyn, on cross-examination, admitted that he did so request the plaintiff.

The presiding Judge instructed the jury "that the requests" so made by Josselyn, would not authorize Treat to extend the time of payment one year with Smith, as he did, so far as Josselyn was concerned."

It was for the jury to determine, from the evidence, whether the delay granted was by the request of the surety or with his consent. The surety, most certainly, is not to be discharged because the holder of the note complied with his requests. In *Suydam* v. *Vance*, 2 McLean, 99, the Court held that, if there was a suspension of the right of the plaintiff to sue at the instance of and for the benefit of the indorser, his consent would be a waiver of any advantage from it.

In *Adams* v. *Way*, 32 Conn., 161, it was held, that a change of the time of payment, with the assent of the surety, would not discharge him. "It could not be tolerated, for a moment," observes DUTTON, J., "that, if the change was made with the full knowledge and consent of the grantor, he could take advantage of it, to avoid his contract."

The ruling was peremptory and withdrew from the consideration of the jury the meaning and intent of Josselyn in what was said by him. This was erroneous. *Linscott* v. *Trask*, 35 Maine, 150; *Whipple* v. *Wing*, 39 Maine, 424.

Exceptions sustained.

KENT, WALTON, DANFORTH and TAPLEY, JJ., concurred.

CUTTING, J., dissenting.—At the trial, I ruled that an agreement between the promisee and the principal promisor, without consideration, for a delay of payment, could not be set up in defence by the surety, whether made with or without his knowledge and consent. Whereupon an issue of fact was presented to the jury, whether the written agreement for a delay of one year was based upon a consideration. Upon that issue the principal defendant swore that the consideration was the sum of $11,91, and the plaintiff that that sum was received only in part payment of the note. The jury believed the defendant. There was no evidence produced that the surety ever knew or understood, or authorized a *legal* contract for delay such as would preclude him from paying the note and resorting to his principal for security. The agreement produced expressed no consideration, and the letters of the surety were equally silent upon that subject. Hence, it will be perceived that the instruction reported was based upon the documentary evidence, which was silent as to any consideration.

ANDREW T. TUCK *versus* OLIVER MOSES *& als.*

A replevin bond, in less than "double the value of the goods to be replevied," is good at common law.

If a plaintiff in replevin neglects to comply with the judgment for return, following an abatement of the writ, because of such defective bond, the defendant in replevin may maintain an action thereon, notwithstanding the writ was abated upon his motion.

ON EXCEPTIONS.

DEBT upon a replevin bond given in the penal sum of fifty-six hundred and twelve dollars, for the replevying of 952 cords of wood, the value of which was, as alleged in the replevin writ, twenty-eight hundred and fifty-six dollars.

Plea, *nil debet* and joinder, with proper specifications of defence.

The writ of replevin was abated on motion of the defendant in replevin, (present plaintiff,) because the penal sum of the bond, (now in suit,) was one hundred dollars less than double the alleged value of the wood replevied, and, thereupon, a judgment for a return was ordered; and the defendants neglecting to comply therewith this suit was commenced. The defendants contended that the plaintiff repudiated the bond in the replevin suit by causing the writ to be abated, and that he is thereby estopped to maintain any action upon it. For the purpose of having the question settled by the full Court, the presiding Judge ordered a nonsuit, and the plaintiff alleged exceptions.

This action was not entered upon the district docket, but came before this Court under R. S., c. 77, § 18.

J. C. Woodman, for the plaintiff.

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

A bond is a contract. But, to be binding, it must be accepted. 2 Parsons on Con., 399, 400. All statute bonds must be accepted in some form by the obligee. The reception of such bonds, (as well as of those which are not statute bonds,) by the clerk, is no acceptance by the party for whose benefit they are filed. The clerk is not agent of the obligee, and cannot accept bonds not statute bonds for him. If such bonds are returned to the clerk with the writs, and are not repudiated by the obligee, the latter may accept them by bringing a suit upon them. Such suit is a legal acceptance. *Kimball* v. *Preble*, 5 Greenl., 353; *Pease* v. *Norton*, 6 Greenl., 200.

Though the bond be not a statute bond it is good at common law. *Morse* v. *Hodsdon*, 5 Mass., 314. The defendant in replevin may accept or reject such a bond. If he accepts, he has its full benefit; if he rejects, he turns to the other remedy by an action of trespass against the plaintiff in replevin or the officer. *Merritt* v. *Lumbert*, 8 Maine,

129, and *Cady* v. *Eggleston*, 11 Mass., 283, where the bond was not repudiated. The choice of remedies is also decided in *Greely* v. *Currier*, 39 Maine, 517. See, also, *Shaw* v. *Tobias*, 3 Coms., 188.

As a defendant in replevin cannot waive the defects in the bond and afterwards reject it and quash the proceedings, so he cannot reject the bond by quashing the proceedings and afterwards accept it by recovering upon it. By repudiating the bond, he makes his election to pursue the common law remedy. No case can be found where the obligee has been permitted to do both. In all the cases, the conditions upon which a bond, that is not a statute bond, is made available to the defendant in replevin is, that he has waived the defects in the bond and accepted it as it was. If he accepts it, he accepts it as it is and for what it is, with all its defects; and, if by reason of its defects, he refuses to accept it, he rejects it as it is and for what it is. The acceptance or rejection is entire. The reason is well stated by C. J. SHAW,—"it was not such a bond as the plaintiff in replevin was bound to give, or the defendant was entitled to receive." *Clark* v. *Con. River Railroad Co.*, 6 Gray, 363. No reason can be given why a party declining to accept a bond offered for his benefit and thereby abating the writ and prosecuting the trial upon the merits, shall be permitted afterwards to accept and maintain a suit upon it. Killing the writ kills the bond, and the defendant cannot resurrect it. Hence the Court, in *Greely* v. *Currier*, *ubi supra*, in which the writ had been abated, on motion of defendant, because the bond was not a statute bond, decided that they could not hear testimony as to the ownership of the property, because, if such testimony were heard, "it would authorize a party to try a question of fact after the proceedings had been quashed, without a writ and without a bond;" thus showing that the writ and bond are coëtaneous. After repudiation of the bond and the consequent abatement of the writ, the defendant in replevin can no more maintain an action upon it, than he could accept a proposal for a contract, which,

after he had rejected it, had been withdrawn. A defective replevin bond, until it is accepted by a waiver of all objection by neglecting to file a plea or motion in abatement, is nothing but a sealed proposal for a contract which the defendant may accept or reject; and the acceptance or rejection is final and conclusive.

Woodman, in reply.

Originally the plaintiff had two concurrent remedies; one by an action in tort for the value of the property; the other by claiming and obtaining judgment for a return, and, consequent thereupon, by a writ of return, a writ of reprisal, and an action on the bond. He elected the latter. Defendant in replevin might have trespass or judgment for a return, but not both. If he designed to have his remedy in trespass, he should not have had judgment for a return, but for costs only. The trespass became merged in the judgment for return. Having obtained judgment for return, he cannot be considered as waiving any of the means appropriate for the execution of such judgment, viz.:—a writ of return, writ of reprisal, and an action on the bond. All these were cognate remedies. Hence the present plaintiff never refused to accept the bond, never repudiated it, either expressly nor by implication; but, by electing not to take his remedy by an action in tort, but expressly electing to take his remedy by judgment for a return, he was, by necessary implication, entitled to all appropriate means for the execution of such judgment, among which is an action on the bond. Practically the last is the one we relied on.

APPLETON, C. J.—The city of Bath, one of the defendants in this suit, replevied from the plaintiff a quantity of wood attached by him, as a deputy sheriff, in suits against the Androscoggin Railroad Co. The bond given in the replevin suit was not in double value of the wood replevied. At the instance, and on the motion of the defendant in replevin seasonably filed, the writ was abated because the bond was not such as the statute requires. The then de-

fendant moved for a return, which was ordered, but the order of the Court not being complied with, he brings this action upon the replevin bond. The presiding Judge, when the cause came on for trial, for the purpose of presenting the questions of law arising upon the preceding facts, ruled that the action was not maintainable and nonsuited the plaintiff, to which exceptions were duly filed and allowed.

The authority of the officer to replevy and deliver goods is, by the terms of the writ as well as by the statute, conditional. If the bond, required alike by writ and statute, is not given, the officer is not justified in making service. *Moors* v. *Parker*, 3 Mass., 310; *Garlin* v. *Strickland*, 27 Maine, 443.

Though the bond may not be in accordance with the statute, the defendant in replevin may waive any variance from its requirements. He has a right to require a statute bond, but he may conclude not to require one. If he delays seasonably to take advantage of such defect by proper plea or motion, or pleads the general issue, he cannot afterwards take advantage of it. *Simonds* v. *Parker*, 1 Met., 508.

If the plaintiff in replevin fails to give the statute bond and the defendant neglects to abate the writ for that cause, the obligors in the bond are bound thereby. "But, if," remarks PARSONS, C. J., in *Morse* v. *Hodsdon*, 5 Mass., 314, "the plaintiff execute an informal bond voluntarily, and to obtain possession of the goods, and the officer thereupon deliver him the goods, the defendant in replevin may, if he please, accept the bond and pursue a remedy at law, upon it, against the obligors, unless the bond be void at common law or by statute." Although the statute requires two sureties in a replevin bond, the party for whose benefit it is taken may waive the objection that there is only one, and, if he does, the makers of the bond cannot resist a recovery on that ground. *Shaw* v. *Tobias*, 3 Coms., 188.

As the delivery of the bond is a condition precedent to the legal service by the officer, he may be treated as a

trespasser if he undertake to make service without the required bond. The remedy for the party from whose possession property has been thus illegally taken, is by action of trover or trespass *vi et armis* against the officer thus illegally replevying, and all ordering or coöperating with him in making such unauthorized service of the writ. *Garlin* v. *Strickland*, 27 Maine, 447. "Without the legal bond," observes PARSONS, C. J., in *Morse* v. *Hodsdon*, 5 Mass., 314, "the officer may be sued as a trespasser for taking the goods from the defendant in replevin, if he choose to consider him in that light, because the injunction of the writ is a condition not performed by the plaintiff in replevin."

The defendant, having quashed a replevin suit because the replevin bond was defective by reason of having but one surety, may move for a return of the property replevied and it will be ordered, if it shall appear that he is entitled to such return. *Greely* v. *Currier*, 39 Maine, 517; *Lowe* v. *Brigham*, 2 Allen, 429. Thus, when an action of replevin is brought in the wrong county and the writ is abated for that cause, a return will be ordered. *Collamore* v. *Page*, 35 Vt., 387.

It thus appears, that the defendant in replevin may abate the writ, when the bond is not in accordance with the statute—and that, upon his motion, a return will be ordered. So, he may, if he deem it expedient, bring an action of trespass against the officer for wrongfully intermeddling with his property, by seizing it without the required bond.

But he cannot have both remedies. He cannot have his judgment for a return, with all its incidents, and his action of trespass for taking the property thus ordered to be returned. He may elect either mode of redress and pursue it.

The original defendant in replevin having abated the suit against him and having obtained upon his motion an order for a return, which was not complied with, the inquiry arises whether he cannot avail himself of the bond, by virtue of which, though defective, the service was made.

The defendant in replevin may well insist that the writ and bond should be in conformity with the requirements of law. If the bond be defective, it is the fault of the plaintiff. The defendant may take advantage of any existing defect, whether in the bond or in the writ. The party neglecting to comply with the law cannot complain if advantage is taken of his non-compliance therewith. The defendant loses none of his rights by abating a process abatable through the neglect of his opponent. "We know of no ground," remarks STORRS, J., in *Fleet* v. *Lockwood*, 17 Conn., 233, "in which he is or ought to be precluded, by interposing this plea in abatement, from asserting his title. Indeed, it is difficult to imagine how, consistently with legal principles, the defendant by pleading in abatement to the regularity of the writ, can be deemed to waive any right, which he might have established, if the cause had gone to trial upon its merits."

The motion for a return assumes that the property has been taken upon a replevin writ, though defective by reason of a non-compliance with the statute and for that cause abated. The judgment for a return rendered, the writ of return and restitution follows, and, in case the officer holding it for service cannot find the property, then the writ of reprisal with its incidents may issue.

By R. S., 1857, c. 98, § 18, though the goods are not restored upon the writ of restitution or reprisal, the defendant is not precluded "from resorting to his remedy upon the replevin bond."

A replevin bond, with the usual condition, is broken by the withdrawal, of the writ of replevin from the hands of the officer, before the return day of the writ and the discontinuance of the suit. When the defendant in replevin is prevented from avowing his right and obtaining his judgment thereupon, by the act or fault of the plaintiff, as where the latter sues out a defective writ and the writ is abated or he becomes nonsuit, or discontinues the action, the defendant may have judgment of return, if the position of the

case in Court will permit it, or he may have his remedy on the replevin bond, for, in all such cases, there is a failure to prosecute. *Persse* v. *Watrous*, 30 Conn., 139. The case of *Sherry & al.* v. *Foresman*, 6 Blackf., 56, was debt upon a replevin bond. One of the pleas was, that the principal obligee was ready and willing to prosecute his writ of replevin with effect, but the Court, at the instance of the plaintiff, dismissed the cause for want of jurisdiction, on the ground of defects apparent on the face of the affidavit and the writ; that no damages were recovered in the writ of replevin, nor was a return ordered. In delivering their opinion, the Court say, — "The fifth and ninth plea are insufficient. There is no doubt that, if the Court in which the bond was taken had no jurisdiction of the subject matter, the bond would be void and the pleas on that ground be good. But there is not the slightest ground for saying that the Court had no jurisdiction of the replevin suit. It might just as well be contended that the Court had no jurisdiction in debt or assumpsit. It is contended that these pleas are valid because they show that the replevin suit was dismissed against the will of the plaintiffs in that suit, but such dismissal is no bar to the action. Foresman and Earl, (the original plaintiffs and present defendants,) were bound to obtain judgment in their replevin suit or be liable with their sureties in the replevin bond. They have failed to obtain such judgment; and the failure, whether it was owing to defects in their affidavit and writ, or to the want of a good declaration, or to their not having sufficient evidence to obtain a verdict, is a breach of the condition of the bond." If a person sues a writ of replevin for property taken on execution, and thereby has a delivery of the property, which writ is quashed as improvidently issued, the bond given for prosecuting the replevin writ with effect is valid, and the value of the property, not exceeding the execution by which it was seized, is the measure of damages. *Roman* v. *Stratton*, 2 Bibb, 199.

In *Lewis* v. *Warren*, pending in the county of Somerset,

the precise question here presented came before the Court for adjudication, and it was held, that an action could be maintained upon the replevin bond, notwithstanding the writ had been abated, because the bond did not comply with the statute in not being in double the amount of the property replevied. The bond was held good at common law.

The bond in the present case is good at common law. *Claggett* v. *Richards*, 45 N. H., 361; *Morse* v. *Hodsdon*, 5 Mass., 314.

The present defendants are estopped from pleading the invalidity of a bond, by means of which they were enabled to seize the property of this plaintiff. They were bound, before seizing it, to furnish the bond required by statute. It is their neglect that it was not done. For such neglect the writ was abated, as well it might be. The writ being abated, the present plaintiff had his option to bring trespass for the tortious taking of his property, or to have a return and restitution. He elected to have a return ordered. The order has not been complied with—his property has not been restored. By the express provisions of R. S., 1857, c. 98, § 18, he may, in such case, resort to his remedy upon the replevin bond. *Exceptions sustained.*

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

WILLIAM BARNES *versus* MARY HATHORN.

A tomb erected upon one's own land, is not necessarily a nuisance to his neighbor; but it may become such from locality and other extraneous facts.

Plaintiff proved that defendant's tomb, erected within forty-four feet of the former's dwellinghouse, contained, in 1856, nine dead bodies, from which was emitted such an effluvia as to render his house unwholesome; that, after an examination by physicians, the bodies were removed; that the tomb remained unoccupied thereafterwards, until 1865, when another body was therein interred; that the defendant's life was made uncomfortable while occupying his dwellinghouse, by the apprehension of danger arising from the use of said tomb; and, that the erection and occupation of said tomb had materially lessened the market value of his premises. In an action for damages on the foregoing facts; — *Held*, a nonsuit was improperly ordered.

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

Tallman & Larrabee, for the defendant.

Gilbert, for the plaintiff.

KENT, J. — The facts, which the plaintiff proved or offered to prove, on which the presiding Judge ordered a nonsuit, are substantially as follows: — that the husband of the defendant, Mary Hathorn, in 1846, built a tomb on the premises now owned by her — and, within 44 feet from the west side of the plaintiff's house, and the windows of his parlor, sitting-room and dining-room, all of which rooms were on that side of his house; that dead bodies were from time to time deposited in said tomb, until about the year 1856, when nine such bodies were in the tomb; that such an effluvia was emitted from them that the plaintiff's house became unwholesome, and, after an examination of the premises by physicians, the defendant caused them to be removed from the tomb; that the tomb remained unoccupied for six years, and until October, 1865, when the defendant caused the tomb to be opened and another dead body to be deposited for burial therein; that there was a wooden frame building over the tomb, which was whitewashed; that the tomb was

of brick, with ventilators at each end; that the plaintiff had resided for 25 years, and still resides, in a house owned by himself and on his lot of about three acres; that the defendant's land adjoins his, and the dividing line is 14 feet from his dwellinghouse, and her lot contains about 130 acres; that the erection and occupation of the tomb, as alleged in the writ, diminished the market value of the plaintiff's house and lot from $1000 to $1500, and that his life in the occupancy of his premises is made uncomfortable by the apprehension of danger arising from the use of said tomb as a burial place.

The plaintiff introduced two physicians, who testified that the effect of burying dead bodies in the tomb might be unwholesome and injurious to the occupants of the house; if much miasma, long continued and concentrated from them, it might be fatal; and that any emission from such bodies might be injurious to the physical and mental system; and, without any effluvia, it might injuriously affect the inmates of the house by exciting the imagination.

The action is for injury to the plaintiff by reason of a nuisance continued by the defendant.

The question before us is whether, upon the case as above stated, a nonsuit was properly ordered.

What is a nuisance? In considering this question, when the complaint is based upon the use of another of his own property, we are first met by the general doctrine of the right of every man to regulate, improve and control his own property; to make such erections as his own judgment, taste or interest may suggest; to be master of his own, without dictation or interference by his neighbors. On the other hand, we meet that equally well established and exceedingly comprehensive rule of the common law—"*sic utere tuo, ut alienum non laedas*"—which is the legal application of the gospel rule of doing unto others as we would that they should do unto us.

The difficulty is in drawing the line in particular cases, so as to recognize and enforce both rules, within reasonable

limitations. It is quite clear that the law does not recognize any legal right in any one to compel his neighbor to follow his tastes, wishes or preferences, or to consult his mere convenience. He cannot dictate the style of architecture or, generally, the location of the buildings — or maintain that an unsightly or ill-proportioned edifice is a nuisance because it offends his eye, or his too cultivated taste. Nor can he interfere because he has idle and unfounded fears of ill effects from the use of the adjoining lot. There may be many acts which, to the eyes of others, appear to be unneighborly and even unkind, and entirely unnecessary to the full enjoyment of the property — vexatious and irritating, and the source of constant mental annoyance, and yet they may be but the legal exercise of the right of dominion, and therefore cannot be deemed nuisances. The diminution of the market value of adjacent buildings, by such use, will not of itself make it a nuisance. But there is a limit to such right. No man is at liberty to use his own without any reference to the health, comfort or reasonable enjoyment of like public or private rights by others. Every man gives up something of this absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use and enjoyment of their property. This is the fundamental principle of all regulated civil communities, and without it society could hardly exist, except by the law of the strongest. This illegal, unreasonable and unjustifiable use to the injury of another, or of the public, the law denominates a nuisance. Such use may be a public nuisance, and it is so when it affects the community generally. When it affects an individual it is called a private nuisance. If, however, an individual sustains special damage to himself, beyond that common to the public by reason of a public nuisance, he may maintain an action for such special injury.

"Nuisance signifies anything that worketh hurt, inconvenience or damage." 3 Black. Com., 215. "Private nuis-

ances may be defined, anything done to the hurt or annoyance of lands, tenements or hereditaments of another." *Ib.*

"Nuisances to a dwellinghouse, are all acts done by another from without, which renders the enjoyment of life within the house, uncomfortable, whether it be by infecting the air with noisome smells, or with gasses injurious to health, or by exciting the constant apprehension of dangers." 2 Greenl. on Ev., § 466.

The general rule of law has been applied to many cases varying in their character and circumstances. We are at present chiefly interested in those relating to dwellinghouses, the habitations of men, although it is useful to examine the whole range of authorities, to extract, if possible, the true principles applicable to the subject.

There is one class of cases, arising from the exercise of trades or business, which are in their nature offensive, or which renders the occupation of buildings near them, unhealthy, or decidedly uncomfortable. Many of these cases may be found collected in a very recent case in this State. *Norcross* v. *Thoms*, 51 Maine, 503, and more fully in the case of *Brown* v. *Perkins*, 12 Gray, 97. It is unnecessary for us to repeat them here. From the general tenor of the reported cases, we find that certain doctrines are recognized and acted upon. One is, that some trades, occupations or acts are regarded as in themselves and inherently noxious, or offensive and prejudicial, without extraneous proof. In other cases they are not necessarily nuisances, but may become so from location or some extraneous fact. Another well established doctrine is, that it is not necessary to prove that the air is poisoned or rendered positively unhealthy; it is enough if the matter alleged to be a nuisance is offensive to the senses, or in any way renders the enjoyment of life and property uncomfortable. *State* v. *Haines*, 30 Maine, 65; *Rex* v. *White*, 1 Burr., 337; *Fish* v. *Dodge*, 4 Denio, 311; *State* v. *Pierse*, 4 McCord, 472; *Catlin* v. *Valentine*, 9 Paige, 575; *Rex* v. *Neil*, 2 Carr & Payne, 485.

Exciting, constant and reasonable apprehension of danger,

although no actual injury has been occasioned, has been held to be a nuisance. Thus, the keeping of large quantities of gunpowder near inhabited dwellings, or by suffering an adjoining tenement to become ruinous and in danger of falling. 2 Greenl. on Ev., § 466, and cases before cited.

The definitions and rules applicable to cases as they arise, must be general, and each case must be brought to the test of the principles laid down. Usually, therefore, it becomes a mixed question of law and fact, whether, on the case proved, the existence of a nuisance is established, or not. If, however, it is clear upon the facts, that a jury would not be authorized to find that a nuisance did exist, the Judge would be justified in ordering a nonsuit.

The case finds that the erection and continuance of a private tomb is the nuisance complained of. A man may have a legal right to build such a tomb on his own land, as a general proposition. It is not in itself and inherently a nuisance to his neighbors. If a nuisance at all, it becomes so from its locality or other extraneous facts. However unwise or inexpedient it may be, in the judgment of reflecting men to deposit the remains of deceased relations or friends in private burying places on private lands, considering the constant change in the title of real estate in our country, and the almost certainty that in one or two generations no one will be left to care for or protect the graves, yet we know of no law which prohibits such erections or interments. But such tombs may be or may become nuisances. On the facts stated, this particular tomb was, at one time, beyond dispute, a very serious nuisance, when it "was occupied by nine dead bodies which emitted such an effluvia as to render the plaintiff's house unwholesome;" and, after an examination of the premises by several physicians, all the bodies were removed, it could hardly be questioned that it was then a nuisance. But the defendant says that, after these bodies were removed, it ceased to be of such a character. Whilst the tomb remained for six years unoccupied, the only ground on which it could be then

called a nuisance, probably, was its unpleasant proximity to the house of the plaintiff. It was only some fifteen paces from the windows of his dining and sitting room. It was certainly not a very cheering or exhilerating prospect which met the plaintiff's vision, whenever he looked abroad. How far, to a man of ordinarily nervous temperament, or to one of a sensitive nature, who shrunk from the constant view of this fixed memorial of death and decay, this erection might prove injurious to health, it is impossible to say.

But, that it must have affected his comfort and happiness in the occupation of his dwelling may be less questionable. There seems to have been no necessity for this close proximity, as the defendant's farm consisted of at least one hundred and thirty acres. On what ground this spot, almost under the droppings from the plaintiff's house, was chosen, instead of some retired place, on this large farm, does not appear, and is not, perhaps, material in our examination of the case.

But, it seems, after six years from the time of removal, the defendant again opens the tomb and commences the deposit of deceased friends anew. One such body had been thus placed in the tomb, before this action was brought. This act would seem to indicate an intention to again use it for the place of interment of her family. Now, considering the result stated as having been produced by the former occupation, might not a man of ordinary firmness and judgment be reasonably apprehensive of danger?

In addition to this, we have the testimony of the physicians called on the trial, that *any* emission from dead bodies in that tomb might be injurious to health, bodily and mentally. It had proved so before, and might again. A single body might not be so liable to create deadly or noxious effluvia as a larger number. But it would be of the same general character, and might of itself prove uncomfortable, if not positively unhealthy. The defendant made no disavowal of an intention to place other bodies there.

On the whole, we are of opinion, that the case should

have been submitted to the jury on the evidence, with proper instructions, and that the nonsuit was not properly ordered. *Exceptions sustained.*

Nonsuit set aside and new trial granted.

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

DICKERSON, J., dissenting. — This is an action of review, and comes before us on exceptions to the ruling of the presiding Judge in ordering a nonsuit. Several questions arise under the bill of exceptions.

1. Whether allowing an unoccupied tomb, built of brick with ventilators at each end, covered with a wooden frame building, whitewashed, and situated forty-four feet from the dwellinghouse of the adjacent proprietor, to remain on one's premises is a nuisance *per se*. The injurious act imputed to the defendant in review is claimed to be a private nuisance which renders the dwellinghouse of the plaintiff in review uncomfortable, unhealthy, and valueless, as a residence.

The law of nuisance is designed to enforce the observance of that fundamental moral maxim: *sic utere tuo, ut alienum non laedas*—so use your own as not to injure another. This rule, however, must have a reasonable construction, or it would become oppressive in many instances, and defeat the benevolent purpose it was designed to subserve. In populous villages and cities, a tree cannot be planted, or a building erected without in some degree diminishing the quantity of light enjoyed by the adjacent proprietor. The smoke emitted from every additional chimney increases the quantity of unconsumed materials in the atmosphere, impairs its purity, and is oftentimes a source of annoyance and discomfort to others; so is the sound of the factory bell, the steam engine, and railroad car. The same remarks are applicable with respect to the enjoyment of public rights. Mills cannot be successfully carried on without detaining, for a longer or shorter time, a portion of the water from

the mills below, equally entitled to its natural and unobstructed flow. Buildings cannot be moved along the public streets, or goods delivered at stores and warehouses, or logs detained, separated, and secured in booms or ponds for manufacture, without temporarily obstructing the great public thoroughfares along and over which all have an equal right of free transit. It is plain that the literal enforcement of this maxim would embarrass the industry of the country, and materially retard the rapid development of the national resources, while, at the same time, it would diminish the sum of individual and social comfort and well-being.

The better interpretation of this rule of human conduct is that which harmonizes with that other maxim of the law, of equal authority, *de minimis non curat lex*, the law takes no notice of trifles. Persons cannot insist upon their extreme rights, and bring suits for every trifling inconvenience, annoyance or discomfort, they may experience on account of the use others may make of their own property. In entering civil society every person surrenders a portion of his rights for his own protection, and for the common good, both in respect to the limitations he may impose upon the manner in which others may enjoy their property, and the dominion he may exercise over his own. The common definition of nuisance—"anything that worketh hurt, inconvenience or damage"—is to be understood with reference to the subject matter, the time, manner, occasion and degree of discomforts, and the mutual adjustment of the common sacrifices of comforts incident to civil society. The annoyance, inconvenience or discomfort complained of must be a subsisting and substantial grievance, materially affecting the ordinary physical comfort of human existence, as understood by the American people in their present state of enlightenment, and not according to the crude and fanciful notions of a semi-barbarous, or less enlightened age. *Tipping* v. *St. Hellens Smelting Co.*, 116 Eng. Com. Law, 608; *Bamford* v. *Turnley*, 3 Best & Smith, 66; *Canby* v. *Ledbitter*, 106 Eng. Com. Law, 470.

In *State* v. *Haines*, 30 Maine, 77, the Court declined to pronounce a bowling alley a nuisance *per se*, though it held that such a structure might become a nuisance by being used in such a manner as to render the enjoyment of life uncomfortable to those residing in the neighborhood. So a steam engine located on State street, in Boston, Mass., is not a nuisance. *Saltonstall* v. *Banker & al.*, 8 Gray, 197. Keeping fifty barrels of gunpowder in a house near dwellinghouses and near the public street, is not, *ipso facto*, a nuisance. *The People* v. *Sands & al.*, 1 Johns., 81; nor is a stable in a village. 1 Hilliard on Torts, 640.

It is not the kind of erection, or the thing kept, but the use made of it, and the time, place and manner of keeping, that determine the legal *status* in this respect. The structure may be faulty in its architectural proportions, and ill adapted for the purpose intended, or it may be even grotesque in its appearance, yet, if not used so as to cause substantial discomfort to the adjacent proprietors, these circumstances will not render it a nuisance. So, the article kept or used, or the business carried on, though dangerous in its character, may be so managed in respect to time, place and manner, as to be harmless in the eye of the law.

The tomb erected by the devisor of the plaintiff in review, and by her allowed to remain on the devised premises, was a lawful erection; for, whatever may be thought of the policy of private burial, the right is unquestionable. In an unoccupied state, it could not have caused the defendant in review such substantial discomfort as the law imputes to a nuisance. It may have been offensive to his tastes, but the law does not enter the domain of the fine arts, and establish styles of architecture; and the apprehension of injury from future deposits therein that might never be made, and noxious smells that might never arise therefrom, is altogether too remote, not to say, fanciful, to base an action at law upon.

2. The next question raised by the bill of exceptions, is whether depositing a dead body in the tomb described, in

the month of October, and allowing it to remain therein till the fourth day of the following December, constitutes a nuisance, no offensive vapors having arisen therefrom during this interval. The gist of the action of nuisance is the damage, and the rule of damages in all cases is the amount of injury actually sustained at the commencement of the suit; no damages can be recovered for prospective injury. 2 Greenl. Ev., (8th Ed.,) 530. 1 Hilliard on Torts, 656.

The case finds that "no offensive vapors had come from the tomb," within six years next preceding the date of the original writ. When the original plaintiff brought his writ, he had suffered no actual injury. Had he reason to apprehend future injury? If so, did such apprehension occasion him the substantial discomfort necessary to make a nuisance?

While the authorities are clear, that, if the odors arising from a particular erection or business render the enjoyment of life and property disagreeable and uncomfortable, such erection or business is a nuisance, though the odors are not *unwholesome*, they do not go so far as to predicate a private nuisance upon the mere *apprehension* that noxious or offensive vapors may arise at some future time from a particular source. On the contrary, in all the reported cases of this sort in this country, and in England, it is believed, that *the existence* of some offensive effluvia is a necessary element in the matter complained of as a private nuisance. This theory, too, is in harmony with the rule of damages to which I have adverted. *Rex* v. *White*, 1 Burr., 337; *Rex* v. *Neil*, 2 Carr & Payne, 327; *Howard* v. *Lee*, 3 Sanf., 281; *Eames* v. *N. E. Worsted Co.*, 11 Met., 57.

There are cases, however, where acts done by another on his own land may constitute a nuisance to a dwellinghouse when they excite the constant and reasonable apprehension of injury. But, in all these cases, it is held that the danger must be actual and imminent, and not imaginary, conjectural or remote. In the language of Chancellor KENT, in *The People* v. *Sands & al.*, 1 Johns., 89, "The fears of mankind

alone will not create a nuisance without the existence of real danger." That case was an indictment for keeping fifty barrels of gunpowder in a house near a dwellinghouse, and near a public street. The Court held that this did not necessarily or *prima facie* constitute a nuisance, as it did not appear from the indictment that the powder was *carelessly* kept. *Non constat* that it was not a proper place to deposit such an article, time, place, and manner, being all important and essential elements in determining whether a powder house is a nuisance. In the language of Chief Justice HOLT, in *anonymous*, 12 Mod., 343, "there must be apparent danger or mischief actually done;" or, as observes Mr. Justice FOWLER, in *Rex* v. *Taylor*, 2 Str., 1167, "the mere laying a thing to be *ad commune nocumentum* is not sufficient, but the Court must examine whether the fact laid implies a nuisance." The act of carelessly keeping great quantities of gunpowder near a dwellinghouse, or of making deep and dangerous excavations of the neighboring soil, or of suffering the adjoining tenement to go to decay, and be in danger of falling upon or otherwise injuring the adjoining tenement, or its inmates, implies imminent and actual danger, and it is for this reason that these particular cases have been held to be private nuisances; take from these this element, as we have seen in the case of gunpowder, and they cease to be nuisances. 2 Greenl. Ev., (8th Ed.,) 522; *Brown* v. *Windser*, 1 C. & J., 26; *Dod* v. *Holme*, Ad. & E., 493.

No noxious vapors had arisen from the structure complained of between the month of October, when the remains were deposited therein, and the fourth day of December, when the original plaintiff commenced his suit; considering the season of the year none could reasonably have been expected or apprehended. The original plaintiff commenced his suit, when, according to the ordinary course of nature, it was utterly impossible that any miasma should arise from the remains for several months to come, if indeed any ever should arise. For ought that appears in

the case the deposit was temporary, to continue during the cold season, and then to be removed, as the other bodies had been removed by the devisor of the defendant in review at the original plaintiff's request. Though a witness himself, Barnes does not testify that he experienced any discomfort from the tomb as used by the defendant, or that he apprehended any injury whatever therefrom. It would be an impeachment of the intelligence which every suitor is presumed to possess, to suppose that he apprehended any immediate injury under these circumstances. When the testimony fails to disclose any injury the Court cannot find any damage, and if there is no damage the action cannot be maintained. The Court cannot indulge in fears not shared in by the plaintiff himself. To adjudge the tomb in question to be a nuisance, under this proof, would be in effect to declare the receiving tombs in many of our public cemeteries nuisances. To avoid snow and frost they are usually built upon the highway for the safe keeping of remains during the cold season. Travellers, or persons residing in the vicinity of such tombs, might with equal propriety sue the proprietors of these cemeteries for maintaining a nuisance. It is hardly worth while to invite such litigation.

Undoubtedly a tomb may be so built and used as to become a nuisance; and I would by no means intimate that a party is without remedy who has reasonable ground to apprehend injury from such a source. It is the peculiar province of courts of equity to interfere by way of injunction to restrain or prevent irreparable mischief to health, trade, means of subsistence or permanent ruin to property. 2 Story's Eq. Jur., §§ 925–27.

3. There was no error in excluding the testimony offered. The defendant in review, being without legal fault in the use of her property, is not liable for any real or supposed depreciation in value resulting therefrom to the property of the plaintiff in review. The plaintiff would have no claim on her for the increased value of his property growing out of her lawful acts upon her own land, nor has he

any claim on her for damage occasioned by the same cause. If his property has depreciated in value from this cause it is *damnum absque injuria*. The nonsuit was properly ordered, and there should be judgment for the original plaintiff.

JONATHAN N. HATCH, JR., *in equity*, *versus* FREDERIC BATES, JR.

So much of the XVth "Rule of Court in Chancery Cases" as pertains to a party's filing duly recorded deeds or copies thereof with the clerk, &c., is permissive and not mandatory.

If a party does not file his deeds as therein expressed, they are not therefore inadmissible, but are subject to the rules of evidence otherwise applicable.

Independent of the "rules of Court," a certified copy of a deed duly recorded is *prima facie* evidence when the party providing it is not the grantee; and the original deed is admissible without proof of execution in the same manner as the copy.

A deed executed, and left by the grantor with a third person by request and direction of the grantee, is a sufficient delivery.

When a deed, as one of the links in a chain of title, is sought to be impeached on the ground that it is a forgery, the declarations of the grantee, who is neither a witness in, nor a party to the suit, made long after its execution, are inadmissible.

The complainant, as mortgagee of the assignee of a former mortgager, brought this bill against an assignee of the former mortgage to redeem it. The respondent, to defeat the complainant's title, testified that he informed the complainant, on the day before the latter took his mortgage, that he, (respondent,) believed the complainant's grantor's title was fraudulent and without consideration; — *Held*, that the caution given to the complainant, based upon the naked belief of the respondent, unsupported by any facts contemporaneously stated, was not sufficient evidence of the complainant's cognizance of fraud, to warrant the Court to set aside the mortgage.

To foreclose a mortgage by an action at law, while c. 105 of the Public Laws of 1849 was in force, a recording of the certified abstract within the time, and at the place therein provided, was essential.

No one but a creditor of the grantor can avail himself of the objection that a deed was given without consideration.

BILL IN EQUITY.

The allegations of the bill and answer, and the material facts in the proofs, sufficiently appear in the opinion.

J. S. Abbott, for the complainant.

Tallman, for the respondent.

DICKERSON, J. — This is a bill in equity to redeem certain real estate in Richmond, from a mortgage given by one Joseph Ring, jr., to George W. Chase, assigned by Chase to William White, and by White to defendant. The case comes before us for hearing on bill, answer and proofs.

The bill alleges that Joseph Ring, jr., the mortgager, conveyed his right to redeem the mortgaged premises to William W. Ring, Sept. 16, 1854; that William W. Ring conveyed the same to Mary Ring, Nov. 1, 1858, who conveyed the same to the plaintiff by mortgage, July 23, 1859.

The answer admits the mortgage of Joseph Ring, jr., to George W. Chase, and assignments as alleged, and also the quitclaim deed, Joseph Ring, jr., to William W. Ring, but denies the deed from William W. Ring to Mary Ring, and the mortgage from her to the plaintiff.

The demand for account was duly made and not complied with.

The quitclaim deed, William W. Ring to Mary Ring, denied in the answer, is in the handwriting of the late Ezra Abbott, a counsellor at law, except the printed form and the name of the grantor, and is witnessed and acknowledged by him. The consideration is seven hundred dollars. The original deed is put into the case without proof of its due execution.

The defendant objects to the introduction of the deed for want of proof of its execution, and invokes the 15th rule of Court in chancery cases. That rule *allows* deeds executed in due form and recorded, or copies of them which have first been filed with the clerk of the courts, to be used without proof of execution, "unless the due execution be

denied, or fraud in relation thereto be alleged, of which notice shall be given within ten days, after notice that they are filed." This rule in this particular is permissive and not mandatory. A party may or may not so file his deeds. If he does not so file them, they are not therefore inadmissible, but are subject to the rules of evidence otherwise applicable in such cases. The plaintiff did not file this deed with the clerk of the courts, and give the required notice to the defendant; he is not a party to the deed. Independently of rules of court, the certified copy of a deed duly recorded is *prima facie* evidence, when the party producing it is not the grantee. *Scanlan* v. *Wright*, 13 Pick., 523; *Hood* v. *Fuller*, 15 Pick., 185; *Commonwealth* v. *Emery*, 2 Gray, 81.

The original deed is admissible without proof of execution in the same manner as the copy would be. *Knox* v. *Silloway*, 10 Maine, 201.

1. The answer to the bill alleges that this deed is a forgery. The grantor, William W. Ring, testifies that he never signed it, or authorized any one to sign it for him, and that he had any knowledge of its existence for nearly four years after it purports to have been executed. The declarations of Mary Ring, the grantee, of a similar import, are introduced. Mary Ring is not a witness in this case, nor a party. Her declarations, made a long time after the date of the deed, are no part of the *res gestae*, and are clearly inadmissible to impeach the plaintiff's title which he derived from her.

On the other hand, several of the plaintiff's witnesses, who are familiar with the handwriting of William W. Ring, pronounce the signature genuine. One of them, his brother, Gorham S. Ring, testifies that, on the day the deed bears date, he went to Ezra Abbott's office with William W.; that William W. inquired of Mr. Abbott for a deed, which was produced and signed by him. This witness further testifies that, previous to his going to Abbott's office with his brother, he heard his mother, Mary Ring, request the latter to

give her a deed for what was due her, and he agreed to do so. Mary J. Ring, sister of William W., testifies in substance to the same conversation. The weight of evidence is in favor of the genuineness of the deed, and the fact testified to by Gorham S. Ring, that the deed was left with Mr. Abbott by request and direction of the grantee, is sufficient proof of its delivery.

The mortgage deed, Mary Ring to the plaintiff, also denied in the defendant's answer, is in the usual form, and duly acknowledged and recorded. Its due execution and the execution of the mortgage notes are proved. Nor does it seem to be seriously controverted that the plaintiff paid $600 in gold, as consideration for the mortgage.

The plaintiff has thus made out a *prima facie* case, and is entitled to have his bill maintained unless some other grounds of defence alleged in the answer are established.

2. The answer further alleges that the several deeds, Joseph Ring, jr., to William W. Ring, William W. Ring to Mary Ring, and Mary Ring to the plaintiff, were given to defraud the creditors of Joseph Ring, jr.; that the plaintiff was cognizant of this when he took the mortgage from Mary Ring, and that he brings this bill for the benefit of Joseph Ring, jr., and Mary Ring, his wife.

The deed, Joseph Ring, jr., to William W. Ring, is the foundation of the plaintiff's claim. Much of the testimony introduced to impeach that deed is inadmissible. Such are declarations of Joseph Ring, jr., not known to the plaintiff when he took the mortgage, and all his declarations made after his deed to William W. Ring. The evidence fails to show either the insolvency of Joseph Ring, jr., at the time of the conveyance, or his indebtedness beyond the amount of the mortgage, or that the plaintiff had any knowledge that the conveyance was fraudulent, when he acquired his title. We are aware that the defendant testifies that he told the plaintiff, the day before he took the mortgage from Mary Ring, that he believed that the conveyance by Joseph Ring, jr., to William W. Ring was fraudulent and without consid-

eration. This remark, if ever it was made, was made at an interview between the plaintiff and defendant nearly five years after the deed was given, and within a year and three months after William W. Ring had deeded the premises to Mary Ring. The plaintiff denies all recollection of this remark, and testifies that he had no knowledge whatever that there was any fraud in the transaction. At most the caution given to the plaintiff was based upon the naked *belief* of the defendant, unsupported by any facts stated at the time it was administered. It would be unsafe to set aside a conveyance upon such testimony.

As the deed of Joseph Ring, jr., to William W. Ring cannot be impeached on the ground that it was a fraud upon *his* creditors, it will not be pretended that the subsequent deeds, William W. Ring to Mary Ring, and Mary Ring to the plaintiff, can be impeached for this cause.

3. Again, the answer alleges that the quitclaim deed of the Ring mortgage, by William White to Mary Ring, operates an assignment of the mortgage, so that the defendant acquired no title by White's subsequent assignment of the mortgage to him. It is unnecessary for us to consider whether this objection is open to the defendant under his answer, or the legal effect of this deed, as we are satisfied that the deed never was delivered to Mary Ring. The deed was made at the request of Joseph Ring, jr., and recorded and returned to him at his instance. He paid whatever consideration was paid. There is no evidence that the grantee, Mary Ring, ever gave Joseph Ring, jr., any authority to take a deed running to her, or that she ever knew of the existence of such a deed. White seems to have regarded this deed as inoperative, since he subsequently assigned the mortgage and mortgage debt to the defendant.

4. The defendant further alleges in his answer, that the plaintiff's mortgage was paid and discharged by a conveyance of the premises to the mortgager. A discharge was executed on the back of the mortgage, Dec. 20, 1864, to Mary Ring, and the mortgage, with the mortgage notes, was

sent to Joseph Ring, jr., with directions to return them to the plaintiff, if the money was not paid. No consideration was paid, nor were the papers ever delivered to the grantee; they were returned to the plaintiff and the discharge was cancelled by him. No title vested in the grantee by virtue of these proceedings; and, if it had, it would have been revested in the grantor by the voluntary return, and acceptance of the mortgage and notes. *Bartlett* v. *Thorndike*, 1 Maine, 73.

5. It is alleged in the answer, that the mortgage of Joseph Ring, jr., was foreclosed by White prior to his assignment of it to the defendant, and that, by that assignment, the defendant became seized in fee of the premises.

The attempted foreclosure was by action at law, and the alleged taking of possession by White took place July 9, 1856. The Act of 1849, c. 105, was then in force, requiring that in such a case "an abstract of the writ of possession with the time of taking possession, certified by the clerk of the Court where the judgment was recovered, shall be recorded within thirty days after possession is obtained, in the registry of deeds in which the mortgage is, or ought to be recorded." No such certified abstract was filed in the case at bar; and the attempted foreclosure thus became incomplete and inoperative. It is unnecessary to consider the other objections to the alleged foreclosure.

6. It is alleged in the defendant's answer that Solon Bates recovered judgment against Joseph Ring, jr., and Austin Ring, in Dec., 1855; that execution was issued upon this judgment and a levy made upon the mortgaged premises, Jan. 14, 1860, and that this judgment was assigned to the defendant Feb. 9, 1864, whereby he became owner of the premises in fee simple. This judgment was rendered more than a year after the deed, Joseph Ring, jr., to William W. Ring, was given. These proceedings, therefore, can avail the defendant only upon the ground that that deed is invalid. We have seen that the defendant has not made

out that point in his defence; hence this ground of defence must also fail him.

7. The defendant seeks to avoid the deed, William W. Ring to Mary Ring, for want of consideration, and on the ground that it was a gift. If it was a gift, the defendant, not being a creditor of William W. Ring, cannot avail himself of this objection. The consideration named in the deed is *prima facie* evidence that the consideration was adequate. There is also corroborative evidence that this deed was given for a valuable consideration, not to be discredited by the testimony of William W. Ring, which, upon a material point in the case, we have found to be wholly unreliable.

It was competent for Mary Ring, though she was a married woman, to execute the mortgage to the plaintiff in her own name. *Brookings* v. *White*, 49 Maine, 479.

Bill sustained.—Defendant to account.

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

ALBION J. POTTER *versus* BENJAMIN C. SEWALL.

In an action upon a receipt, stipulating that the defendant, "for value received," promised "to pay" the plaintiff "$500, or redeliver nine masts which" the plaintiff "has taken by virtue of a writ" described; that, for an acknowledged consideration, the defendant agreed to "safely keep and redeliver said masts to the" plaintiff, "or his order, on demand; and that, if no demand were made within 30 days from the rendition of judgment, he would redeliver said masts, that they might be taken on execution, as they were attached and were the property of the defendant in said writ:" — *Held*,

1. That evidence that, when he gave the receipt, the defendant had a factor's lien upon the masts for money advanced thereon to the defendant in the original writ, to an amount exceeding their value; that he then so informed the plaintiff; and that he was misled by the plaintiff, is inadmissible in the absence of fraud or mistake in fact; and

2. That a motion for a nonsuit on account of the non-production of the writ and officer's return thereon, showing an attachment of the masts, was rightfully overruled.

Under what circumstances this Court, sitting *in banc*, will refuse a motion to discharge a report in order to permit a party to prove facts alleged to have been discovered since the last preceding *nisi prius* term.

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

ASSUMPSIT on the following receipt:—

"Sagadahoc ss.—Bath, May 12th, 1862.

"For value received, I promise to pay Albion J. Potter, deputy sheriff, or his order, five hundred dollars, or to redeliver nine sticks of timber, called masts, which said property the said officer has taken by virtue of a writ in favor of Theodore Littlefield and others against George Hart; the writ is dated Dec. 30, 1861, and returnable to the Supreme Judicial Court next to be holden at Alfred, within the county of York, on the fourth Tuesday of May, 1862, and in consideration of one cent, paid by the said Potter, I do hereby acknowledge and hereby promise and agree safely to keep and to redeliver all the said property above mentioned, to the said officer, to his order, or to his successor in office, on demand, to be delivered at Bath in the like good order and condition that the same is now in, free from all charge and expenses to the above named officer or creditor aforesaid; and I agree that a demand on me shall be binding; and I further agree that, if no demand be made, I will, within thirty days from the rendition of judgment in the action aforesaid, redeliver all the above described property as aforesaid, that the same may be taken in execution, as it is attached and is the property of the said George Hart.

(Signed,) "B. C. Sewall."

At the trial the plaintiff read the writ, pleadings and specifications of defence, receipt, legal copies of the judgment, execution and officer's return thereon, issued on the judgment in the original suit on which said property was attached, and rested his case. The defendant moved for a nonsuit, because the plaintiff had not shown the writ whereon the property was attached, which motion the presiding Judge overruled. The defendant then offered to prove that, when he gave the receipt in suit, he had a factor's lien upon the

property attached and mentioned in the receipt, for money advanced thereon to the defendant in the former suit to an amount exceeding the value of said property; that he then so informed the plaintiff; and that he was misled by the officer, but disclaimed the imputation of any fraud to the latter in the transaction. The presiding Judge rejected the evidence; whereupon a default was entered by consent, and if the evidence offered was inadmissible and the action was otherwise maintainable the default was to stand; but if the evidence was admissible, or if the action could not be maintained on the evidence introduced, the action was to stand for trial.

J. M. Goodwin, for the plaintiff.

Tallman & Larrabee, for the defendant.

The evidence offered was admissible at least on the question of damages. *Bursley* v. *Hamilton*, 15 Pick., 40; *Dewey* v. *Field*, 4 Met., 381; *Drew* v. *Livermore*, 40 Maine, 268. On the motion to discharge the report, counsel cited *Allen* v. *Archer*, 49 Maine, 353.

BARROWS, J. — The wholesome rule that a party shall not be permitted to introduce parol contemporaneous evidence to contradict or vary the terms of his own unambiguous written contract, is not to be departed from because the party, having mistaken the law, may find himself under legal liabilities which he did not contemplate when he entered into that contract. Especially, now that the party is by law a witness in his own case, should the rule be adhered to which precludes him from contradicting orally that which his own written admission in the instrument declared on has established as a fact in the case by which the rights of the parties are to be determined.

The defendant in his written contract with the plaintiff, entered into without fraud or mistake of fact, and upon a valuable consideration, has said in so many words that the property attached is the property of George Hart, the

debtor, and by that writing he undertook and promised to do one of two things—either to deliver that property to the plaintiff within thirty days from the rendition of judgment in the suit against Hart, or to pay five hundred dollars. The judgment has been rendered, yet the defendant has done neither of the things which he thus agreed to do, but proposes to defend the plaintiff's suit upon the broken contract by showing that he himself had a factor's lien upon the property for money advanced to an amount exceeding its value.

The case in its essential circumstances is not more favorable to the maintenance of such a defence than was that of *Drew* v. *Livermore*, 40 Maine, 266,—where Livermore, having made advances towards the building of a vessel and taken a mortgage thereof, afterwards, when an officer attached the vessel for a debt of the builder, gave a receipt therefor to the amount of $500, and it was held that he could not avoid his liability thereupon for the debt and cost in the suit in which she was attached, by showing that his claim exceeded the value of the vessel, though he proposed also to prove that he denied the validity of the attachment when it was made, and signed the receipt under the advice of counsel that it would not preclude him from contesting it in a suit thereupon. The same mistake in matter of law was made by the receipter there as here. The same line of argument in defence was pursued in that case as in this. But, unfortunately for the receipters, it has been established by a series of decisions in this State that, where a receipt of this description has been given, the receipters are not to be regarded as the mere servants of the officer; that the officer is to rely upon their contract as his security, and not upon the property itself, (*Waterhouse* v. *Bird*, 37 Maine, 329,) and that he cannot rid himself of liability to the creditor by showing that the goods attached were the property of the receipter. *Penobscot Boom Corp.* v. *Wilkins*, 27 Maine, 350.

They must not, then, be permitted to evade their contract with him, by proof of contemporaneous conversations inconsistent with its obligations. Men must not enter into written stipulations to do that which is inconsistent with their own rights in property, if they would not be held to have waived those rights, and to be bound by their stipulations.

In *Bursley* v. *Hamilton*, 15 Pick., 40, by the terms of the receipt, it would seem that the defendant merely became the servant of the officer for the safe keeping of the property attached.

In all these cases, to avoid confusion, the particular terms of the contracts are to be regarded, and, by them, the rights of the various parties interested are to be determined.

Here, as in *Drew* v. *Livermore*, *ubi sup.*, and in *Smith* v. *Mitchell*, 31 Maine, 288, it must be said of the defendant, "he entered into a written contract, the terms of which are clear and explicit. There is no suggestion that any fraud was practiced upon him, nor that he acted under mistake of fact in relation to the matter. By that contract he must be bound."

In that contract he admitted the attachment. The motion for the nonsuit, on account of the non-production of the writ and officer's return thereon, was therefore rightly overruled, and, for reasons above given, the testimony offered was rightly excluded.

The defendant moved, in the Law Court, June term, 1866, to have the report (which was made up at the August term, 1865,) discharged, in order to permit him to prove what he says he has discovered since the last *nisi prius* term in this county—that the officer returned the attachment of the logs subject to *his* lien claim. Even if he could have been permitted, in the face of his own admission in the contract, to set up the insufficiency or invalidity of the attachment, reasonable diligence would have enabled him to present the proof at the time of the trial. The action was entered at the December term, 1864. The trial did not take place until the third term, and two more terms subsequently elapsed

before the filing of this motion. To allow it, under such circumstances, would go far towards making the needless vexations and delays attendant upon litigation interminable. We will set no such precedent for the indulgence of laches.

Judgment for the plaintiff.

CUTTING, WALTON DANFORTH and TAPLEY, JJ., concurred.

SAMUEL FOYE *versus* SEWALL SOUTHARD.

The proceeds of unbranded pressed hay, tortiously taken and sold, or wrongfully sold by one not the owner, but lawfully possessed thereof, may be recovered by the owner in assumpsit for money had and received against such tortious vendor.

ON EXCEPTIONS from *Nisi Prius.*

ASSUMPSIT for hay sold, and for money had and delivered.

It appeared from the testimony of the plaintiff that he had about sixteen tons of hay, of two qualities, in his barn, where about all of it could be seen; that the defendant came, and after examining it, bought it for $14 per ton for the second quality, and $17 for the first, the plaintiff to deliver it on board the defendant's vessel. Four loads were unloaded without objections by the defendant, but while unloading the fifth load the defendant found fault with the quality, and said he would not have the remainder of that load consisting of three bundles, nor the sixth load then present but unloaded. Plaintiff told the defendant he must take all or none. Defendant said it was not good hay nor the hay he had bought, and he would not have it. He, however, agreed to refer it to one Greenleaf, to which the plaintiff assented. Greenleaf said he called it a fair lot of hay, and that it was the same hay that he saw at plaintiff's barn, and that, if the defendant would not take it, he, (Greenleaf,) would, at an agreed price.

When Greenleaf went away, the defendant told the plaintiff he would not have the hay. Plaintiff replied he should not pick it, but he must have all or none.

The plaintiff hauled the balance to Greenleaf, intending to haul the whole to him. While plaintiff was making arrangements to take the hay delivered to defendant, the vessel of the latter sailed to Boston — sailed on Sunday.

Defendant sold the hay, about 32 bales, — 5 tons, — in Boston, at $23 per ton. Upon arrival home, defendant told the plaintiff he had sold the hay and would pay him, but never did.

Plaintiff told the defendant same day that Greenleaf had bought all the hay. Greenleaf paid for all the hay delivered to him. Plaintiff never went to the wharf after the hay, after defendant's vessel sailed. The hay was not branded.

Defendant moved for a nonsuit.

The plaintiff contended that the contract of sale was rescinded by mutual consent, and that the hay, thus remaining his property, it was taken away without his consent and converted into money, and, under the circumstances, the count for money had and received could be maintained. Also that, as there was no lawful sale, there was no sale; and the property remaining the plaintiff's, and it having been taken to Boston and sold for money, the count for money had and received was maintainable.

But the presiding Judge sustained the defendant's motion and ordered a nonsuit and the plaintiff alleged exceptions.

A. P. Gould, for the plaintiff.

1. The hay did not cease to be the plaintiff's property because it was not branded. If the plaintiff had offered the hay for sale or shipment without the brand, it would then only become a subject of forfeiture, but not forfeited. It would not cease to be plaintiff's property until libelled, tried and condemned by a competent court. It would be subject of larceny. Plaintiff might maintain trespass or waive the

tort and bring assumpsit. *A fortiori*, he may recover the proceeds received for it.

2. Defendant's promise after receiving the money will support the money count.

3. If the contract had not been rescinded, it was void. Plaintiff could not recover the price agreed, as for goods sold, because contract is forbidden by statute. But the hay remained plaintiff's property to feed his stock or to use in unforbidden way, and, while plaintiff's, defendant took it to Boston and sold it. Defendant violated no law there; and, if taken there and sold with consent of plaintiff, the latter would not violate the statute which provides that that hay shall be branded which is "pressed and put up in bundles for sale in this State." 2 Greenl. on Ev., § 117.

Pickard v. *Bailey*, 46 Maine, 200, and *Buxton* v. *Hamlin*, 32 Maine, 448, do not apply. This action is not brought to enforce a contract forbidden by statute. First count is for value of hay taken without consent, and second count for money realized out of plaintiff's hay. The sale of unbranded hay is simply *malum prohibitum*. *Faikney* v. *Renores*, 4 Burrows, 2069; *Pepper* v. *Haight*, 20 Barb., 429; *Curtis* v. *Leavitt*, 15 N. Y., (1 Smith,) 9.

Ingalls & Smith, for the defendant.

WALTON, J. — The hay sued for not having been branded as required by law, it may be that the plaintiff cannot recover upon his count for goods sold and delivered, (R. S., c. 38, § 35; *Buxton* v. *Hamblen*, 32 Maine, 448,) although a contrary doctrine has been held in New Hampshire. *Brackett* v. *Hoyt*, 9 Foster, 264; *Williams* v. *Tappan*, 3 Foster, 385.

But, if the plaintiff can prove that the defendant tortiously took his hay and sold it, or, being lawfully possessed of it, wrongfully sold it, he may waive the tort and recover the proceeds of the sale under his count for money had and received. 2 Greenl. on Ev., § 120. Unbranded hay is as

much under the protection of the law against tortious intermeddlers as hay that is branded.

As the evidence tended to prove that the contract of sale between the plaintiff and the defendant was rescinded, that the hay remained the plaintiff's property, that the defendant afterwards tortiously sold it and received the pay, we think the plaintiff had a right to have the case submitted to the jury, and should not have been nonsuited.

Exceptions sustained — New trial granted.

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

JOHN BULFINCH, *Adm'r, appellant from a decree of the Judge of Probate, versus* INHABITANTS OF WALDOBORO'.

An administrator cannot appeal from an order of the Judge of Probate, authorizing an action to be brought upon his official bond.

Such authority may be exercised under R. S., c. 72, § 14, without notice to the obligors in the bond.

APPEAL from an order of the Judge of Probate for Lincoln County, authorizing an action to be commenced upon the appellant's administration bond.

Upon the facts as agreed by the parties, which the opinion renders it unnecessary to report, the case was submitted, with an agreement that the action upon the appellant's administration bond should abide the opinion of the Court in this case.

Bulfinch, pro se.

Henry Farrington, for the defendants.

BARROWS, J. — John Bulfinch, administrator on the estate of Evarts Bulfinch, deceased, claims an appeal from an order made by the Judge of Probate for the county of Lincoln, permitting the inhabitants of Waldoboro' to commence

a suit upon the bond which this appellant gave as administrator.

Founded upon a statement of facts to which the parties have agreed, the appellant presents a strong argument against the maintenance of such suit upon the administration bond. But the decision of that question cannot properly be reached in this process. Before we can proceed to consider it, the appellant must, as a necessary preliminary, establish his right to appeal from the order of the Probate Judge of which he complains.

That order fixes no liability upon this appellant — denies him no right. He is not legally aggrieved thereby — manifestly not aggrieved if the proposed suit upon the bond is maintainable, — and, if the appellant is found to be entitled to prevail therein, he will have his legal equivalent for the expense which he may incur in the costs to be taxed in his favor.

In no case can one of the obligors interpose an appeal from the order of the Probate Judge authorizing a suit upon the bond, to delay or prevent the institution of the suit.

The power given to the Judge of Probate by § 14, c. 72, of the R. S. of 1857, to authorize the commencement of a suit upon a probate bond, may be exercised without notice to the obligors in the bond, and no legal right of the obligors is affected by the permission to commence a suit.

To require such notice, — to allow such an appeal as is here claimed, might not unfrequently practically defeat the object to be attained by the commencement of the suit.

The power given by c. 123, § 9, of the R. S. of 1841, to the Probate Court, to grant leave to a creditor of an insolvent estate to institute a suit for the recovery of his claim in a common law court under certain circumstances, contemplated *a notice to the executor or administrator*, and a hearing before the Probate Judge. It was under that statute that the decision in *Leighton* v. *Chapman*, 30 Maine, 538, relied upon by the appellant to support this appeal, was

made. The decision is not applicable in this case, on account of the distinction just adverted to.

We cannot, consistently with a due regard for a systematic course of legal procedure, undertake in this case to examine the formidable obstacles presented by the appellant to the maintenance of the proposed suit upon the bond. If the appellees shall think it worth while to institute and prosecute such a suit, the questions here attempted to be raised will be properly before the Court.

Inasmuch as we can give no opinion upon the main matters in controversy between the parties in this case, the stipulation with regard to the disposition of the suit, *Benner* v. *Bulfinch, Adm'r*, becomes inoperative. Under the circumstances developed in the agreed statement of facts, we do not think the appellees are entitled to costs.

Appeal dismissed.

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

DAVID A. BUNTON *versus* REUBEN B. DUNN.

If the plaintiff, (one of the members of a firm including the defendant and others, each of which purchased and held lands for the general objects of the co-partnership,) sell his entire interest in the partnership property, including the lands, to the defendant, taking back a bond reciting the sale and conditioned to "save the plaintiff harmless from all the liabilities of said firm and growing out of said firm;" a judgment rendered against all the members of the firm, on a petition for partition of one not a member thereof, commenced before, but determined after, such sale, and defended by an attorney retained by the defendant, in the name of all the members, is covered by the bond; and, if the plaintiff pay such judgment, he will be entitled to recover the amount thus paid, in an action upon said bond.

ON REPORT from *Nisi Prius.*

DEBT on a bond in the penal sum of $10,000 given by the defendant to the plaintiff.

The plaintiff filed specifications of his claims under the

bond, including $345,68 paid in discharge of a judgment rendered in favor of one Lyford, on a petition for partition of the lands owned by the members of the firm of R. B. Dunn & Co.; costs incurred against him in an unsuccessful attempt to reverse said judgment, and counsel fees paid to Bellows & Farr in a suit of the members of the firm with one King.

The defendant denied, that such judgment and claims were the "liabilities of said company or growing out of said company," pleading *non est factum*, with a brief statement setting out the conditions of the bond and averring a performance.

R. Foster, for the plaintiff.

J. S. Abbott, for the defendant, contended that —

The lands were held by certain individuals, who were the members of the firm of R. B. Dunn & Co., as tenants in common and not as co-partners, no allusion to any partnership being made in the deeds.

The firm of R. B. Dunn & Co. could not authorize another, by power of attorney, to convey the interests owned by the individual members. A deed of all the partnership property, wherever situated, would not reach the land.

If a creditor of the plaintiff had, prior to sale to defendant, sued and attached the former's undivided interest in the Carrol lands, and afterwards, on the same day, a creditor of R. B. Dunn & Co. had attached the Carrol lands as partnership property, and that company had then been insolvent, which would have held the lands?

APPLETON, C. J. — The plaintiff and defendant, prior to April 30th, 1853, had, with others, been co-partners in trade and in lumbering, under the name and firm of R. B. Dunn & Co. The members of the firm owned timber land in Whitefield, where their store was, and in Carrol, N. H. The Carrol lands the plaintiff had purchased of the defendant.

On the 17th March, 1852, one Stephen C. Lyford filed a petition for partition of the Carrol land, in the Court of

Common Pleas for the county of Coös, claiming to be the owner of one eighth thereof. At the July term following, an appearance was entered for the different members of the firm of R. B. Dunn & Co., by an attorney retained and employed by the defendant. Whether the attorney was employed to appear only for the defendant or for all the members of the firm of Dunn & Co. is in contest. As all the members of the firm were interested in the lands sought to be divided, and as the respondents denied the seizin of the petitioner and pleaded sole seizin in themselves, the circumstances of the case unmistakeably indicate, that the retainer was for all the members of the firm, notwithstanding the impression of Dunn seems to be otherwise. The plea filed shows that the attorney employed was made acquainted with the state of the title as claimed by the defendant, and that he filed his plea accordingly.

On the 30th April, while this petition was pending, the plaintiff sold out his entire interest in the whole property of R. B. Dunn & Co. to defendant, giving him at the same time a deed of warranty of certain lots in Whitefield, "also all my [his] right, title, estate and interest and claim to any and all lands, mills, mill privileges and real estate whatsoever situate in Whitefield, and in and to any timber standing or being in any lands in said town," and a release of the lots in Carrol and the timber standing thereon. On the same day, the defendant gave back to the plaintiff the bond in suit, in the penal sum of ten thousand dollars conditioned as follows, "the condition of the above obligation is such, that, whereas said Bunton has this day conveyed to me all his right, title and interest, of any name and nature, in the firm of R. B. Dunn & Co., located at Whitefield, N. H., now, if I, the said Dunn, shall save the said Bunton harmless from all the liabilities of said company and growing out of said company and pay said Bunton whatever money he may have put into the business operations of said company from his private funds, then this obligation to be void; otherwise to remain in full force and effect."

The petition for partition of Lyford proceeded to final judgment in his favor, and an execution issued from the office of the Clerk of the Supreme Judicial Court for the county of Coös, on the 5th Tuesday of December, 1856, against the plaintiff and the defendant and the other members of the firm of R. B. Dunn & Co., for the sum of three hundred and forty-five dollars and sixty-eight cents, which this plaintiff having paid seeks to recover in this action.

The firm of Dunn & Co. was established for the purpose of lumbering. Its members owned lands, mills and timber purchased for that purpose. Their interest in the land was the same as their interest in the firm. The deeds and bond refer to and are a part of one and the same transaction, by which the plaintiff conveyed all "his right, title and interest of any name and nature in the firm of R. B. Dunn & Co." and the defendant received such conveyance. These parties treated the real estate as partnership property, purchased and held for the objects of the firm,—i. e. lumbering,—and conveyed, when the plaintiff ceased to have an interest therein, by him to the defendant. The bond is in most general terms and must be held to cover legal and equitable liabilities.

The plaintiff, by his conveyance of April 30, 1853, ceased to have any interest in the Carrol lands or the timber thereon. The result of the petition for partition was henceforth of no importance to him. The execution obtained by Lyford was a liability growing out of the estate, on that day conveyed to the defendant, and to protect him against which he gave the bond in suit. If it were otherwise, the plaintiff would have conveyed an estate and yet not have been protected against suits in relation to property in which his interest has long previously ceased.

The judgment recovered by Lyford against the members of the firm of R. B. Dunn & Co., is within the bond, and the plaintiff is entitled to recover therefor for the bill of Bellows & Farr in the King suit.

It seems that, after this judgment, the plaintiff filed a

bill to have the proceedings in the partition of Lyford set aside as against him. Those proceedings were at his own instance and for his own benefit. They were not at the request, nor for the benefit of Dunn, who, in any event, was to remain liable. No reason is perceived why he should be held responsible for the expenses incurred in those proceedings.

Defendant defaulted for $345,68 *and interest from 5th Tuesday of Dec.*, 1856, *and* $22,75, *paid Bellows & Farr, and interest from date of writ.*

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

LOVINA LAUGHLIN *versus* SEWALL EATON *& al.*

Admissions of marriage, by the plaintiff, are competent evidence in support of a plea in abatement for the non-joinder of her husband.

The well established doctrine of the common law, that a married woman cannot sue alone for malicious prosecution, has not been changed by R. S., c. 61.

She cannot sue alone in such action, although her husband went, several years since, to California, but is alive, keeps up a correspondence and frequently sends her funds.

What facts are sufficient to authorize the inference of marriage to support a plea in abatement for non-joinder of husband.

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

CASE for malicious prosecution.

L. Clay, in support of the exceptions.

Positive proof of marriage essential. 2 Greenl. on Ev., §§ 461–2–3. Dilatory pleas to be construed most strongly against defendant. 1 Chit. on Pl., 544, Story's Pl., title Pleas in abatement. Husband need not join, when he has no personal interest, or is out of the jurisdiction. 1 Chit.

on Pl., 541–2; *Nye* v. *Spencer*, 41 Maine, 272; R. S., c. 61; Pub. Laws of 1862, c. 148; Oliver's Prec., 70; *Gregory* v. *Paul*, 15 Mass., 30; *Walford* v. *Duchess of Pienne*, 2 Esp. R., 554; *Carroll* v. *Blencow*, 4 Esp. R., 27; *Rangler* v. *Hummell*, 37 Penn., 130; 3 & 4 Will., c. 42, § 11; Stephen's Pl., 49–50.

Kempton, for the defendants.

BARROWS, J. — To this action for malicious prosecution upon a charge of adultery, the defendants seasonably pleaded in abatement the coverture of the plaintiff. Plaintiff replied denying the coverture and tendering an issue to the country, which was joined by defendants, and the case was submitted to the presiding Judge to be decided without the aid of a jury upon an agreed statement of facts, the more important of which are as follows: — The plaintiff's maiden name was Lovina Wight. She was a native of Vienna, in this county where her parents still reside. After an absence at service for two or three years she returned to Viena in 1851 or 1852 with John Laughlin, whom she introduced as her husband, and who called her his wife. She said they were married, and thereafterwards they lived and cohabited together as husband and wife, having several children, one of whom is now living and with her. Since the reputed marriage she has assumed the name of Laughlin, and she and her children are known by that name. Six or seven years ago Laughlin went to California, where he was seen a few months since by a man who knew him here. Since he went thither he and the plaintiff "have kept up a correspondence as husband and wife, he sending her funds quite often."

It was agreed, that, if the foregoing facts are admissible and competent to prove a marriage, or if a marriage may be inferred from them, and, "if they are in law sufficient to sustain the plea in abatement," the issue was to be found for the defendants — otherwise, for the plaintiff.

The presiding Judge found for the defendants, sustained

the plea and ordered the writ to be abated, to which order plaintiff excepts.

In this State, evidence of such admissions of marriage as this plaintiff appears to have made is competent even upon an indictment for adultery. *State* v. *Libby*, 44 Maine, 469, and cases therein referred to. In the absence of any controlling proof no one can hesitate to say that, as against her, a marriage is proved, and the other admitted facts sufficiently show the continuance of the coverture. In addition to these admissions of the plaintiff herself, we have, in the statement of facts, evidence of common reputation, — long continued cohabitation, — birth of children, — claim and recognition of right to support, and "correspondence as husband and wife," (whatever that may mean,) from all which, upon an issue of this description in a civil suit, a marriage may well be inferred, though they would not be competent evidence to support a criminal prosecution. That this woman, whose maiden name was Lovina Wight, and who prosecutes this action by the name of Lovina Laughlin, is the lawful wife of the still living John Laughlin, to whom she said she was married, there can be no manner of doubt, taking into consideration the additional fact that she, though a competent witness, does not offer herself to deny it, and it only remains to be determined whether "the facts proved are sufficient in law to sustain the plea in abatement."

The well known general doctrine of the common law is, that where a wrong is committed against the person of the wife during coverture, as by beating her, slandering her reputation, or by malicious prosecution, she cannot sue alone. For injuries to the wife occasioning to the husband a deprivation of the society of his wife, or of her assistance in his domestic affairs, or by which he is put to expense, he may have his separate action, as where a violent battery has caused a long continued illness of the wife or expense in her cure, or if she be maliciously indicted and thereby separated from him, or he put to expense in her defence. But, if the action is brought for *her* personal suffering and injury,

the husband and wife must join, and care should be taken not to include in the declaration a statement of any cause of action for which the husband alone would be entitled to recover. 1 Chitty's Pl., 46, 47, 61. *Horton & ux.*, v. *Byles*, 1 Siderfin, 387; *Russell & ux.* v. *Corne*, 1 Salkeld, 119; *Hyde* v. *Scyssor*, Cro. Jac., 538.

When an injury is done to both, as slander or battery of husband and wife, separate actions must be brought, one by the husband alone for the injury to him, and one by the husband and wife for the injury to her. If both causes of action are joined it is error. *Ebersoll* v. *Krug & ux., in error*, 3 Binn., 555. There is nothing in this case which brings it within any known exception to the general rule above stated. John Laughlin has not been banished or abjured the country, or deserted his wife and gone beyond seas. So far as appears, he is still in frequent communication with her, supplying her with funds and only temporarily, though long absent.

In *Gregory* v. *Paul*, 15 Mass., 30, cited for plaintiff, the wife of a foreigner, deserted by her husband in a foreign country, who had thereafter maintained herself as a single woman, and lived for five years in Massachusetts, her husband never having been within the United States, was holden competent to sue as a *feme sole*. Sec. 10, chap. 61, of the R. S. of 1857, embodies the doctrine thus laid down, with some additions, as the law of this State. It is unnecessary to contrast the case of *Gregory* v. *Paul* with the one at bar, or to consider further under what circumstances the absence of the husband from the State will excuse his nonjoinder in a suit of this description.

Nor do our other statutes authorizing married women in certain cases to maintain suits as if sole, enlarge the plaintiff's rights in a suit like this. Under § 3, c. 61, a married woman, may, if she pleases, prosecute suits at law or in equity for the preservation and protection of her property as if unmarried, and may maintain an action in her own name

to recover the wages of her personal labor, not performed for her own family.

But it was determined by this Court, in *Ballard & ux.* v. *Russell*, 33 Maine, 196, that the statute enabling her to sue for the preservation and protection of her property did not extend to rights of action for tort to the person.

The plaintiff's counsel urges that, if enabled to sue in her own name, without joining her husband, for the protection of her property, much more ought she to have that power for the protection of her liberty and reputation, when her husband is out of the jurisdiction, or his consent cannot be had to join in the suit.

The argument would be appropriately addressed to the Legislature.

The present state of the law requires that the entry in this case should be *Exceptions overruled.*

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

SARAH P. CHAPMAN *& als., in Eq.*, v. ANDROSCOGGIN R. R. COMPANY *& als.*

Sections 29 to 37 of c. 76, of R. S., do not permit a sale of an equity of redemption upon two or more executions jointly in favor of different creditors.

BILL IN EQUITY to redeem certain real estate from a mortgage.

The bill substantially alleges that on June 28, 1853, one John B. Jones, being the owner of certain land (described) of the value of $7000, mortgaged the same to one Chandler, since deceased, to secure said Jones' notes for $2000; that, on May 5, 1856, the right of redemption still remaining in said Jones, one Lincoln, a creditor of said Jones, attached

said Jones' right in equity on a writ against him; that, on May 6, 1856, one Longfellow, (one of the respondents,) also attached said right in equity on a writ against the said Jones; that said writs were duly served, returned and entered, and judgments rendered thereon at Augusta, at the November term, 1857, in favor of said Lincoln, for the sum of $1164,18, and in favor of said Longfellow, in the sum of $1144,43; that executions were duly issued on said judgments on January 8, 1858, which were duly delivered to one Clark, then sheriff of Androscoggin county, who then and there, within thirty days after the rendition of said judgments, duly seized, advertised and sold at public auction, all of the right of redeeming said premises which said Jones had at the time of said attachments, to said Longfellow, for the sum of $2500, or thereabouts, he being the highest bidder at said sale, in full satisfaction of said executions, as by said Clark's return thereon; that, on March 15, 1858, said Clark, by his deed duly executed, conveyed said Jones' right to redeem said premises to said Longfellow; that, on April 30, 1859, said Longfellow conveyed one undivided half of said premises to one Edward T. Chapman, for a valuable consideration, which deeds were duly and seasonably recorded; that the complainants, (the heirs of said Chapman,) are informed and believe that the heirs and legal representatives of said Chandler duly assigned said notes and mortgage to the defendant, Abial M. Jones, who afterwards assigned the same to the defendant railway company, and that, long after said attachments, said John B. Jones conveyed said premises to said Abial M. Jones; that, on Sept. 26, 1864, said Abial M. Jones duly conveyed said premises to said railroad company, who have ever since been in possession thereof, taking the rent and profits, amounting to $1200, besides the sum expended for repairs, &c.

The bill further alleges a demand and refusal to account, a tender of the amount due on said mortgage, a demand of a conveyance of the premises, and that the complainants are the legal representatives and heirs at law of the said

Chapman. The prayer is, that the respondents may answer, come to a joint account, and that the complainants be let in to redeem, &c.

The bill was returnable at Nov. term, 1865. The answer denied the right of the complainants to redeem the mortgage, because, among other things, the attempted sale of said equity of redemption was made by a single sale on two executions jointly. The answer contained numerous other averments, which the view, taken by the Court, renders it unnecessary to report.

A. G. Stinchfield, for the complainants.

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

KENT, J. — The complainants seek to redeem a mortgage. The respondents deny that the complainants have any legal or equitable right, title or interest in the premises, which entitles them to claim a right to redeem. This objection is open to the respondents, and the complainants must show such right before they can compel the mortgagee or his assigns to discharge the mortgage, or release to them. *Smith* v. *Dow*, 51 Maine, 21.

The title, under which this claim is made, is derived from a sale of the equity by the sheriff of Androscoggin county, on two executions against the mortgager. The respondents set up the claim that the mortgager had no equity or interest at the time of the sale on execution, but that his equity had been before the sale conveyed to another, and afterwards, by the grantee, to them. The complainants' answer to this is, that attachments had been made, in the suits on which the executions issued, before the conveyance by the mortgager. Several questions have been made and ably argued, arising from the proceedings in making and perfecting the attachments and the sale on executions, and the acts and proceedings of parties in and out of Court, touching the premises.

There is one objection made, which reaches beyond all these matters, and involves the title of the complainants at

its very inception, and, if sustained, is fatal to the claim now made, of being the legal owners of the equity sold by the sheriff.

It appears by the return on the execution, *Longfellow* v. *Jones*, that the officer, as he says, "in obedience to the within writ of execution, and another writ of execution, R. G. Lincoln against John Smith & others," (one of whom was Jones,) "and in order to satisfy the same, I have taken the right in equity." He afterwards says: — "I sold said right in equity of redemption at public auction on the aforesaid executions." He further certifies that he applied the proceeds to the satisfaction of that execution and the balance to the satisfaction of the other execution, and that both executions were in his hands at time of taking the right in equity.

The return on the other execution is similar in all respects, except that it states that he had applied enough to pay this execution and the balance to the payment in full of the other execution.

The precise question is, whether a single, joint sale, made on two executions in favor of different parties against the mortgager, is such a sale of an equity of redemption as will pass the title. The sale is one authorized only by statute. A failure to comply with any of the substantial requirements of the statute renders the proceedings void, and leaves the title to the land unaffected. *Smith* v. *Dow*, 51 Maine, 27; *Jewett* v. *Whitney*, 51 Maine, 244.

The sale of an equity is authorized by statute. R. S., c. 76, § 29 to 37. This statute manifestly contemplates a single sale of a single equity, but does not authorize a sale of two or more distinct equities, together, and for a single sum. *Smith* v. *Dow*, before cited.

Does the statute authorize a sale of a single equity, on and by virtue of two distinct judgments and executions, by a single sale?

No doubt the same equity may be sold on different executions, at different times, as the same land may be levied on by different creditors. If the last attaching creditor sells the

equity, the first attaching creditors may, of course, subsequently seize and sell the same equity, and the title under the last sale will prevail over the other. And if the attachment, first in time, proves to be invalid or fatally defective, and the same equity is sold on a subsequent attachment, which holds good, the last sale will be effectual to pass the title. But can an officer, holding several executions, seize and sell the equity on all or any two of them at same sale and as one sale? The provisions of the statute seem all to point to a sale on one execution only. There are no provisions as to the mode of proceeding in case of a single sale on two or more executions. But there are distinct provisions to meet the possible and not uncommon case of a sale which produces more money than is required to satisfy the execution on which the equity or other property is sold. Ch. 84, § 21. The surplus or residue is to be applied towards the payment of other executions in the hands of the officer against the same debtors, in the orders in which attachments were made or executions served, and the residue, (if any,) to be paid over to the debtor. *Hinckley* v. *Bridgham*, 46 Maine, 456. If the Legislature had intended to give an authority to the officer to sell goods or other property on and by virtue of all the executions in his hands, either at one sale or by successive sales, they would have so declared, and would have provided a mode for apportioning the proceeds. There is clearly no necessity for such joint sale, for the law now secures all rights in a simple and effectual manner. It looks only to a single and entire sale, for a single price, on a single execution, leaving the proceeds to be appropriated in the mode and on the principles indicated. No other mode is suggested or provided for, and none is needed. The subsequent attaching creditors, or those who have delivered executions to the officers do not receive any part of the money, on the ground that the property has been sold on or by virtue of their executions, but simply on the ground that there is a sum of money in the hands of the officer which the law sees fit to

appropriate to the creditors interposing, instead of the debtor himself. But, if there are no such interfering creditors, then the residue is to be paid to the debtor.

We should be slow to introduce by construction a new and unnecessary mode, complicated and embarrassing to all parties, and not alluded to in the statute. It must be remembered that these sales are authorized only by statute, and, if not in all essential particulars corresponding with its requirements, they are void or ineffectual.

There would be great difficulties, which, if not absolutely insuperable, yet are manifest and vexatious, arising from a single sale on more than one execution.

If there had been no attachments in the suits on which the executions issued, and the seizure and sale of the equity is on them all, for one price, how are the proceeds, if insufficient to pay all the executions, to be divided? Shall it be *pro rata* according to the amount of each execution, or equally among the creditors *per capita?* The rule given in the statute has reference only to a case where the sale has been made on one execution.

If there had been attachments, at different times, and, on a joint sale on all the executions, the proceeds are not sufficient to pay all of them, is the first attaching creditor to be paid in full and the residue to be divided among the others according to priority, or how is the division to be made?

If, in the above supposed case, the sale produces no more than is required to pay the first attachment, and it is applied to that purpose, the second will receive nothing, although the equity has been sold on his execution for the sum named and a full and formal return is made thereon by the officers.

There are also serious questions which might arise directly affecting the title sold and conveyed. If the sale is made on two or more executions, the title must rest on the returns and proceedings on all.

In case of two attachments, and a conveyance by the debtor after the attachments and before the sale on both

executions, and one of the attachments proves invalid for some cause, as against a subsequent purchaser, and the other attachment holds good, and the equity is sold on both for a sum much beyond the amount of the second execution, will the title pass? What would be done with the surplus money? And the title could rest only on the return on the second mortgage. It would resemble the case of the attempt to enforce a judgment on a lien claim which included claims not covered by the lien. It has been repeatedly decided that, in such a case, the lien is lost and defeated. *Bicknell* v. *Trickey*, 34 Maine, 273. And on such execution no right can be set up under the lien, because it has been lost by the intermixing of other claims. Now, in the case just stated, the sale being made on two executions, one valid against a subsequent purchaser and one invalid, is it to be regarded as if sold on the latter only? And, if so, to whom is the surplus to be paid? The subsequent purchaser would be met by the objection that he is not a judgment creditor, and has neither an attachment or execution, and therefore not within the provisions of § 21 of c. 84.

On an examination of the statutes bearing on this question, and the manifest intention of the law makers, — considering the difficulties and embarrassments, which must arise from a construction which would allow an officer to sell an equity of redemption or personal property at one sale on an indefinite number of executions, we conclude that such a mode could not have been intended. As this decision is necessarily fatal to the whole title under which the complainants claim a right to redeem, the entry must be

Bill dismissed, with costs for respondents.

Appleton, C. J. and Dickerson, J., concurred.
Walton, and Barrows, JJ., concurred in the result.
Danforth, J., did not sit.

WILLIAM H. BALDWIN *& al.*, *versus* JOHN HATCH.

An officer, holding funds arising from the sale of goods attached, may deduct a reasonable compensation for the expense of keeping and selling the same before applying the balance to the satisfaction of the execution, although the full amount of his charges is not taxed and allowed in the plaintiff's bill of cost.

The burden of paying such charges is upon the debtor and not upon the creditor.

An officer is not bound by the taxation of his fees in a suit in which he is not a party.

Aliter, with a party.

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

CASE against the defendant, as sheriff, for the default of his deputy, Josephus Stevens, for not applying and paying over to the plaintiffs money received from the sale of goods attached.

Plaintiff introduced the record of a suit *Wm. H. Baldwin & al.* v. *B. H. Osborn & al.;* the original writ, officer's return, with the memorandum of the clerk of the court thereon, showing that a hearing was had before him, by the counsel of the parties to the suit on the taxation of the costs, in the absence of the officer, and that the clerk deducted from the officer's fees the sum of $110. The defendant offered evidence to show that the officer was justly entitled to all the fees and charges returned on the writ, and for keeping and selling the goods attached; which was objected to by the plaintiffs on the ground that the taxation by the Court was conclusive; but the presiding Judge overruled the objection, and admitted the evidence. The defendant then proved the sale of the goods attached after an appraisal under the statute. He then proved that the amount of the sales of the goods attached was $1413,23; that the goods were attached on two other suits subject to plaintiffs' attachment, all the executions were put into his hands within thirty days from rendition of judgment, and

that he applied the money received from sale of the goods, (1,) to discharge prior mortgage, $297,12; (2,) $849,12 in full satisfaction of plaintiffs' execution against Osborn & al.; (3,) $214,34 in satisfaction of the second execution in his hands; (4,) and the balance on the third execution. He also proved that he paid to plaintiffs' counsel in the former suit $489,12, retaining in his hands the sum of $360,06, as his fees and charges.

Plaintiffs' counsel contended that if the officer was justly entitled to all he had charged he should have first deducted that sum from the fund in his hands, and from the remainder satisfy the plaintiffs' debt, and apply the balance in satisfaction of the subsequent attachments in the order in which they were made. The presiding Judge ruled that the appropriation adopted by the officer was correct, and submitted the case to the jury under appropriate instructions on the reasonableness of the officer's charges.

Plaintiffs' counsel also contended that the officer had charged more for the item "paid for rent of the store" than he had paid or was authorized to pay; but the presiding Judge ruled that the taxation by the clerk was conclusive. The verdict was for the defendant, and the plaintiffs alleged exceptions.

A. Libby, for the plaintiffs.

J. Baker, for the defendant.

WALTON, J.—The officer, (Stevens,) seems to have acted upon the supposition that he would not be authorized to deduct from the funds in his hands the expense of keeping and selling the goods attached unless the amount was first taxed and allowed in the plaintiffs' bill of cost. In this he was mistaken.

In *Twombly* v. *Hunewell*, 2 Maine, 221, only $30 were taxed and allowed for the officer in the plaintiff's bill of cost. The officer deducted from the funds in his hands $175, in addition to the $30 thus allowed, and the Court held that he was justified in so doing.

In *Tyler* v. *Ulmer*, 12 Mass., 168, Chief Justice PARKER, in declaring the judgment of the Court, says, "the expense of keeping is always eventually a charge upon the debtor; for the officer, if he pays that expense, will deduct it from the proceeds, before he pays them over to the creditor; and so much less of the debt will therefore be paid."

And in *Sewall* v. *Matton*, 9 Mass., 535, the Court went so far as to say that, "when an officer attaches the debtor's cattle, the debtor is bound to support them, after notice to him by the officer that they are attached; and if he neglects to do it, and they perish from that cause, the loss will be his."

And the *Revised Statutes*, c. 81, § 46, provide that when successive attachments have been made, and the property has been sold, the proceeds of the sale, after deducting necessary expenses, shall be held subject to the successive attachments as if the sale had been on execution.

The attaching officer was not a party to the suit in which the property was first attached, and was not bound by the taxation of his fees therein; and if enough was not therein allowed, he had a right to deduct from the funds in his hands a further sum sufficient to afford him a reasonable compensation; but this should have been done before he proceeded to satisfy the executions in his hands; he had no right to take money which had been appropriated to satisfy the plaintiff's execution for such a purpose, and thus throw the burden of taking care of the property upon the creditor instead of the debtor. *Exceptions sustained.*

New trial granted.

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

BARROWS, J., did not concur.

ALBION B. CASTON *versus* MONMOUTH M. F. INS. CO.

By virtue of § 2, c. 34, of the Public Laws of 1861, any application for insurance, drawn by an agent of an insurance company, is conclusive upon the company, although it contain a representation material and untrue.

In an action upon a policy, the defendants cannot, under the specification of defence that, "if the house was destroyed, as alleged, plaintiff never gave any legal notice thereof to the defendants," require the plaintiff to prove that he delivered to them, or their agent, as particular account of the loss, &c., as required by § 5* of c. 34.

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

In the application, the question was asked—"by whom are the premises occupied, and for what use?" The answer was—"self and family for farm use."

James M. Carpenter, called by plaintiff, testified:—

"I have been agent of the defendants for nearly seven years. I took the application of the plaintiff for this policy of insurance. I filled it myself. I inspected the premises and wrote it out from what I saw. I don't think Caston had anything to say as to how the premises should be described in the application. I wrote the answer to the question about the occupancy myself. The premises were sold by Parker to the plaintiff the same day the application was made, and Parker was in the house at the time but left in a short time after, and I made this statement in the usual manner. I made the writings between plaintiff and Parker and knew all the facts about the ownership and occupancy. I fixed

* Stat. 1861, c. 34, § 5. "In case of loss, under a policy against fire, the insured shall notify the company or its agent of the fire, and, within a reasonable time afterwards, shall deliver to the company or its agent, as particular an account of the loss and damage as the nature of the case will admit, stating therein his interest in the property, what other insurance, if any, existed thereon, in what manner the building insured, or containing the property insured, was occupied at the time of the fire, and by whom, and when and how the fire occurred, so far as he knows or believes; such statement shall be sworn to before some disinterested magistrate, who shall certify that he has examined the circumstances attending the loss, and has reason to, and does believe such statement is true," &c.

the sum to be insured on the buildings. The house was formerly insured in the same company for $150. I cut it down to $125, and plaintiff assented. The house was burnt in July, 1863. It was worth $200 at the time. After the fire, plaintiff applied to me to write the notice to the defendants, and I did. One of the directors, Mr. Holmes, came down to view and investigate the case. I went with him and showed him the place; told him what was burnt and what its value was.

Cross-examination. — This house was very old. I have known it twenty-five years, and it was old then. It had been kept in fair repair for a farm house, until recently. No one occupied the house, that I know of, after Parker left. I did not know, when I filled the application, that the plaintiff was to occupy it. Nothing was said about it that day. Plaintiff lived with me two-thirds of the time, that summer, but his home was at his mother's, 1¼ miles, by the road, from this house, and two-thirds of a mile, in an air line.

The remaining facts appear in the opinion.

J. Baker, for the plaintiff.

Libby, for the defendants.

Dickerson, J. — This is an action upon a policy of insurance against fire. After introducing evidence of his title, the policy of insurance, application, proof of the loss by fire, the amount of the loss, and notice, the plaintiff rested his case. Thereupon, on motion of the defendants, the Court ordered a nonsuit, and the plaintiff excepted.

It is argued in support of the nonsuit, —

1. That the representation in the application in regard to the occupancy of the house insured, was material and untrue.

The case finds that the application for insurance, including the valuation and description of the property, was drawn up by the agent of the company, who "knew all the facts about the ownership and occupancy." The statute of 1861,

c. 34, § 2, makes an application thus drawn up conclusive upon the company.

2. It is further argued in support of the nonsuit, that the plaintiff did not comply with the terms of the policy, and the requirement of the statute of 1861, c. 34, § 5, in regard to notice.

The plaintiff notified the company of the fire the next day after it occurred by letter, through the agent who effected the insurance. This was a compliance with the stipulation in the policy. No other notice was given; and the defendants insist that the plaintiff should also have delivered to the defendants or their agent "a particular account of the loss and damage," as required by § 5, c. 34, of the statute of 1861. The plaintiff replies that this objection is not open to the defendants under their specifications of defence. If the defendants can avail themselves of this ground of defence, they concede that it must be under the sixth specification, which declares that, "if the house and L were destroyed, as is alleged, plaintiff never gave any legal notice thereof to the defendants." The notice required by the statute does not differ materially from that specified in the policy, and given by the plaintiff. Statute of 1861, c. 34, § 5. There was no occasion for two notices of the same fact; the notice given by the plaintiff was a compliance with the statute in respect to notice as well as the policy.

The objection arising from the alleged non-delivery by the plaintiff to the defendants of "a particular account of the loss and damage," mentioned in the statute, is not open to the defendants, as they have not set forth this ground of defence in their specifications. Whether, if open to the defendants, it would avail them to defeat the action, has been seriously questioned, the plaintiff having given the notice required in the policy. *Fox* v. *Conway Fire Ins. Co.*, 53 Maine, 109.

This view of the case renders it unnecessary to consider

the question of waiver, and the other points raised by the plaintiff's counsel at the trial.

Exceptions sustained,
Nonsuit stricken off,
Case to stand for trial.

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

KENNEBEC & PORTLAND R. R. CO. *& als., in Eq., versus* PORTLAND & KENNEBEC R. R. CO. *& als.*

A railroad corporation and a portion of its stockholders cannot join as co-complainants in a bill to redeem the road from a mortgage, there being no allegation that the corporation has been guilty of any violation of its trust.

To constitute multifariousness as respects the subject matter of a bill, the different grounds of suit must be wholly distinct, and each must be sufficient as stated to sustain a bill.

If they be not entirely distinct and unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, all tending to one end; and if one connected story can be told of the whole, it is not multifarious.

All who have been so connected with the mortgages of a railroad sought to be redeemed, as to render them liable for income under it, should be made parties defendant.

Hence, where a bill was brought against a railroad corporation in possession, and a portion of its members, to redeem a railroad from a mortgage, alleges that all the individuals named as defendants fraudulently combined together in all the transactions set forth in the bill, of which the plaintiffs complain, and that they are all partakers of the income of the road which should equitably go in payment of the mortgage debt, and the defendant corporation took possession under the mortgage: — *Held*, there was no misjoinder of defendants.

Such a bill must allège that the defendant corporation holds, or has some title in the mortgage, or must aver information or belief to that effect.

It must also allege a formal offer to pay such an amount as may be found due; an averment of the demand for an account "in order that the complainants might pay," or the prayer to be "let in to redeem on payment," &c., is not sufficient.

Kennebec & Portland R. R. Co. *v.* Portland & Kennebec R. R. Co.

Where there is no allegation of the commencement of a foreclosure, but there is an allegation that possession has been taken as under R. S., c. 51, § 54, and that all claims secured by the mortgage have been paid, or have been so purchased that they should in equity be considered as paid, there need be no other allegation of payment, or of an adequate tender of the amount of overdue bonds and coupons.

BILL IN EQUITY. The case was heard on demurrer. The bill substantially alleges, that the Kennebec and Portland Railroad Company, a corporation, &c., and certain others named, stockholders and bondholders therein, complain against the Portland and Kennebec Railroad Company, a corporation, &c., Richard D. Rice, Darius Alden, Nathaniel M. Whitmore, Sarah Hagar, administratrix of the estate of Marshall S. Hagar, deceased, Geo. F. Patten, John Patten, Wm. D. Sewall, Jos. McKeen, Geo. F. Shepley, John B. Brown and Horatio N. Jose, that, in 1850, the Kennebec & Portland Railroad Company held and owned a railroad extending from Augusta through several towns (named) to Portland, and thence to a junction with the Portland, Saco and Portsmouth Railroad at Cape Elizabeth, with a branch road from Brunswick to Bath; that, in the construction of that portion of said railroad from Augusta to Yarmouth, including said branch road, said corporation issued certificates of stock known as "original stock," to the amount of $700,000, and issued and sold certificates of stock, known as "old preferred stock," to the amount of $240,000, in which last named, dividends of ten per cent. per anum were payable; that, to obtain means for constructing the road from Yarmouth to Cape Elizabeth, said corporation agreed with persons unknown, that, if they would furnish means to construct said portion of said road, exclusive of land damages, &c., said corporation would issue to them certificates of stock, known as Yarmouth stock, and secure to the holders thereof the whole income of said portion, until said persons were paid principal and ten per cent. annual income, and, if at any time, such income were insufficient to pay said dividends, said corporation would make it up to them and secure the payment by a first mortgage

of said portion of said road and franchise, to be held until said amount was fully paid, said portion then to become the property of said corporation; that said corporation issued to said contributors certificates to the amount of $204,200, on which ten per cent. dividends were payable and duly secured the same by mortgage to Reuel Williams, John Patten and J. B. Carroll, in trust, which trust said Williams, Patten and Carroll accepted; that, to construct and equip said road, said corporation, under due legislative authority, borrowed of certain cities and towns, and of certain persons unknown, $800,000, in money and scrip, and secured them by a mortgage of nineteen-twentieths of said road and franchise to commissioners of the sinking fund, provided by the Act authorizing said loan, and another mortgage of one-twentieth of said road and franchise to John Patten, Marshall S. Hagar and Joseph McKeen, in trust, subject to the former mortgage; that, in 1851, said corporation duly issued and sold bonds, known as the first mortgage bonds of the Kennebec and Portland Railroad Company, to the amount of $230,000, payable in twenty years, &c., and duly secured them by a mortgage to Patten, Hagar and McKeen, in trust, subject to the before named mortgages; that, in 1852, said corporation duly issued and sold in part, bonds known as the second mortgage bonds of the Kennebec and Portland Railroad Company, to the amount of $250,000, payable in twelve years, &c., and duly secured the same by a mortgage of said road and franchise to said Patten, Hagar and McKeen, in trust, subject to the previously named mortgages; that in 1854, said corporation duly issued and sold certificates of stock, known as "new preferred stock," to the amount of $120,000, payable, &c.; making the entire cost of said railroad and equipments, $2,544,200; that said Patten, Hagar and McKeen accepted said trusts; and that in 1853, agreeably to a vote of said corporation, said certificates of "old preferred stock" were surrendered and new ones issued to and received by the holders thereof, and the holders of Yarmouth stock relinquished for the benefit of

the holders of said "old preferred stock" four of the said ten per cent.; that, in 1857, said Patten, Hagar and McKeen, by reason of the breach of the condition of said mortgages, duly took possession and management of said railroad, franchise and furniture thereof, and continued to hold the same until 1864, taking all the income, rents and profits.

The bill further alleges that, in 1861, one Allen Lambard, Thos. J. Southard, Abner B. Thompson, said Alden, Whitmore, G. F. Patten and Wm. D. Sewall were duly elected directors of said company, and so continued until 1864, that said Lambard was duly chosen president of said corporation, which several trusts said president and directors respectively accepted; that it was their legal duty to faithfully administer the business of said corporation; that the said trustees in assuming the management of said road were holden to account to the complainants, the K. & P. R. R. Co., for the income and profits actually received and what might have been under efficient management; that they so carelessly, negligently and unskilfully managed the same, that the net earnings were less by $50,000 per annum than if the same had been managed faithfully and in accordance with the fair intents of their trusts.

The bill further avers, that the said trustees, while in possession as aforesaid, combining with said Alden, Whitmore, Sewall and Geo. F. Patten, directors as aforesaid, and a majority thereof, and with said Brown, Shepley and Jose, and with other persons, to the complainants unknown, all of whom, when discovered, the complainants pray may be made parties defendant hereto, contriving to obtain for themselves and their associates the possession, management and ownership of said road, franchise, &c., and deprived the complainants thereof, bought in for much less than the real value thereof, $700,000 of said "original," "preferred" and "Yarmouth stock," bonds, coupons, mortgages, &c., all of which the complainant company were liable to redeem, all of which, stock, &c., were so purchased with money belonging to said company, being the earnings of

said railroad, and by the said trustees, and while in possession, and by said Alden, Whitmore, Sewall and G. F. Patten, directors, and by the said Brown, Shepley and Jose, in connection with said trustees and directors, knowing them to be such and the purposes of such purchases.

The bill further alleges that Reuel Williams, in his lifetime, owning $500,000 of "original," "preferred," and "Yarmouth stock," secured by mortgage of the rolling stock of said road, offered to sell the same to said trustees, for the benefit of the Kennebec and Portland Railroad Co., for less than its value, viz., $113,000, but said trustees, contriving to obtain it for themselves and associates, wrongfully declined to purchase, and thereafterwards the same was purchased by said Rice and Alden for the benefit of said trustees and their said associates, and for the purposes aforesaid, for said sum, which was paid out of the earnings of said company; that instead of surrendering said stock, &c., to said company, as they ought, they claim to recover the same in full of said company.

The bill further alleges that the said Alden, Whitmore, Sewall, and Geo. F. Patten, a majority of said directors, combining with said trustees and their said associates, for the purpose of becoming owners of said railroad, in violation of their trusts, neglected to redeem said bonds, and, in 1863, the complainants, through their president, having brought a bill in equity to redeem the mortgages to secure said bonds, the said Alden, Whitmore, Sewall and Patten, without the knowledge of said Lambard, called and held a meeting of said board of directors, and voted to dismiss said bill, and the same was accordingly done.

It further alleges, said railroad and franchise has been of sufficient value, rightly managed, to have paid the interest upon and redeemed said bonds, and should have been so applied, but said trustees have applied the same to purchase stock, &c., for the benefit of themselves and associates, and allowed said interests to go unpaid, and said bonds, &c., to remain unredeemed; that, subsequent to 1863, but precisely

when, the complainants are not informed, but pray the respondents may discover when they, the P. & K. R. R. Co. were, as they claim, created a body corporate and became possessed of said railroad, &c., claiming to hold it by some title derived through the said Kennebec and Portland Railroad Company, the precise nature of which is unknown to the complainants, and they pray that the respondents may set forth specifically by what title they claim to hold it, if any, and have appropriated the same to their own use and have taken and appropriated the income thereof to their own use, and have not paid the dividends on said "preferred stock," nor the interest on said "first mortgage bonds," &c.; that said Portland and Kennebec Railroad Company, if they hold any legal title to said railroad, &c., which the complainants deny, took the same with notice of the said trusts, and of the equitable rights of the holders of said bonds and stock to demand and enforce payment of interest, dividends, and principal of said bonds, out of the income; that said trustees and directors and their said associates were members of said defendant company.

The bill further alleges, that said Rogers and others are the holders of a large amount of said stock, that said Rich is holder of a large amount of said "first mortgage bonds," on which nothing has been paid since April, 1856; that, in 1862 and in 1865, they duly demanded of said trustees and of the respondents, the Portland and Kennebec Railroad Company, a true account in writing of the amount due on the mortgages given to secure said first and second mortgage bonds, and of the income, &c., and money expended in repairs and improvements of said mortgaged premises, in order that they might pay and redeem the same, and that said trustees and the Portland and Kennebec Railroad Company have refused to render such account or to allow the Kennebec and Portland Railroad Company to redeem said mortgages.

The prayer was that the defendant company might answer; that the said Patten, Whitmore and Sarah Hagar may an-

swer whether or not said John Patten and M. S. Hagar, while trustees, were directly or indirectly interested in any purchases of stock, &c., issued by the complainant company, which said company was liable to redeem, &c., whether they were or were to be interested in the purchase by said Rice, whether they ever received any stock, &c., so purchased, when, how much, and what was paid therefor; that said Rice and Alden might answer whether the Williams purchase, &c., was made at the suggestion, &c., of said trustees, or by the direction of, or in behalf of the holders of said bonds; and whether, to their knowledge, information or belief, the said John Patten and Marshall S. Hagar, or either of them, were directly or indirectly interested in said Williams purchase, what amount of original, new and old preferred stock, Yarmouth stock, first and second mortgage bonds, coupons, and claims secured by mortgages on the rolling stock of said railroad, were purchased by them, or either of them, of the said Williams, and what disposition was made of the same by them or either of them, and whether they, or either of them, delivered or agreed to deliver any portion of said purchase, and, if so, what portion to the said John Patten, or to any one for him, to the said Marshall S. Hagar, or to any one in his behalf, to the said Whitmore, Sewall and George F. Patten, and the said Shepley, Brown and Jose, and how much to each, and what was paid therefor, if anything; and that the said Joseph McKeen may answer specifically, whether to his knowledge, information or belief, the said Williams purchase was made at the request, suggestion, or with the knowledge of said trustees or either of them, or by the direction of, or in behalf of the holders of said bonds; and that the said John Patten, Sarah Hagar, Joseph McKeen, Darius Alden, N. M. Whitmore, William D. Sewall, George F. Patten, George F. Shepley, John B. Brown and Horatio N. Jose may answer specifically what amount of stock, bonds, coupons and claims which your orators, the Kennebec and Portland Railroad Company, were liable to pay, they and each of them have

purchased or received, when, of whom, and at what prices, and that the defendants, the Portland and Kennebec Railroad Company, may state the amount of income received by them since they came into the possession and management of said railroad, and that they and the said trustees may be decreed to come to a fair and just account with the plaintiffs, the Kennebec and Portland Railroad Company, in respect to the net income of the said mortgaged premises, and may be enjoined from using or appropriating the income of said railroad property and franchise, otherwise than in accordance with, and fulfilment of the trusts and equitable liens charged upon the same by the Kennebec and Portland Railroad Company, as they shall be found by the Court.

And that the complainants may be let in to redeem the said mortgaged premises on payment to the defendants of what shall appear to be due to them, if anything, after deducting thereout what the said trustees and the said Portland and Kennebec Railroad Company have received or might have received, from the rents, profits and income of said mortgaged premises; and that the said defendants may be decreed to pay unto and account with the plaintiffs, the Kennebec and Portland Railroad Company, for what shall appear to be due, upon taking the said accounts, and deliver possession of the said mortgaged premises to the plaintiffs, the Kennebec and Portland Railroad Company, together with the furniture and rolling stock of said railroad and the books, writings and records relating thereto; and for further relief.

A. G. Stinchfield, for the complainants.

A. Libby, for P. & K. R. R. Co.

Bion Bradbury, for Brown & als., respondents.

DANFORTH, J.—This case is before us on a general demurrer to the complainants' bill. At the argument, several objections were raised; the first of which is, a misjoinder of plaintiffs. In this respect a corporation and a portion of its members are joined.

The bill shows, whatever it may be in other respects, that all its allegations charge the defendants with injuries to corporate property. To the property thus injured, the stockholders had no title or interest whatever; no right to intermeddle with it more than a stranger. "The corporation itself is regarded as a distinct person; and its property is legally vested in itself, and not in its stockholders. As individuals, they cannot, even by joining together unanimously, convey a title to it, or maintain an action at law for its possession, or for damages done to it. The artificial person, called the corporation, must manage its affairs in its own name, as exclusively as a natural person manages his property and business. The officers, though chosen by a vote of the stockholders, are not their agents, but the agents of the corporation, and they are accountable to it alone." *Peabody & al.* v. *Flint & als.*, 6 Allen, 55, 56.

Stockholders undoubtedly have an interest in the property and business of the corporation, which will be protected in equity when invaded. They have equitable rights which, when violated, may be enforced by equitable remedies. "The corporation itself holds its property as trustee for the stockholders, who have a joint interest in all its property and effects, and each of whom is related to it as *cestui que trust.*"

So long as the corporation is faithful to its trust, the stockholders, as individuals, have no occasion and no right to resort to or enforce any remedies, legal or equitable, to vindicate any injury to the corporate property. When it is guilty of a breach of trust, then, and only then, the relationship of the stockholders, arising from that trust, gives them a right to pursue the proper remedy to vindicate their rights. But, in such a case, it necessarily follows that the corporation must, or at least may be, a party defendant; for it is only the violation of the trust existing between the corporation and its stockholders, that gives the latter any occasion for a remedy. These principles appear to have been well settled. *Peabody & al.* v. *Flint & als.*, 6 Allen,

52; *Smith* v. *Hurd*, 12 Met., 371; *Smith* v. *Poor*, 40 Maine, 413; *Hersey* v. *Veazie*, 24 Maine, 9.

In the bill now before us, there is no allegation that the corporation, of which the plaintiffs are members, has been guilty of any violation of its trust, or in any way combined with the defendants to the injury of the plaintiffs, or refused to pursue such remedies as are open to them to protect their property. On the other hand, they are co-plaintiffs in this bill, and, so far as appears, assisting in its prosecution. No decree can be ordered in favor of these stockholders, either for an account or for redemption; for they have no right to the funds of the corporation, nor have they such an interest in the road as would give them a right to redeem. None can redeem except those who have some interest, however small, in the property to be redeemed. 2 Hoffman's Chancery Practice, 156 and note.

To be entitled to redeem property mortgaged, the person must show a title to the equity. 1 Vern., 182. It follows that there is a misjoinder of plaintiffs, for which a demurrer lies. Story's Equity Plead., §§ 232, 544.

Another objection raised to the bill, is, that it is multifarious as respects its subject matter, or a misjoinder of claims therein set out. "There appears to be no positive or inflexible rule as to what, in the sense of courts of equity, shall constitute multifariousness in a bill, but each case must in a great measure be governed by its own circumstances," and much must be left to the discretion of the Court. 1 Daniell's Ch. Pr., 343 and note. Nevertheless, when it clearly exists, a demurrer will be sustained. Story's Equity Plead., § 271.

To support this objection, two things must concur; "first, the different grounds of suit must be wholly distinct; secondly, each ground must be sufficient, as stated, to sustain a bill; if the grounds be not entirely distinct and unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, all tending to one end; if one connected story can be told of

the whole, the objection does not apply." Story's Eq. Plead., § 2716 and cases cited in note.

From the bill, we learn that the plaintiff corporation was the builder and original owner of the road therein described; that, becoming embarrassed for want of funds, among other means to relieve themselves, they executed and delivered to three of the defendants, as trustees, two mortgages of the road to secure the payment of certain bonds issued by the corporation, known as first and second mortgage bonds; that, in process of time, the interest on said bonds not having been paid, the trustees and mortgagees took possession of the road for breach of the condition of said mortgages. Then follows a history of the management of the road and the income thereof received by the mortgagees, and the other individual defendants, alleged to have wrongfully and fraudulently combined with them, until they became absorbed in and compose a new corporation; which new corporation is now, as stated in the bill, in possession of the road. Here is a series of transactions, not separate and entirely distinct, but forming one course of dealing, all tending to one end, that of, as alleged, absorbing the road and all its incidents, and all the defendants are combined together to accomplish that end. The statement of all these transactions was proper and necessary, in order to lay the foundation for the prayers for account and redemption. The transactions themselves are so mixed up and intimately connected that, if true, it is difficult to see how justice can be done between the parties without a knowledge of them. Therefore the demurrer, for this cause, cannot be sustained.

Another objection made to the bill is the improper joinder of defendants. If the bill can be sustained against any of the defendants, those only can demur who are improperly joined. Story's Eq. Plead., § 544. In this case it is alleged that all the individuals named as defendants fraudulently combined together, in all the transactions set out in the bill of which the plaintiffs complain. They are all alleged to have been partakers of the income of the road which should

equitably go in payment of the debts secured by the mortgages, therefore all should be held to account. The defendant corporation is now in possession of the road, and, if they took it under the mortgages, they took it subject to all payments which may previously have been made; therefore it becomes important that all who have been connected with the mortgage, in such a way as to render them liable for income under it, should be made parties. Story's Eq. Plead., § 190; *McCabe* v. *Bellows & al.*, 1 Allen, 269.

There is, however, another ground on which these individual defendants are properly made parties. They are all members of the defendant corporation, and this is a bill of discovery as well as relief. They have information important to the plaintiffs, and to which the plaintiffs have a right as the facts now appear. It is not necessary that each of the parties should be interested in the whole case. If they have information as to a part, and so connected with the real defendant as to entitle the plaintiffs to their disclosure under oath, without calling them as witnesses, they are properly made parties, even though no decree could be made against them. Such is the case with members of corporations. Story says, in his treatise on Equity Pleading, § 235, not only that officers, but "the members of corporations may also be made parties to a bill, either for discovery alone, or for discovery and relief, although they have no other interest, than as corporators, in the subject matter of the suit." See, also, 1 Daniell's Chancery Prac., 134; *Wright* v. *Dame & als.*, 1 Met., 237.

It is further contended that the bill, as a bill of redemption, is defective in several particulars. It is said that the bill can only be maintained on "payment, or on an adequate and sufficient tender of the amount of the over due bonds and coupons." This appears to be a necessary averment to sustain the bill under the 55th section of chapter 51, R. S. But it will be noticed that this section refers to the redemption of mortgages of railroads after the commencement of proceedings for the purpose of foreclosure. There is noth-

ing in the bill which shows the commencement of any such proceedings; hence, if the bill comes within any of the provisions of that chapter, it is rather under the fifty-fourth section, which provides that the trustees may take possession for the purpose of securing the appropriation of the earnings, or a portion of them, to the payment of such claims as are secured by the mortgage; and, when paid, the road to be surrendered. Accordingly, we find in the bill an averment that all such claims have been paid, or have been so purchased that they should in equity be considered as paid, which seems to be a sufficient averment as the facts now appear.

It is further objected that the bill does not aver that the defendant corporation holds the mortgages, or either of them; but denies all title in them; "nor is there any averment of information or belief, that they hold the mortgage title, or any portion of it." The bill is certainly defective in this respect. If it should appear upon answer and proof that they hold, as suggested in the bill, without title, then the plaintiffs would have an adequate remedy at law, and in such a case, as the bill now stands, if at all, the plaintiffs would not be entitled to a discovery even. It is upon this point that a discovery is asked, and, before it will be ordered, the proper averment must be made, to show that plaintiffs are entitled to it. It would not be according to the principles of equity, to proceed with the case until we have the requisite assurance that the plaintiffs are entitled to a hearing. They may be entitled to a discovery, but it can only be upon the ground of the necessary information, or belief, that the title, when discovered, would be such as to authorize the plaintiffs to proceed in equity.

It is also objected that the bill does not aver an offer to pay such an amount as may be found due. This is also a defect. This offer must be a formal one. The statement of the demand for an account, on the trustees, "in order that they might pay," or the prayer to be let in to redeem on

payment, &c., is not sufficient. R. S., c. 90, § 13; Story's Equity Plead., § 187, a.

The result is, that the bill is defective in the misjoinder of plaintiffs; in the omission to make the proper statement in regard to the title of the defendant corporation, they being the party in possession, and the want of the proper offer to pay the amount due. The first and last defects are amendable, as is also the other, if it can be done consistent with the truth, and will be allowed upon such terms as the Court at *nisi prius* may think proper.

The demurrer sustained, and, unless the bill is amended, it must be dismissed.

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

ASA GILES *& als., in Eq., versus* JOSEPH EATON *& als.*

An answer to a bill in equity, complete in every respect, cannot be treated as an answer until the party has filed it.

If he died before filing the same, it cannot be filed as an answer by the solicitor.

His executors may, however, consider how far and to what extent they can properly incorporate into their answer the facts set forth in the unfiled answer.

BILL IN EQUITY.

The bill was brought for the August term of this Court, 1865, and was duly served on defendants on the nineteenth day of May, 1865. Joseph Eaton, one of the defendants, deceased on the twenty-ninth day of August, A. D., 1865. On the first day of September, a paper, purporting to be the answer of Joseph Eaton and Stephen Young, was filed in the case by J. W. Bradbury, defendant's solicitor. S. Heath, Mary Eaton and Joseph Eaton were duly appointed executors on the estate of said Joseph Eaton, deceased, on

the twenty-fifth day of September, 1865. At the November term, 1865, of this Court, the death of said Eaton was suggested, and said executors appeared, and on the twenty-fifth day of said November term the following entry was made upon the docket in this case:—"Executors come in and ratify and adopt the filing of the answer of said Eaton." On the nineteenth day of February, 1866, plaintiffs' solicitor filed in the clerk's office a rule requiring the said executor to show cause why the bill should not be taken as confessed by them for want of an answer. The rule was seasonably served on defendants' solicitor.

At this (March) term, on a hearing of the question presented by said rule, the presiding Judge ruled that the said answer was properly in the case as the answer of said Jos. Eaton, and the rule was discharged. To which ruling the plaintiffs excepted.

A. Libbey, for the complainants.

J. W. Bradbury, for the respondents.

APPLETON, C. J.—It seems that Joseph Eaton, in his lifetime, prepared an answer to this bill and made oath to the truth of the same, as required by the rules for practice in chancery, but neglected to have it filed in the clerk's office before his decease. It would probably be desirable for the interests of his estate that the same should be regarded as filed. As it was not, the inquiry arises, whether we can regard that as done which was not done; in other words, whether filing an answer and not filing it, are equivalent or identical. The statement of the proposition would seem to be a determination of the question.

By the rules for practice in chancery, 37 Maine, 581, a special and limited time is given to the parties within which certain specified acts are to be done, and in which, if not done, the party neglecting is deemed to be in default. These times are to be determined by and calculated from the docket entries.

By Rule 6, the defendant is to make his defence to the

whole bill on the merits by demurrer, plea or answer, within sixty days after the entry of his appearance, unless exceptions are taken to the bill; and, in such case, within forty days after they are disposed of.

Exceptions to an answer, by Rule 8, should be drawn and signed by counsel and filed with the clerk, and notice thereof given within thirty days after the answer is filed. By Rule 27, the day of filing each paper will be noted on the back of it and also on the docket.

The time, therefore, which is given for exceptions is from the day of the filing, not from some unascertainable date, when the intention to file may have arisen in the mind of the individual, whose answer it would have been, had the intention been made effective by filing.

The defendant, until his answer is filed, may alter or amend, or refuse to place it on file, preferring to make a new answer. The answer remains as much under his control as a deed made, signed and acknowledged, remaining in the hands of the grantor and not delivered. He may never file it, and we cannot treat it as his answer, until, by his final act, it is conclusively seen to be so. If the defendant lives, it assuredly is not his answer within the rules of practice, until filed. If the defendant dies, his death does not any the more make it available, as an answer before filing. "The clerk of records and writs dates it the day it is brought into his office, numbers it, and receives it into his custody, the bill is then said to be filed, and of record, but before this process is completed it is not of any effect in Court, and persons to be made parties have no right to take copies of it." 1 Daniell's Chancery Practice, 454. The same rule applies to the answer.

So, in common law procedure, pleas in abatement must be filed within the time prescribed by the rules of Court, and if not so filed, they will not be received. Nor can a single judge at *nisi prius* dispense with these rules in a particular case. *Thompson* v. *Hatch*, 3 Pick., 512; *Tripp* v. *Brownell*, 2 Gray, 402.

The death of Eaton was a revocation of the power of his solicitor, who thereupon ceased to have authority to act in his behalf. The dead man had no solicitor and the filing of what, if Eaton had lived, might or might not have been his answer, was unauthorized.

Upon the death of Eaton, his executors were properly made parties. As no answer had been filed, it became their duty to file one. But the entry upon the docket is not the filing of an answer by them. It is their duty to file one, and it is for them to consider how far and to what extent they can properly incorporate the facts set forth in the unfiled answer of Eaton, in the one they may see fit to place on file.

While the answer of Eaton could not properly be regarded as on file, it by no means follows that the bill, as against the executors, must necessarily be taken as confessed. Under the circumstances of the case, they would be entitled to an enlargement of time, by filing a rule with the clerk, as provided by Rule 10. *Exceptions sustained.*

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

MICAH U. NORTON *versus* REUBEN KIDDER.

If the defendant, being cashier of a bank, receive, at the banking house, a certain sum of money from the plaintiff with instructions to appropriate it to the payment of a specific note signed by the latter, then undue; and he apply the same upon another note signed by the plaintiff, both of which are payable to said bank; and the plaintiff do not subsequently acquiesce in such application, the defendant will be personally liable in an action for money had and received to refund the sum thus received, with interest from the time when received.

And whether the defendant applied the money to his own use or to that of the bank is immaterial.

The facts do not constitute a voluntary or involuntary payment.

The refusal to give a requested instruction, sound as an abstract legal proposition, but inapplicable, is not open to exception.

Norton *v.* Kidder.

On Exceptions from *Nisi Prius*.

Assumpsit for $250, for so much money had and received, with a specification of two hundred dollars and interest, delivered July 14, 1862, to the defendant, then cashier of the Bank of Somerset, with directions to appropriate the same to the payment of a note on four months, for that amount, dated April 19, 1862, and payable to said bank, which money the defendant refused and neglected to so appropriate.

It appeared in evidence that said bank held a note described as above, signed by one Greenleaf, as principal, and by the plaintiff and one Bartlett, as sureties; that, about July 14, 1862, the plaintiff sent by one Jenkins $200, which the latter delivered to the defendant at said bank, with written and oral instructions to apply it to the payment of said note; that the defendant received the money, saying "he was not in the habit of receiving money before it was due, except by agreement, but that he would receive it on a $1500 note, signed by the plaintiff, as surety, and then overdue, and, if any objection was made, he would make it right by paying back the money or applying it to the $200 note, if he (Jenkins) would call again;" that Jenkins called again, in about a week afterward, and asked for the $200 note or a return of the money, which latter statement the defendant denied.

It further appeared in evidence, that Greenleaf paid $100, September 10, 1862, which was duly indorsed upon the $200 note, and that, on Sept. 28, 1863, the plaintiff paid under protest the remainder ($106,96) due on the same, claiming at the same time that the $200 sent through Jenkins should have been applied as directed, and that he should sue for it; that the defendant denied ever having received the $200, saying, if the plaintiff could show it he was responsible for it. The defendant's counsel requested the presiding Judge to instruct the jury; —

1. That, if they should be satisfied from the evidence that the defendant, in receiving and appropriating the $200,

claimed, acted as, and was the cashier of the Bank of Somerset; that this was known to the plaintiff at or before the time when he paid the balance of the $200 note; and that the defendant received to his own use or benefit no part of the $200 claimed, the plaintiff cannot recover, and their verdict should be for the defendant.

2. That if, when the plaintiff paid said balance, he understood the facts as they really were; and, if the $200 dollars sent to the bank in July, 1862, by Jenkins, should be regarded as payment of the $200 note, the payment of the balance, by the plaintiff, Sept., 1863, even if made under protest, and with the statement that he should sue the defendant for or on account of it, no legal grounds for an action would thereby be shown, and the plaintiff must fail.

3. That, if they should be satisfied, from the evidence, that the defendant did not receive said $200, or any part of it for himself, — that the same was received for said bank, and that the plaintiff knew the facts so to be when he paid said balance, this action could not be maintained, and the verdict should be for the defendant.

4. That each of the foregoing requested instructions should be given, if the jury should not be satisfied that plaintiff actually knew the facts, as supposed in the requests; provided, they should be satisfied from the evidence that he might have readily ascertained the facts by the exercise of ordinary care.

The presiding Judge, in order to give progress to the case, declined to give the requested instructions, but did instruct them: —

1. That, if the $200 were sent by the plaintiff with instructions to have the same applied to the payment of the $200 note, and the instructions were communicated to the defendant, and he applied the same on the $1500 note; and the defendant did not afterwards acquiesce in said application, their verdict should be for the plaintiff; and

2. In such case, the verdict should be for $200 with interest from the time when the defendant received it.

The verdict was for the plaintiff for $239,50, and the defendant alleged exceptions.

J. S. Abbott, for the defendant.

1. The defendant, in all he did, acted as the cashier of the bank, which was well known to the plaintiff. As soon as received, it was in the custody of the bank, and it was ever held by the bank. The bank, (if any party,) and not the defendant, is liable. Story on Agency, §§ 261–2–3–4, and authorities cited *infra*.

If the plaintiff is right in his position, the $200 note was paid and could not be subsequently collected. The legal proposition involved in the second requested instruction, is this: — A owes B a note which is in the hands of B's agent, C. A pays it to the agent, the latter having authority to receive it. The money is not indorsed, and C, afterwards calls on A in behalf of B, for payment of same. A has full knowledge of the facts, but pays it a second time under protest, and the funds are immediately placed by C, with the funds of his principal, B. Upon what principle can assumpsit for money had and received be maintained against C? A voluntary repayment of a debt, already known to be paid, cannot be recovered back in this form of action, whether paid under protest or not. *French* v. *Fuller*, 23 Pick., 108; *Forbes* v. *Appleton*, 5 Cush., 115; *Bacon* v. *Bacon*, 17 Pick., 134; *Brisbane* v. *Dacres*, 5 Taunt., 144; *E. Sudbury* v. *Sudbury*, 12 Pick., 5; *Boston & Sand Glass Co.* v. *Boston*, 4 Met., 187–8; *Brown* v. *McKinnally*, 1 Esp., 279; *Gilpatrick* v. *Sayward*, 5 Maine, 469; *Norton* v. *Marden*, 15 Maine, 46; *Norris* v. *Blethen*, 19 Maine, 348; *Weeks* v. *Thomas*, 21 Maine, 465.

3. If any action would lie against the defendant, it is not assumpsit, but only a special action on the case. Story on Agency, § 264; 1 Chitty's Plead., 358.

The rule of damages was erroneous. Plaintiff has only paid the balance of the $200 note, viz.; $106,94, in consequence of the misappropriation of the $200, and hence should only recover that amount.

The jury would have been justified in finding that the plaintiff was not damnified, inasmuch as the $200 was appropriated to his own debt.

S. D. Lindsey, for the plaintiff, cited *Foster & al.* v. *Essex Bank*, 17 Mass., 512; 2 Greenl. on Ev., § 119.

DANFORTH, J. — The verdict of the jury establishes the fact that the plaintiff sent to the defendant the sum of $200 for a special purpose, and that the defendant received the money, knowing the purpose for which it was sent, and immediately misapplied it. It is, however, contended that the action cannot be maintained, and certain instructions to this effect were requested. First, it is alleged that the defendant was cashier of the Bank of Somerset, and that, as such, he received the money for and in behalf of the bank. It will be noticed that this money was not sent to the defendant to be paid to the bank absolutely, but only on condition, which condition was not complied with; all of which was within the knowledge of the defendant. He therefore paid it into the bank without authority and in his own wrong. It was a misfeasance from the consequences of which, according to well settled principles of law, his agency cannot screen him. For which reason the first requested instruction was properly refused.

The second requested instruction may be good law, but is not applicable to this case. The $200 note, referred to, was not payable when the money was sent, and the defendant, as he had a right to do, refused to apply the money to its payment. In no sense, then, could the note be said to have been paid, and, if sued, the action could not have been successfully defended on that ground. Besides, the present suit was commenced to recover the money sent, and no claim is made for any part of the money paid on the note.

No question of voluntary, or involuntary payment is presented, and the second requested instruction was rightfully withheld.

The third requested instruction is similar to the first. The final payment of the $200 note is of no consequence, except as proof of the continued misappropriation of the money sent.

From these principles it necessarily follows that the instruction given is correct. The money was sent by the plaintiff to the defendant for a particular purpose, which purpose was communicated to him. He declined compliance with the request, and immediately applied it to another purpose. Whether defendant applied it to his own use or to that of another is immaterial, as, in either case, it is equally withheld from the plaintiff, to whom it belongs. Neither is he relieved by the fact that he paid a debt of the plaintiff with it, for without his (plaintiff's) assent, he had no more right to do this than to pay the debt of any other. In a legal view the plaintiff was damnified; for his money, to which he was entitled, immediately upon defendant's refusing to comply with his request as to its appropriation, has been withheld from him. The amount which he is entitled to recover, is the amount withheld and interest in accordance with the instruction.

Exceptions overruled. — Judgment upon the verdict.

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

STATE *versus* DANIEL W. HAM *& als.*

By virtue of R. S., c. 131, § 4,* a person substantially charged in an indictment with the commission of an assault and battery, as well as of a riot, may be convicted of the former and acquitted of the latter.

ON EXCEPTIONS from *Nisi Prius.*

INDICTMENT.

* See opinion.

D. D. Stewart, in support of the exceptions.

J. A. Peters, Att'y Gen'l, contra.

APPLETON, C. J. — The defendants were indicted for a riot, for that they "with force and arms at Hartland aforesaid, in the county aforesaid, unlawfully, riotously and routously did assemble and gather together to the disturbance of the public peace, and being so then and there assembled and gathered together, in and upon one Joel T. Stafford, then and there unlawfully, riotously and routously did make an assault, and the said Joel T. Stafford then and there unlawfully, riotously and routously did beat, wound and ill-treat," &c. Under this indictment the defendants were found guilty of assault and battery, and not guilty of a riot.

By R. S., 1857, c. 131, § 4, "when a person, indicted for any offence, is acquitted of a part by the verdict of a jury, and found guilty of the residue thereof, such verdict may be received and recorded by the Court; and he may be considered as convicted of the offence, if any, which is substantially charged by such residue, and be punished accordingly, though such offence would not otherwise be within the jurisdiction of said Court."

The indictment substantially charges a riot with an assault and battery.

Under an indictment charging four with riot and a riotous assault and battery, one may be convicted of an assault and battery and the others acquitted generally. *Shouse* v. *Commonwealth*, 5 Barr, 83. "When a count in the indictment," remarks BURNSIDE, J., in delivering the opinion of the Court in the case just cited, "contains a double averment, it is the province of petit jury to discriminate and find the divisible offence; and this distinction runs through the whole criminal law." *Exceptions overruled.*

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

AMANDA LAWRENCE *versus* DAVID P. CHASE.

An oral agreement to execute and deliver a writing obligatory to convey real estate, upon the terms and conditions therein mentioned, is within the fourth clause of the statute of frauds.

If the defendant would take advantage of that statute, in an action for the breach of such an agreement, he must do so by some proper plea.

The plaintiff conveyed her farm to one W., receiving back a writing obligatory to reconvey upon the conditions therein specified, which obligation she assigned to the defendant in consideration of his oral agreement to redeem and take a deed of the farm from W., and then execute and deliver her a similar writing to reconvey to her whenever, within three years, she should pay him whatever should be reasonably due for services and expenditures. The defendant redeemed and took a deed of the farm from W., but refused to execute and deliver said obligation, and conveyed away the farm to D. In assumpsit, for breach of the agreement, — *Held*, that, under the general issue, the damages were the actual value of the farm, after deducting the amount actually paid by the defendant to redeem, and such other sums paid out and for services rendered by him at her request, as she had agreed to allow.

The bill of exceptions must show upon what ground a request for an instruction to the jury, that the action on trial cannot be maintained, was based, in order to render the refusal exceptionable.

A defect as to the time and place, at and to which a writ is made returnable, may be amended on motion, after a general appearance by the defendant and the expiration of the time for filing pleas in abatement.

ASSUMPSIT for breach of an alleged oral agreement to execute and deliver a bond to convey real estate.

The writ was made upon a Franklin county blank, commencing "Franklin, ss.;" it was signed by the clerk of the court for Franklin County, dated Aug 20, 1864, and made returnable to the Supreme Judicial Court, to be held at "Norridgewock, in said county, on the third Tuesday of August, 1864." The action was entered at the September term in Somerset County, at which term the defendant appeared by his attorneys, and the action was continued to the December term. On the third day of the December term, DANFORTH, J., presiding, permitted the plaintiff, against objection, to amend the writ as to the time and place at and to which it was made returnable, and the defendant excepted.

The writ contained a count for money had and received, with a specification of the amount of money received by the defendant for a farm belonging to the plaintiff and by her conveyed to one Whitney, receiving back a bond for reconveyance, which bond was assigned by the plaintiff to the defendant. Also a special count alleging, substantially, that, in May, 1862, the plaintiff was possessed of a writing obligatory, dated Aug. 21, 1861, and signed by one Geo. W. Whitney, wherein he obligated himself to reconvey to the plaintiff the farm which she had on that day conveyed to said Whitney, upon the conditions therein mentioned; that, at the special request of the defendant, the plaintiff then transferred and assigned said bond to him upon the consideration and agreement of the defendant that he would redeem said farm from Whitney, and, after redemption, he would give the plaintiff his bond to reconvey the same to her upon her paying to him what should be reasonably due for the same at any time within three years; that the defendant did redeem said farm, May 29, 1862, and receive a deed thereof from Whitney; that the plaintiff demanded of the defendant his said bond, which was refused; that the defendant, on June 1, 1863, sold and conveyed away the farm for $800; and that it was worth $1500, &c.

Plea, general issue and joinder; and the following among other specifications of defence was filed.

2. There was no agreement, express or implied, at the time of the assignment of said writing obligatory, or at any other time, by which the defendant bound himself, in any manner, to make, execute and deliver to the plaintiff any bond or writing obligatory whatever. Nor was he, by the terms of said assignment, in any manner bound to do so.

In argument to the jury, the defendant contended that the action could not be maintained on the special count, and requested the presiding Judge, (DICKERSON,) so to instruct the jury, which he declined; but he did instruct them:—

That, if the plaintiff had proved the allegations in the special count, she was entitled to recover on that count, and

the measure of damages would be the actual value of the farm, after deducting the amount of money actually paid by the defendant to relieve it from incumbrances, and such other sums paid out, and for services rendered by the defendant at plaintiff's request, as plaintiff agreed to allow defendant in just payment of her claim against him.

The defendant also requested the presiding Judge to instruct the jury that any promise made by the defendant to the plaintiff, after he received a deed from Whitney, to account to her for the proceeds of any sale of said farm, would be without consideration and invalid in law; but the presiding Judge, in addition to other instructions, instructed the jury:—

That, if the defendant obtained the deed from Whitney in consideration of delivering to him the obligation he gave the plaintiff and paying him the amount of Whitney's claim against her, the plaintiff would be entitled to recover on the money count, after the defendant had sold the land and received the money therefor, with or without any such promise.

The jury returned a verdict for the plaintiff, for $839,50, and the defendant alleged exceptions.

The remaining facts sufficiently appear in the opinion.

Wright & Barrett, for the defendant.

1. The writ was void. *Cranmer* v. *Van Alstyne*, 9 Johns., 386. Hence not amendable. *Cranmer* v. *Van-Alstyne*, 9 Johns., 386; *Burk* v. *Barnard*, 4 Johns., 309; *Bunn* v. *Thomas*, 2 Johns., 190; *Bell* v. *Austin*, 13 Pick., 90. Not being returnable at any term, Court had no jurisdiction; and appearance of the defendant conferred no jurisdiction. *State* v. *Bonney*, 34 Maine, 223; *Bailey* v. *Smith*, 3 Fairfield, 196; and *Bragg* v. *Greenleaf*, 14 Maine, 395, not inconsistent with the above.

2. The agreement set out in special count was within statute of frauds and the first requested instruction should have been given. R. S., c. 111, § 1; *Norton* v. *Webb*, 35 Maine, 218; *Steele* v. *Adams*, 1 Greenl., 3; *Norton* v.

Preston, 15 Maine, 14; *Blood* v. *Hardy*, 15 Maine, 61; *Boyd* v. *Stone*, 11 Mass., 342; *Sherburne* v. *Fuller*, 5 Mass., 133; *Patterson* v. *Cunningham*, 3 Fairfield, 506, and cases there cited. Plaintiff's remedy is in equity.

Instruction upon money count was inconsistent with that on special count, and tended to mislead the jury. If the plaintiff was entitled to recover under the special count, the amount would be the reasonable damages sustained by the breach of the contract, without reference to the amount the farm sold for. If under money count, she was entitled to the amount of her money in his hands as trustee, after deducting all legal claims against her. Counsel also submitted an elaborate brief in support of the motion.

J. H. Webster, for the plaintiff.

WALTON, J.—If the defendant would take advantage of the statute of frauds in an action to recover damages for the breach of an oral agreement within its provisions, he must do so by some proper plea. The proper plea is sometimes a demurrer, sometimes the general issue, and sometimes a special plea in bar. Which is the proper one to use can always be determined by a simple inspection of the plaintiff's declaration. If the declaration sets out a parol promise, a demurrer is the proper plea. If the declaration sets out a written promise, the general issue, "never promised in manner and form," &c., is the proper plea. If the declaration avers a promise merely, without stating whether it is or is not in writing, then a special plea in bar, denying that it is in writing, is the proper plea. The form of such a special plea is given by Mr. Chitty. 3 Chitty's Plead., 909. Under our system of pleading, such a special plea can of course be in the form of a brief statement filed with the general issue, provided a proper foundation for it is laid in the specifications of defence.

The reasons for requiring such a special plea are, that the statute of frauds does not make contracts within its provisions illegal; it only secures to the defendant an immunity,

which he may avail himself of or not as he sees fit; and if he sees fit to avail himself of it he should say so, clearly and distinctly, at the outset, and not by a general traverse put the plaintiff to the trouble and expense of proving the promise set forth in his declaration, and then for the first time make his election not to abide by it. Such a course is trifling with the Court. The defendant has no right thus to compel the Court to spend its time in trying an issue which he does not intend to abide by.

It was to avoid just such a covert and crooked course of proceeding, that the statute was passed requiring defendants in civil actions to file with the clerk a written specification of the grounds of their defence, fourteen days at least before the next term after the entry of the action, and the rule established that they shall, in all cases, on the trial of the actions, be confined to the grounds therein set forth. Nothing is easier than for parties to comply with this simple provision of law. If a party desires to take advantage of the fact that his promise was not made within six years before the commencement of the suit, and is therefore barred by the statute of limitations, he must say so. If he desires to take advantage of the fact that his promise is not in writing, and is not therefore binding upon him, he must say so. He cannot omit all mention of these grounds of defence in his specifications, go to trial upon the general issue, and then for the first time insist upon the benefit of them. Browne on Stat. of Frauds, §§ 508, 513; *Cahill* v. *Bigelow & trustee*, 18 Pick., 369; R. S., c. 82, § 18; Rule 9, of this Court.

This view of the law disposes of the principal questions discussed in this case. The plaintiff, in her declaration, avers a promise or agreement on the part of the defendant to execute and deliver to her his writing obligatory to convey to her certain real estate, upon certain terms and conditions therein named. Such an agreement is undoubtedly within the fourth clause of the statute of frauds; (BROWNE on Stat. of Frauds, § 266, and authorities there cited,) and

this fact, if the defendant had seasonably and in a proper manner taken advantage of it, might have defeated the plaintiff's suit at law, and driven her into equity for a remedy against the fraud thus attempted upon her, or, perhaps she could have avoided the difficulty by an amendment of her writ, charging the defendant with the value of the consideration which she had parted with, and recovered upon an implied promise to pay a reasonable compensation therefor, which the defendant would not be allowed to rebut by setting up an express promise not binding upon him, and which he had elected not to be bound by; for the law seems to be well settled in favor of such a recovery; (Browne on Stat. of Frauds, § 117,) but this the defendant did not do, and we think the point is not now open to him. He went to trial under the general issue, and a broad denial of any agreement, express or implied, and permitted evidence of a parol agreement to be introduced without objection; and, now that the issue which he chose to present has been found against him, we think it is too late for him to set up the statute of frauds. No such ground of defence is mentioned in his specifications, (and there was no motion to amend them,) and so far as the case discloses, no such ground was taken at the trial. The case shows that the defendant's counsel argued to the jury, and requested the presiding Judge to instruct them, that the action could not be maintained; but the ground on which his argument and request were based does not appear. It may have been upon the statute of frauds, but the case does not show it, and we are not at liberty to go out of the case to ascertain how the fact was. Besides, if the objection was not taken till after the closing arguments were commenced, for the reasons already stated, we think it was then too late. The defendant chose to go to trial upon an issue which he probably thought more honorable than one based on the statute of frauds, and we think he must abide by the election he then made.

This view of the law disposes of so much of the excep-

tions as relate to the rulings of the presiding Judge in relation to the maintenance of the suit. We see nothing in them of which the defendant can justly complain.

Nor do we see any error in the rulings of the presiding Judge on the question of damages. If the defendant had performed the engagement which the jury have found he made, the plaintiff could have regained the title to her farm, by paying the defendant what he had paid out to relieve it from incumbrances, and such other sums as she had agreed to allow him for money paid and services rendered. The damage to her, by non-performance, would therefore be the value of the farm, minus those sums. This was the rule given by the presiding Judge to the jury, and we have no doubt it was the correct one.

But it is claimed that, upon this rule, the damages are too large, and a motion is made to have the verdict set aside for that reason. Let us see. The jury found specially the value of the farm to be $1060. The defendant pretended to have claims against the farm amounting to $412; but he admits that this amount was made up from recollection; that he had no account against the plaintiff; and she denies most of the items testified to by him. Deducting the amount of the verdict, $839,64, from the value of the farm, and we find that the jury allowed him $220,36; and we are not prepared to say, in view of all the evidence in the case, that this was not enough.

The defendant excepts to the allowance of certain amendments of the writ. The defects were such as could only be taken advantage of by plea in abatement, within the first two days of the term when the action was entered. This not having been done, the objection, when made, was too late, and the amendments were properly allowed.

Motion and exceptions overruled.

Judgment on the verdict.

APPLETON, C. J., DICKERSON, BARROWS and DANFORTH, JJ., concurred.

Caleb Patterson *versus* Austin Eames *& als.*

By virtue of the Public Acts of the third session of the Thirty-seventh Congress, c. 4, § 5, a poor debtor's bond, executed Feb. 9, 1863, without being stamped, may be used in evidence in an action upon it, provided it be duly stamped in presence of the Court.

So, by virtue of the Public Acts of the first session of the Thirty-eighth Congress, c. 173, § 163,* a magistrate's certificate of the administration of the poor debtor's oath, dated Aug. 8, 1863, may be given in evidence in defence of such action, provided it be duly stamped in presence of the Court.

An officer may serve a citation upon the creditor, and, upon the latter's neglect or unreasonable refusal, the former may appoint one of the justices to hear the disclosure of the debtor, although such officer be one of the sureties in such debtor's bond.

On Report.

Debt on a bond, given to the plaintiff as execution creditor to procure a release from arrest on execution, signed by Austin Eames as principal, and Samuel Bunker and another as sureties. Plea, general issue and brief statement alleging performance of one of the conditions of the bond by disclosing and taking the oath prescribed in c. 113, § 28 of the Revised Statutes. Defendant objected to said bond being received in evidence, upon the ground that it

* *Act* of 1st session of 38th Congress, c. 137, § 163. "No deed, instrument, document, writing or paper, required by law to be stamped, which has been heretofore signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be * * admitted, or used as evidence in any court until a legal stamp * * denoting the amount of duty, shall have been affixed thereto, and the date when the same is so used or affixed, with his initials, shall have been placed thereon by the person using or affixing the same; and the person desiring to use * * any such deed, instrument, document, writing, or paper, as evidence, his agent or attorney, is authorized, in the presence of the court, register, or recorder, respectively, to affix the stamp or stamps thereon required: — *Provided*, that no instrument, document, or paper, made, signed, or issued, prior to the passage of this Act, without being duly stamped, * * * shall, for that cause, if the stamp or stamps required shall be subsequently affixed, be deemed invalid and of no effect," &c. Approved, June 30, 1864. The other Congressional Acts cited in the opinion are similar, limiting the time when instruments could be subsequently stamped, to Jan. 1, and March 1, 1863, respectively.

had no revenue stamp affixed to it. The plaintiff's attorney thereupon, in presence of the Court, affixed to said bond the proper stamp, and put on said stamp the date when so affixed with his initials. The bond was then admitted subject to objection.

The defendant offered in evidence a certificate of the administration of the oath prescribed in c. 113, § 28, R. S., to the said Eames, by two justices of the peace and quorum, in the usual form, dated August 8, 1863, which was objected to because it was not duly stamped. The defendants then, in presence of the Court, affixed and cancelled the legal stamp, and thereupon the certificate was admitted subject to objection.

The plaintiff then proved that Samuel Bunker, who was proved to have been a deputy sheriff for the county of Somerset, one of the defendants and a surety on the bond in suit, served the citation upon the plaintiff, under which the disclosure was made, and also, in the absence of the plaintiff, selected one of the justices who acted in said disclosure, and administered said oath and made out and signed said certificate. The case was withdrawn from the jury and reported to this Court, who were to enter judgment in accordance with the legal rights of the parties.

A. H. Ware, for the plaintiff.

1. The certificate was improperly admitted. (1.) Because it was void when issued. Acts of 2nd. Sess. 37th Cong., c. 119, § 5. (2.) Because no subsequently enacted statute can give validity to a void instrument.

2. Bunker, being surety on the bond, could not legally serve the citation; and, if he could,

3. He, being interested, could not select one of the justices. *Winsor* v. *Clark*, 36 Maine, 110; *Hesketh* v. *Braddock*, 3 Burr, 1847; the latter case is where an interested officer returned a juror, and the court quashed the proceedings.

Getchell, for the defendant.

CUTTING, J. — Debt on a debtor's bond, releasing him from an arrest on execution, dated Feb. 9, 1863, upon which, at the trial, the revenue stamp in the presence of the Court was properly affixed, as also was that to the certificate of the magistrates, who administered the oath, dated Aug. 8, 1863. See Acts of Congress, approved Dec. 25, 1862, March 3, 1863, and June 30, 1864.

The documentary evidence, therefore, introduced by each party, was legally admissible.

But it is contended, by the plaintiff, that the discharge of the magistrates was ineffectual for want of jurisdiction, because one of them was appointed in the absence of the creditor by Samuel Bunker, who, as deputy sheriff, served the citation, and was interested as one of the debtor's sureties on the bond.

By R. S. of 1857, c. 113, § 24. — "The citation shall be served on the creditor by an officer qualified to serve civil process between the same parties." Was the officer so qualified? Chap. 80, § 9, of the same revision, provides that "every sheriff and each of his deputies shall serve and execute, within his county, all writs and precepts issued by lawful authority. Sec. 42 creates the only exception, which is, that — "every coroner shall serve and execute, within his county, all writs and precepts in which the sheriff thereof or his deputy is a party."

Was Bunker, the officer, who served the citation, a party? He was not. *Walker* v. *Hill*, 21 Maine, 481, where it was decided that a deputy sheriff, the sole party in interest, but not of record, could serve the writ. In that opinion, the Judge misrecited § 60 of c. 104, by the interpolation of the word "interested," which does not appear in the section, or in any other section of that or any subsequent revision. Had the citation been correct, the decision was erroneous, unless, as was probably the case, the service had been made prior to the enactment.

The officer, then, could not only "serve the precept on which the debtor was arrested," but was, if it had been pre-

sented to him, under legal obligation so to do, and consequently to appoint one of the justices upon the neglect or refusal of the creditor. R. S., c. 113, § 40. In the performance of such duty he acted ministerially. His interest was remote and contingent. He could not anticipate that the creditor would not appear and select a justice, or that such a justice, if selected by himself, would act corruptly by disregarding his official oath. *Plaintiff nonsuit.*

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

JOSEPH HEWETT & *al. versus* JOHN H. ADAMS & *als.*

Under R. S., c. 47, the Court must adjudicate that the assets are insufficient to pay the claims against the bank, before the receivers can file their bill in equity against the stockholders.

And the allegations in such a bill, that such adjudication had been made, can be proved only by the record of a judgment, to which the bank was a party.

Docket entries, made under a petition to which the bank was not a party, are not sufficient.

It seems, that the petition of the bank commissioners for the appointment of receivers, &c., duly entered and continued upon the docket, until such adjudication, would be the proper process under which all the proceedings should be had prior to the filing of the bill.

BILL IN EQUITY, by the receivers of the Shipbuilders' Bank, against certain persons alleged to be stockholders therein. The case has been before the Court on demurrer. See 50 Maine, 271. The case was heard on bill, answer and proofs.

On Dec. 28, 1854, Thomas Jewett and James Hovey, Bank Commissioners, complained to RICE, J., in vacation, that the Shipbuilders' Bank was insolvent, and prayed for a temporary injunction and the appointment of a time and place for a hearing. A decree of temporary injunction and order of notice, were duly made and issued, returnable

Jan. 10, 1855, when, upon a full hearing, the injunction was made perpetual, and Joseph Hewett, Alvord Levensaler and Abiel W. Kennedy were appointed receivers, who thereupon gave the bond required by the statute.

No entry was ever made upon the docket of the Court of the complaint for injunction, nor of any of the proceedings, relating to either the temporary or perpetual injunction against the bank; nor was any record of any of said proceedings or injunctions ever made in any county in the State.

At the January term, 1859, William Wilson and als., entered a petition in Lincoln county, alleging themselves to be creditors of said bank, &c., and praying that the receivers be required to execute their duties or be removed, &c.; upon which notice was ordered. On Jan. 25, the receivers submitted their first report and the entry thereof was made under the entry of this petition. The report was ordered to be filed, and the receivers "forthwith to settle and adjust all matters relating to the affairs of the bank; and they are hereby directed to file a bill in equity, against the stockholders, to compel each and all of them, to pay in to them, the amount of their stock, in accordance with the statute; and the money and funds, now in their hands, to be kept at interest, until further order of Court." Other reports were subsequently made of the names.

No other entry, or record, was ever made of either of the reports of the receivers, or any action of the Court or any justice thereof, concerning them, except that contained upon the docket under said petition of Wilson & als.

The remaining facts sufficiently appear in the opinion.

Peter Thacher & Brother, for complainants.

A. P. Gould, for Adams & others.

Wm. G. Crosby, for Harris & others.

J. H. Drummond, for Bryant & others.

DANFORTH, J.—The plaintiffs, as receivers of the Shipbuilders' Bank, file their bill against certain persons alleged to be stockholders therein, and liable for the bills issued by it and remaining unpaid at the expiration of the charter.

The bill has been before the Court upon demurrer which was overruled. It now only remains to consider whether the material allegations, all of which have been denied in the answers, have been proved by competent testimony.

The liability of stockholders for the payment of unredeemed bills, at the time this bank was chartered, was founded upon § 45, c. 77, R. S. of 1841. Subsequent sections provided a remedy to enforce this liability.

By the law of 1855, c. 164, subsequently incorporated into the R. S. of 1857, when receivers were appointed for any bank, an entirely different remedy was provided for the holders of bills, the liability of the stockholders, by an express provision of the law, remaining the same.

By this law, the receivers, in behalf of the claimants, are to file a bill in equity. But before this can be done, certain prerequisites are necessary. The amount of the bank's indebtedness, and its insolvency are first to be ascertained. For this purpose, all claims are first to be laid before the receivers for their examination and allowance. After which, the receivers are to make a detailed report of their doings to the Supreme Judicial Court, which is to be accepted, if no objection is made thereto, and the Court is satisfied of its correctness.

The receivers are also to report to the Court the amount and value of the assets in their hands, whereupon the Court adjudicates upon the question of insolvency. And, upon this adjudication depends the authority of the receivers to file their bill. The acceptance of and judgment upon the report of claims by the receivers, would seem also to fix the amount due from the bank and the persons to whom due.

Hence, in the bill, after the allegations of the appointment and qualification of the receivers, which appear to be

sustained by the proof, it is alleged that the required reports were made and the necessary adjudications followed.

Have these allegations been proved by legal evidence. If so, it would be a judgment of Court which would be binding upon the bank, and the stockholders, as being in privity with the bank, thereby setting at rest most of the questions raised in the argument of counsel, leaving to be determined only the questions as to who of the defendants are stockholders. If no such judgment is proved, then the bill was filed without authority, and there would be no proof as to any unredeemed bills of the bank, for none other is offered.

This adjudication is in fact a judgment of the Court, and, as such, must be proved by its records, and by them alone.

There seems to be some proof of an adjudication by the Court upon reports offered, though, for aught that appears, it has never been extended upon the records. Certain docket entries are offered in evidence, by which it appears that Wm. Wilson & als., claiming to be creditors of the bank, at the January term, 1859, of this Court, in Lincoln county, filed their petition, asking that the receivers might be required to execute their trust, or be removed, and that they be required to make a report of their doings, and of the amount and value of the assets in their hands. This was duly entered upon the docket as an original process. The receivers appeared by their counsel, and made the reports asked for. It does not appear that these reports were accepted at this term, but it does appear that an order was passed requiring, among other things, that they should settle the affairs of the bank forthwith, and file a bill in equity against the stockholders to compel them to pay the amount of their stock, according to the statute. At the two subsequent terms, this petition was left off the docket. But, at the January term, 1860, on motion of petitioners and by order of Court, it was brought forward, another report made by the receivers and accepted by the Court. And then, the Court adjudge the assets of the bank insufficient to pay its

liabilities. These facts appear by docket entries only, and all of them entered under and as relating to the matter of the petition of Wilson & als., and apparently intended as a disposition of the matters in controversy contained therein, and between the parties thereto. We do not perceive that the judgment of Court could go any further, and settle any controversies not raised in the precept, or be binding upon persons not parties or privies.

It will be noticed that, in this petition the receivers were called upon to give an account of their stewardship, as officers of the Court, and not as representatives of the bank. The object was not to settle the amount due from the bank, but to require the receivers to do their duty and close up their labors. It is not easy to see how the bank can, in any legal sense, be considered a party to this petition, or be bound by anything done under it. And yet, this is all the evidence we have of any judgment of the Court as the foundation of this bill, or of the amount of the liability of the stockholders.

On the other hand, there ought to have been a process in Court to which the bank would be a party, and under which the proper adjudications might have been made. The receivers were appointed under petition from the bank commissioners, after notice issued, and in which the bank is respondent. True, this was done before a Justice of the Court in vacation, where no entry or record of Court was or could be made. But when receivers were appointed they were under the control of the Court, and the jurisdiction of the Court, as well as all its subsequent doings relate back to, and depend upon the original process, and are incidental thereto until the end is reached, which, in the case of insolvent banks, is when the reports of the receivers are adjudicated upon. *Atlas Bank* v. *Nahant Bank*, 23 Pick., 480, 486.

To this original process the bank is a party, and remains so to the end. Other parties may come in, particularly

when the receivers make their report, as is provided by the statute. But this does not change the original parties.

Although a part of the proceedings under this process, as the beginning of it, may be done under the direction of a Justice of the Court in vacation, and without a record, yet something must be done in Court, and that must be recorded and proved by the record, and, when entered, the original process should be entered and recorded or some entry made, so that it shall appear as part of the original process, and done under and by virtue of it.

Now, it does not appear that this original process, nor any other to which the bank was made a party, was ever entered in Court. The bank, as a party, has never been in Court at all. How then can any judgment be rendered which shall bind it? No matter how open the doings of the Court may be, or how publicly its discussion of matters which may affect the interests of any party, such party is not bound to appear, and cannot be concluded by any such doings, until called in by a proper notice and such as can be proved by a record. It is undoubtedly true, that, when once in Court, a party is bound to take notice of the doings of the Court in relation to that process by which he is called into Court; and it is not to be presumed that the Court will proceed until the party has had an opportunity of being heard. But no such presumption as this prevails, until the party is once brought into Court by due notice.

For this reason it does not help the matter to consider the report of the receivers an independent entry, and not a part of the petition or process under which it appears upon the docket. For, still there would seem to be, not only an entire want of any proof of notice, but satisfactory evidence that no notice was given.

But, it is said that the receivers are the bank, and, being a party to the report and in Court, they thereby become a party to the judgment and it becomes binding upon the bank, and upon the stockholders.

No authority, however, is cited to show this entire swal-

lowing up of the bank in the receivers. True, it is, that in many respects they represent the bank. So, in many others, they act for the creditors. And, in this instance, two of them, at least, would appear to be creditors. In allowing claims, they may be considered rather as commissioners of insolvency, and not as agents of either party. And, then again, all the authorities seem to concur in considering them as officers and servants of the Court, while the statute authorizing their appointment and regulating their proceedings would seem to recognize the bank as still having an independent existence, for certain purposes at least.

The bond of the receivers runs to the bank; suits for the collection of demands may be commenced in the name of the bank; if the bank should prove to be solvent, the balance of its property is to be returned, not to the stockholders, but to the bank. And, as we have already seen, and what would seem to be conclusive in the case, the bank remains a party to the original process until its close. And, as such party, is by the statute entitled to be heard on the acceptance of the receivers' report, and, when objection is made in writing by any claimant, is entitled to a jury trial. Sec. 71, c. 47, provides that, when either party requests it, a trial may be had by a jury, with all the incidents of a jury trial.

If, then, the bank and receivers are not one and the same, there does not seem to be any proof of any judgment of Court which would be authority for the commencement of this process, nor any proof that there is any amount of unpaid bills for which the stockholders would be liable.

The judgment proved is in another process, for another purpose, and between other parties, one of which, the bank, had no notice, in the rendering of which it has had no opportunity to be heard, and not being bound by it, neither can it bind the stockholders. If these records were merely informal, — if there was enough in them to show that the party interested, and now objecting, had had an opportunity to be heard, and substantial justice had been done,

then the Court, having control of its own records, would have them amended so as to conform to the fact, and be careful that no party should suffer for any neglect or want of knowledge on the part of its officer. But, in this case, the difficulty is not so much with the record as with the facts. There is an attempt to bind a party by a judgment in which he has had no opportunity to be heard, thereby violating one of the fundamental principles of justice as held by all judicial tribunals.

This right to be heard in matters affecting our interests is a most sacred one, and should, on all occasions, be most carefully guarded. *Bill dismissed.*

WALTON, DICKERSON and BARROWS, JJ. concurred.

KENT, J., did not concur.

The following opinion was submitted by

APPLETON, C. J.—Bank Commissioners are public officers, appointed for the discharge of certain specified duties.

By R. S., 1857, c. 47, § 57, in case of over issue or other misconduct on the part of any bank, the bank commissioners are authorized to make complaint "to any Justice of the Supreme Judicial Court, who shall thereupon summon such bank, by a notice to its president or cashier, to appear before him, at a time and place appointed, to answer to such complaint and show cause why an injunction should not issue against it." Any Justice before whom these proceedings are had, may issue an injunction, and, "after a full hearing of the bank upon the matters aforesaid, (its alleged delinquencies,) may dissolve, modify or make perpetual the injunction; make all needful orders and decrees to suspend, restrain or prohibit the further prosecution of the business of the bank, according to the course of chancery proceedings; at his discretion, may appoint receivers to take possession of its property as hereinafter provided, subject to the rules and orders from time to time prescribed by said Court, or any Justice thereof in vacation."

This section obviously refers to judicial proceedings to

be entered upon the docket of the Court and become a matter of record, though, to guard against any sudden emergency, when prompt action might be required to protect the public, authority is given for the action of a single Judge in vacation.

It authorizes the appointment of receivers, who are officers of the Court, subject to its rules and orders and amenable to its authority, — with certain duties to perform, and whose reports, as to the manner of their performance, are made to and accepted or rejected by the Court, and, if accepted, become a part of its records.

The rules for the guidance of the receivers are to be prepared by the Court, or by a single Judge, the statute thus recognizing a process pending, while authority is conferred upon a single Judge in vacation, in case no Court should be in session.

The receivers are officers of the Court, not of the Judge by whom they may happen to be appointed. They are the officers and representatives of the Court. They are entitled alike to its advice and protection. Their appointment is in a particular suit and they continue only to act during its pendency. The suit ended, their official existence ends. There can be no receiver without a cause to which his action must relate.

When the Act incorporating a bank is repealed, the charter is regarded as having expired. *Crease* v. *Babcock*, 23 Pick., 335. Such, too, would be the case upon the final decree upon proceedings in behalf of the bank commissioners. Until the final decree of the Court perpetually enjoining corporate action, a bank would seem to have a qualified existence.

The bank commissioners, after their action under § 57, seem to have proceeded no further. Their complaint was never entered in Court, as it should have been, for it is not possible that the Legislature ever intended that there should be a judgment of sequestration, by which the whole estate of a corporation shall be taken from its control and dispos-

ed of by others without a formal decree of the Court affirming such action duly entered upon its records. That this is so, will be abundantly apparent by recurring to the subsequent sections of the Act under consideration.

By § 70, "all claims and demands are to be laid before the receivers for examination and allowance." "They shall make a report in detail to the Supreme Judicial Court at such time as the Court directs, specifying all claims presented and the amount allowed in each case, which shall be accepted, if no objection is made thereto, and the Court is satisfied it is correct and ought to be allowed."

This section obviously refers to action by the Court in reference to the report of one of its officers, upon matters submitted to such officer, arising in a cause pending before it. The Court cannot act judicially upon a cause not upon its docket. The report of a receiver, like that of an auditor, relates to some suit already existing and pending. The Court adjudicates upon the report thus offered, accepting or rejecting it, as it "is satisfied it is correct and ought to be allowed" or not.

By § 71, objections by claimants may be made to the acceptance or rejection of claims, "and the Court shall hear the parties and determine the case." If either party requests it the Court may direct an issue to be made up and submitted to the jury. Questions of law, arising in the course of the proceedings, may be made and carried before the full Court in the manner provided in actions in Court.

The report of a receiver is not to be entered as a new and substantive proceeding by itself, and as a new action in Court. "The course of chancery proceedings" must govern. It is to be entered under the complaint by the bank commissioners, to which it relates, and under and by virtue of which all the proceedings since the original complaint have been had and to which they refer as growing out of, and being parts and necessary consequences thereof. An issue of law cannot be directed, nor can questions of law be raised, when there is no cause pending, as would be the case, if the

complaint is not entered. The section presupposes the existence of the complaint of the bank commissioners as pending upon the docket of the Court.

By § 72, the receivers are to report to the Court the amount and value of the assets in their hands belonging to such bank. "When the claims against a bank have been ascertained and determined by the Court, or by the Court and jury upon an accepted verdict, * * * the Court shall order the proceeds of the assets to be applied to the payment thereof."

All these proceedings are to be according to the course of chancery. Reports to the Court are made by its officers and accepted or rejected,—but they all grow out of and are necessary sequences of the original proceeding which is still pending. An issue may be made up and submitted to the jury precisely as in equity when, upon a bill pending before him, the chancellor directs an issue.

By § 73, "if it appears to the Court" that the assets are insufficient to pay the claims against the bank, "the receivers shall forthwith file their bill in equity, in their own names, but in behalf of the claimants, against the persons liable as stockholders," and upon the hearing the Court shall determine and assess what the several stockholders shall pay, &c.

The authority to commence a bill is not given to the receivers in the first instance, and as a part of their official duty. It may never become necessary. It will hardly be pretended that a bill could legally be filed before these reports are made, or while litigation in reference thereto is pending. The bill is to be filed, after the insufficiency of the assets of the bank to pay the claims against it have been made to appear to the Court, by the reports of its receivers, made in conformity with its orders and duly accepted.

All except the preliminary proceedings are to be in open Court, at regular terms thereof, and, of necessity, imply some process pending upon its docket to which they relate and from which they legitimately flow.

It is apparent, therefore, that the complaint of the bank commissioners should be entered and remain upon the docket until the final decree of the Court. It was the duty of the bank commissioners to see that such entry was made, and to supervise the proceedings instituted by them for the public protection. The mere making a complaint under § 57 was but the beginning of official action. They were as much bound to attend to the proceedings consequent upon the complaint as they were to make it. They made a complaint and then left it to shift for itself.

By § 73, as already observed, no bill is to be filed until it appears to the Court that the assets of the bank are insufficient to meet the claims against it, and the amount of claims and assets are to be ascertained as prescribed by the preceding sections. All these sections negative action in vacation or by a single Judge and require that of the Court at one of its regular terms. They imply some cause upon its docket, in which reports are to be made and accepted or rejected.

The bill was before the Court upon demurrer. 50 Maine, 280. It alleged the existence of the prerequisites necessary by statute for its maintenance.

The cause is now before us upon bill, proof and answer, and it appears that the bank commissioners proceeded under § 57 to procure an injunction and appoint receivers, — and that no further action in the premises was had by them. They never entered their complaint upon the docket of the Court. The receivers never made any report of the claims against the bank, in any process between the commissioners and the bank, as required by § 70. The claimants had no opportunity in such suit to contest the claims allowed and disallowed, as provided by § 71. There was no report of assets to the Court and no order of distribution by the Court, as directed by § 72. There is no adjudication that the assets are insufficient and that a bill in equity should be brought by the receivers under § 73. All these deficiencies are apparent. They must have existed, for there was no

complaint against the bank upon the docket, and no Court can properly take cognizance of proceedings not pending before it.

The petition of William Wilson & als. v. the receivers, praying that they may be required to execute their duties or be removed, was an anomalous proceeding, unknown to law or equity practice, and unauthorized by any statute. It was entered as an action upon the docket. But any party, in any suit, might as well, as these petitioners, have petitioned the Court that his opponent should be ready to proceed to trial, or do some other act required for the speedy disposition of a cause pending. The paper filed and its entry are at variance with the recognized and well established rules of procedure. The entries under this petition cannot affect the rights of those now litigating before us. The respondents are strangers thereto. They neither appeared nor were notified to appear in that proceeding, and are not concluded by any entry made therein.

All the orders of the Court under the complaint instituted by the bank commissioners against the bank, which should have been entered upon the docket at the term next after it was made, the various reports of the receivers, the motions relating to their acceptance or rejection, and the orders of Court thereupon, should have appeared as in that suit. Instead of this, there was no original entry, and consequently what took place after the first action of the Judge in vacation was without actual or constructive notice to those whose interests were to be determined by the adjudication of the Court. A final decree of a Court presupposes anterior proceedings to which it applies, and upon which it is based. But when there has been no entry of the bill or complaint, it is difficult to perceive how there can be a final decree.

The original action of the Judge in vacation, and the appointment of receivers, was in accordance with § 57, and it is owing to the negligence of the commissioners that the

proper entry of the complaint was not duly made and that the subsequent proceedings are fatally defective.

Bill dismissed, without cost to either party.

CUTTING, J., dissenting.—The Shipbuilders' Bank was incorporated by a special law of this State, on March 7, 1853, subject to the usual restrictions and liabilities of banking corporations. During that year the bank was duly organized and went apparently into successful operation.

The liabilities of banking corporations, at that time, were created by force of c. 1, § 45, of the Act of Amendment to the revision of 1841, which provides that,—

"The holders of stock in any bank, at the time when its charter may expire, shall be liable, in their individual capacities, for the redemption and payment of all bills, which may have been issued by said bank, and which shall remain unpaid, in proportion to the stock they may respectively hold at the dissolution of the charter."

Section 60, directs the Governor, with the advice of the Council, to appoint two bank commissioners, who, by § 61, are authorized and required to visit every bank in this State, as often as they deem it expedient for the public safety, &c.

Section 62. "If, upon examination of any bank, said commissioners shall be of opinion that the same is insolvent, or that its condition is such as to render its further progress hazardous to the public, or to those having funds in its custody, or that said bank has exceeded its powers, or has failed to comply with all the rules, restrictions and conditions provided by law, they may apply to some one of the Justices of the Supreme Judicial Court, to issue an injunction to restrain such corporation, in whole or in part, from further proceeding with its business, until a hearing of said corporation can be had. And said Justice shall forthwith issue such process; and, after a full hearing of the said corporation upon the matters aforesaid, may dissolve or modify, or make perpetual the same; and make such orders and decrees to suspend, restrain or prohibit the further prosecution

of the business of said corporation, as may be needful in the premises, according to the course of chancery proceedings; and, at his discretion, may appoint agents or receivers to take possession of the property and effects of the corporation, subject to such rules and orders as may from time to time be prescribed by the Supreme Judicial Court, or any Justice thereof in vacation."

The foregoing section and its reënactment, by § 57, c. 47 of R. S. of 1857, are the only provisions authorizing the bank commissioners to apply to this Court for a temporary or permanent injunction, or the Court, or any Justice thereof, to grant the same. Other provisions in the statutes refer to the remedies of the creditors of a bank, who neglect to pay any of its bills, when duly presented, and, upon certain facts appearing, require the Court to appoint three receivers and require bonds, instead of two or more, as in case of injunction, without a provision for bonds, but confer no power to grant *injunctions*. It is necessary that this distinction should be noted, since it obviates many points raised by the respondents' counsel. *Hewett* v. *Adams*, 50 Maine, 280.

On Dec. 28, 1854, the bank commissioners, as the exhibits show, made a written application to Judge Rice for an injunction against the Shipbuilders' Bank, for causes therein alleged. A temporary injunction was accordingly granted, which, on January 10, 1855, after a hearing by the bank, was made perpetual by an order and decree, wherein "the said corporation, its stockholders, officers and agents were prohibited, restrained and enjoined from the further prosecution of the business of said corporation;" and thereupon receivers were appointed, as provided by § 62, before cited, who were required to "demand and receive of the officers of said bank, all its real and personal estate, with all its books, papers, title deeds and evidences of debts due said bank,"—and to "proceed with due diligence to sell and dispose of said property and collect the debts due said corporation, and with the proceeds thereof to pay the claims

against said corporation, in such manner and at such times as thereafter should be ordered by the Supreme Judicial Court, or any Justice thereof," &c.

Thereupon the chartered rights of the corporation terminated. *Wiswell* v. *Starr*, 48 Maine, 401; recognized in *Hewett* v. *Adams*, 50 Maine, 279 and 283; in which case the Court remark, on page 280, that "the proceedings under § 62 and § 67 have a different origin and contemplate different results."

Such was the law and such were the incipient proceedings in this case up to March 16, 1855, when an additional Act was passed, c. 164, § 6, which provides that, "if it shall be made to appear to the Court that the assets aforesaid are insufficient to pay the said claims against the bank, said receivers shall, forthwith, file their bill in equity in their own names, but in behalf of the claimants, against the persons who are or were stockholders in such bank, and who by law may be liable to contribute to the payment of its debts. And they shall be cited to appear before the Court or Judge upon such notice as he shall order to be given."

The mode and manner by which "it shall be made to appear to the Court" is disclosed in § 3. "And said receivers shall make a report in detail to the Supreme Judicial Court, at such time or times as the same shall direct, specifying all claims presented, and the amount allowed in each case; which report shall be accepted, if no objection shall be made thereto, and the Court shall be satisfied the same is correct." § 4. "When such report shall be presented to the Court for acceptance, any claimant, whose claim shall be disallowed in whole or in part, or any claimant interested in the rejection of any claim, may make his objection and the Court shall hear the parties and determine the same," &c. By § 5, when the assets are insufficient to pay the claims allowed, then "it has been made to appear to the Court."

The foregoing provision was remedial, otherwise it could not have affected past transactions, and might not, as it was, except for § 8, which enacts that,—"The foregoing provis-

ions shall be construed to apply to all cases where receivers have been already appointed and have not yet liquidated and paid the demands against any bank." The receivers in this case, being within such predicament, were embraced within that provision, but without the loss of their official identity as receivers of a corporation annihilated by a perpetual injunction.

Next in the order of time appears the Revision of the Statute of 1857, c. 47, which is a reënactment of previous laws relating to banks, arranged and consolidated. § 57 corresponding with § 62 of the R. S. of 1841, and § 60 with § 67. And by § 64, the same distinction between the two sets of receivers is manifestly recognized.

We have thus seen that the bank commissioners, after having filed their complaint and procured a perpetual injunction, have discharged all their statute duties, and, consequently, are no longer in Court, and that the bank disappears for the same cause. That record is then made up. A new record only remains to be made of subsequent transactions between the receivers of the corporation funds, and the creditors or claimants.

Who then "shall make it appear to the Court" that the funds in the hands of the receivers are insufficient to pay the claims? The bank cannot — the stockholders will not. It must then be the claimants.

So it appears, that, at the January term, 1859, William Wilson and others, creditors of the bank, filed their petition against the receivers, requiring them "to make to the Court a detailed report of their doings, and of the amount and value of the assets in their hands." Whereupon, after due notice, by order of the Court at the same term, the receivers filed their report and vouchers, showing a large bank indebtedness, and were ordered to "file a bill in equity against the stockholders, to compel each and all of them to pay in to them the amount of their stock, in accordance with the statute." At the January term, 1860, further action was

had on the report, and, to cure any seeming defects, the same was accepted.

The bill was acordingly filed on or about May 10th, 1860, which is now before us, together with the respondents' several answers and the proofs.

It is now contended by the respondents, and is the material objection raised in defence, that the acceptance of the receivers' detailed report, and the action of the Court thereon, was in response to Wilson and others' petition, and that no person other than those therein named had legal notice of its pendency. That is an objection which neither of the respondents is authorized to make. They were never parties in any of the prior proceedings, and there is no law requiring them to be made such. What persons are permitted to make objections to the receivers' report when presented?

An answer to this inquiry carries us back to the sections of the statutes already cited. See § 71 of c. 47 of R. S. of 1857. "When such report is so presented, any claimant interested in the decision of the receivers in the allowance or rejection of any claims, may make his objection," &c.

No claimants have ever objected, and do not now object, but, on the contrary, some of them, and for aught that appears, all of them, or at least a part for the whole, were the petitioners for acceptance of the report and for the proceedings in chancery.

When a party asks the Court, having jurisdiction over the subject matter, to nullify or set aside their recorded proceedings, it should appear that the party has been aggrieved, and the allegation should be sustained by proof. None such appears.

All the documents disclosing the whole proceedings are filed in the clerk's office. From these and the docket entries a record can be made up, which is never done until the termination of the suit.

JOSEPH H. EASTABROOK *versus* THE UNION MUTUAL LIFE INSURANCE COMPANY.

The condition in a policy of life insurance, "that in case the insured shall die by his own hand, or in consequence of a duel, or the violation of any state, national or provincial law, or by the hands of justice, this policy shall be null, void and of no effect," does not include suicide by an insane man in a fit of insanity.

ON EXCEPTIONS.

There was also a motion to set aside the verdict as against evidence, but no question of law was raised in connection with it.

ASSUMPSIT on a policy of insurance on the life of Joseph H. Eastabrook, jr.

The policy contained the following provision, "that in case the said Joseph H. Eastabrook, jr., shall die by his own hand, or in consequence of a duel, or the violation of any state, national or provincial law, or by the hands of justice, this policy shall be null, void and of no effect."

The insured committed suicide, and the plaintiff alleged, and offered evidence tending to prove, that it was done in a fit of insanity.

The presiding Judge instructed the jury, *inter alia*, that, if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff would be entitled to recover.

The verdict was for the plaintiff, and the jury found specially "that the self-destruction was the result of a blind and irresistible impulse over which the will had no control," and that "the self-destruction was not an act of volition;" and the defendants excepted.

Thacher, for defendants.

A. S. Rice, for plaintiff.

APPLETON, C. J. — The plaintiff effected an insurance upon the life of his son, Joseph H. Eastabrook, jr., who in

a fit of insanity on the 30th. day of July, 1864, committed suicide.

In the policy there is an express condition "that in case the said Joseph H. Eastabrook, jr. * * shall die by his own hand, or in consequence of a duel, or the violation of any state, national or provincial law, or by the hands of justice, * * this policy shall be null, void and of no effect."

Is suicide by an insane man in a fit of insanity within the above condition?

Upon this question there has been a great diversity of judicial opinion. In England, the majority of the Court of Common Pleas, in *Borradaile* v. *Hunter*, 5 Man. & Gran., (44 E. C. L.,) 637, held that a policy containing a proviso that in case "the assured should die by his own hand or by the hands of justice, or in consequence of a duel," was avoided, though the assured at the time of committing the act "was not capable of judging between right and wrong." In *Clift* v. *Schwabe*, 3 Man., Gran. and Scott, (54 E. C. L.,) 437, the language of the policy was that "every policy effected by a person on his or her own life should be void, if such person should commit suicide or die by duelling or the hands of justice." It was held, by the majority of the Court, that it was immaterial whether the assured at the time of his self-destruction was or was not a responsible moral agent. "It will, however, be observed, that the authorities against this decision are very strong. POLLOCK, C. B., and WIGHTMAN, J., dissented from it and to them may be added CRESWELL, J., in the Court below, and it may be inferred that TINDALL, C. J., and ERSKINE, J., would have done so on the authority of *Borradaile* v. *Hunter;* ALEXANDER, C. B., and Lord TENTERDEN, C. J., from their decisions at *Nisi Prius*, in the unreported cases cited in the notes to that case; and perhaps Lord St. LEONARDS, C., who, referring to the principal case, adds in a note "*sed quere* the decision." Bunyon on Life Assurance, 75. In this country there will be found a similar variety of opinion. In

Breasteed v. *The Farmer's Loan and Trust Co.*, 4 Hill, 74, the Supreme Court of New York held that the words "shall die by his own hand," have reference to an act of criminal self-destruction. This view of the law was sustained upon appeal. S. C. 4 Selden, 299. The Supreme Court of Massachusetts, in *Deane* v. *American Mutual Life Insurance Co.*, 4 Allen, 96, decided that suicide, committed by a person who understood the nature of the act and intended to take his own life, though committed during insanity, avoids a policy which provides that it shall be void if the assured shall die by his own hand. In this conflict of authority, it may not be amiss briefly to examine the question, and to endeavor to determine what conclusion will best accord with the object of the policy, and with the intent of the parties as ascertainable from its language upon the recognized principles of interpretation.

An insurance upon life is of comparatively recent date. A creditor may insure upon the life of his debtor, or one may insure upon his own life, for the benefit of his family. In no event, can the person upon whose life the policy is effected, be benefitted by his own death. Death, whether by disease, by accident, or the result of insanity, is in each case within the general object of the policy.

The terms "suicide" and "dying by one's own hand," are generally used synonomously. Sometimes one form of expression is used and sometimes the other. They have the same meaning. Dying by one's own hand is but another form of expression for suicide.

The phrase "die by his own hand," may include all cases of death by the person upon whose life the policy is effected, or it may receive limitations. If limitations, then the inquiry arises as to the extent of those limitations. The authorities concur in this, that the expression does not embrace all cases of death by one's own hand. If the insured kill himself by drinking poison, not being aware that it was poison, or by snapping a loaded pistol, ignorant that it was

loaded, or by leaping from a window in the delirium of a fever, it is conceded that he would not die by his own hand, within the meaning of the clause under consideration, though he might literally die by his own hand, that is, by his own act.

"It is to be observed," remarks TINDALL, C. J., in *Borradaile* v. *Hunter*, "that the words of the proviso are the words, not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and good sense, therefore, no less than upon the acknowledged principles of legal construction, they are to be taken most strongly against those who speak the words, and most favorably for the other party. For, it is no more than just, that if the words are ambiguous, he, whose meaning they are intended to express, and not the other party, should suffer by the ambiguity." That they are ambiguous is conceded, for the courts in no case have given them a literal construction. When death is the result of insanity, it is equally the result of disease for which the insane is in no respect responsible. It is a well settled physiological principle, "that disturbed intelligence has the same relation to the brain that disordered respiration has to the lungs and pleura." Death, then, by an insane suicide, is as much death by disease as though it were death by fever or consumption. Death by accident or mistake, though by the party's own hand, is not within the condition. Death by disease is provided for by the policy. Insanity is a disease. Death the result of insanity, is death by disease. The insane suicide no more dies by his own hand than the suicide by mistake or accident. If the act be not the act of a responsible being, but is the result of any delusion or perversion, whether physical, intellectual or moral, it is not the act of the man. "If they, (the insurers,) intended the exception to extend both to the case of felonious self-destruction and self-destruction not felonious, "they ought," observes TINDALL, C. J., in *Borradaile* v. *Hunter*, "so to have expressed it clearly in the

policy; and that, at all events, if they have left it doubtful on the face of the policy whether it is so confined or not, that doubt ought, in my opinion, to be determined against them; for it is incumbent on them to bring themselves within the exception, and, if their meaning remains in doubt, they have failed so to do."

The different English Life Insurance Companies, (when unwilling to incur the risk of suicidal insanity,) have guarded against such risk by language clearly excluding it from the policy. Thus, the Equitable has the condition, "if he shall die by his own hand, being at the time sane or insane;" the Eagle, "if he shall die by his own act, whether sane or insane." In the policies of the Solicitors and General Life Assurance, the condition is, if he die by his own act, "whether felonious or not."

The policy, in the clause under consideration, refers to death by his own hand, or in consequence of a duel or the violation of any state, national or provincial law, or by the hands of justice. All the other cases, after the first, involve criminal delinquency. They involve intentional misdoing. They assume criminal intention. They are cases where death occurs in consequence of committing a felony or other violation of law on the part of the insured. There must in all be moral as well as legal responsibility. *Nocitur a sociis* is a familiar maxim in the interpretation of covenants. The other members of the sentence, connected with the verb "die," imply death as the result of crime committed by a responsible being. The first of these conditions, to which the others refer, and with which they are connected, must equally with the other refer to a felonious death, to the case of *felo de se*, not to the case of a death without legal or moral blame,—the result of accident, mistake or disease.

The madman, who in a fit of delirium commits suicide, as much dies by his own hand as does the individual who accidentally and unintentionally takes his own life. They each die by their own hands, but without moral responsibility or legal blame. One is no more within the conditions

of the policy than the other. In each case, it should receive the same construction.

That a jury would be likely to regard suicide as proof of insanity does not affect the conclusion. If suicide is to be regarded as evidentiary of insanity, as it unquestionably is in most cases, then they generally arrive at correct results. If it is not properly to be so regarded, it may be an argument against a trial by jury, that the tribunal is one which allows itself to be governed by its prejudices rather than by the proofs, but it is none against the construction of the policy, that death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule.

Nor does the case of suicide, by one insane, fall within the danger, to guard against the occurrence of which, this condition was inserted. "A policy," observes MAULE, J., in *Borradaile* v. *Hunter*, "by which the sum insured is payable on the death of the person assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers a temptation to self-destruction to that extent. To protect the insurers against the increase of risk arising out of this temptation, is the object for which the condition in question is inserted." The reason here given assumes, or presupposes, sanity on the part of the assured. It implies a motive acting upon a sane mind, for sanity in all cases is to be presumed. But, in fact, there is very slight foundation for any such reasoning. The person whose life is insured never receives money payable after his death. Suicide for the benefit of others is rare, exceptional and Quixotic. The love of life, the strongest sentiment of our nature, affords reasonable security against a danger so remotely probable. An insane man would be little likely to calculate the difference in value between a payment to be made immediately and one indefinitely deferred, and kill himself that some one else might receive the money at an earlier

date in consequence of his committing suicide. The evidence affords not the slightest indication that any such motive had any influence in the present case.

Where the policy is on the life of a nominee, as in the one under consideration, "the insurance can be no inducement to a criminal act, and may reasonably be construed to cover this as well as every other risk. There is, indeed, no reason why it should not do so; for the general tables of mortality, which form the basis of the calculations upon which the policy is founded, include this as well as every other cause of death; so that the particular risk is actually insured against." Bunyon on Life Insurance, 73.

But, whether these views are correct or not, the defendants had the benefit of instructions in entire conformity with the law, as stated by the Supreme Court of Massachusetts, in *Deane* v. *Am. Mutual Life Insurance Company*, and the jury have, on the evidence, found the facts such, as in accordance with the law of that cause, would justify their verdict. *Motion and exceptions overruled.*

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

KENT, J., dissented.

SAMUEL P. HALL *& als. versus* AMAZIAH B. GRAY.

In assumpsit by the owners of a vessel against its master for earnings, a release by one of the plaintiffs is a bar to the action.

And evidence of collusion between the parties to the release is inadmissible to change its effect.

ASSUMPSIT by the owners of a schooner against its master for certain alleged earnings.

The defendant produced a release from one of the plaintiffs—his brother. All the plaintiffs, excepting the brother,

alleged that the release was given collusively to defraud them. The case was continued on report, with the agreement that, if the release would be a defence, and proof of such alleged collusion and intended fraud would not be admissible to change the effect of the release, or would not change it, then the plaintiffs were to be nonsuited, otherwise the cause to stand for trial.

T. C. Woodman, for the plaintiffs.

1. Plaintiffs being joint owners were rightfully joined. *White* v. *Curtis*, 35 Maine, 534; *Blanchard* v. *Dyer*, 21 Maine, 111.

2. Courts should discountenance such frauds. *Darling* v. *Simpson*, 15 Maine, 175; *Marshall* v. *Jones*, 11 Maine, 54; *Lunt* v. *Stevens*, 24 Maine, 534. As to the admissibility of the evidence of collusion. *Loring* v. *Brackett*, 3 Pick., 403; *Eastman* v. *Wright*, 6 Pick., 316, 323; 2 Parsons on Con., 129, note t, and cases there cited.

J. A. Peters, for the defendant.

APPLETON, C. J.—The plaintiffs, joint owners of a vessel, have brought the present suit. A joinder of all the owners was necessary. Since the commencement of the action, one of the plaintiffs, by a release under seal, has discharged the defendant.

It was held, in *Ruddock's case*, 6 Coke, 25, that, "where divers persons were to recover a personal thing, the release or default of one bars all." The general rule, as stated by KENT, C. J., in *Pierson* v. *Hooker*, 3 Johns., 68, is "that, where two have a joint personal interest, the release of one bars the other." Where several plaintiffs must join in a personal action, the release of one joint plaintiff is a bar to the action. *Austin* v. *Hall*, 13 Johns., 286. A release by one of two joint covenantees is binding on the other. *Fitch* v. *Forman*, 14 Johns., 172. "The release of one is as effectual as the release of all, when a joinder of all the plaintiffs is necessary," observes SPENSER, J., in *Decker* v. *Livingston*, 15 Johns., 479. In an action on the case, in the nature

of waste, brought by several plaintiffs, the release of the action by one of the plaintiffs, is a good bar. *Kimball* v. *Wilson*, 3 N. H., 96. So one of many tenants in common may release and discharge a trespass on the common land. *Bradbury* v. *Boynton*, 22 Maine, 287. So a discharge by one of many joint trespassers, is a discharge of all. *Gilpatrick* v. *Hunter*, 24 Maine, 18. A release by two of three joint obligees is a bar to a suit brought by the third, in the name of all, to recover his interest. In such joint action the plaintiff cannot set up that such a release was a fraud on one of them, and thus deprive the defendant of a legal defence to the claim of the three. *Myrick* v. *Dame*, 9 Cush., 248.

In *Lunt* v. *Stevens*, 24 Maine, 534, it was held, a writing signed by one of the plaintiffs not under seal, did not constitute a discharge. In *McAlister* v. *Sprague*, 34 Maine, 296, the same principle was affirmed. In the case at bar, the discharge upon which the defendant relies, was under seal and according to the authorities constitutes a bar.

Plaintiff nonsuit.

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

MARK P. WHEELER *versus* NELSON S. ALLEN, *Ex'r.*

After making certain specific bequests, the will proceeds as follows: — "I give and bequeath all my property, which shall remain, to the sons and daughters of my brothers William, Mark, John, George and Horatio, equally, and to the heirs of their bodies respectively; and, in case of the failure of the heirs of the body of any or either of them, it is my wish that the share of such deceased one, without issue, should be divided among those who shall survive, and the heirs of their bodies respectively, share and share alike." In an action by one of the children of a daughter of the testator's brother Mark, to recover a distributive share under the will; — *Held*, 1. That the gift to "the heirs of the body" of the "sons and daughters" of the testator's brothers, was original and independent, and not substitutionary; and

2, That the children of a nephew or niece, who was dead at the date of the will, are collectively entitled to a share in the residuary estate in like manner as the nephews and nieces themselves, or the heirs of the bodies of those who may have died since the will was made.

ON REPORT.

DEBT for a legacy.

The only question sought to be raised was as to the right of the plaintiff to recover a distributive share under the will. The facts sufficiently appear in the opinion.

W. B. Smith, for the defendant, contended:—

That the issue respectively of the six sons and daughters, deceased before the execution of the will, were not entitled to take. They were not named. The testatrix's intimacy with the family made her aware that these "sons and daughters" were deceased when she made her will. If she intended to make these "heirs of the body" of such deceased "sons and daughters," the recipients of her legacy, it would have been clearly so expressed. Her language is prospective. Her words, "in case of failure of heirs of the body," evidently and only refer to a possible event thereafter to take place, and for this she makes the provision that the share of such one, so failing, (present tense) should be divided among the survivors.

George Walker, for the plaintiff.

BARROWS, J.—Elizabeth Allan, by her will, made Sept. 15, 1854, and admitted to probate in October, 1863, after bequeathing to her brother John Allan, the dividends upon certain stocks and the interest upon certain mortgages, to be collected by her executors and paid over to the said John, during his life, and making certain specific bequests of money and other personal property to certain relatives by name, disposed of the remainder of the property as follows:

"I give and bequeath all my property which shall remain after the payment of the foregoing legacies, and the amount hereinafter bequeathed to my executors, and after the de-

cease of my brother John Allan, to the sons and daughters of my brother William Allan, *and the sons and daughters of my brother Mark Allan*, and the sons and daughters of my brother John Allan, and the sons and daughters of my brother George W. Allan, and the sons and daughters of my brother Horatio G. Allan, equally, *and to the heirs of their bodies respectively*, and, in case of the failure of heirs of the body of any or either of them, it is my wish that the share of such deceased one, without issue, should be divided among those who shall survive and to the heirs of their bodies respectively, share and share alike." The specific legacies had been paid and John Allan was dead, at the commencement of this suit. The plaintiff is one of four children of a daughter of Mark Allan. His mother died in February, 1851, he being then more than 21 years of age. When the will was made, in September, 1854, the five brothers of the testatrix, abovenamed, had twenty-nine sons and daughters living, all of whom, or the heirs of their bodies, still survive, and there were six of "the sons and daughters," (including the plaintiff's mother,) who had died previously, leaving "heirs of their bodies."

It is conceded that the plaintiff is entitled to recover in this action one-fourth of one-thirty-fifth of the amount remaining in the hands of the defendant, as executor, to be distributed under the order of the Judge of Probate, if the children of any of the six nephews and nieces of the testatrix, who died previous to the making of the will, are entitled to a distributive share of the estate, under the item above recited.

Do the children of the nephews and nieces, who were dead at the date of the will, take any share of the residuary estate under this item?

Upon a review of the cases which are to be found in the books, more or less resembling the one at bar, it is apparent that distinctions somewhat subtle and shadowy have obtained from time to time, depending, perhaps, upon "the length of the Chancellor's foot," or the liveliness of his imagination,

and producing a series of decisions not at first sight easily capable of being made to harmonize, if not actually conflicting.

In *Christopherson* v. *Naylor*, 1 Merivale, 320, the bequest was to "each and every of the child and children of my brother and sisters, A, B, C and D, which shall be living at my decease; *but, if* any child or children of my said brother and sisters, or any of them, shall happen to die in my lifetime and leave issue living at his or her decease, then, and in such case, the legacy or legacies hereby intended for such children, so dying, shall be upon trust for, and I give and bequeath the same to his, her or their issue, such issue taking only the legacy or legacies which his, her or their parents or parent would have been entitled to, if living at my decease,"—and it was held that the children of those of the nephews and nieces, who were dead at the time of the making of the will, were not included in the gift,—the Master of the Rolls remarking that "the nephews and nieces are here the primary legatees; nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently show no object of substitution; and, to give them original legacies, would be in effect to make a new will for the testator."

In *Butler* v. *Ommaney*, 4 Russell's (Chancery) Reports, 70, the testator had bequeathed the residue of his estate, after the death of his wife and brother Joseph, "between the children of his said brother, and his late sister Betty, and late brother Jacob, who should be living, in equal shares, and, as to such of them as should be then dead, leaving a child or children, such child or children were to be and stand in the place or places of his, her or their parent or parents, and the Vice Chancellor held, that the children of

those of Jacob's children who were dead at the date of the will took no share of the residue.

In *Gray* v. *Garman*, 7 Jurist, 275, the testator gave the residue of his property to his wife, for life, and, "at her death, to be equally divided between her brothers and sisters, and, in case any or either of them should be dead," (at the time of the decease of the wife,) "leaving issue, then such issue to stand in the place of their respective parent or parents." And the question was whether the issue of a brother of the wife, who was dead at the date of the will, were entitled. The Vice Chancellor, WIGRAM, decided against their claim, holding that "the word 'them,' in the second clause, referred to the brothers and sisters described in the first, which clearly did not extend to a brother or sister previously dead."

And, in the case of *Waugh* v. *Waugh*, 2 Mylne and Keen's Reports, 41, a bequest of stock was made to the executors in trust to pay the dividends accruing therefrom to the testator's nephew J., during his life, "and, as to the principal, in trust for all the brothers and sisters of the said J., who should be living at the time of his death, *and the children then living of any of his brothers and sisters, who should previously have departed this life*, equally to be divided among such brothers and sisters *and children*, but so nevertheless that the children of such deceased brother or sister should take only the share which their parents would have taken if living, which should be equally divided among such children." The question was whether the daughter of one of J's brothers, who was dead at the date of the will, should share, and Sir J. LEACH, Master of the Rolls, held, she was not entitled, remarking that, "the words used in the first part of the bequest would comprise the claimant, but by the subsequent part of the gift it was expressed that the children of a deceased brother of J. were to take only the share which their parents would have taken if living, by which was to be understood, would have taken under that bequest if living. And the parent of the claimant being

dead at the time of the making of the will could have taken nothing under that bequest." In the foregoing cases, the gift to the children of the deceased person, was held to be substitutionary merely, and there being no person living when the will was made, capable of taking as the primary legatee, the gift over to the children failed. But there is a class of cases where, under clauses not very dissimilar, the gift has been held to be an original, independent gift, and the children were considered as comprehended concurrently with the other class of legatees.

Thus, in the case of *Tytherleigh* v. *Harbin*, 6 Simons' (Chancery) Reports, 329, the estate was devised in trust for R. T. during life and, after his decease, to be conveyed "unto or amongst all and every and such one or more of the child or children of the said R. T. who shall be living at the time of his decease, and the issue of such of them as shall be then dead, leaving issue, such issue to take equally between them the share only which their parent would have been entitled to if then living."

The issue of a child of R. T., who was dead at the date of the will, claimed to be included in the devise; and the Vice Chancellor, SHADWELL, held them entitled, remarking, among other things, as follows: "In this case there is an original substantive gift to the child or children of R. T., living at the time of his decease, and the issue of such of them as should be then dead, leaving issue, and I think the word 'them' means nothing more than child or children," and he must have held that the subsequent language—"such issue to take between or amongst them the share only," &c., was designed merely to show what share the issue of a deceased child were to take, and that it did not make the gift substitutionary in its character. It is apparent that there is little in the language of the bequest here to distinguish it from *Waugh* v. *Waugh*, (which was cited in argument,) where a different result was reached, and the Vice Chancellor observed that, "that decision might have been supported on the ground that the testator, by making a separate provis-

ion for the claimant, (as he in fact did,) had shown an intention to exclude her from any share in the legacy" of stock.

Rust v. *Baker*, 8 Sim., 443, was where a testator gave a share of his residuary personal estate to "A, B, and C, and all and every other, the children of D, *and the issue of such of his children as should have departed this life.*" Under this clause the issue of a child of D's, who had been abroad without being heard from long enough to be presumed to be dead at the date of the will, were held entitled to share.

So, in *Bell* v. *Beckwith*, 2 Beavan, 308, where the trust was for "all and every the children of J. B., deceased, to be equally divided amongst them, and the issue of such of them as should be deceased, share and share alike, *such issue to be entitled to the share of his, her, or their deceased parents, equally amongst them,*" the bequest was held to include a grandchild of J. B., whose parent was dead when the will was made, the Master of the Rolls considering that the effect of the latter words was merely to limit the amount of the share to which the issue were entitled, not to show that they were to take only by way of substitution.

In *Clay* v. *Pennington*, 7 Sim., 370, the residuary fund was bequeathed by the testator "unto the children of his brother B, *and their lawful issue*, in equal shares and proportions," and the issue of some of B's children, who were dead at the date of the will, were held entitled to share with the other children and their issue.

See also the recent case of *Lamphier* v. *Buck*, Am. Law Register, New Series, vol. 5, p. 224, for language which was held to import a gift, original and not substitutionary, to the issue of deceased nephews and nieces.

And even where the clause relied on to support the claim is one of substitution merely, courts will avoid, if possible, a construction which will prevent the issue of a deceased child from sharing in what was apparently designed to be a general family provision.

Thus, in *Jarvis* v. *Pond*, 9 Sim., 549, the testatrix, after giving the residue of her property to Mary, one of her daughters, for life, proceeded as follows: — "and after her decease I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary; and, in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters *to have their father's or mother's part.*" Besides sons and daughters who survived her, the testatrix had had a son and daughter who were dead at the date of the will leaving children, and it was held that these children were entitled to shares of the residue, although, according to the rule acted on in *Christopherson* v. *Naylor* and *Waugh* v. *Waugh*, their father's or mother's part would have been *nil* and theirs consequently the same.

But it should be remarked that they were the lineal descendants of the testatrix — *secus*, in the other two cases just named, and in the case at bar. Was the gift by Elizabeth Allan to "the heirs of the body" of her brothers' sons and daughters, original, or by way of substitution?

Plainly, we think, referring to the cases before cited, as guides, it was an original independent gift *to them*. She seems to have regarded with equal favor her nephews and nieces and the heirs of their bodies, only providing that "in case of the failure of heirs of the body of any or either of them, the share of such deceased one, without issue, should be divided among those who shall survive and the heirs of their bodies respectively, share and share alike."

Under such a clause, the children of a nephew or niece who was dead at the date of the will, are collectively entitled to a share in the residuary estate, in like manner as the nephews and nieces themselves, or the heirs of the bodies of those who may have died since the will was made.

Defendant defaulted.

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

ROWENA LONGFELLOW *& als. versus* GEO. H. LONGFELLOW.*

To prove that the relation of landlord and tenant subsisted between the parties to an action of assumpsit for use and occupation, it is competent for the plaintiffs to introduce a lease between the same parties, executed at a previous period, covering the same and other premises, and extending down to the commencement of the time sued for in this action, although such lease had expired and the rent under it had all been paid.

To the admissibility of such a lease it cannot be objected, for the first time at the law argument, that there is no evidence that the parties to the lease are identical with the parties to the action, and that the lease was *res inter alios;* such objection, when not made at the trial, comes too late, whether the case comes up by exceptions or on report.

What facts will make out a *prima facie* case in such an action.

In assumpsit for rent accruing after the termination of a lease for a term of years, the tenant will not be permitted to deny the title of his landlord so long as he holds over, without surrendering possession of the whole premises for which rent is claimed. He cannot, by surrender of a part of the premises, acquire the right to dispute the landlord's title to the remainder.

A defendant cannot invoke the aid of the statute of limitations unless he has specified it as a ground of defence.

ON REPORT.

ASSUMPSIT by Rowena Longfellow, Emma D. Smith, Amanda L. Longfellow, Arethusa B. Longfellow, Rowena H. Longfellow, Eliza G. Longfellow, Jacob Longfellow and Henry A. Longfellow, widow and all the surviving children and heirs at law of Daniel Longfellow, deceased, against the defendant, for the use and occupation of certain land, from April 1, 1856, to September 18, 1862.

Plea, general issue, with a brief statement denying the relation of landlord and tenant, denying the plaintiff's title and asserting title in the defendant, and also the statute of limitations.

The specifications of defence contained no allusion to the statute of limitations.

The plaintiffs offered, and the presiding Judge admitted,

* This case has come into the possession of the present Reporter since the issuing of vol. 53.

against certain objections by the defendant, a lease to the defendant, signed by Rowena Longfellow, Eliza G. Longfellow, Jacob Longfellow, William C. Smith and his wife Emma Smith, and Nathan Longfellow, "as guardian of the minor heirs of Daniel Longfellow," of the same premises, (together with other land,) for which rent was claimed in this action, for the term of ten years from April 1, 1846.

The remaining facts of the case, including the essential part of the evidence, are sufficiently stated in the opinion.

George F. Talbot, for the plaintiffs.

Joseph Granger, for the defendant.

1. The lease was inadmissible. It was *functus officio*. The term had long ago expired. The rent reserved had all been paid. This action was not instituted to recover any rent stipulated for in the lease, nor for the performance or non-performance of any covenant or stipulation in the lease.

Besides, it was an instrument *inter alios*.

Amanda W. Longfellow, Arethusa B. Longfellow, Rowena H. Longfellow and Henry A. Longfellow are plaintiffs, and not parties to the lease. Nathan Longfellow is a party to the lease, and is not a plaintiff in this suit. Henry A. Longfellow was a witness to the lease. It does not appear for whom Nathan Longfellow was guardian. Nor that his interest as guardian had expired or ceased. If it had terminated, it either did so at the expiration of the lease, or it did not. If it did, the lease was not admissible. If it did not, Nathan Longfellow should have been a party to this suit.

It nowhere appears that Amanda W., Arethusa B., Rowena H. and Henry A. Longfellow, were not of full age at the date of the lease.

For whom was Nathan Longfellow guardian? Who were the minor heirs of Daniel Longfellow?

This action is not based upon any evidence of any right of property in the plaintiffs any further than it can lawfully be gathered from the lease. How can it be gathered from

the lease that those plaintiffs, who are not parties to it, have any interest in the leased premises?

2. A *prima facie* case was not made out. If the lease was admissible it disproved the plaintiffs' title. If it showed anything, it showed the title to be in other parties than the plaintiffs. Plaintiffs could not sail on two tacks at once. They could not play fast and loose, and take the ground that defendant was estopped and the plaintiffs not estopped, by the lease, to deny that the lessors were the sole owners of the leased premises.

Estoppels must be mutual and bind both parties or neither. If the lessors were the sole owners, several of the plaintiffs had no interest. If the action fails as to one it fails as to the whole. Misjoinder or non-joinder of plaintiffs goes to a nonsuit in an action of assumpsit.

3. The testimony offered by defendant was erroneously excluded.

Defendant never occupied the land for which this rent is claimed as the tenant of these plaintiffs. The relation of landlord and tenant never subsisted between them. Defendant was once the tenant of a part only of the plaintiffs and another person not in the suit.

Defendant is in no way estopped to deny the title of Henry A. Longfellow, Amanda W., Arethusa B., or Rowena H. Longfellow.

Plaintiffs themselves have shown that Rowena Longfellow, the widow, has no title and never had any. Plaintiffs say the property belonged to Daniel Longfellow, her husband. As his widow, Rowena had no right, unless she had a right of dower, and there is no evidence that she ever claimed dower in the leased premises, much less, that it was ever set out to her, or that she was entitled to it. No evidence that she was the mother of any of Daniel Longfellow's children, or in any way the heir of Phineas who died.

No objection was made to plaintiffs showing that Rowena, the widow, had no title. Plaintiffs cannot set up an estoppel against the effect of their own proofs.

Estoppels are odious, as they shut out the truth, and are not to be pressed beyond the limits of well established rules.

If Rowena Longfellow never had any title, as the evidence adduced by the plaintiff shows, defendant is not estopped to insist on it as a ground of nonsuit.

If the landlord under whom the tenant entered never had any title, and he set up a title by fraud or mistake, it is well settled law that the tenant may show it. So the tenant may show that the title of his landlord has expired.

4. Defendant has already shown that defendant is at liberty to dispute the title of these plaintiffs, or at least a part of them, and that he is not estopped to deny the relation of landlord and tenant. As the estoppel does not apply, if at all, at least to a part of the plaintiffs, and as the plaintiffs have shown no title in themselves, and the defendant was precluded from showing title in himself, the Court will, in accordance with the agreement of the parties, order a new trial.

BARROWS, J. — The plaintiffs bring their action of assumpsit against the defendant for the use and occupation of the land upon which his shop stands, in Machias, from April 1, 1856, to Sept. 18, 1862. Writ dated Sept. 19, 1862. The case comes before us upon a report of the evidence, with stipulations that if certain rulings of the presiding Judge, admitting evidence offered by the plaintiffs and excluding testimony offered by defendant, are correct, and plaintiffs have made out a *prima facie* case, and defendant is not at liberty to dispute plaintiffs' title, or to deny that the relation of landlord and tenant continues to exist between the plaintiffs and himself, until he surrenders possession to them of all the land included in a certain lease, which was offered in evidence by the plaintiffs and which embraced the land for the use and occupation of which this suit is brought, the defendant is to be defaulted, otherwise the case is to stand for trial.

The testimony shows that the plaintiffs are the widow

and all the surviving children and heirs at law of Daniel Longfellow who died in 1837. Phineas Longfellow, another of the family, died without wife or children shortly after his father, and his share of his father's estate of course descended to his mother, brothers and sisters.

Nathan Longfellow, a brother of Daniel, 73 years old, testifies that Daniel always occupied the premises, (a portion of which is now covered by defendant's store,) claiming to own them, that he had a blacksmith shop on the lot, that his family, the plaintiffs, occupied the lot after his death and rented it; that witness, in behalf of plaintiffs, claimed damages of the town for taking some of the land for a town landing, and that the town paid $200 therefor; that the plaintiffs now receive rent for that part of the lot not occupied by defendant; that a fair yearly rent for the land covered by defendant's store for the last five or six years, would be $10 or $15.

Other witnesses testified to the occupation of the premises by Daniel Longfellow in his lifetime and by his family after his death. The plaintiffs offered in evidence the lease dated April 1, 1846, of the store lot with more of the adjacent land to the defendant, for 10 years, at an annual rent of $6 and taxes, executed by defendant as lessee, and Rowena, the widow, and three of the other plaintiffs and "Nathan Longtellow, as guardian," as lessors. The execution of the lease was not disputed and it was agreed that defendant had paid the rent under the lease for ten years up to the expiration of the term, April 1, 1856. Defendant objected to the introduction of the lease as evidence, "because it expired long ago and defendant does not now hold under it, but claims that he owns the property and has a better title to it than plaintiffs, and because it includes other land besides the store lot for which rent is claimed in this suit, — land which has been in plaintiffs' possession ever since the lease expired." The objections were overruled and the lease admitted. Was this erroneous?

To maintain this action of assumpsit for use and occupa-

tion, the relation of landlord and tenant must subsist between the parties, founded on an agreement either express or implied. Of the objections made at the time, the only one now urged in argument is, that the lease had expired before the commencement of this suit; was *functus officio*, and the suit was not brought for any rent reserved by the lease, which had all been paid by the defendant. But it was surely competent for the plaintiffs to show the existence of the relation of landlord and tenant between the parties, by evidence under the defendant's hand and seal, at a previous period, and to claim that, in the absence of evidence to the contrary, that relation continued to subsist which was thus proved to have been once established. But the main ground of objection now relied on is, that the instrument was *res inter alios*; that, of the present plaintiffs, Amanda, Arethusa, Rowena H. and Henry A Longfellow do not appear to have executed the lease, and that "Nathan Longfellow, as guardian," who did execute it, is not a party to this suit. It is urged that there is no evidence that Nathan Longfellow was guardian for Amanda and the other children, not executing as lessors, or that his interest as guardian has ceased.

No such objection was suggested at the time of the trial. Where testimony is objected to upon the trial of a cause, the party objecting should state specifically all the grounds of objection upon which he intends to rely. If he fails to do so, and the testimony is admitted, the ruling cannot be treated as erroneous. *White* v. *Chadbourne*, 41 Maine, 149.

The reason and propriety of this rule are obvious. When the objection is made at the time of trial, the opposite party has his fair opportunity to withdraw the testimony offered and avoid the point, — to offer other testimony in place of that which is objected to, or to bring out more distinctly in testimony facts that are tacitly understood between Court and counsel as admitted, when the objections offered are considered and the rulings made, and which would do away with

the objection thus subsequently raised. The case at bar well illustrates the fitness and justice of this rule. When the case was presented at *nisi prius*, it is hardly possible that this objection of *res inter alios* should have occurred to either of the counsel or to the presiding Judge. Testimony was given as to the relationship of the parties plaintiff, and as to Nathan Longfellow's position as guardian of the younger children, from which the substantial identity of the parties to the lease with the parties to the suit was received as undisputed. But the counsel now gravely argues that this was all *res inter alios* and inadmissible, because it was not stated which of the children Nathan Longfellow was guardian for, or that Amanda, Arethusa, Rowena H., and Henry were not of age at the date of the lease, or that Nathan Longfellow is not still guardian for some minor heirs. If there is any obscurity as to this matter in the testimony as reported, it would be the grossest injustice to allow an objection, thus held in reserve until too late to be obviated, to prevail and expose parties to additional delay and expense. The doctrine that objections thus taken come too late, is well established upon sound reason and authority. They are not to be considered as open matters upon the hearing of exceptions, and upon a report presented with such stipulations as this, the correctness of the rulings must be tested in the same manner as it would be upon exceptions. The lease, then, was rightly admitted. Was a *prima facie* case made out? Could the jury have fairly inferred, from the testimony that was put in, all that was necessary to entitle the plaintiff to a verdict? Defendant's counsel undertakes to argue that the lease disproves the title of the plaintiffs, or some of them, and shows it to have been in other parties. An examination of the testimony shows that there is nothing upon which to base such an idea. Nathan Longfellow testifies that some of Daniel's children were over 40 years of age in 1863. Then they were over 21 in 1846, when the lease was made. The widow and three children sign the lease as lessors, and Nathan Longfellow signs "as

guardian," being described in the lease as "Guardian of the minor heirs of Daniel Longfellow." It appears, from his testimony, that the plaintiffs are the widow and the children, and *all* the children of Daniel that survived their father, except Phineas, who died without wife or children in a few years after his father, — that Daniel died in 1837, from which it follows that the youngest child must have arrived at the age of 21 years when the suit was brought, in 1862. The question for whom was Nathan Longfellow guardian is sufficiently answered, and in a manner perfectly consistent with the title of the plaintiffs, and with their right to maintain this suit. By taking such a lease, defendant must be considered as admitting not only the title of the widow and heirs of Daniel Longfellow, but that at the date of the same some of them were of age to contract and some were minors. He dealt with them as if such were the case, and it is not now in his mouth to say that there is no evidence that so it actually was. Nathan Longfellow was a party to the lease only to represent the title and interest of those who, being then incapacitated to make contracts respecting their property, are now of age and do not further require his intervention. *They* were the real parties in interest and a lease thus executed does not disprove and has no tendency to disprove their title. The defendant does not claim that a *prima facie* case is not made out in other respects, so that it is unnecessary further to rehearse the details of the testimony.

The defendant offered to prove by legal testimony the property to be his, — that he has paid no rent and has never promised to pay any for it since the expiration of the lease. But he admitted that he entered under the lease and that he never surrendered that part of the property, for which rent is here claimed, to the plaintiffs after its expiration.

The general rule that the defendant in this action of assumpsit, for use and occupation, as in all actions for rent, is not permitted to call in question his landlord's title to the

premises, or in any way to impeach it, is not disputed here. The relation of landlord and tenant once established, the defendant, so long as that relation subsists, cannot be suffered to allege title in himself or in any person other than him from whom he holds. He may show that the plaintiff's interest was but temporary, and that it has expired, — or that he has conveyed it away subsequent to the demise to some third person under whom defendant has commenced a fresh holding, — or that the tenancy has been determined, and that subsequently to the determination he has ceased to occupy the premises. But the defendant here proposed to do none of these things. His position here is based upon the same not very ingenuous hypothesis upon which he founds his argument in support of the points previously discussed, viz. : — that the lessors and the plaintiffs are not shown to be identical, because it was not testified *totidem verbis* that Nathan Longfellow was the guardian of Amanda, Arethusa, Rowena H., and Henry A. Longfellow, and, upon the further untenable proposition that plaintiffs themselves have shown that Rowena, the widow, had no title, and, therefore, an estoppel cannot be claimed as to her. The defendant accepted a lease from her jointly with others, doubtless well knowing that she was entitled to a share from her deceased son Phineas, and we shall not presume, in order to avoid any estoppel thereby created, that Daniel Longfellow had another wife besides the one who is proved to have survived him, or that his son Phineas was the child of some woman whose existence is not suggested, until the final argument of the case as a question of law.

Defendant admitted that he entered under the lease and that he never surrendered that part of the property, for which rent is here claimed, to the plaintiffs after its expiration. He would have it, that after the expiration of the term, he is at liberty to deny the relation of landlord and tenant between his lessors and himself, without quitting the possession. But the law settles his *status* differently. An abundance of cases declare that a lessee thus holding over

is the tenant at will of the lessor. The relation of landlord and tenant continues until the lessee has yielded the possession which he gained by the consent of the lessors and in submission to their title. When a lease has expired, the tenant continues liable for the rent, in an action of assumpsit for use and occupation, unless he delivers up complete possession of the premises, or the landlord accepts another in his room. Lord KENYON, in *Harding* v. *Crethorn*, 1 Esp., 57. "When a tenant is permitted to hold over, it is to be presumed that he does so as to the payment of rent upon the same terms as had been agreed upon in the lease." WHITMAN, C. J., in *Wheeler* v. *Cowan*, 25 Maine, 287.

And the estoppel, before referred to, applies to each part and parcel of the premises held under the demise. The tenant cannot by a surrender of a part of the premises acquire the right to dispute his landlord's title to the remainder.

The statute of limitations was not specified as one of the grounds of defence, and cannot now be invoked by the defendant.

The legal rights of the defendant were not prejudiced in any essential particular by the rulings at *Nisi Prius*, which were all substantially correct. *Defendant defaulted*, —

Damages to be assessed by the Clerk according to the agreement in the report and on the rule given by the Judge at Nisi Prius.

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

INHABITANTS OF FRANKFORT *versus* INHABITANTS OF WINTERPORT.*

An original town, a part of the territory of which has been set off and incorporated as a new town, still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless otherwise provided in Act authorizing the separation.

An Act of separation providing that the "town farm" of the original town "shall belong to" the new town, does not transfer the personal property being on the "town farm," belonging to the original town.

By § 2,† c. 422, of Special Laws of 1860, the right of collecting the "unpaid taxes" of the original town was retained therein.

The words "and for other necessary town charges," as used in R. S., c. 3, § 26, authorize towns to employ a reasonable number of agents or attorneys to advance or protect the rights of the former, before any legally constituted tribunal; they do not authorize a town to raise and expend money to send lobyists to the Legislature.

ON FACTS AGREED.

ASSUMPSIT, to recover certain sums of money, under Special Laws of 1860, c. 422, § 2.

W. G. Crosby, for the plaintiffs.

N. H. Hubbard, for the defendants.

CUTTING, J. — This case is presented on facts agreed, and depends upon the construction of § 2 of an Act to incorporate the town of Winterport, c. 422, passed in 1860. That section is as follows: —

"The inhabitants of Winterport shall pay all unpaid taxes legally assessed on them by the town of Frankfort; and all indebtedness and liabilities of Frankfort, and all claims and demands against it, in suit or otherwise, shall be shared and paid equally, by said two towns; and the town farm of Frankfort shall belong to the town of Winterport, but the town house, town safe, and all other town property shall belong to Frankfort."

* This case has just come into the hands of the present Reporter.

† See opinion.

The old town of Frankfort, notwithstanding a part of its territory was set off and incorporated as a new town, "still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the Act authorizing the separation." *Windham* v. *Portland*, 4 Mass., 384, cited in *North Yarmouth* v. *Skillings*, 45 Maine, 133.

In this case, a new provision was made, divesting Frankfort of the town farm, but not of the personal property remaining thereon, which would no more be transferred by the Act than a deed of a farm would carry with it all the personal property of the grantor, which remained upon it at the time of such conveyance. Nor has the ancient town been deprived of the right to collect the unpaid taxes, but wholly otherwise by the very language of the Act.

Again, it appears that, in 1859 and 1860, Frankfort, before its separation, called public meetings, passed sundry resolutions unfriendly to the anticipated division, and voted to send twenty delegates, more or less, to the Legislature to oppose the contemplated project; for those services Frankfort has paid, a part before and the balance since the separation. Now by the plaintiffs it is claimed, that they should be reimbursed for one half of the money so expended; whereas the defendants not only object to the justice and legality of the whole claim, but contend that they are entitled to recover by the way of offset one half of that sum as money unlawfully collected and appropriated.

This, at first view, presents a question of a "novel impression," which is, whether a town in its corporate capacity by force of those words in the statute, "and for other necessary town charges," can legally raise and expend money in order to send lobby members to the House of Representatives. We frequently hear of such persons in attendance, but had always supposed it was either at their own expense or that of their friends, and are still of that opinion. At the same time, we wish by no means to be understood as overruling the doctrine of the case of *Bachelder* v. *Epping*, 8 Foster,

534. Undoubtedly all corporations, and towns, as *quasi* corporations, may use all lawful means to advance or protect their rights before any legally constituted tribunal, and for that purpose may employ agents or attorneys, but are restricted to a reasonable number. An assault by storm can be justifiable only in case of war, a *casus belli* before war is proclaimed will not permit it.

Consequently, while the plaintiffs have no legal claim for reimbursement, neither have the defendants for moneys paid before their corporate existence.

We have not been furnished with a copy of the writ, and cannot predict what effect this opinion may have in terminating the suit. It may embrace other claims. Therefore the action must stand for trial, unless otherwise disposed of by the parties. Interest from demand, if any was made, otherwise from the date of the writ.

Action to stand for trial, or, according to the agreement of the parties, an auditor is to be appointed, if either party request it.

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

INHABITANTS OF MONROE *versus* INHABITANTS OF FRANKFORT.

The settlement of a pauper, who, at the time of the annexation, was residing on the territory set off from the defendant town and annexed to the plaintiff town, and then and there supported by the former, was not changed by § 3, c. 226, of the Special Laws of 1863.*

* Statute of 1863, c. 226, § 3. "All paupers now chargeable to the town of Frankfort, on said territory, which is set off, and all paupers who shall become chargeable on said territory, in consequence of having derived a residence in said town of Frankfort, shall have their settlement in and be supported by the said town of Monroe."

On Report.

Assumpsit, for supplies furnished by the plaintiffs to a pauper, who, at the time of the passage of c. 226 of the Special Laws of 1863, was residing on the territory set off from Frankfort to Monroe, and there supported as a pauper by the defendants. The only question was the construction of § 3, of said chapter 226.

The full Court were to render judgment upon nonsuit or default, as the rights of the parties required.

N. H. Hubbard, for the plaintiffs.

Thos. W. Vose, for the defendants.

Appleton, C. J.—By an Act approved Feb. 21, 1863, c. 226, certain territory "and the inhabitants residing thereon," was set off from the town of Frankfort and annexed to the town of Monroe.

James Grant, for whose support this suit is brought, was a pauper living on the part annexed, when the Act referred to took effect, having previously acquired a settlement in the town of Frankfort by a residence on what now constitutes that town.

It is obvious that then there might be paupers supported by Frankfort, who had acquired a settlement by virtue of residence on the part set off to Monroe. So, hereafter, persons might become paupers, whose settlement was acquired by reason of such residence. It would seem equitable that the town of Monroe should, in the future, be responsible only for the support and maintenance of such paupers as had acquired a settlement by residence on the part annexed. So there might be paupers at the time of annexation or thereafter whose settlement originated in such residence.

By § 3, "all paupers now chargeable to the town of Frankfort, on said territory, which is set off, and all paupers who shall become chargeable on said territory in consequence of having derived a residence in said town of

Frankfort, shall have their settlement in and be supported by said town of Monroe." All other paupers, it would seem to follow, are to be supported by Frankfort.

This section refers to two classes of paupers: — those "now chargeable * * on said territory" and all persons "who shall become chargeable on said territory." The punctuation is entitled to very slight regard in the construction of a statute. Hence, by omitting the comma in the printed statute after the word Frankfort, the idea of the Legislature becomes more apparent. The phrases "now chargeable * * ON said territory" and "shall become chargeable ON said territory," have, in each instance, reference to the same kind of liability, — that is, one imposed on a territory by virtue of residence thereon. The section referred to treats the part annexed as a distinct town, imposing upon it the same liability as if it had been a town. Those chargeable ON said territory are those who have acquired a settlement in Frankfort by a residence thereon. Why chargeable? "In consequence of having derived a residence in said town of Frankfort." In other words, in consequence of having resided in Frankfort so long as thereby to have acquired a settlement. Those "now chargeable * * *on* said territory," are those who have acquired a settlement thereon. Those "who shall become chargeable *on* said territory" are those who, having a settlement by residence, hereafter become paupers. That is, each part of the town is to take care of those, who become paupers by residence therein. Monroe bears the burden of those chargeable *on* the territory annexed by reason of antecedent residence thereon; Frankfort is left to support those chargeable *on* the remaining portion of its territory.

These views best correspond with the general pauper law and with the past legislation in the division of towns, and the construction given to such legislation. The annexation is of certain territory "and the inhabitants residing thereon."

In *Southbridge* v. *Charlton*, 15 Mass., 248, a new town

was created out of parts of existing towns. It was held that the new town was not chargeable with the support of paupers, who, at the time of incorporation, were supported by the old towns, upon the territory forming part of the new town, but whose settlement was derived from owning and occupying real estate in another part of the old town. "We think it very clear," observes PARKER, C. J., "that the Act of incorporation did not affect their settlement. They were paupers, not having removed within the limits of the newly incorporated town, by their own volition, but having been placed there by the overseers of Charlton, for the convenience of the town, their municipal relations remained unaffected by the removal. Nor were they inhabitants of that part of Charlton which became Southbridge, within the meaning of the fourth section of the Act of incorporation." In *New Braintree* v. *Boylston*, 24 Pick., 164, an Act incorporating part of a town into a separate town, provided that any person who might have gained an inhabitancy within the part thus incorporated, and who should thereafter need to be supported as a poor person, should be supported by the new town. It was held that a pauper, who had gained a settlement on that part of the territory which continued to be the old town, but had removed into the other part before it was incorporated as the new town, retained his settlement in the old town. In *Smithfield* v. *Belgrade*, 19 Maine, 387, it was decided that, when a part of one town has been annexed to another, a pauper residing on the part annexed with one who had contracted with the town to support him, but whose residence had, prior thereto, been on a part not annexed, is not thereby transferred to the town to which the annexation is made,—such residence being merely temporary, and not established in that part of the town in which it is. "We are of opinion," observes WESTON, C. J., "that a temporary residence, under these circumstances, did not establish his home in that part of the town," referring to the part annexed. The residence of a pauper "at the poor house, we think," observes MAY, J., in *Brewer*

v. *Eddington*, 42 Maine, 541, "cannot properly be regarded as possessing the characteristics of a statute home. * * He was subject to removal at any time, not at his own will, but at the option and discretion of others. The town or the overseers of the poor might remove him at pleasure. His supplies were all furnished by the town. We are of opinion that such a residence does not constitute a home within the meaning of the statute." If, then, James Grant was not to be deemed an inhabitant, dwelling and having his home in the part annexed, his settlement has not been changed by the Act of annexation, but remains in the town of Frankfort, where before it had been established by his residence therein.

That the construction given is in accordance with the intention of the Legislature, is fully established by the Act approved March 21, 1864, c. 385, § 2,* which is fully confirmatory of these views. *Defendants defaulted.*

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

* Statute of 1864, c. 385, § 2. "The third section of said Act, (statute of 1863, c. 226,) shall be so amended as to read, all persons now chargeable as paupers, and all who may become chargeable as paupers, whose legal settlement is upon said territory, shall have their settlement in and be supported by said town of Monroe."

BENJAMIN M. HEWEY *versus* BENJAMIN F. NOURSE.

Section 16 of c. 26 of R. S., is not in abrogation of the common law, but a substantial affirmance of it.

When a portion only of the instructions to a jury is reported in the exceptions, it will be presumed that the presiding Judge gave all other proper instructions.

Thus, in a case under R. S., c. 26, § 16, for damages caused by the spreading of a fire, kindled by the defendant upon his own land, an instruction that,

if the defendant was in any fault in setting or guarding the fire, at any time before it was blown by the violent wind upon the plaintiff's land, and, in consequence of such fault, the wind carried the fire there, then the defendant would be liable, although, after it was so blown, it was beyond human control until the plaintiff's property was destroyed, is unexceptionable on the part of the defendant, it being predicated upon the presumption that the presiding Judge gave the proper instructions as to the "fault" mentioned.

A person, kindling a fire upon his own land, for purposes of husbandry, is responsible for damages occurring in consequence of a want of ordinary care in guarding it.

When a witness, by reason of a mistake, has testified incorrectly, in behalf of the prevailing party, the Court, in its discretion, may grant a new trial.

But it must clearly appear that the mistake was in regard to a material point; and the circumstances should be such as to render it probable that the mistake affected the verdict.

To sustain a motion to set aside a verdict for such cause, it is not sufficient that the witness testifies that he is convinced of his mistake, it should also be made to appear to the Court, that there is reasonable ground to believe the witness was actually mistaken.

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

CASE, for damages caused by a fire, kindled upon the defendant's land, for the purposes of husbandry, which spread upon the plaintiff's woodland. The fire was kindled on the morning of 21st June, and the piece all burned over that day; none of the fire got off of said piece until ten o'clock, A. M., of the 23d June, when a violent wind arose and carried some of the smoldering fire from the burnt piece, sixteen rods, to the plaintiff's woodland, where, by reason of the wind, it spread and burned so rapidly that it was beyond human control, until after the plaintiff's property was burned.

The defendant contended that, if the wind blew the fire sixteen rods, to the plaintiff's land, and thereby got beyond human control until after the injury to the plaintiff's property, and the jury should find that the fire was kindled at a suitable time and in a prudent manner, then the defendant would not be liable. The instructions upon this point,

as well as the other facts in the case, will be found in the opinion.

N. Abbott, for the defendant, contended that;—

1. The action is founded on R. S., c. 26, § 16, which only requires that the fire shall be kindled "at a suitable time and in a careful and prudent manner." No "guarding" is required as by the common law. Plaintiff having elected the statute remedy must stand by it. He cannot require the defendant to do any more than the statute requires, and the latter makes him liable only "by his failure to comply with this provision." Instructions that the defendant was liable, if in "any fault in setting the fire or guarding and taking care of it for three days after it was kindled, were erroneous." Only ordinary care in guarding a fire is required by the common law. Hence the instruction that, if the defendant was in "any fault", &c., was too favorable to the plaintiff, and was calculatad to mislead the jury.

2. King was a material witness; his testimony was against the interest of the defendant; he has since discovered that he testified incorrectly, by mistake; and a new trial should be granted. *Warren* v. *Hope*, 6 Greenl., 479.

N. H. Hubbard, for the plaintiff.

DICKERSON, J.—This is an action of the case, charging the defendant with kindling a fire upon his own land, for a lawful purpose, "at an unsuitable time and in a careless, and imprudent manner," and that the fire, for want of proper care on his part, "spread, and caused great damage to the plaintiff's woodland, down timber, wood and bark." No reference is made in the writ to the statute upon the subject; and the declaration appears to be drawn according to the usual formula where the remedy is sought at common law. As the statute does not abrogate the common law, but is rather a substantial affirmance of it, we need only consider the principles of the common law applicable in such cases.

There was testimony in the case tending to show that

there was a piece of crippled land, or land covered with down wood and brush, adjoining that on which the fire was kindled, and that, after the fire caught on that land, it became unmanageable and was not subject to human control, in consequence of the violence of the wind, until after it had reached the plaintiff's land, and done the damage complained of. The counsel for the defendant contended that the defendant would not be liable for the damage thus done, if the fire was kindled at a suitable time, and in a prudent manner; but the Court instructed the jury that, if the defendant was in any fault in setting the fire or in guarding and taking care of it at any time before it blew on to the crippled land, in consequence of which fault the wind blew the fire on to the same, he would be liable, although, after the wind so blew the fire, it became unmanageable, until after the plaintiff's property was injured. The verdict was for the plaintiff, and the defendant excepted.

Every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable, and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. *Batchelder* v. *Keagan*, 18 Maine, 38; *Barnard* v. *Poor*, 21 Pick., 380; *Tourtellot* v. *Rosebrook*, 11 Met., 462.

Where only a portion of the instructions to the jury is reported, it will be presumed that the presiding Judge gave all other proper instructions. *Sidensparker* v. *Sidensparker*, 52 Maine, 481.

The "fault," mentioned in the reported instructions, is to be understood as that degree of negligence which amounts to a want of ordinary care. The instructions predicate the defendant's liability upon his neglect to use the ordinary means to prevent the fire spreading upon the crippled land indicated by the evidence. The jury were told, in effect, that if the defendant's fault was not the sole cause of the wind blowing the fire upon the crippled land, he was not liable. The "fault," to be found by the jury, in order to warrant a verdict for the plaintiff, was not a trifling or insignificant one, but a culpable neglect "in consequence of which the wind blew the fire" into the dangerous quarter, a direction quite as favorable to the defendant as he was entitled to. Whether the fault or negligence consisted in the time or manner of kindling the fire, or the means used to prevent its spreading was immaterial, as either would be sufficient to render the defendant liable if the plaintiff had suffered injury thereby. We can discover no error in refusing to give the requested instructions, or in the instructions given.

The motion to set aside the verdict as against the weight of evidence is not sustained. There was testimony on both sides, and the jury have found that it preponderated in favor of the plaintiff. The fitness of the time, appropriateness of the manner, and the requirements of ordinary care in respect to the subject matter in controversy, are familiar topics to those usually called to act as jurors. To justify the Court in setting the verdict aside, for the cause alleged in the motion, there must be such a manifest weight of evidence against the verdict, as to render it clear that the jury either misapprehended the evidence, or were guilty of gross misconduct. We see nothing in this case to warrant such a conclusion.

The defendant has filed a motion for a new trial, on the ground that John King, a witness called by the plaintiff, was mistaken in his testimony, and his deposition has been taken to sustain the motion. Where a witness, who testifi-

ed for the prevailing party, discovers that he testified incorrectly by reason of mistake, the Court, in its discretion, may grant a new trial at the instance of the other party. *Richardson* v. *Fisher*, 1 Bingham, 145; *Warren* v. *Hope*, 2 Greenl., 479.

But it must clearly appear that the witness has fallen into a mistake in giving his testimony upon a material point in the case; and the circumstances of the case should be such as to render it probable that the mistake of the witness had the effect of turning the verdict of the jury. *Coddington* v. *Hunt*, 6 Hill, 596.

To show due care in watching the fire, the defendant introduced one Edward Kennedy, one of his employes, who testified that he "was on the burnt piece, watching the fire all the forenoon, on Thursday," the day when the damage was done. John King, called by the plaintiff, testified that, at "eleven o'clock, on that day, he saw three Irishmen hoeing, and talked with them; that one of them was Edward Kennedy; that, a few minutes afterwards, he saw Kennedy at the pump, near by, looking toward the smoke in the vicinity of the burnt piece; that the wind blew Kennedy's hat off while he was standing near the pump; witness knew it was Kennedy and could identify him." The materiality of the testimony is apparent, and is not denied by the plaintiff's counsel.

In his deposition, taken in support of the motion, King says he is convinced that he was mistaken as to the identity of Kennedy, and that he became convinced solely from the statements of the two Currens and one Guttey, all Irishmen and employes of the defendant, neither of whom was a witness at the trial. It appears from King's deposition that, at the instance of one Baker, agent of the defendant, he called on the Currens with Baker. They tell King that, on the occasion testified to by him, they were at work building wall in the Nourse place, near where the fire was set, and that Edward Kennedy went down with them in the morning, and remained there during the forenoon watching

the fire. Shehan, another Irishman and agent of the defendant, takes King to Guttey, to convince him that *he* was the man that King took for Kennedy. King does not recognize him as the man, but Guttey *says* he is, and King believes him, though Guttey has no recollection of seeing King on that day, or having his hat blown off by the wind, or of standing by the pump, facts testified to by King as having taken place on the occasion of his interview with Kennedy. How a man of ordinary intelligence should be convinced of mistake under such circumstances, and upon such statements is, perhaps, not easy to be understood; though it is not difficult to see how new trials would be multiplied, if they could be obtained through such agencies; litigation would be attended with interminable delays, and that wholesome maxim of the law, *interest reipublicae ut sit finis litium*, would become a dead letter.

In order to authorize the Court to set aside a verdict on account of a mistake in the testimony of a witness, called by the prevailing party, it is not sufficient that the witness testifies that *he* is convinced that he was mistaken in his testimony; it should also appear to the Court, from the facts and circumstances of the case, that there is reasonable ground to believe that the witness was actually mistaken. Otherwise there would be great danger that the fears or credulity of witnesses would be unduly excited by unscrupulous litigants, and the ends of justice perverted. After a careful examination of the facts in this case, we are by no means satisfied that the witness King was mistaken in his original testimony, and the motion must be overruled.

Exceptions and motion overruled.

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

Samuel P. Strickland *& al. versus* Frederick J. Parker.

A marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels and ship cradle, and constructed in the usual manner, is a fixture, and will pass by a levy upon the realty.

By extending his execution upon his judgment debtor's undivided part of such railway and land on which it is located, the judgment creditor becomes a tenant in common with the other owners.

One tenant in common of such railway, having the general oversight of the business, receiving the income and paying the bills and dividends, is not thereby authorized to sell the whole railway.

54 263
94 252

If he does make such sale, and the purchaser thereupon removes the materials to another town, and there makes them into a new railway on his own land, a co-tenant may maintain trover for his proportion against the purchaser; and the seller's account for expenditures, &c., cannot be considered in such action.

On Facts Agreed.

Trover, for twenty-three-sixtieths of the specific materials of a marine railway formerly built on land, twenty-three-sixtieths of which belonged to one J. P. Hardy, and the remainder to Theophilus Cushing and others.

The plaintiffs attached and levied upon Hardy's interest in the real estate, including the railway and its appurtenances. The several owners of the land built their respective proportions of the railway. Cushing had the general oversight of the business, paid bills, and received the income, and paid out dividends of earnings.

Several years after the levy, Cushing sold the whole railway to the defendant, who thereupon took it up and carried the materials to another town, and there made them into a new railway on his own land, paying Cushing $750 for the same, which sum Cushing claimed to hold on account of the balance due him for expenditures on account of the railway, the principal part of which accrued before the levy. The plaintiffs never gave Cushing any authority to do any act whatever respecting the railway, and never assented to any

use of it or otherwise interfered with it. It was out of repair and had not been repaired since 1856 or 1857.

If the plaintiffs could recover, the defendant was to be defaulted, as by the opinion. If Cushing's account afforded any defence which was not otherwise sustainable, a new trial was to be had, to inquire into its correctness.

A. W. Paine, for the plaintiffs.

N. H. Hubbard, for the defendant,

Cited 2 Greenl. on Evidence, 699 and note. Plaintiffs now own all they ever did. No right has been injured by the sale by Cushing. Parker has done nothing to sever the tenancy, or refused to account. If the tenancy has been severed, Cushing is the one in fault, and action should be against him and not against defendant. *Dain* v. *Cowing*, 22 Maine, 347; *Wheeler* v. *Wheeler*, 33 Maine, 347.

KENT, J. —The plaintiffs' title to the property, which is the subject of this action of trover, depends upon a levy on real estate made by them. At the time of the levy, there was on the land a marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels and ship cradle, all being a part of the railway, forming its entire superstructure. The railway was made in the usual mode in constructing such works, by sleepers laid on the ground; the chain and cradle forming a necessary part of the railway.

The first question is, whether the railway passed by the levy, or whether it was personal property, so disconnected from the realty, that it could only be seized and sold as a personal chattel.

The same principles of construction apply to a levy as to a deed, in determining what passes by the language used. *Waterhouse* v. *Gibson*, 4 Greenl., 230; *Winslow* v. *Mer. Ins. Co.*, 1 Mass., 316. This is also the rule in New York and Pennsylvania. The same rule applies to fixtures under a levy, as under a deed, and an article may constitute a

part of the realty, as between grantor and grantee, when it would not, under similar circumstances, be so treated as between landlord and tenant. *Powell & ux.* v. *Munson M. Co.*, 3 Mason, 359; *Parsons* v. *Copeland*, 38 Maine, 537.

The levy in this case refers to the railway as part of the real estate appraised, and the debtor had its value allowed to him. Did it pass by the levy?

It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures, and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness; and that is, that no general rule, applicable to all cases, and to all relations of the parties, can be extracted from the authorities.

There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee. And this distinction is observed in the case between mortgager and mortgagee, and again modified as between the heir and the executor.

The fact of actual and permanent annexation of the thing, personal in its nature, to the freehold, was formerly regarded as essential. But this has been found to be unsatisfactory and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test. *Fay* v. *Muzzy*, 13 Gray, 56; *Winslow* v. *M. Ins. Co.*, 4 Met., 314.

Where there are no qualifications arising from the relation of the parties to each other, the question whether any erection is a fixture, and passes by deed or levy, must be determined upon the general doctrines of the law applied to the particular facts. The case of *Parsons* v. *Copeland*, 38 Maine, 537, contains a full discussion of the general subject, and settles the law in this State so far as its doctrines are applicable to the case before us. The marine

railway, which is the subject of this suit, was laid on the earth, and was in fact affixed thereto. Indeed, the soil made an important and indispensable portion of the erection. The structure did not merely rest on the earth, as a basis and support to a building or superstructure, which was no otherwise dependent on or indebted to the earth except as it upheld it in its place. The road bed, so far as one was required, is made of and by the earth. Independent of the solid earth, the superstructure, in itself alone, had no strength or substance required for the work to be performed. A railway consists as truly of its earth bed as of its rails and sleepers. The soil is thus a part of the whole, and not merely a resting place for a foundation on which are reared works perfect in themselves, and requiring nothing of the earth in their workings;—as a factory with its machinery and wheels and belts.

It is regarded as one of the indications that the thing in question is a fixture, that it appears, from the whole case, that such was the intention of the owners of the soil who erected it. This point is stated in the case of *Parsons* v. *Copeland*, and is thus explained and enforced in the case of *Snediker* v. *Warring*, (a recent and leading case,) 2 Kernan, 170:—"A thing may be as firmly affixed to the land by gravitation, as by clamps or cement. Its character may depend upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was, that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the land.

The facts agreed to in this case, we think, clearly indicate an intention to annex the railway to the soil, and to change whatever of a chattel nature belonged to any portion, and to make it a permanent accession to the land, so long as it existed.

It is the permanent and habitual annexation, and not the

manner of fastening, that determines when personal property becomes a part of the realty. *Luffkin* v. *Griffiths*, 35 Barb., 58; *Wall* v. *Hurd*, 4 Gray, 271.

The Supreme Court in New York had before them the question of what constitutes fixtures, as applied to a railroad, in the case of the *Farmers' Loan & T. Co.* v. *Hendrickson*, 25 Barb., 488. The exact point in controversy, in that case, was whether the locomotives and cars, and the rolling stock, were real or personal estate, and whether they would pass by a deed, executed and recorded as a deed of real estate. The Court held that they did pass as fixtures, or real estate, by such deed. Whatever doubts we might entertain on this point, we cannot hesitate in assenting to the first proposition laid down by the Court, that "the road bed, the rails fastened to them, and the buildings at the depots, are clearly *real* property." Indeed, no one in that case questioned this.

If we look at the numerous cases to be found in the reports, we shall find in the instances in which the question of fixtures has been raised, that the principles on which they were decided to be such, and the nature of those erections, confirm the view we have taken, — that this marine railway was, with its necessary appendages, a fixture, and passed by the levy. *Blethen* v. *Towle*, 40 Maine, 310, a cistern above ground, on blocks; *Bliss* v. *Whitney*, 9 Allen, 114, platform scales; *Bishop* v. *Bishop*, 1 Kern., 123, hoop poles; *Snedicker* v. *Warring*, 2 Kernan, before cited, a statue of Washington and sun dial. In all these cases, they were held to be fixtures.

Fixtures annexed by the owner of the land to real estate pass by sale or levy as real estate. *Bliss* v. *Whitney*, 9 Allen, 114. And so of necessary appendages, fitted and prepared to be used with real estate. *Farrar* v. *Stackpole*, 6 Greenl., 154; 1 Greenl. Cruise, 41, § 7.

This railway and appendages passed to the plaintiffs by levy, as real estate. They now bring this action of trover

for its conversion, as personal property. It is objected that, if it passed as real estate, *this* action cannot be sustained.

The levy was on twenty-three-sixtieths, in common. The plaintiffs then became tenants in common with Cushing and others, who owned the remainder. Cushing, who had the general oversight of the business, sold the whole railway to the defendant, who thereupon took the whole up and removed it to another town, across the river, and there made a new railway out of the materials, on his own land.

We can find no authority in Cushing to sell the whole. He was, at best, but a co-tenant, having a general oversight, but without any authority, express or implied, to sell anything more than his own undivided interest. By the purchase, if of any validity, the defendant only became a tenant in common of an undivided portion.

If property, before it was detached was a fixture, the person having title to the realty can sue for the recovery of the thing itself, after it had been detached as personal property. *Luffkin* v. *Griffiths*, 35 Barb., 62. *Riley* v. *Boston Water Power Co.*, 11 Cush., 11, which was an action for the value of certain loads of gravel, taken wrongfully from the plaintiff's land and sold by the wrongdoer to the defendants, who bought in good faith. The action was sustained. *Phillips* v. *Brown*, 7 Gray, 26.

The common case of trees severed from the freehold and converted, which are always regarded as personal property, is another illustration of the general rule.

But it is further contended, that there has been no such interference with the property as will enable a co-tenant to maintain trover. It is urged that here has been no destruction of the common property, and the counsel for the defendant cites and relies upon the conclusion, drawn from the authority (as he understands it,) in 2 Greenl. on Ev., 699, — "that, to maintain the action, there must be either a destruction of the common property, or something equivalent to it, and that where the thing substantially ex-

ists, within the reach of the party, the tenancy in common remains unchanged."

Admitting that this is not too strongly stated, we do not understand that by destruction is intended a physical destruction by burning or other means, so that nothing of the materials remains. But it means that the thing owned in common is no longer that thing, but something else, that cannot be used or possessed by the parties as before. The rule however, as stated, has other qualifications. Anything equivalent to destruction is equally effective. And further, if the thing is so changed that it is no longer the same thing, or if removed, and put into such a condition that the co-owner cannot avail himself of his right, but the same is out "of his reach," the thing, as to him, is destroyed, within the meaning of the rule.

In this case, the whole structure was taken up and removed to another town, and the materials used to construct a *new* railway on land of the defendant. The plaintiffs had no property in this new railway. They had no interest in the land, and no right to enter upon it. The defendant assumed the entire right and ownership, and this was what he bought. The thing no longer existed so as to be within the reach of the party. The plaintiffs' rights were as effectually destroyed as if the whole materials had been burned.

We have no doubt that these admitted facts make out a clear case of conversion by a co-tenant, within the strictest rules that have ever been promulgated.

It has been decided in this State, that a co-tenant can maintain trover against another co-tenant, who has claimed to own and assumed to sell the whole of the common property, and that these facts are sufficient evidence of conversion, (33 Maine, 347,) or, when he has by his acts caused the destruction of it. *Ibid.* To the same point, *Weld* v. *Qwen*, 21 Pick., 559; *Boobier* v. *Boobier*, 39 Maine, 409; *Bryant* v. *Clifford*, 13 Met., 138.

The rights of the parties in this suit cannot be affected by the claim set up by Mr. Cushing to retain the purchase

money paid to him, on account of his services and disbursements whilst acting as general superintendent. Those matters must be adjusted between the owners. This defendant has nothing to do with them, and he must be held liable for his act of conversion.

The damages, it is agreed, are to be assessed at twenty-three-sixtieths of $750 and interest.

Defendant defaulted.

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

SAMUEL WISWELL *versus* OTIS A. MARSTON.

Where land is described in a deed as "beginning at a stake and stones and southerly corner of" the grantor's "land, thence north 45°, 25′ west, formerly 45° N. W., on said" grantor's and H. R's "line, to a cedar stake," &c.; the true corner of the grantor's land is the place of beginning, whether it be identical with the location of the stake and stones mentioned or not; and the true line of the grantor and H. R., is the boundary upon that side.

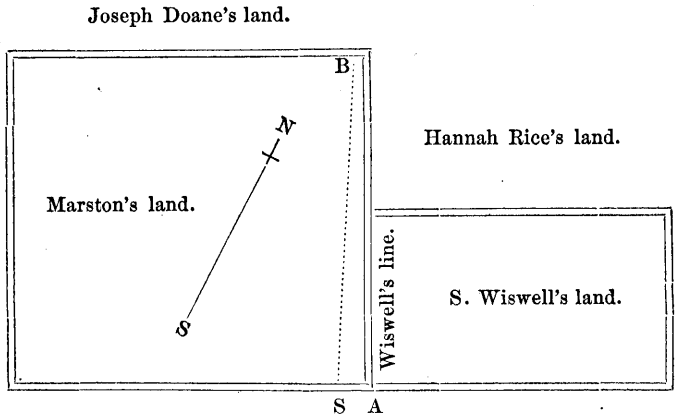
Neither will it make any difference that the grantor and a former owner of the adjacent land, (now owned by the defendant,) had occupied up to the line indicated by the stakes and stones for ten years; or that, before conveying to the defendant, the plaintiff, with a surveyor, established the stakes and stones as monuments and intended to constitute them the bounds, and the defendant supposed them to be the true bounds when he accepted the deed.

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

TRESPASS. The plaintiff and defendant occupied lands adjoining, and, as the plaintiff contended, separated by a fence on the true line, which the defendant removed. The removal of the fence was the cause of this action.

The defendant received his title from the plaintiff as administrator of Eben Wiswell's estate; and the land, thus

conveyed, adjoined the plaintiff's on the north-west side, for a portion of its width, and Mrs. Hannah Rice's, which lay next to plaintiff's. The material language of the deed will be found in the opinion. See diagram.



A, "southerly corner of S. Wiswell's land;" S, "stake and stones;" B, "cedar stake and stones on the north side of a small brook on the southerly side of Joseph Doane's land." The dotted line represents the line surveyed by Freeman.

The plaintiff introduced testimony tending to show that a day or two before he conveyed to the defendant, he informed the latter that he was going to run the line with a surveyor; that he did run the line with one Freeman, a surveyor, the defendant not being present; that he and the surveyor put down the points named as stakes and stones for the boundaries; that they run the course between said points; hat the true course in a direct line is named in the deed; that, taking those two points or corners, and running said course as far as the plaintiff's adjoining land was concerned, it would run over and in the line of a fence which defendant removed, and represented by the dotted line; that it was by the plaintiff designed to be so run and inserted in the deed; that the plaintiff had occupied up to said fence for eight or ten years prior and up to the date of said deed,

claiming it as his line; that his brother Eben, till he died, claimed and occupied up to said fence on the other side, each acquiescing in it as the true line, at least, as far as said fence extended; that, when the defendant received his deed, said fence was where the plaintiff and his said brother had maintained it; and that the defendant did not then pretend that it was not the true line.

There was also testimony tending to show that the fence line was not the true divisional line between the plaintiff and his brother Eben, the line between them being an old dividing line between two old settlers' lots; and that it was sixteen feet or more over upon land occupied by the plaintiff, to which point the defendant removed and placed the fence.

The plaintiff contended, as a construction of the deed, that, if his testimony was true, the defendant would be bound by the line made by himself and his brother Eben, so far as fenced, between the monuments named as stakes and stones. But the presiding Judge ruled otherwise; and charged the jury that, by the terms of the deed, the defendant was bounded on the side in question by the line of Samuel Wiswell's and Hannah Rice's land, commencing at the south-east corner of said Samuel's land as it was established by the original survey, under which the parties claimed; and, if said line was variant from the line from the one stake to the other mentioned in the administrator's deed, the original line would govern. The case was submitted to the jury to determine which was the said line; and the verdict being for the defendant, the plaintiff alleged exceptions.

J. A. Peters, in support of the exceptions.

The plaintiff's possession has one element of difference between this and any case relied on by the defendant. "On said Wiswell's land," meant on land occupied by him. Occupation is an apparent ownership. One does not usually know another's title. Words are not *owned* but "*on* Wiswell's land. The call would be answered, if on land occupied by him, and then all the calls would be answered.

2. Besides the fence and occupied line being regarded as the true line, is the fact that the defendant supposed the fence to be on the true line, and got all the land which he supposed he was getting.

3. One actual stake and stones were at the head of this fence and the other same direction below. The course is correctly given. The line was by the plaintiff designed to be on the fence, and by the defendant really also. If not the true line, as existing before the deed, it was deemed to be, and the actual position of the true line in doubt. All rules in relation to boundaries have their exceptions. If defendant's construction be adopted it will reject the point of departure, actually placed as the bound; the course recently and accurately run; the second stake, purposely erected for the description; the establishment of the fence; plaintiff's occupation since any occupation was had—and all on one line. If plaintiff's construction is adopted, all these are retained. A deed is to be construed so as to respond to all the calls. *Ricker* v. *Barry*, 36 Maine, 116.

A. W. Paine, for the defendant.

CUTTING, J.—The plaintiff, as administrator of his brother's estate, under license from the Probate Court, conveyed to the defendant a lot of land situated westerly of, and adjoining his own lot. The material language of the deed is as follows:—

"Beginning at a stake and stones and southerly corner of Samuel Wiswell's land, on the northerly line of John Jameson's land, thence north 45° 25′ west (formerly 45° N. W.) on said Wiswell's and Hannah Rice's line to a cedar stake and stones on the north side of a small brook on the southerly line of Jos. Doane's land," &c.

The plaintiff's lot extended only to his westerly line, which continued northerly constituted the westerly boundary of Hannah Rice's land. This line the jury have found to be the true divisional line of the two lots, and, if they were correctly instructed, their verdict should stand. If the

deed to the defendant fixes a line further westerly, then there would be a strip of land intervening between the plaintiff's lot and the lot conveyed, owned by neither party, but by the heirs of the intestate. Waiving then, for the present, the construction of the descriptive portion of the deed, how can the plaintiff complain of the instructions? They did not authorize the jury to infringe upon the plaintiff's land by passing over his westerly line, but only that defendant's lot was bounded easterly on the same line; that is, in the language of the instructions, "the defendant was bounded on the side in question by the line of Samuel Wiswell, (plaintiff,) and Hannah Rice's land, commencing at the south-east corner of said Samuel's land as said line was established by the original survey." Thus it is presumed that the jury did commence at the south-east corner of the plaintiff's land and run down on the line of his and Hannah Rice's lot.

Neither party contends that the divisional line was not established by the original survey; and the location of that line upon the face of the earth, it was for the jury to determine. The controversy arose in consequence of the plaintiff's endeavor to ascertain and define the line, *ex parte*, before his conveyance, and erecting temporary monuments which he supposed corresponded with it. Such conclusion necessarily results from the description in his deed to the defendant, the construction of which is next to be considered.

The place of starting is the most material point to be ascertained. The deed says:—"Beginning at a stake and stones and southerly corner of Samuel Wiswell's (plaintiff's) land, on the northerly line of John Jameson's land." Hence it is legally to be inferred that the stake and stones and southerly corner refer to the same starting point. If so, then no controversy would have arisen, but, if variant, then the question is, as to which is to control. The rule of law upon this point has been well settled in *Pride* v. *Lunt*, 19 Maine, 115, a leading case in our Reports. There it was decided that,—"where the commencement of a levy is described to be at a stake at the westerly corner of land set off to William Cobb, and that corner can be ascertained,

parol evidence is inadmissible to prove that in fact the stake referred to stood at a different place." And the Court remark,—"The conveyance in this case having declared that the land set off to Boyd does adjoin that set off to Cobb, the parol evidence cannot be received to prove that it does not." So in *Moore* v. *Griffin*, 22 Maine, 350.

Again; if the line did not commence at the southerly corner, but at some other place, it could not run northwesterly "on said Wiswell's and Hannah Rice's line," which is a monument the whole distance, and only terminates "on the southerly line of Joseph Doane's land," that is, where his line meets the other line and thereby forms the northwesterly corner of the defendant's lot. Whether the "cedar stake and stones on the southerly side of a small brook" is identical with the corner monument, and on the Wiswell and Rice line, is immaterial, for, as we have seen, the more permanent and consistent monuments must control.

That the Wiswell and Rice line was designed to be the true line is further inferable, (if any inference be necessary beyond the express language of the deed,) from the course by the compass:—"Thence north 45° 25′ west, formerly 45° N. W." How was the variation of the needle ascertained except by reference to the original running?

That the occupation, unless adverse, of such a character, and for a sufficient period of time as to gain title by disseazin, could not control the express language of the deed, is clearly established by the authorities. *Cleveland* v. *Flagg*, 4 Cush., 76; *Cowell* v. *Tucker*, 9 Met., 150; and *Crosby* v. *Parker*, 4 Mass., 110.

In this case, the rulings were strictly in conformity with the law, and the verdict sustained not only the legal, but the equitable right of each party. They relieved the plaintiff of the fraudulent charge of pretending to sell and convey all of his brother's lot adjoining his own, while at the same time he designed covertly to retain a part for himself.

Exceptions overruled.

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

Asa Warren *versus* Samuel H. Blake.

Where the title of two adjoining closes becomes united in one person, all subordinate rights and easements are extinguished.

Where an owner of land surveyed and laid out into lots, with a street represented upon the recorded plan as running east and west between the two ranges of lots, simultaneously conveyed the south range to the defendant, commencing at the west end of the "southerly line of the street as laid down on" the plan, thence south and east, certain specified distances, thence north, up a specified stream, "to a point where a line drawn from the point of beginning, at right angles with" the first line "would strike said stream, thence westerly, at right angles with" the first line, "to the place of beginning;" and the north range to the plaintiff, commencing at the west end of the "southerly line of" the street "according to the plan, thence easterly by the line of said street, as laid down on said plan, to the" stream, "thence north and west," certain specified distances, "thence southerly," by a specified line, to the place of beginning; — *Held*, that the fee in all of the land covered by the street passed to the latter and not to the former.

The clauses in the deed to the grantor of the defendant, "with the buildings thereon," and "to have and to hold the above granted premises with all the privileges and appurtenances thereto belonging," will not pass the fee to so much of said street as is covered by the north end of the brick stable erected on the south range of lots, nor to the passage-way thereto, subject to an easement, to the plaintiff to pass thereon to his pasture.

If the owner of two adjoining closes, over one of which a convenient passage-way exists for the benefit of the other, simultaneously conveys them to two different purchasers, the right to use the passage-way will not pass as an easement or appurtenance to the purchaser of the latter close, unless such use be a matter of strict necessity.

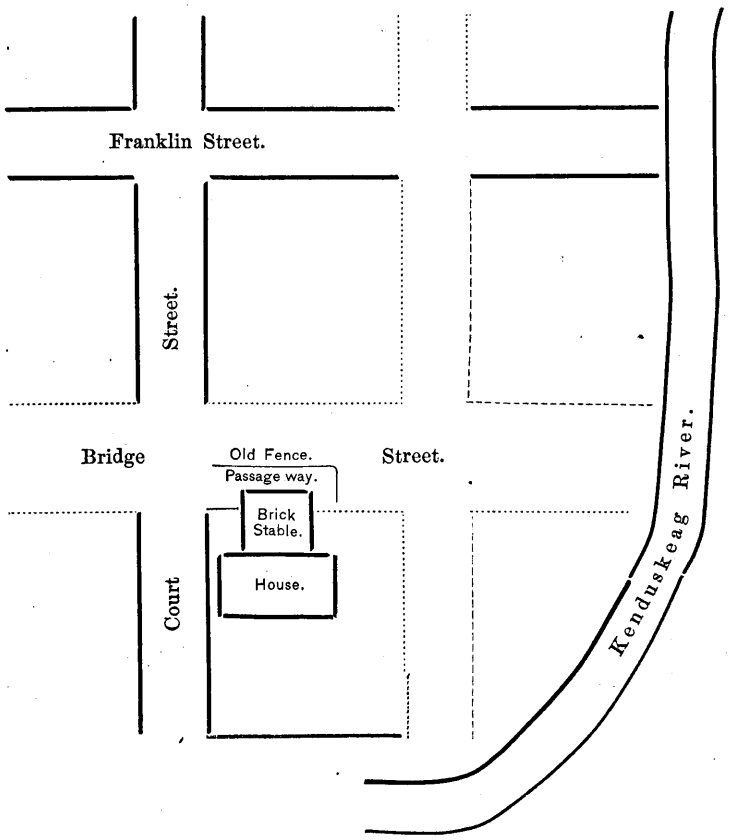
On Report.

Writ of Entry.

It appeared that the house was built about the year 1833, and the brick stable, ten feet of which was within the limits of Bridge street, a few years later; that, whilst Samuel Farrar lived there, he used the southerly side of Bridge street as a passage way to the rear of his buildings; that there was a stone monument still standing at north corner of Bridge and Court streets, and an old fence extending down near the middle of Bridge street, a short distance beyond the lower part of the stable, and from thence, at right angles, to the south line of Bridge street. This fence en-

closed a passage-way fifteen feet in width, from Court street to entrances into the stable, and closed on Court street by a wide and narrow gates. It was used by Farrar for more than twenty years, and was the only access he had to his garden, &c.; and, since Warren has owned the pasture, it has been the only way to it from Court street.

The remaining facts sufficiently appear in the opinion. The description of the premises will be readily understood by reference to the following diagram, representing a portion of Valentine's plan, with allottings omitted.



J. A. Peters, for the plaintiff.

S. H. Blake, pro se.

Defendant claims an easement in Bridge street, because,

1. There was no merger of Bridge street, by unity of title in S. Farrar, and because it is but one of the six streets into which the Hatch land was laid out. It was not an entirety. Others were interested.

2. S. Farrar's deed to Isaac Farrar, under which defendant claims, bounds defendant's premises by Bridge street, and hence gives him an easement. *Southerland* v. *Jackson*, 32 Maine, 81; *O'Linda* v. *Lothrop*, 21 Pick., 292; *Smyles* v. *Hastings*, 22 N. Y., 222. Bridge street exists upon the face of the earth, has stone monuments at its corners, a fence on its south line and an open space to the Kenduskeag; and it so existed, notwithstanding the unity of title, when Farrar conveyed, and it is referred to in that conveyance as an existing fact, and defendant is bounded by it as such, and he has an easement in it implied by such boundary and reference to it as a street. When Farrar divided the estate and conveyed the south part he revived the street, recognized it as existing, and his grantee has all the rights incident to and implied by such recognition. *Walker* v. *City of Worcester*, 6 Gray, 550.

If deed under which defendant claims had not referred to street, but simply conveyed lots included and numbered as by Valentine's plan, and no street had been marked out on the face of the earth, the deed would pass an easement in the street. *Bizzell* v. *N. Y. Cen. Railroad*, 23 N. Y., 64. Nor is it of any consequence, so far, that deed to plaintiff includes the site of Bridge street, — extending to its south line. 37 N. Y., 194; 23 N. Y., 65.

3. Defendant claims right to use passage-way as necessary to the use of the buildings. It has been used thirty years. It was granted by the deed. Washburn on Easements, 61, § 42; *Ib.*, 29, § 10; *Atkins* v. *Bullman*, 2 Met., 465; *Dunkle* v. *Wilton R. R. Co.*, 4 Foster, (N. H.)

502; *James* v. *Plane*, 4 Adolph. & Ellis, 749; *Lampman* v. *Wilks*, 21 N. Y., 510. Necessity does not create the way, but is merely the evidence that the parties must have intended to grant it. 1 Coms., 101; Washburn on Easements, 526, § 6. If the deed exclude the way by metes and bounds, still the way passes. *Hattemier* v. *Albro*, 18 N. Y., 751; *Leonard* v. *Leonard*, 2 Allen, 545. Necessity need not be absolute. *Pettingill* v. *Porter*, 8 Allen, 6. In granting a part of an estate, an easement has been reserved to the grantor without express terms, if it were *de facto* used in connection with it when granted, and were necessary to its enjoyment in the condition in which the estate was. *Pyer* v. *Carter*, 1 Hurlst. & N., 916; Washburn on Easements, 529, § 9.

4. Defendant claims that the fee of so much of Bridge street as the stable stands upon, and of the passage-way (subject to an easement by the plaintiff to his pasture below,) passed by the clause "with the buildings thereon" standing. The buildings were an entirety. Farrar could not have intended otherwise. Also, the *habendum* of the "above granted premises, with the privileges and appurtenances thereto belonging." The ground under the stable and the passage-way to it were "appurtenances" to the buildings and passed with the buildings. *Ammidown* v. *Ball*, 8 Allen, 293.

KENT, J.—Nathaniel Hatch, being owner of a considerable tract of land in Bangor, caused the same to be laid out into lots, and, by the plan made by the surveyor, which was recorded, a certain portion of the land is represented as streets, with designating names; one of these streets on the plan is called "Bridge street." Samuel Farrar, under whom both parties claim distinct parcels, became the owner of the land on both sides of this Bridge street. Whilst the title to the whole tract was thus in him, he, by deeds of the same date, conveyed to two persons, the plaintiff and the defendant's grantor, each a portion of the land, both conveyances

including the whole tract. The defendant's deed was recorded one day before the plaintiff's. The deed to the plaintiff in terms, and beyond dispute, includes the whole of the land in what is called Bridge street on the plan. The deed to the defendant's grantor, of same date, as clearly excludes from the lines therein given the land laid down as such street.

The plaintiff brings this real action to recover the land included in the street. The defendant pleads the general issue, and, by brief statement, claims an easement on Bridge street, and title to so much of the street as is covered by his stable and a narrow passage-way thereto.

Assuming that the defendant has such easement, or right to use the street as a private way, or for any purpose, we do not readily perceive why the plaintiff may not assert his legal title to the land, and recover possession under his title; leaving to the defendant to assert whatever right he may have by way of easement, or any similar legal right, after such recovery.

But the parties seem desirous to have all the questions between them determined by the Court, and we therefore have examined the whole case, and will now give the result of our investigations. What was the effect of the union of title in Samuel Farrar to both tracts of land, or rather, of the whole tract through which this street was laid on the plan? Mr. Farrar first acquired title to the portion on the southerly side of the designated street by deeds from Nathaniel Hatch, which clearly and distinctly, by the description, bounded him on Bridge street. He acquired, subsequently, title to the portion on the northerly side through a levy made by a creditor of Hatch. The description in that levy included all the land covered by the street, as it made the south line of the tract levied on, the *south* line of what was called Bridge street. Samuel Farrar obtained this title under the levy, and in the deed to him the whole of the land covered by this street is expressly conveyed, but this portion is excepted from the covenants of warranty. The

whole tract, through which the street was designated, thus became the absolute property of Samuel Farrar. "When the possession of two closes is united in one person all subordinate rights and easements are extinguished." *Whalley* v. *Thompson*, 1 B. & P., 373.

The street was not a public street in any sense. It has never been laid out or accepted as such. If required as a public highway, it could only become such by a legal laying out. *Harwood* v. *Hutchinson*, 10 Maine, 335. But it is unquestionably true that individuals, who have taken deeds referring to a plan and bounded on a street, may claim a right to have it kept open for their reasonable use as a way, although the fee in no part of the street passed. *Sutherland* v. *Jackson*, 32 Maine, 80.

We are not called upon to discuss or decide the question, how far individuals holding deeds of lots on other streets, laid down on this plan of twelve acres, can claim a right to have this distant street always kept open. The question here is one of legal title, and the question of easement or right arises between grantees of the same individual, under deeds from him, after the whole tract through which the street passes had become his sole property. When the same person owns a tract of land or two adjoining lots, when no public or private rights are interposed, he may carve out and sell any portion that he pleases, and the terms of the grant as they can be learned from the language of the deed, or by just and legal construction, will regulate and measure the rights of the grantee. *Salisbury* v. *Andrews*, 19 Pick., 250.

He may sell a house, without the easement; he may sell a part of a house, or a house without the outbuildings; and, if this appears to have been done, in clear and explicit and unmistakeable language, there is no place or right for a Court to doubt or question, or to refuse to carry out, in its judgment, the legal result. *Ibid.* And so, if there is a private way over such premises, actually in use, or designated on a plan, and no one else has a legal right to use it,

he may discontinue it, in whole or in part, and may sell and convey the fee in the land over which such way was laid out or used. *Whalley* v. *Thompson*, 1 Bos. & Puller, 373.

What did Samuel Farrar actually do, after this union of titles in himself? The defendant claims that, by his deed to Isaac Farrar, his grantor, he in fact conveyed the fee to the middle of Bridge street, by bounding him on that street. But did he thus bound him? By deeds of the same date, he conveyed, as before stated, all the land on both sides of the street and including the land in the street.

In the deed to Isaac Farrar, he commences the description of the premises granted at a point on Court street, where the southerly line of Bridge street intersects that street. This is the only reference in that deed to Bridge street. The lines then run southerly by Court street, and from thence to Kenduskeag stream, then up the stream to a point, where a line drawn from the point of beginning, at right angles with said Court street, would strike said stream, thence westerly, at right angles with Court street, to the place of beginning. In this last line, and in the fixing of the points of its departure, there seems to be a studious avoidance of any recognition of the line of Bridge street as the boundary. It may be that the line, as described, would nearly, if not entirely correspond with the line of that street on the plan. But the deed does not bound him on that street, *eo nomine*, and the reason for this careful omission is doubtless to be found in the fact, that in the deed of the other parcel to the plaintiff, on the same day, the description of the premises, as clearly and carefully included *all* the street in the grant. And this in fee, and not as a street. For, instead of beginning on the *north* line of this Bridge street, as he naturally would, if he had intended to recognize it as a street, and running by such north line, he begins at the same point that he does in the deed of the other parcel, viz.: the point in the southerly line of Bridge street; but instead of running as before along Court street, he, in this deed to the plaintiff, describes the next

line as "easterly by the line of said street, as laid down on the plan, to Kenduskeag stream, then around the lot lines, on the stream, and then to Court street, and then on Court street "to the point of beginning," i. e. the *southerly* line of Bridge street. This description very clearly conveys the fee in the whole street as a part of the lot, and not as a street. The common grantor, on the same day, therefore, evidently and purposely, used words in both deeds to express his intention of disregarding the location and existence of this street in the future.

It has been decided in this State, that a grant of land, bounded in terms on a highway, carries the fee to the centre of the way, if there are no words to show a contrary intent. As in the case where a man, owning on both sides of a road laid out through his land, sells and bounds on each side by the road. *Johnson* v. *Anderson*, 18 Maine, 76.

But where, by the deed, the limits given clearly exclude the land in the street, and bound the party on a line, not named expressly as the line of the street, (as a wall or fence,) although in fact coinciding with the line of the way, it has been held that the fee did not pass, although there might be a right to use the way. *Sutherland* v. *Jackson*, 32 Maine, 80; *Tyler* v. *Hammond*, 11 Pick., 193; *Howard* v. *Hutchinson*, 10 Maine, 335. The intention of the party is an essential element, to be gathered from his language in his deed. We do not find anything in the deeds from which an intention to grant a fee in this street to Isaac Farrar can be fairly established. On the contrary, it appears plainly, that he did not intend to do so, and that he did not do so, taking both deeds into consideration.

The defendant further contends that, if he obtained no fee in the street, by the boundaries mentioned in his deed, he did acquire *a fee*, (and not merely an easement,) in so much of Bridge street as the stable covers, and in the passage-way thereto, — subject to an easement in the plaintiff to pass thereon to his pasture. This he claims as granted by the deed to Isaac Farrar, and as distinct from the claim, hereaf-

ter considered, of a right by necessity, or an easement, which was attached to the freehold granted.

We have already seen that a man may deed as he pleases, and by such lines as he sees fit to designate as the limits of his grant. These may seem to others as singular and perhaps absurd. But the Court has no power to go beyond them, and fix other lines, which to them may appear more sensible and reasonable, in view of the actual situation of the property.

In this case, we find that the grantor did actually convey to this plaintiff, in fee, all the land which is claimed by defendant, by his proposition. We further find that he limited the defendant's grantor, by a distinct and perfectly straight and unswerving line from Court street to the stream. We are now asked to change this line, and make one in lieu of it, that shall make two right angles, so as to include a passage-way and a part of a stable. This claim is based on the words in the deed—"with the buildings thereon standing,"—and the usual general clause in the *habendum*,—"to have and to hold the above granted premises, with the privileges and appurtenances thereto belonging."

Where a deed of land describes it by bounds and admeasurements in feet and inches, and also adds the words "or however otherwise the same is bounded, or reputed to be bounded, being the mansion house and land thereto belonging,"—it was held that this sweeping clause did not enlarge the grant, although, if these latter words had stood alone, they would have carried the mansion house and land belonging to it, but not being embraced in the particular description by metes and bounds they did not pass.

It is familiar law that land cannot pass as appurtenant to land, although an easement may. The question is, whether by any fair construction of the deed, it, by its own force, conveyed the fee to this strip.

In the case of *Ammidown* v. *Ball*, 8 Allen, 293, cited and relied upon by the defendant, the question was whether a small parcel, or curtilage, enclosed and used with the

house, passed, although not within the lines as given in the deed. The opinion of the Court finds a distinction between this case and the ordinary one arising under a general expression in the *habendum*, in the fact that, in the description of the land granted, after giving the boundaries, these words are added, "together with *all* the dwellinghouse and building, *with the appurtenances* situated thereon or belonging thereto," and then follows the usual and general *habendum*. It was held that the word "appurtenances," first used, referred to the appurtenances belonging to the house, and not those belonging to the estate generally; that the deed not only conveys the whole land, with its privileges and appurtenances, generally, but mentions the house and building with *their* appurtenances. It is admitted that land cannot be appurtenant to land or to a house, but it was concluded in this case, that, by the special language of the deed, and the *repetition* of the word, this small triangular piece was actually granted by the deed and passed as an appurtenant to the house.

This case, therefore, although it is the strongest case for the defendant, we have seen, is not a direct authority, by reason of the distinction above stated. It does not meet this case; as here the word "appurtenances," was only used in the *habendum* generally. We can find nothing in this case which would authorize us to declare that the legal title or fee in the land, in the street outside of the boundaries given, passed to the defendant. The plaintiff acquired title, as we have seen, by deed of same day. *Whalley* v. *Thompson*, 1 Bos. & Pull., 373, before cited. The defendant, in his able argument, which evinces research and a full and fair presentation of all the questions arising in the case, does not press the point last alluded to with as much elaborateness and confidence as he does another analogous to it. He insists that if the *legal title* to the land covered by the street, or the passage-way, did not pass, and if he acquired no right of any kind in Bridge street, as such, yet he has an easement or right of way in that strip, used as a passage-

way, and on which a part of his stable stands. He claims this as fairly arising under the deed from Samuel to Isaac Farrar, from whom he claims.

It is well settled that an easement, or right to use or to occupy land, not within the lines given in a deed, may be claimed and held as a right, when the fee of the land does not pass. The question is, when and how far does that right become vested under such a deed? A distinction is made between a deed conveying in terms a particular house, or messuage, or farm, known by a certain name, without defined limits, and a deed conveying a specific piece of land, carved out of a larger piece, held by the grantors, and exactly described by metes and bounds. In the former case, where the grant is by name and not bounds, many things will pass which have been used with the principal thing, as parcel of the granted premises, which would not pass under a grant of a piece of land by metes and bounds. *Grant* v. *Chase*, 17 Mass., 443. But even in the latter case an easement or right may pass. Whenever the thing granted cannot be used for any beneficial purpose by the grantee, without some use of other property of grantor, the law, which always assumes that the parties intended that the purchaser or grantee should have possession and use of the thing conveyed, infers, as a part of the grant, a right to use that other property, so far as necessary to the fair enjoyment of what was conveyed, although not expressly named in the deed. The common illustration is that of a conveyance of a parcel of land, say one acre, by metes and bounds, out of the centre of a lot, entirely surrounded by other land of grantor. In this case the law infers, as part of the grant, a right of access over that other land to the grantee of the acre. The ground on which this right is based is that of *necessity*. And this example seems to have been the foundation for the whole doctrine on this subject, which has found its way into the law. This doctrine, in some reported cases in this country and in England, starting from this point of *necessity*, has been apparently extend-

ed to cases of convenience, and to what was, in fact, in use by the grantor at the time of the conveyance. This has sometimes arisen from not observing the distinction before alluded to between a grant of a messuage by name and one by precise metes and bounds.

We have examined with care the authorities cited, and some others, but do not deem it necessary to allude to each, by a statement in detail of the facts and reasoning. Some of the leading cases on this subject, cited by defendant, are *Atkins* v. *Boardman*, 2 Met., 465; *Dunkle* v. *Wilton R. R.*, 4 Foster, (N. H.,) 502; *Lampman* v. *Wilks*, 21 N. Y., 510; *Hattemein* v. *Albro*, 18 N. Y., 751; *Leonard* v. *Leonard*, 2 Allen, 545, and the leading English case of *Pyer* v. *Carter*, 1 Hurls. & Norman, 916.

The last named case would seem to decide that, on the grant of a part of an estate, an easement might be claimed as reserved or granted, without express reservation, or grant, if it were, *de facto*, used in connection with it at the time of the grant, and was necessary to its enjoyment in the condition in which the estate then was. Here, although the word "necessity" is used, it is limited to the necessity in using the property in its then condition and according to the prior use. But is this the true rule?

This case of *Pyer* v. *Carter* has been very recently, not merely doubted, but denied by the Chancellor of England, in the case of *Suffield* v. *Brown*, reported in 10 Jurist, (N. S.,) part 1, p. 111. The Chancellor distinctly denies the doctrine that, where an owner of an entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous, apparent, or necessary easements out of or upon the thing granted, as have been used by the owner of the whole, and for the part reserved. If the vendor was in the habit of using a part in connection, and for convenience of another part, when owning the whole parcel, his right to do so was cut off, and released by necessary operation of an unqualified sale and conveyance of the subservient property. The Chancellor

also holds, that notice of the manner of using before conveyance given to the grantee would not make any difference in the rights of the parties, which must be determined by the deed. The Court in Massachusetts has had this question before them in several cases. *Nichols* v. *Luce*, 24 Pick., 102; *Johnson* v. *Jordan*, 2 Met., 234; *Thayer* v. *Paine*, 2 Cush., 327; *Casberry* v. *Willis*, 7 Allen, 364; *Randall* v. *McLaughlin*, 10 Allen, 366.

The law, as settled in that Commonwealth, is stated with precision by Mr. Justice HOAR, in *Casberry* v. *Willis*,— "where there is a grant of land *by metes and bounds*, without express reservation, and with full covenants of warranty against incumbrances, we think there is no just reason to hold that there can be any reservation by *implication*, unless the easement is *strictly one of necessity*. Where the easement is only one of existing use, and great convenience, but for which a substitute can be furnished by reasonable labor and expense, the grantor may certainly cut himself off from it by his deed, if such is the intention of the parties. And it is difficult to see how such an intention could be more clearly and distinctly intimated than by such a deed and warranty. The exceptions are of things appendant to the granted premises, and which are naturally or necessarily annexed to them, such as a natural watercourse, and perhaps an artificial conduit, running to the granted premises from other land of the grantee. A way, when it is strictly a way of necessity, has been considered as falling under the same rule, and as passing to the grantee, or being reserved by the grantor, without any express words of grant or reservation. In the case at bar, the way, and other privileges, claimed by defendant, were not annexed to the sugar house estate by any natural or legal necessity." In the same case, the fact of unity of possession and seizin in the grantor is considered. It is said, that "it does not appear that the way and other privileges were ever used or claimed before Estes became seized of both houses. And, if they had existed before that time, the right would have been extinguished by

the unity of title in Estes," * * * "and could not be claimed afterwards, without a new grant. Whilst both estates were owned by Blanchard, no easement could be created by any use of the drain, for the benefit of one."

This case, from which we have extracted so largely, is reaffirmed in the very recent case of *Randall* v. *McLaughlin*, 10 Allen, 366.

We adopt, substantially, the same view of the law, as in accordance with authority and as sustained by reason and expediency. If we adopt any other rule than that of strict necessity, we open a door to doubt and uncertainty, to the disturbance and questioning of titles, and to controversies as to matters of fact, outside of the language or boundaries of the deed. If an estate, fully granted without exception or reservation, can be encumbered forever by an easement, or right of use by a third party, by the finding of a jury that such use would be highly convenient, or that it was exercised by a former owner, or was notorious, or any other ground short of strict necessity, the sanctity and security of titles by deeds, exact and precise in their terms, would be seriously shaken and impaired. The record gives no notice of any such right or easement.

Without a more particular examination of the cases to which we have referred, and which we have examined, we will simply apply the rule we have stated to the facts in the case before us.

On the one hand, it appears that Samuel Farrar, whilst he lived on the premises, used a strip about fifteen feet wide, of what is called Bridge street, as a passage-way to the rear of his buildings, to his garden, and to his pasture, (now owned by the plaintiff,) and for his cow and horse to go into and out of his stable, and to get hay to his stable and coal to his shed and house. And he had in use no other access to his garden and ice house for a team. On the other hand, it appears that his house and lot were bounded on Court street, and that, according to his witnesses' testimony, "there is no natural impediment to making a road

through his premises, and round his house, and up to his stable." It would seem that such a way would be more circuitous and expensive than the present one, but not impracticable or very expensive.

There can be no doubt that this way, thus used, was highly convenient and useful to the estate conveyed to the defendant. It certainly does appear somewhat singular, and almost inexplicable, that, in conveying the estate on the same day, to two persons, in separate parcels, the common grantor should have so carefully and clearly conveyed the whole of the land covered by this street and passage-way, in fee, with covenants of warranty, and with no reservation in favor of the other lot, to one person, and, in the deed to the other, of the estate he lived on, with equal care, should have limited it by a strict line, not even referring to the street or passage-way as a boundary, and apparently intending to ignore and abolish all rights or claims of use or easement. But he did do so, and the parties accepted and entered under their deeds and we cannot alter them.

We feel bound to subject the facts to the test of strict necessity, as before explained, and we cannot find the existence of any such necessity as would create a perpetual easement in favor of the estate owned by the defendant, over the estate granted to the plaintiff.

The result is, that the plaintiff is entitled to judgment.

Judgment for the demandant for possession of the land demanded in his writ and declaration and costs.

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

FREDERICK DREW *& als., in Equity, versus* ALBERT G. WAKEFIELD *& al., Executors.**

Where a bequest is made subject to a condition precedent, and no time is fixed for the performance of the condition, and its performance is wholly dependent on the will of the grantee, the law gives a reasonable time to perform it.

What is an unreasonable time.

Effect of R. S., c. 74, § 17, limiting the time of performing a condition precedent in case of bequests, upon a will probated before such statute went into operation.

Where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taking it shall be deemed a trustee for other trusts in the will, or for those who are to take under the dispositions of law.

When a bequest of personal property becomes ineffectual for any cause, residuary legatees take it by virtue of the residuary clause.

The common law distinction between a lapsed devise and a lapsed legacy, has been abolished by R. S. of 1841, c. 92, § 13, (R. S., c. 74, § 5,) by which a devise will pass subsequently acquired real estate.

Contingent interests, not previously devised, will go by a general residuary clause to the residuary devisee, unless the will contains special indications of a contrary intention on the part of the testator.

Stat. 43 Eliz., c. 4, relating to charitable gifts and uses, is a part of the common law of this State.

Notwithstanding a trust for charitable uses may be somewhat vague and indefinite, a court of equity may enforce its execution.

When a bequest is to relations, the next of kin are entitled to the bequest, unless, from its nature, or the testator having authorized a power of selection, a different construction is allowed.

When a fund is bequeathed to executors or trustees upon trust, to distribute among the testator's relations, or apply to any other specific purpose, in such manner as they may think fit, the executors or trustees, if willing to execute the trust, will not, on a bill being filed for carrying the trusts into execution, be deprived of their discretionary power, but they may propose a scheme before the master for the approbation of the Court.

It may well be presumed to be in accordance with the intentions of a testator that, in the distribution of his estate, his "deserving relations" should be preferred to "indigent persons" not of kin.

Where the testator had given a deed of land, with restrictions, to a certain son, and, by will, had removed the restrictions, adding "said farm is given

* This case came into the hands of the present Reporter since the issuing of vol 53.

to him in full for his share of my estate;" and certain devises had lapsed and gone, by a general residuary clause, to certain trustees named, to be distributed among the testator's "deserving relations, in such manner as the trustees may think proper,"— such son may become the object of his father's bounty within the discretion vested in such trustees.

Reasonable costs and charges may be allowed to both parties to a bill in equity, brought to obtain a construction of a will.

BILL IN EQUITY.

APPLETON, C. J.—The complainants, heirs at law of the late Thomas Drew, have brought their bill in equity against the defendants, as executors and trustees under his will, to enforce certain trusts, as they allege, contained therein and in their favor.

The rights of these parties litigant arise under the will of said Drew, and depend upon the construction to be given thereto, taken in connection with the facts asserted in the bill and admitted by the answer or proved by testimony, to the admissibility of which no exceptions are taken.

The testator, after giving legacies to his children, by the seventh item of his will, devised real and personal estate to the defendants, as trustees, in the following words:—

"Seventh,— And whereas I have long contemplated the establishment of an asylum and farm school for the reform and education of indigent boys, as contemplated in an Act of the Legislature of the State of Maine, entitled an Act to incorporate "The Bangor Asylum and Farm School for Indigent Boys" passed April 2, 1852, as a great public charity, and have desired to impart of my ability to the endowment of such an institution, I therefore give, bequeath and devise to my said executors, but *in trust* for the endowment of such an institution, *when* properly and legally organized and sufficiently endowed, with this my bequest, to put such school in operation, all the lands and real estate which I own, or in which I am interested in the town of Sangerville, which land and real estate I value at the sum of five thousand dollars, and said executors are to hold said lands and real estate in trust for said purpose until in their opinion said institution is properly organized and sufficiently en-

dowed, aforesaid, when they are authorized to convey said lands to the proper officers of said institution, in trust, for the use of said institution.

"I also give, bequeath and devise to my said executors the sum of sixteen thousand dollars in trust for said institution, said sum being in notes in part, and the residue to be made up in the sale of lands by said executors, which sale they are authorized to make *when* they may deem it proper, which sum shall be invested by said executors in such manner as shall make the bequest most advantageous for such school, and to be paid over and conveyed to the proper officers of such school *when* a sufficient sum shall have been subscribed and given to justify, in their judgment, the commencement of such school, but not until the available means of such school, including my bequest, shall amount to the sum of forty thousand dollars."

This bequest is upon condition. Conditions may be precedent or subsequent. Conditions precedent are such as must be punctually performed, before the estate can vest. The bequest is on condition precedent. Before the Bangor Asylum and Farm School for Indigent Boys can have any right to this bequest or any claim to a conveyance, performance of the conditions, upon which alone such rights depend, must be fully shown.

But for what length of time can the performance of a condition precedent be deferred? How long are the trustees to retain the property bequeathed to the Bangor Asylum and Farm School hopelessly awaiting the performance of the conditions, upon the happening of which they would be authorized to convey to the "proper officers of said institution." The performance of the condition depended upon the action of the corporation to whom the devise was made. Conditions precedent must always be performed before the right dependent thereon can be enjoyed, and if no time be fixed and performance be wholly at the will of the grantee, the law gives a reasonable time in which to perform it. *Ward* v. *Patterson*, 46 Penn., (10 Wright,)

372. In the case cited, eight or nine years elapsed before the performance of the condition precedent, and the delay was held unreasonable.

More than eleven years have elapsed since the death of Mr. Drew and the probate of his will. The corporators of "The Bangor Asylum and Farm School for Indigent Boys" have accepted their charter, but have never met for the purpose of organizing under it. They have no organization. They have no officers, nor do they intend to have any. No funds have been raised for the purpose of establishing the Asylum and Farm School. There has never been an attempt to raise any. It is not the intention of the corporators to take any action on the subject. There is not the most remote probability that the sum of twenty thousand dollars, or any portion of it, will ever be raised. No delay is asked for the purpose of making an attempt to raise it. Under such circumstances, it would seem that a reasonable time for the performance of the condition preliminary to a conveyance to the Bangor Asylum and Farm School had passed long ago.

Whatever may be the common law, as to what shall constitute a reasonable time for the performance of a condition like the present, it is not necessary to consider. It has been fixed by the Legislature, by R. S., 1857, c. 74, at five years. It is objected that this Act, having been passed since the probate of the will under consideration, is unconstitutional, as injuriously affecting vested rights. But whose rights have been disturbed? Not those of the trustees under the will, for it is immaterial to them whether they hold the estates in controversy for one or another object specified in the will, or for the benefit of the heirs at law. It deprives the corporation of no rights, for they have had none of which they could be deprived. They interpose no claim for the bequest. They ask not for delay. The contingent objects of the testator's intended bounty are not *in esse*, or are unknown and unknowable. No rights have been disturbed. None have been divested, because none have ever vested.

What shall constitute a reasonable time for the performance of the condition precedent, would seem to be a matter the Legislature were especially fitted to establish and determine. The period fixed is certainly not unreasonable. The trustees are not to hold the trust estate forever, when there has long since ceased to be the slightest probability that it will ever be required for the purposes for which it was bequeathed. If five years be a reasonable time for the future, more than double that time has elapsed since the probate of the will.

So, if a legacy be given upon condition subsequent, its performance is required within a reasonable time. In *Attorney General* v. *Bishop of Chester*, 1 Bro. Ch. Cases, 444, a legacy given towards establishing a bishop in America was held good, notwithstanding none was yet appointed; and the Court directed the money to remain in Court until it should be seen whether any appointment should take place. But how long was it to remain under judicial custody? Certainly not forever. When real estate was conveyed on condition that the grantee should remove a mortgage and no time was fixed for so doing, by the parties, it was held that the condition must be performed within a reasonable time. *Ross* v. *Tremaine*, 2 Met., 495.

Whether the condition be precedent or subsequent is immaterial. A reasonable time for its performance has elapsed, and it remains unperformed. The Bangor Asylum and Farm School for indigent boys are not entitled to the devise.

Nor does the doctrine of *cy pres*, or approximation, apply. The testator was one of those to whom corporate powers were granted. The Bangor Asylum and Farm School was the corporation to whose care he was willing to intrust the management of his funds. No other corporation, similar in its character or object has applied. Other charitable purposes are set forth in his will, and are entitled to this fund. *Attorney General* v. *Ironmongers' Co.*, 2 Beavan, 313.

When a trust is ineffectually declared or fails, or becomes incapable of taking effect, the party taking it shall be

deemed a trustee for other trusts in the will, or for those who are to take under the disposition of law.

It is next to be considered whether the twenty thousand dollar fund, consisting of real and personal estate, is to be held in whole or in part by these defendants as trustees in trust for the heirs at law, as such, or in trust for the charities designated in the next item of the will.

"Eighth. — The remainder of my property and estate, real, personal and mixed, I give, bequeath and devise to my said executors and their successors, to be held by them in trust, and after the payment of the aforesaid legacies and bequests, and of my just debts, funeral expenses and costs of probate, to be distributed by them to deserving relations and such indigent persons as they may think worthy of the same, and in such manner as they may think proper."

A portion of the estate set apart for the Bangor Asylum was in personal and a part in real property. The personal property falls into the residuum to be disposed of as indicated in the last cited item of the will. The residuary legatees, when a bequest of personal property becomes ineffectual for any cause, take it by virtue of the residuary clause of the will.

There is a distinction in the English authorities between a lapsed devise of real estate, and a lapsed legacy of personal estate; and while the latter falls into the residuary estate and passes by the residuary clause, if any there be, and, if not, passes to the next of kin, the former does not pass to the residuary devisee, but, the devise becoming void, the estate descends to the legal heir. But this distinction seems to have been abolished by R. S., 1841, c. 92, § 13, by which a devise will pass subsequently acquired real estate. In commenting upon the statute of Massachusetts, which is similar to the one just referred to, Mr. Justice WILDE, in *Prescott* v. *Prescott*, 7 Met., 246, remarks as follows: "The rule is, that lapsed legacies of personal estate pass to the residuary legatee, if any there be, and if not, to the next of kin. This rule, by the common law, does not apply to

lapsed devises of real estate. The distinction is founded on another principle of the common law, by which a devise of real estate is limited in its operation to lands of which the testator was seized when he made his will. The foundation of this distinction is removed by the R. S., c. 62, § 3, which provide that 'any estate, right or interest in lands acquired by the testator after the making of his will, shall pass thereby, in like manner as if possessed at the time of making the will, if such shall clearly and manifestly appear, by the will, to have been the intention of the testator.' This provision seems to remove the distinction between real and personal estate, so that now all legacies and devises pass to the residuary legatee." In *Blaney* v. *Blaney*, 1 Cush., 107, METCALF, J., referring to the same statute, says, that the English rule, above mentioned, "if it ever was in force here, can exist no longer."

The devise of real estate in trust for the Bangor Asylum and Farm School, was upon condition. The condition has never been performed. Whether it ever would be, in the beginning, was matter of doubt. More than reasonable delay for its performance has been allowed. There was, then, a contingent interest remaining. This is disposed of by specific devise. The testator did not intend to die intestate as to any of his property. This contingent interest passed to the respondents, under the residuary clause. *Doe* v. *Scott*, 3 M. & S., 300; *Hayden* v. *Stoughton*, 5 Pick., 528; *Brigham* v. *Shattuck*, 10 Pick., 309. "The rule as to reversionary and contingent interests, not previously devised," remarks WALWORTH, Ch. in *Van Kleek* v. *The Reformed Dutch Church*, 6 Paige, 600, "as now settled in England, appears to be, that a general residuary clause will carry all such interests to the residuary devisee, unless the will contain special indications of a contrary intention on the part of the testator." None such appear, but rather the reverse.

It was determined, in *Going* v. *Emery*, 16 Pick., 107, that the Statute 43 Eliz. c. 4, relating to charitable gifts and

uses, forms in principle and substance a part of the law of Massachusetts. The same course of reasoning adopted in that case shows it a part of the common law of this State. But were it not thus in force, a court of chancery has original jurisdiction to enforce and compel the performance of trusts for pious and charitable uses, when the devise or conveyance in trust is made to a trustee capable of taking the legal estate. *Dutch Church* v. *Mott*, 7 Paige, 77.

Notwithstanding the trust is somewhat vague and indefinite, a court of equity will enforce its execution. Gifts for "charitable, beneficial and public works," at Dacca, in Bengal, for the exclusive benefit of the native inhabitants, *Mitford* v. *Reynolds*, 1 Phillips, 185; for "poor pious persons, male and female," &c., *Nash* v. *Morley*, 5 Beav., 177; for "the widows and orphans of the parish of L.," *Attorney General* v. *Comber*, 1 Sim. & St., 93; for "the benefit and advancement of learning in every part of the world," *Whicher* v. *Hume*, 10 Eng. Law & Eq., 217, have been held valid. Trusts, equally uncertain and indefinite, have been sustained in this country, as in *Shotwell* v. *Mott*, 2 Sandf., Ch., 46, where the bequest was for the members of the New York Yearly Society of Friends, who are in limited and straightened circumstances; in *Going* v. *Emery*, 16 Pick., 107, for the cause of Christ, and for the benefit and promotion of true evangelical piety and religion.

Where the bequest is to relations, the next of kin, according to the statute of distributions, are entitled to the bequest, unless, from the nature of the bequest, or the testator having authorized a power of selection, a different construction is allowed. The Court cannot act arbitrarily by selecting particular objects. Nor can it execute the power in favor of relations in general, for that might lead to indefinite division, as in *Bennett* v. *Honeywood*, Amb., 708, where, within two years, four hundred and fifty persons applied as relations.

In *Harding* v. *Glyn*, 1 Atk., 469, a testator gave to Elizabeth, his wife, a house and certain goods and chattels, but

" desired her at, or before her death, to give the same unto and amongst such of the testator's relations as she should think most deserving and should approve of." The wife died without executing the appointment, and the Court divided the estate equally among the testator's relations living at the time of the wife's death. The rule, as laid down by Lord COTTENHAM, in 5 M. & Cr., 92, is thus expressed, that " where there appears a general intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favor of the class."

Where a fund is bequeathed to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose, in such manner as they may think fit, the executors or trustees, if willing to execute the trust, will not, on a bill being filed for carrying the trust into execution, be deprived of their discretionary power, but may propose a scheme before the master for the approbation of the Court. *Mahon* v. *Savage*, 1 Sch. & Lef., 111. " When a person has the power given to him of distributing among relatives, he may exercise his discretion," observes Lord REDESDALE, in the case last cited, " by giving to any of the kindred, though not within the statute. But if there has been no distribution by the person having the power, but it is to be left to the decision of the Court what relations shall take, the person entitled must be of kin within the statute, for the Court must have some criterion to go by, and the statute is a good rule for that purpose and the only rule the Court can have."

It may well be presumed to be in accordance with the intentions of the testator, that, in the distribution of his estate, his " deserving relations " should be preferred to " indigent persons" not of kin.

It is not necessary, therefore, to consider whether the alternative bequest to indigent persons is not too vague and indefinite to be upheld. *Vezey* v. *Jameson*, 1 Sim. & St.,

69; *Ommany* v. *Butcher*, 1 Turn. & Rus., 260. If so, the residue of the estate would have devolved to the next of kin, had it not been devised in trust for "deserving relations."

The testator intended to dispose of his whole estate by will. He expected all the provisions of his will would be carried into effect. He gave certain definite sums to his sons, — the same to all. He had previously given to John Usher Drew a farm, subject to certain restrictions. These restrictions he removed by will — adding — "said farm is given to him in full for his share in my said estate." But, if all the provisions of his will had been carried into effect, as he supposed they would be, the bequest to each of his children would have been in full of such child's share of his estate. But all these bequests were made upon the hypothesis that his disposition of his estate would be effectual. There is no particular purpose to limit John more than any of his children. They stand alike and may each become the objects of their father's bounty within the discretion vested in the trustees.

The parties are properly before the Court to litigate the question as to the proper disposition and distribution of the estate in controversy. The respondents are in no fault. They were under no obligation to assume responsibility without the direction of the Court. Reasonable costs and charges are therefore to be allowed out of the estate to both parties. *Bliss* v. *American Bible Society*, 3 Allen, 334.

If the estate should be divided among the heirs according to the statute of distribution, if desired by all the heirs and the executor's consent, the trust may be annulled, and the property distributed among the heirs upon their executing a release to the executors. *Smith* v. *Harrington*, 4 Allen, 566.

The bill is sustained, and —

Ordered, that Franklin A. Wilson, Esq., be appointed master to determine the reasonable costs and charges accruing in this case, —

And that the respondent be at liberty to lay before the

master a plan for distributing the estate in their hands, and let the master be at liberty to make a separate report of such plan and thereupon let the parties be at liberty to apply for payment or distribution of the funds remaining in the hands of the executors.

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

J. A. Peters, for the complainants.

A. G. Wakefield, for the respondents.

ALBION K. JONES *versus* MOSES BUCK.

Where the starting point in a description of a levy, is stated in the appraisers' return to be the "S. E. corner of lot number 29," and none of the other calls apply to that lot, but all but the first do apply to lot 32, and the latter lot was in fact the one examined and appraised, the levy will be upheld.

The statute does not require the return of an officer making a levy upon real estate, to specifically declare that the land appraised is "set off" to the creditor, "to have and to hold to him, his heirs," &c.; and, if the name of a person other than the creditor be inserted, the whole phrase may be rejected as surplusage.

ON REPORT.

WRIT OF ENTRY to recover a piece of land alleged to have been set off on an execution in favor of the plaintiff against the defendant.

The land was described by the appraisers as "commencing at the southeast corner of lot numbered twenty-nine, according to" a plan named, "thence northerly, along the west side of the Bennock road, to a point opposite the center of the front door of the house on said lot, thence, by a line parallel with south line of said lot, through the middle of the front entry of said house to the east line or side of the stable, thence southerly, at right angles, by said east side of said stable to the south line of said lot, then east to the first mentioned bound. * * And we have appraised said

real estate, described as above, as the estate in fee simple, in severalty and possession of said Buck, at the sum of," &c., "and have set off said real estate with metes and bounds as aforesaid to said Jones in full," &c., "to have and to hold the premises aforesaid, to him the said Jones, his heirs and assigns forever, in fee simple and in possession."

The essential part of the officer's return was as follows:— "the said appraisers proceeded with me to view and examine the same, so far as is necessary to a just estimate," &c., "and, having so viewed and examined, they appraise the same at the sum of," &c., "and set off the same with metes and bounds as aforesaid, to Joseph Baker, attorney for said Jones, to have and to hold to him, his heirs and assigns in fee simple, in severalty and possession, in full," &c. "I refer to and adopt the returns of said appraisers as a part of this my return, and I have this day levied this execution upon said land, described as aforesaid, and delivered seizin and possession thereof to said Jones," &c. The levy was made June 9, 1862.

It appeared in evidence that the plaintiff demanded possession of the defendant (who was in possession) July, 1863. The defendant declined giving possession to the plaintiff, alleging that the levy was void.

Robert Ellis, called by the plaintiff, testified he was one of the appraisers; that the officer shew the appraisers the premises; that the appraisers set off by metes and bounds the house and lot Buck then lived in; and the description accurately describes that house and lot except the number of the lot. After the testimony was all in, the case was withdrawn from the jury and reported for this Court to render judgment for the plaintiff or the defendant as the law, applicable to so much of the evidence as is legally admissible, should warrant.

J. Baker, for the plaintiff.

J. H. Hilliard, for the defendant.

Courses and distances can be controlled only by monu-

ments. The location of monuments may be shown by parol, while courses and distances cannot. *Chadbourne* v. *Mason*, 48 Maine, 25.

The return of the officer is the only evidence of title by levy. Statute title must be strictly in accordance with the statute, and every thing requisite must appear in the return. *Lumbert* v. *Hill*, 41 Maine, 482.

Parol evidence is not admissible to explain or vary the effect of language used in the return. *Grover* v. *Howard*, 31 Maine, 550.

The description of the premises is void for uncertainty. S. E. corner of lot 29, is a monument. The "house and stable" are monuments, the location of which is proved by parol to be on lot 32, two lots distant from lot 29.

Melvin v. *Prop'rs of Locks & Canals*, 5 Met., 15, and the cases there cited, are unlike the case at bar; for, if the number of the lot is discarded, nothing is left for direction. The word "possession," used in the officer's return, has reference to the title of the debtor, and is not descriptive of the land attempted to be levied upon. "Possession" is used in opposition to reversion or remainder. The creditor cannot find the land by the description. If the creditor cannot "find his land in the country, how can the Court find it in chancery?" Lord BACON.

Land conveyed to a client's attorney is not conveyed to the client. Equity may regard the attorney as holding in trust for the client and give relief, but no legal title is thus conveyed to the client.

KENT, J.—The title on which the plaintiff relies to sustain this action, is by a levy on an execution in his favor against the defendant. The defendant resists this title on the ground that the levy was so defective that the title has never passed out of him. The first objection is, that the description of the premises in the return of the officer is void for uncertainty or contradiction, and that it cannot be applied to any existing lot of land, if we follow literally

the points and boundaries named in the levy. The starting point, given in the levy, is the southeast corner of lot number twenty-nine. The land actually examined, appraised and which the other lines and monuments designate and set out, begins at the S. E. corner of lot No. thirty-two. There is no question, that, assuming the starting point as the corner of lot No. thirty-two, the description given in the return would correspond in all particulars with the lot which the plaintiff claims as being the one which passed to him by the levy. Does the fact that the starting point indicates another place or point, not reconcileable with the other description, render the levy void for uncertainty? It seems now to be well settled, that where several particulars are named, descriptive of the premises conveyed, if some are false or inconsistent, and the lines around the lot be sufficient of themselves, they will be retained and the others rejected, in giving a construction to a deed. *Vose* v. *Handy*, 2 Greenl., 322; *Wing* v. *Burgis*, 13 Maine, 111; a case where there was a mistake in the starting point in the levy, resembling this case in many particulars. The very recent case of *Forbes* v. *Hall*, 51 Maine, 568, reaffirms the same doctrine; *Cate* v. *Thayer*, 3 Greenl., 71; *Keith* v. *Reynolds*, 3 Greenl. 393.

In Massachusetts, the same rule was laid down before the separation, in *Worthington* v. *Hyler*, 4 Mass., 196, and has been repeatedly recognized since. *Melvin* v. *Prop'rs. of Locks, &c.*, 5 Met., 28; *Bosworth* v. *Sturtevant*, 2 Cush., 392; *Thatcher* v. *Howland*, 2 Met., 41; *Loomis* v. *Jackson*, 19 Johns., 449; *Jackson* v. *Root*, 18 Johns., 60; *Jackson* v. *Marsh*, 6 Cow., 281; *Johnson* v. *Simpson*, 36 N. H., 91. The last cited case is one where there was a mistake in the number of the lot, the line of which was made a boundary.

If we apply the principle laid down in these cases, to the facts before us, we find that there are several particulars stated in the levy that clearly show that the land levied on can be found only where the plaintiff contends that it is. The first line is to run to a point opposite to the centre of the front door of the house. Then through the centre of

the entry to the east line or side of the stable, and then, at right angles, by the east side of the stable, &c. Here we have indicated a dwellinghouse, and, beyond it a stable, having an east side, along which the line is to run. It is not pretended that there are any erections answering to these calls on any of the other lots. It is shown that they are all found on this lot No. 32. We therefore have no hesitation in deciding that the levy is not void or ineffectual on the ground of uncertainty in the description.

Another objection to the levy is made on the ground that the officer, in his return, says that the *appraisers* appraised the premises at a sum named, "and set off the same, with metes and bounds as aforesaid, to *Joseph Baker, attorney* to said Jones, to have and to hold to him and his heirs and assigns, in severalty and possession, in full satisfaction of this execution and costs of levying the same. I refer to and adopt the return of said appraisers as a part of this my return." The return of the appraisers is, that they "have set off said real estate, with metes and bounds as aforesaid, *to said Jones*, in full satisfaction of this execution and cost of levy." The question is, whether this misrecital by the officer, of the appraisers' return, which he adopts as part of his return, is fatal. The officer says, that the appraisers set the premises off to Joseph Baker, attorney of the plaintiff, and refers to their return, or certificate, as showing that fact. But the appraisers say, in that certificate, that they set it off to *Jones*, the creditor. It may be a grave question whether, taking both returns, the fair construction is not, that the land was set off to the creditor and not to the attorney, even if it were necessary to an effectual levy, that the return should show, by direct assertion, that the land was set off to the creditor, his heirs and assigns, to have and to hold forever. But is this required?

"All the debtor's interest in the premises will pass by a levy." R. S., c. 76, § 6. What makes a levy? The statute points out with great precision all the steps and acts necessary to make it effectual. A levy is a statute conveyance,

and vests the title and seizin in the creditor without other conveyance. "It is the return of the officer of the appraisal and proceedings, which operates as a statute conveyance and divests the debtor of his title, and the delivery of seizin is an acceptance of that title by the creditor, in satisfaction of the debt." This is the language of C. J. SHEPLEY, in *Pope* v. *Cutler*, 22 Maine, 109; *Foster* v. *Gordon*, 49 Maine, 57; *Langdon* v. *Potter*, 3 Mass., 215; *Wyman* v. *Bragden*, 4 Mass., 150, 4 Mass., 512; *Bryant* v. *Fairfield*, 51 Maine, 155. No deed or instrument of conveyance from the sheriff is required, as it is in case of a sale of an equity of redemption, c. 76, § 33. No words of grant are necessary in a levy. The title passes, not by deed, but by the levy, from the debtor to the creditor. When that is complete by the performance of all the statute requisites, and seizin is delivered and accepted, the title is perfect. All that the sheriff is authorized or required to do, after the levy is completed, is to deliver seizin and possession to the creditor, and to make a return of all his doings on the execution. The title rests on the return, and if that shows that all the statute requirements have been complied with, the title is good under it.

In this case the officer's return shows such compliance. It states every thing that the statute specifies as requisite in § 5. Section 1 provides that "real estate may be taken to satisfy an execution, by causing it to be appraised by three disinterested men." It is not a sale to satisfy the execution, and the transfer of the title by the officer to the purchaser, but the taking of the real estate and title thereto by the creditor on appraisement in satisfaction and payment of the execution. It is clear that the title under a levy can only pass to the creditor, and cannot to an assignee or grantee of a creditor, nor to his attorney. Baker can set up no legal title under the levy, even if he is to be considered as taking it for the benefit of the creditor, his client. The title, if it passes at all, passes to the creditor.

The sheriff in his return says that he delivered seizin and

possession to Jones, the creditor, although he had before inserted the words objected to, in relation to Joseph Baker, attorney. The question is, whether the insertion of these words, manifestly by inadvertence, avoids and renders nugatory the attempted levy? To determine this question we may inquire whether any such language, or its equivalent is required by the statute; i. e. is it essential that there should be in the return a specific declaration that the land is set off to the creditor "to have and to hold to him and his heirs," &c. If, instead of the name of "Joseph Baker, attorney to said Jones," the return had read, "to said Jones, the creditor," would they have been absolutely necessary to make the levy valid. Might they not be regarded as superfluous and surplusage? The law does not require them. The return would be perfect without them, and the title would pass by force of the return, as it shows a full performance of all prerequisites to make a perfect levy, without the words in question. If then they were not necessary, and might be struck out and leave the levy good, if the true name had been inserted, may they not be regarded in the same light when another name is inserted? Or, in other words, will a levy, perfect in all respects to give title to the creditor, with seizin delivered to the creditor, be rendered nugatory by the insertion in the return, by mistake or ignorance, or other cause, of the name of a person who could not, in any event, derive any title or interest therefrom to himself,—and when the whole sentence, in which the name is inserted, might be struck out as unnecessary, even if it had correctly named the creditor? It is to be observed that in the appraisers' certificate, adopted by the officer in his return, the land taken is described as the estate in fee simple, in severalty and in possession of Moses Buck, the debtor. This action is between the creditor and debtor, and as between them the above description is important in designating the land levied on in fact.

In the case of *Balch* v. *Pattee*, 38 Maine, 353, it appeared that the officer had first stated in his return, that the levy

was on the 17th of February, 1851, but he certified at the bottom of his return, that the levy was completed March 11, 1851. It was objected that this was fatal. The Court say, that "the officer having certified at the bottom of his return, that the levy was completed on March 11th, when nothing appears to have been done, or was necessary to give any additional effect to the proceedings, must be regarded as nugatory." The levy was sustained.

We are aware that it has been decided that a statute levy must be perfect, and that it cannot be reformed in equity, where there are subsequent purchasers, or levies by other creditors, subsequently. *Lunbert* v. *Hill*, 41 Maine, 475. It is not decided in that case that the levy cannot be reformed, if no third party has intervened and the title remains in the debtor, if the levy is inoperative. But, if it cannot be reformed, within the rules of equity, it does not follow that what is surplusage, and useless, and unnecessary, may not be rejected or disregarded, if what remains contains all that the statute requires. We do not question the doctrine, that such a mistake as this, if made in reference to any fact, or proceeding, or party, expressly required by statute and made essential to the validity of the levy, would be fatal. But we do not regard this in that light.

The conclusion is, that judgment must be rendered for the demandant. *Judgment for demandant.*

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

JOHN BRACKETT *versus* JAMES GODDARD.

Timber trees, cut down and lying at full length upon the ground where they grew, will pass by a deed of the land.

ON REPORT.

ASSUMPSIT on account annexed, for $60, for money paid by the plaintiff to the defendant, for logs and down timber, the title to which, the plaintiff alleged, was not in the defendant at the time of sale. The writ also contained a count for money had and received for same amount.

It appeared from the report that the defendant owned, in the summer of 1863, a timber lot in Hermon; that he cut down a large number of hemlock trees thereon, peeled the bark therefrom and removed it from the lot, — intending to prepare the trees by cutting off the tops and haul them off as logs to be sawed during the ensuing winter. The trees were severed from the stumps, and they lay as they fell, with the tops on. In the felling the choppers endeavored, so far as practicable, to have them lie in a good position for peeling, and afterwards hauling them off.

In the fore part of the fall of the same year, the defendant conveyed the lot by deed of warranty, without any reservations, to one Works. On the 20th of the following November, after Works had entered into possession of the lot under his deed, the defendant sold the hemlocks thus cut, to the plaintiff, by a bill of sale. To recover back the money paid for the bill of sale, this action was brought.

Previous to the commencement of this suit, the plaintiff demanded the hemlocks of Works, who refused to deliver them or permit the plaintiff to take them. Thereupon the plaintiff sued Works in trover therefor, and entered his action in Court, which action was continued from term to term for several terms, when that action was by agreement of parties entered "neither party." At a certain term of the Court, during the pendency of that action, the plaintiff wrote

to the defendant, then residing at Manchester, N. H., asking him to come to Bangor as a witness. The defendant went to Bangor at the time requested. For his travel and attendance as a witness, he filed an account in set-off in this action.

The Court were to render such judgment as the legal rights of the parties entitled them to.

D. D. Stewart, for the plaintiff.

Do several acres of hemlock trees, cut down and lying at full length as they fell upon the ground, untrimmed, with tops all on, pass by a deed of the land? Can the grantor, who has transferred both the fee and possession, successfully set up a claim of title to such trees, and take them away against the consent of his grantee? Thousands of acres of land are daily conveyed in Maine and the northern border States, covered with choppings, cut-downs, fallen trees and down timber, and nobody before, so far as the reports of cases in the several States show, ever presented such a claim. "The novelty of a particular action or defence, when the facts on which it is founded are of common occurrence, is a strong argument that it cannot be upheld." *Costigan* v. *Mohawk & Hudson R. R. Co.*, 2 Denio, 609; *Spear* v. *Cummings*, 23 Pick., 225; *Peters* v. *Peters*, 8 Cush., 535–6. If a warranty deed will not carry with it felled trees, it cannot convey, for the same reason, rocks and loose stones lying on top of the ground.

The rule touching fixtures is the same between grantor and grantee as between heir and executor. 2 Kent's Com., 345; *Dispatch Line* v. *Bellamy Manf. Co.*, 12 N. H. 205.

Is it the duty of an executor to return an inventory of the felled trees, choppings and down timber which were on the lands of his testator at the time of his death?

A. W. Paine, for the defendant.

Trees severed from the soil are personal property, and trover will lie for them, the conversion being regarded as

made at the moment they are removed from the stump. And so in trespass. *Longfellow* v. *Quimby*, 33 Maine, 457.

Contracts by parol will be sustained respecting them, which would otherwise be void by the statute of frauds. Brown on Stat. of Frauds, 245, § 242; *Smith* v. *Surman*, 9 B. & C., 561.

Logs, not the growth of the land sold, but drawn upon it from other land, as is frequently the case in the forest, must be personal property.

"Trees are part of the real estate while growing and before they are severed from the freehold, but as soon as they are cut down they are personal property." Bouvier's Law Dict., title "Trees;" 1 Hilliard on Torts, 544; *Bank* v. *Craig*, 1 Barb., 542; *Warner* v. *Leland*, 2 Barb., 613.

Kittredge v. *Woods*, 3 N. H., 506, speaks of timber trees, if blown down, or cut down by a stranger, although severed from the land, as belonging to the lessor, which implies the contrary when intentionally cut down by the owner.

The deed passes whatever is property of the realty; and that is to be regarded as a part of the realty which, in the estimation of the parties and according to their intention, is such, the form of the thing itself being considered. The rule is illustrated by the doctrine of fixtures, the intention of the parties and the nature of the thing itself entering into the consideration in settling the question whether the thing is or is not a part of the realty. If trees are cut with a design to remove them as an article of use or merchandise, it becomes personal estate. If it was the intention of the parties to prosecute that design, and remove it from the land, it still retains its personal character, and does not pass by deed of the land, provided the visible appearance is in conformity with the design. If the intention of the grantor, as evidenced by the thing itself, is not to remove but to abandon it as an article of use or merchandise and make it thus a part of the realty, it remains such and passes. Tops of trees, left from logging operations, down timber, abandoned on the land, exhibit themselves as abandoned

things, and become as much a part of the land as the detached boulders on the surface, or the piles of manure which have been hauled upon the land for the purposes of agriculture. They are like the leaves of the forest which, though most distant in their nature from real estate, are yet, by their abandonment, as much a part of the soil as the earth they lie upon. Tops of trees, abandoned trunks, like leaves, are organized matter returning by decay to dust. But the stick of timber, the mill log, the pile of bark and cordwood, are not such. Their nature discovers their designed use, not to return to earth as soil, but to be taken off for the arts of life. They speak a language of themselves, proving no design of being abandoned, or becoming, or remaining any longer a habitant of the soil where it grew. The moment it left the stump, it ceased to be nourished by the earth, and its new character gives it its laws and governs its future course. It can then be no longer an incident to the soil, more than the ox which is depastured upon it. But, like the ox, if dead and buried, or not buried, in its soil, becomes, upon such abandonment, a part of the realty, and not before. *Small* v. *Danville*, 51 Maine, 359.

APPLETON, C. J.,—This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his

deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property and may be seized and sold on execution. *Staples* v. *Emery*, 7 Greenl., 301. So, wheat or corn growing is a chattel and may be sold on execution. *Whipple* v. *Tool*, 2 Johns., 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed. 2 Kent, 346, or by statute, as in this State by R. S., c. 81, § 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. *Goodrich* v. *Jones*, 2 Hill, 142. Hop poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop raising, are part of the real estate. *Bishop* v. *Bishop*, 1 Kenan, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks RICHARDSON, C. J., in *Kittredge* v. *Wood*, 3 N. H., 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the statute of 1867, c. 88, defining the ownership of down timber. It would have been otherwise, had they been cut into logs or hewed into timber. *Cook* v. *Whitney*, 16 Illinois, 481.

The defendant, at the plaintiff's request, travelled from another State, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-

off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by statute.

Offset allowed.—Defendant defaulted, to be heard in damages.

CUTTING, KENT, WALTON, DICKERSON and BARROWS, JJ., concurred. TAPLEY, J., did not concur.

RUFUS MANSUR *versus* RUFUS S. COFFIN *& al., and Tr'st's.*

A trustee writ, made returnable in any county other than that in which one or more of the alleged trustees, on which service has been made, resides, may be abated.

Such defect, if apparent upon inspection of the writ, may be taken advantage of by motion seasonably made.

The want of service on an alleged trustee, residing in the county in which the writ is made returnable, cannot be cured under R. S., c. 81, § 25.

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

TRUSTEE PROCESS.

The plaintiff, both of the defendants, and Benjamin Harris, one of the alleged trustees, were described in the writ as residents in certain towns in Aroostook county, where the writ was made returnable, and Samuel H. Dale, the other trustee, was described as "of Bangor, in the county of Penobscot." The residences of all the parties were thus truly described. The officer's return shew an attachment of real and personal estate, service on Samuel H. Dale and the principal defendants, but no service was shown on Benjamin Harris. On the first day of the return term, the defendants appeared specially and filed a written motion to dismiss the action, because,—

1. The Court has no jurisdiction of the action;—
2. Said action is trustee process, and the only trustee sum-

moned, to wit, Samuel H. Dale, is not a resident of this county, but resides in the county of Penobscot, where the suit should have been brought; —

3. Full, complete and sufficient service of the writ in said action has not been made. And the defendants say that the above defects appear upon the face of the record.

The presiding Judge overruled the motion, and the defendant alleged exceptions.

W. J. Copeland, for the defendant.

J. C. Madigan, for the plaintiff.

Law does not favor dilatory pleas. They should contain technical accuracy. The objection should have been taken by plea in abatement instead of motion. The motion is not sufficient, but should set forth that Harris had no goods or estate in his hands, &c. *Gardner* v. *Barker*, 12 Mass., 36.

The question of jurisdiction is determined by the writ. R. S., c. 86, §§ 2, 3, 4, 5 and 6. It was correctly "brought." Service was to be a subsequent act, and could not affect the jurisdiction if "brought" aright. Lack of service could not disprove Harris' trusteeship. He might die before service was made, or remove from the State, or the officer might attempt a service and make it erroneously, or fail to make return thereof. But, if returned without service, service could still be made. R. S., c. 81, § 25. And such motion has been made. The action was "brought" against a trustee in this county, and the jurisdiction should be presumed.

TAPLEY, J. — All actions commenced in the Supreme Judicial Court by foreign attachment, or trustee process, must be commenced in a county where some one or more of the trustees reside. R. S., c. 86, § 5.

The jurisdiction of the Court is made dependent upon the fact that some one or more of the trustees resides in the county. In other actions it is made dependent upon the fact that one of the parties, when they live in the State, resides in the county where the action is commenced, and in

some cases jurisdiction is attained by an actual attachment of property in the county. R. S., c. 81, §§ 2 and 5.

It will be perceived that in all these cases, the jurisdiction is made dependent upon some existing fact, and not upon the supposition by any one that such a fact does exist when it does not. Courts cannot, in determining their jurisdiction, inquire into the belief of different persons, and make that the foundation of their jurisdiction. They must have a more reliable, fixed, certain and definite foundation to proceed upon.

Different persons frequently entertain different views upon the same state of facts.

In actions where there are several plaintiffs, they might entertain different views upon the same state of facts. In such a case we have no authority for adopting the one, and discarding the other, and we could not well act upon the views of both, if opposed to each other.

To grant the construction contended for, would require the interpolation of the word "supposed," before the word "trustee," and change the foundation of the Court's jurisdiction, from a fact existing, to a mere inference of the party that the fact did exist.

The Court would have as much authority to interpolate the word "supposed" with reference to the place of residence, as with reference to the fact of being a trustee, and thus change the rule of construction provided by the second section of the same chapter.

It is suggested that such a construction is needed to avoid many embarrassments which would arise without it. If it be a fact that such difficulties now exist, it may furnish cause for new legislation upon the subject, but it neither confers upon the Court power to change the law, nor justifies it in assuming such power.

The declaration that a party is a trustee, and that he resides in a particular place, is a declaration of certain facts, and, under the rules of proceeding in such cases, these allegations, for the purpose of charging or discharging him as

trustee, are taken to be true until the contrary is made to appear by his disclosure.

They are, however, issues that may be raised by a plea in abatement of the action. *Jacobs & als.*, v. *Mellen & Tr.*, 14 Mass., 131; *Gardner* v. *Barker & Tr.*, 12 Mass., 36.

In this last case, the Court say, "if it could not be pleaded, the statute might constantly be evaded. The plaintiff might summon one as trustee who would agree to be defaulted, in which case, it could never appear to the Court, in that suit, that he had no effects of the principal, unless it could be so pleaded. It is certain that the defendant will, in many cases, be deprived of the advantage intended to be secured to him by the statute, unless he is allowed to plead the defect and insufficiency of the service. There is no hardship on the plaintiff in holding him to answer to such a plea, as the defendant takes on himself the burden of proving affirmatively that none of the persons summoned have any of his effects in their hands."

In cases where the jurisdiction is dependent upon the *attachment of property*, it may be pleaded in abatement of the action that there was no actual attachment made. *Gould* v. *Whiting*, 6 Pick. 364; *Eaton* v. *Whiting*, 3 Pick., 484.

There may be cases where the matter may be shown in abatement, upon *motion* or suggestion to the Court. In those cases where the record discloses the defect relied upon, a *motion*, grounded upon such defect, is sufficient, as no question of fact arises *dehors* the record. *Jacobs & al.* v. *Mellen & Tr.*, 14 Mass., 131. In this case it was said, — "if Wheeler and Gay alone, had been summoned as trustees, the writ would have abated at the motion of the defendant, or of any one as *amicus curiae*, because the defect would be apparent on the face of the writ."

The jurisdiction is determined by the facts existing at the time when the action was commenced.

The "service on the trustee binds all goods, effects or credits of the principal defendant, entrusted and deposited in his possession, to respond the final judgment in the ac-

tion, as when attached by the ordinary process." R. S., c. 86, § 4.

The exceptions state that the officer's return shows a service on Samuel H. Dale, but no service is shown on Benjamin Harris. The plaintiff contends that service may now be made upon Harris, under the provisions of § 25, c. 81, R. S., and says that a motion to that effect has been made.

If such could be done, it would not bind the goods, effects and credits of the principal defendant, in his hands, at an earlier period than the time of service, and could not relate back to the date of the writ or its entry in Court.

The new summons, however, provided for by this section, is a new summons to a defendant, and not to a trustee in the process of foreign attachment. A new service upon a trustee is regulated by § 6 of c. 86, which must be made before final service upon the principal defendant. To allow a new service *now*, upon the trustee, if it were of any avail at all, would be *now*, after entry in Court, to make a new attachment by and upon a summons. The new summons would not be a service of the *writ*, but merely a summons to come in and answer to the writ.

It is therefore apparent that not only has no service been made upon Harris, but that none can be made, and it becomes apparent that only Dale has been summoned as trustee, and, upon the authority of *Jacobs & al.* v. *Mellen & Tr.*, the writ may abate "on the motion of the defendant or of any one as *amicus curiae*, because the defect is apparent on the face of the writ."

Any party may avail himself of this objection. *Scudder* v. *Davis*, 33 Maine, 577.

Should it subsequently appear that Dale was not trustee, the question might arise whether the Court might not proceed in Aroostook county, inasmuch as both the principal parties reside there. R. S., c. 86, § 16.

This question seems to have received the attention of the Court, in *Greenwood* v. *Fales*, 6 Greenl., 405. It was there determined the writ must abate nevertheless. The Court

say, "although the plaintiff may discontinue his suit against the trustees, the character of the process remains, and, if made returnable to a wrong county, may be abated, whatever course the plaintiff may subsequently pursue. The authorities cited by the counsel for the defendant fully maintain this position."

The statute, c. 86, requires that this kind of process shall be brought in a county where one or more of the trustees resides. It having been brought in a county where no trustee resides, the action must abate.

Exceptions sustained, and action abated.

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

GEORGE B. PAGE *& als.*, *versus* HIRAM ESTY.

A lease for a term of years, conditioned for the payment of an annual rent, with a perpetual right of renewal, does not divest the lessor of his fee in the premises.

A conveyance of the leased premises by the lessor makes the grantee the landlord of the lessee, with the right to possession upon a forfeiture for breach of the conditions of the lease.

A surrender of the lease, after such conveyance, to the original lessor, gives him no interest in the premises; and, if the lease is cancelled, the grantee holds the premises discharged of the incumbrance.

A judgment is conclusive upon the parties, and their privies in estate.

When a motion to set aside a verdict is overruled and judgment rendered thereon, a similar motion in a subsequent suit between the same parties or their privies in estate, to set aside a verdict settling the same questions, in the same way, must be overruled.

In an action of trespass *quare clausum*, the jury found that the *locus in quo* was "necessary for and attached to" the defendant's gristmill, — the use of the *locus*, as a passage-way by plaintiff, being inconsistent, with the ordinary use of the gristmill; a motion to set aside the verdict as against evidence was overruled and judgment rendered; in a subsequent suit between the defendant's grantees and the plaintiffs, the jury, upon the same evidence, and upon the same instructions, found that another parcel of the same premises, which the respective parties claimed under the same title, was "necessary for and attached to" the gristmill,—

Page *v.* Esty.

Held, that a motion to set aside the verdict in the latter case as being against evidence, must be overruled, it appearing that the use by the other party of the premises in dispute in the second case, was a greater incumbrance on the use of the gristmill than his use of the premises in dispute in the first case.

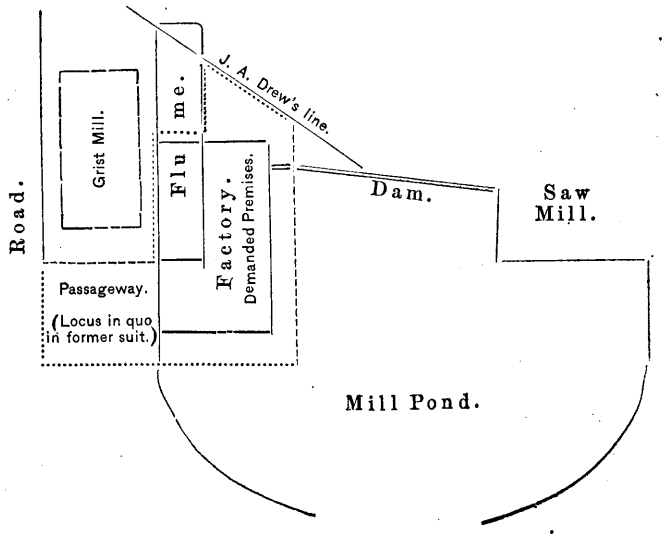
A conveyance of "a gristmill in Houlton, on the Meduxnekeag stream, now owned and occupied by us, with all the appurtenances and machinery thereunto belonging, *together* with the land and privileges where the same is situated, necessary for, and attached to said gristmill; hereby meaning and intending to convey all of the lands and mill privileges, (not heretofore sold by us,) on the dam connected with said grist mill and privilege," conveys so much of the "land and privileges where the mill is situated" as the jury shall find is "necessary for and attached to said gristmill;" also, all the lands and mill privilege," *situate on the same dam*, not before sold by the grantors, whether "necessary for and attached to said gristmill" or not.

ON EXCEPTIONS, by the defendant, to the ruling of CUTTING, J., and ON MOTION to set aside the verdict as against evidence.

REAL ACTION.

The facts are sufficiently stated in the opinion.

The following is a diagram, taken from Burleigh's plan of the premises.



J. Granger, for tenant.

B. Bradbury and *J. C. Madagan*, for demandants.

The opinion of the majority of the Court was drawn by

CUTTING, J. — The demandants claim title to the disputed premises through mesne conveyance from one Bachelor Hussey, whose deed from Jay S. Putnam and Aaron R. Putnam, dated May 13, 1843, conveyed to him in mortgage, — "the gristmill in said Houlton, on the Meduxnekeag stream, now owned and occupied by us, with all the appurtenances and machinery thereto belonging, together with the land and privilege where the same is situated, necessary for and attached to said gristmill; hereby meaning and intending to convey all the lands and mill privilege (not heretofore sold by us) on the dam connected with said gristmill and privilege." The demandants contend that the foregoing language is sufficiently explicit and comprehensive to embrace the demanded premises. Whereas the tenant, denying the correctness of such a construction, claims title derived from the same original grantors by a lease from them to one Samuel Houlton, dated March 15, 1841, duly recorded; letting the demanded premises, which are situated easterly and nearly adjoining the gristmill building, for the term of twenty years, with an agreement "to renew and continue to renew said lease on the same conditions," one of which was the payment of fifteen dollars each year. The said lessee "to have the privilege of making a road at the south end of said gristmill to said leased premises."

On March 10, 1843, Samuel Houlton, by his deed of that date, conveyed his interest to one Hiram Esty.

On April 29, 1844, the lease having been cancelled, the lessors, viz., Jay S. Putnam and Aaron R. Putnam, conveyed by deed the same premises, which they had previously leased, to one Rufus Mansur, who subsequently conveyed the same to Hiram Esty, who conveyed the same to the tenant.

The foregoing is substantially the history of the title, as claimed by the respective parties, both claiming under the same grantors. The demandants contend that the demanded premises is embraced in the mortgage deed from Putnam to Hussey, either as being "all the lands and mill privilege (not heretofore sold by us) on the dam connected with said gristmill and privilege," or, as being "the land and privilege where the same is situated, necessary for and attached to said gristmill," and that they were necessary for and attached to said gristmill; both of which propositions are denied by the tenant.

The deed from the Putnams to Hussey being prior to that to Mansur, the former must control, notwithstanding the latter may embrace a portion of the same premises. The lease to Houlton, while in force, would have only created an incumbrance, so long as its conditions were complied with, the rent enuring to Hussey or his grantees. The surrender of the lease alone would not authorize the lessors to convey in fee the leased premises, provided they had previously conveyed them to another person; for, by so doing, the other person would have been deprived of his rent. So that the rights of the parties principally depend upon the construction of the deed from the Putnams to Hussey.

This deed has already, in the case of *Esty* v. *Baker*, 48 Maine, 495, received a partial construction. It appeared in that case that the plaintiff erected, in 1841, on the premises leased to Houlton, a factory building. Among the rights granted in the lease to Houlton, was the right to make a road on the south side of the gristmill to the county road. This road the plaintiff had built. In 1857, the defendant erected a shop near said road or passage-way, and placed a shaft from his shop to his gristmill, on the other side of the passage-way, running the shaft under a bridge or platform, and so as not to obstruct the passage-way to the factory.

The defendant offered to prove that the land, on which the trespass was alleged, was necessary to the gristmill, and

that the lease to Houlton, under which the plaintiff, in part, derived his title, had been surrendered; all of which the Court (Judge APPLETON sitting at *Nisi Prius*,) excluded, and ruled that the conveyance of the gristmill covered only the land on which it stood; that the lease to Houlton was assignable, and was duly assigned to the plaintiff; and that the location of the shaft across the passage-way, leading to the plaintiff's factory, was a trespass, for which the defendant was liable in nominal damages.

This ruling was not sustained by the full Court, and the case was sent back for trial to ascertain, as a matter of *fact*, whether the passage-way was "*necessary for and attached to said gristmill.*" Upon that issue, principally, the case was presented to the jury, as again reported in 50 Maine, 325. But, in order to present that question of fact, it became necessary to give a construction to the deed most favorable to the plaintiff. Otherwise, if the construction contended for by the defendant's attorney had been given, no question would have been left for the findings of the jury. Consequently, for the purposes of the trial, I instructed the jury, that the Hussey deed conveyed only the gristmill owned by the grantor, with the land and privilege where the mill was situated, necessary for and attached thereto, exclusive of anything embraced in that description, which the grantors had previously sold; that, if the land covered by the passage-way, and on which the defendant's shop was erected, were, on May 13, 1843, (the date of the Hussey deed,) necessary for and attached to said gristmill, then it passed to Hussey, and this action cannot be maintained.

Upon these instructions and others of minor consequence, the jury returned their verdict for the defendant, which this Court have sustained, overruling all exceptions, as well as the motion to set it aside as being against evidence. It is true, that the jury found specially that the plaintiff had given the defendant permission to erect the building, but that finding was not considered by the Court, and became

immaterial, since, if he was not the owner, such consent was wholly superfluous.

Let us here then consider, as to what has heretofore been settled by the jury and this Court. It is, that the lease was surrendered and became inoperative; that the passage-way described therein was necessary for and attached to the gristmill, and passed by deed to Hussey. This decision is forever binding upon the parties of record and their privies in estate. If not of record, certainly the same facts would produce the same result. It isolated the plaintiff's building, situated easterly and on the stream side of the gristmill, and debarred him from any right, except by permission, to pass and repass to and from the public highway, which rendered his property comparatively valueless, except his claim for betterments.

Cotemporaneous with this decision, and, it is to be presumed, influenced by it, the plaintiffs, in the case now under consideration, purchased the gristmill with all the rights and privileges coëxtensive with those named in the mortgage deed from the Putnams to Hussey, which had previously been foreclosed, and thereupon commenced their action for possession of the demanded premises, claiming title to the same by force of their deed. The case was tried upon the same rulings and instructions as in the previous case of *Esty* v. *Baker*, which had passed the ordeal of the full bench, and been pronounced to be correct. Much testimony was elicited and a personal examination of the premises had by the jury, who, by their verdict, found the title to be in the plaintiffs, but allowed the defendant the full value of his erections. Nothwithstanding all this, again are presented the same old exceptions and motion, which, if we are consistent, should be disposed of as formerly. If there are any reasons why the present verdict should be set aside, which were not invoked against the former one, I am unable to perceive them. In the former case the passage-way was in controversy, as being inconsistent with the ordinary use of the gristmill, and, under instructions to the jury, which

have been fully sustained by this Court, they found such inconsistency, and their verdict has been sustained and judgment rendered thereon. The right to have and maintain a passage way, from the public highway to the site of the factory building, was as well provided for in the lease to Houlton as the site itself.

Now, on referring to the survey and plan of Parker P. Burleigh, used at the trial in both cases, it will be perceived that the passage-way is located south of the gristmill and not far from eight feet therefrom, and is about twenty-three feet in width on an average. Whereas, the factory building is situated easterly of the gristmill, about two feet therefrom, and directly over the gristmill flume, creating a much greater incumbrance to the gristmill than the approach before mentioned.

The difficulty in these cases has arisen from the fact that the descriptions in the deed to Hussey and the lease to Houlton were inconsistent and conflicting. If the defendant held his title under the lease, I see no reason why he should not have prevailed, the lease having been executed and delivered prior to the deed. But the defendant does not hold under the lease, but under a deed made long subsequent, by the Putnams to Mansur, and after the rights under the Hussey deed had fully vested.

But the Court, at the several *Nisi Prius* trials, has been requested to give a judicial construction to the Hussey deed, and none has been given, except one at the first trial, which the law court held to be too restricted; the rulings at the other trials were merely *pro forma*, for the purpose of admitting parol testimony and other documentary evidence as to certain facts, explanatory of the intention of the parties. The facts are now before us and we can proceed more understandingly. Of the rulings heretofore, the defendant has no reason to complain, for, if otherwise and as contended by the plaintiffs, his whole evidence might have been excluded.

What was the Putnams' title to lands and privileges on

the gristmill dam, on May 13, 1843, prior to their conveyance to Bachelor Hussey? They were then the undisputed owners in fee of the gristmill proper, and of the demanded premises. It is true, they had previously leased a portion to Houlton, for a period of twenty years, with his right of a perpetual renewal, upon condition that he paid the sum of fifteen dollars annually. But this lease did not divest the lessors of their fee in the leased premises; at any time, upon a forfeiture, their possession would revert. The Putnams, then, had a legal right to convey the leased premises in fee and in mortgage to Hussey, who subsequently became, in legal contemplation, the landlord of the lessee.

Again, on an inspection of Burleigh's plan, it will be noticed, that the dam extends across the Meduxnekeag stream; on the eastern shore is a sawmill, on the western the gristmill. Such were the erections at the date of the Hussey deed. How natural, then, and appropriate, it would have been to denominate the eastern part the sawmill, and the western the gristmill dam.

With these preliminary remarks, the true intent and meaning of the language, used in the grant to Hussey, becomes apparent. It conveys "the gristmill in Houlton, on the Meduxnekeag stream, now owned and occupied by us, with all the appurtenances and machinery thereto belonging." Had the description ended here, only the mill and the land upon which it stood might have passed, as was ruled by the Judge at the first trial, which has before been referred to. But the description proceeds,—"*together* with the land and privilege where the same is situated, necessary for and attached to said gristmill." The word "together" implies something in addition to what had previously been described, and embraces the "land and privileges where the mill is situated." This sentence advances one step further and authorized the jury to find what land and privileges were necessary for and attached to said gristmill, as subsequently decided, in the case of *Esty* v. *Baker*, before cited, and again found, by the jury in the case at bar, under similar

rulings. Next comes an additional, and the final clause, of which the exigency of no former trial, nor even of this, at *Nisi Prius*, has required a judicial construction; for the owners of the gristmill, on the two prior clauses, have been sufficiently protected without it. Had the verdicts of the jury been adverse to them, based on the facts, they have always reserved this final clause to be invoked by them in the last resort, for the maintenance of their legal rights; and it is not invoked now, as I understand from the argument of the plaintiffs' counsel, except for the purpose of terminating an endless clamor to set aside verdicts as being against evidence, and to show that the defendant has no legal title whatever to the demanded premises.

That final clause is this,—"hereby meaning and intending to convey all of the lands and mill privilege (not heretofore sold by us) on the dam connected with said gristmill and privilege."

We have seen that the factory site at this time had not been sold, and that it was situated on the dam—was land and mill privilege. Besides, the term "all the lands, would, *ex vi termini*, embrace all its privileges. If it was intended that it was only such lands and privilege as was connected with said gristmill and privilege, what was the necessity of using the word dam at all; the description would have been perfectly intelligible without it. Such construction would not answer all the calls in the deed. It would virtually be discarding one of the most important words in the grant. If the language had been, all the lands and privilege on the gristmill dam, no one could have mistaken the meaning; and the expression, on the dam connected with said gristmill and privilege, is equivalent to the expression, on the gristmill dam, used to distinguish it from the sawmill dam on the opposite side.

Judge DAVIS, who drew the opinion of the Court, in *Esty* v. *Baker*, has advanced additional reasons, sustained by authorities cited, and has come to the same conclusion. The

facts on two trials, with a most liberal construction for the tenant, having been settled against him, and now the law regarding his title, it would seem that he ought to be satisfied with the very liberal allowance which the jury have awarded him for his improvements.

Exceptions and motion overruled.
Judgment on the verdict.

WALTON, DICKERSON and DANFORTH, JJ., concurred.
TAPLEY, J., concurred in the result.

APPLETON, C. J., dissenting. — The rights of the parties litigant are to be determined by and are dependent upon the construction of the deed under which the demandants derive their title.

On the 15th March, 1841, Jay S. Putnam and Aaron R. Putnam leased to Samuel Houlton "the following described mill privilege, situate in Houlton, viz., commencing at the south end of *our* gristmill flume, now occupied by us in said Houlton, four feet east of the southwest corner of said flume, running northerly on said flume parallel with said gristmill forty feet, thence easterly to the east side of said flume, thence northerly to James A. Drew's line, thence easterly on said line fifteen feet, thence southerly, parallel with said gristmill, a sufficient distance to come in right angles with first mentioned bounds, thence westerly to the first mentioned bound, together with our right of the water privilege of said dam for dressing cloth, carding and manufacturing wool in its various branches, with the right to occupy the above described part of said flume for a foundation to erect buildings on, and the privilege of making a road at the south end of said gristmill to said premises, not obstructing the privilege of water to said gristmill, provided, also, that the said Houlton, or those claiming by, through or under him, shall take no water, when, by so doing, there would not be sufficient left for the Putnams' gristmill, or when the same would interfere with the right of

water granted to James A. Drew, in 1829, and to Edward Kelleran, in 1834." This lease was under seal, and for the term of twenty years, with a perpetual right of renewal on the part of the lessee.

On March 10, 1843, Samuel Houlton conveyed his interest, thus acquired, to Hiram Esty, for whose benefit he had originally taken the lease.

After this lease, and while Esty was in the occupation of the premises and of the buildings erected thereon, on the 13th of May, 1843, said J. S. and A. R. Putnam mortgaged to Bachelor Hussey "the gristmill, in said Houlton, on the Meduxnekeag stream, *now owned and occupied by us*, with all the appurtenances and machinery thereto belonging, together with the land and privileges where the same is situated, necessary for and attached to said gristmill; hereby meaning and intending to convey all the lands and mill privilege (not heretofore sold by us) on the dam connected with said gristmill and privilege, with the preference of water in said stream and privilege; being situate on and a part of lot numbered thirty-eight, in said Houlton, the same being subject, or a part of the same mill to a mortgage in favor of Edward Kelleran, on which there is due about the sum of three hundred and fifty dollars."

This mortgage was duly foreclosed and the title to the mortgaged premises is vested in the plaintiffs.

On the 29th April, 1844, the Putnams conveyed to Rufus Mansur the premises leased to Houlton. Mansur conveyed the same to Hiram Esty, on Dec. 29, 1851.

The defendant acquired the title of Hiram Esty to the premises in dispute, by deed dated Aug. 29, 1863.

The tenant, and those under whom his title is derived, have occupied the premises in controversy since the date of the lease from the Putnams to Houlton, 15th March, 1841, without the payment of rent to, or the recognition of title in the plaintiffs, or those claiming title under the mortgage from the Putnams to Hussey, dated 13th May, 1843.

The demandants claim that the land in controversy is in-

cluded in the mortgage from the Putnams to Hussey, of the date of May 13, 1843.

This mortgage conveys "the gristmill in said Houlton, on Meduxnekeag, *now* owned and *occupied* by *us*, together with the land and privileges where the same is situated, *necessary for and attached to* said gristmill;" These words convey the gristmill and the land under and adjoining the same, necessary for its use and then used with it. *Whitney* v. *Olney*, 3 Mason, 280; *Crosby* v. *Bradbury*, 20 Maine, 61.

They do not convey the premises in dispute. They are not included in the expression *now owned and occupied*, for they were subject to a lease with a right of perpetual renewal, and were not occupied by the mortgagers.

The plaintiffs cannot claim these premises as "necessary for and attached to said gristmill," for the gristmill has been occupied for about a quarter of a century without its occupants enjoying them. The lease to Houlton determines the question of necessity. It was given while the Putnams were the undisputed owners of the whole. The mortgage is subsequent to that lease, which was duly recorded.

Neither are these premises attached to said gristmill. The proof shows they never were. If they had been, they were detached by the lease, and with a right on the part of the lessee that they should ever remain thus detached. If the jury have found these premises "necessary for and attached to the gristmill," such finding is most manifestly against all the evidence in the case, for they have been used for purposes disconnected with the gristmill, from a period anterior to the mortgage under which the demandants claim, and have been so used by and under authority derived from those from whom the demandants' title was obtained. *Furbush* v. *Lambard*, 13 Met., 109.

But the mortgage deed further adds; "hereby meaning and intending to convey all the lands and mill privilege (not heretofore sold by us) on the dam *connected* with said gristmill privilege," &c.

The words "meaning and intending," obviously imply

that what follows is explanatory of what precedes. Such is their natural and obvious meaning, though, in some cases, what follows has been held to enlarge, and in others, to restrict the previous grant.

The meaning and intention is not "to convey *all* the lands and mill privilege (not heretofore sold by us) on the dam," but the "lands and mill privileges on the dam connected with said gristmill," excepting what had been sold, and those only. It was not to convey lands adjacent to the gristmill. It is not to convey other lands and privileges. It is to convey only those on the dam *connected* with the gristmill. The object was to assure all the rights of the gristmill as connected with the dam, not to convey all mills and privileges on the dam.

But the land and privileges previously leased, though on the dam, were not then and never had been "connected with the said gristmill and privilege." It was land *other* than land connected therewith. It was a privilege other than the gristmill privilege. If they had ever constituted any part or portion of the gristmill lot and its privilege, of which there is no proof, they had been disconnected therefrom. They had ceased, though on the dam, to be "connected with said gristmill and privilege" by the act of the Putnams, and before the conveyance, under which the demandants claim.

Nor are these views inconsistent with those previously expressed, when the construction of the language in the mortgage deed from the Putnams to Hussey was under the consideration of the Court. In *Esty* v. *Baker*, 48 Maine, 495, the Court intimated clearly the opinion, that the road leased to Houlton and granted to Mansur, was neither necessary for or attached to the plaintiffs' gristmill. *A fortiori*, was this the case as to the residue of the premises thus leased and granted. In *Esty* v. *Baker*, 50 Maine, 325, Mr. Justice DAVIS remarks as follows:—"So far as appears in the evidence reported, the parties themselves, by their subsequent acts and occupation, seem to have adopted the latter

construction, treating the grant as embracing, not all the lands and privilege on the dam, not previously sold, but all the lands and privilege connected with the gristmill." But there is no intimation that the grant embraced other lands and privileges than those connected with the gristmill, still less, that it embraced those which, if ever connected therewith, had, by the previous act of the mortgager, been disconnected, and were then occupied and enjoyed as separate and distinct therefrom.

The verdict is alike against law and evidence, and should be set aside and a new trial granted.

KENT and BARROWS, JJ., concurred.

SAMUEL WOODBURY, *Appellant from a decree of the Judge of Probate, versus* SARAH S. HAMMOND.

A surety upon a guardian's bond has no right of appeal from the decree of a Judge of Probate, allowing a guardianship account, filed by the administratrix of the deceased guardian.

In 1842, W. was appointed guardian of the defendant by the Judge of Probate for the county of Cumberland, both guardian and ward residing, at the time, in Danville, then in that county. The guardian gave bond, returned an inventory, and subsequently sold, under a license, a part of his ward's real estate. In 1864, W. died at Danville; H. was appointed, by the Judge of Probate for Androscoggin county, administratrix of his estate, (which was duly represented insolvent,) and subsequently, H., as administratrix, filed in the Probate Court for the county of Cumberland, a guardianship account of W.: — *Held*,

1. That the Judge of Probate for the county of Cumberland had jurisdiction by virtne of c. 60 of the Public Laws of 1854;

2. That c. 87 of Public Laws of 1854, did not affect c. 60, so far as it relates to probate matters;

3. That the administratrix was the proper person to settle the account of guardianship; and,

4. That the representation of insolvency did not affect the course of proceedings.

Woodbury *v.* Hammond.

Neither the insolvency of the guardian, or his estate, nor the lapse of six years after the ward attains his majority, will operate as a release from the guardian's liability to settle a final account, or absolve the guardian or his personal representative from the duty to account.

It is no objection that an account of guardianship is settled after the ward has become of age, so long as it embraces nothing except what accrued during his minority.

Mode of stating an account of guardianship.

APPEAL from the decree of the Judge of Probate for the county of Cumberland, allowing the guardianship account of the late William Woodbury, of Danville, in the county of Androscoggin, made and filed in said Probate Court, by Hannah Woodbury, as administratrix of the estate of the said William Woodbury.

In 1842, William Woodbury was appointed and qualified as guardian of the defendant, who lived in his family until she attained her majority. The guardian duly gave bond for the faithful performance of his duties, and also a bond to account for the sale of the real estate of his ward, the appellant being one of the sureties in each. The guardian returned an inventory, and sold, under a license, a part of his ward's real estate; but never settled any account of his guardianship. The defendant became of age in March, 1853, and never had or requested any settlement with her guardian, prior to his death in March, 1864.

Hannah Woodbury, wife of William, was duly appointed administratrix of the estate of her husband, by the Judge of Probate for the county of Androscoggin, in May, 1864. In July following, the estate having been represented insolvent, commissioners of insolvency were appointed.

The defendant never presented any claim against the estate. In July, 1864, Hannah Woodbury, as administratrix, filed, with the Judge of Probate for this county, an account of the guardianship of said William Woodbury, wherein a balance was stated to be due from the guardian to the defendant, at the time she became of age, which account was examined by the Judge of Probate for this county, and a

part of the balance decreed by him to be allowed; and from this decree the appeal in this case was taken.

The reasons for the appeal were: —

1. Because the said Probate Court had no jurisdiction of said account, to allow the same, or to decree any sum to be due from said deceased guardian, or from his estate, to the said Sarah S. Hammond.

2. Because the said Hannah Woodbury, who filed said account, as administratrix of the estate of said William Woodbury, deceased, who was formerly guardian of said Sarah S. Hammond, had no right or authority of law, to present and make oath to said account.

3. Because the said Hannah Woodbury, as administratrix as aforesaid, at the time of filing said account, had taken upon herself to administer upon the estate of said William Woodbury, deceased, in the county of Androscoggin, in this State, and was duly appointed thereto by the Judge of Probate for said county of Androscoggin, and represented said estate to be insolvent, and commissioners of insolvency on said estate had been appointed by the Judge of Probate for said county of Androscoggin.

4. Because said commissioners of insolvency were the proper and only original tribunal authorized by law, to examine and allow claims against the estate of said William Woodbury, deceased, late guardian as aforesaid.

5. Because that, long prior to the decease of the said William Woodbury, and before the filing of said guardianship account, the said Sarah S. Emerson, now Sarah S. Hammond, had arrived at the age of twenty-one years, and any legal and just claim which she may have had against said William Woodbury, in his lifetime, or his estate, since his decease, ought to have been presented before the commissioners of insolvency on said estate, for their determination and allowance.

6. Because the claim of the said Sarah S. Hammond, set forth in said account, and allowed by the Judge of Probate,

had been outstanding against said William Woodbury, (if the same had not been settled and paid over,) more than six years prior to his decease, and more than six years after said guardianship had ceased, and is therefore barred from recovery by law, by force of the statute of limitations in such case made and provided.

The following publication in full, of the Judge of Probate's opinion in this case, must find its justification in the importance of the principles therein so clearly enunciated, and in the fact of their being affirmed by this Court.

Upon the question of jurisdiction, I have no doubt, whether as regards the person to present the account or the authority of a Judge of Probate to pass upon the same, after the wards have arrived at full age.

Aside from the propriety, if not necessity, of allowing the executor or administrator of a deceased guardian to settle such an account, and the common practice relative thereto, so far as any decisions are concerned, they fully sustain the right claimed by the administratrix. See *Curtis* v. *Bailey*, 1 Pick., 198, where the administrator of the deceased surety of a guardian, was allowed to present and settle a guardian's account.

In New Hampshire the executor of a deceased guardian was held to be the proper person to settle such an account. *Kittredge* v. *Belton*, 14 N. H., 409; *Gregg* v. *Gregg*, 15 N. H., 490.

In *Pierce* v. *Irish*, 31 Maine, 254, the settlement of a guardian's account by the Judge of Probate, *after* the ward had arrived at full age, was upheld.

So far, however, as relates to transactions between the guardian and his late wards for the time subsequent to their majority, I do not think it competent for me to adjudicate.

It appears that Mr. Woodbury, as guardian of the minor children of George Emerson, deceased, received from said Emerson's administrator $314,37, being two-thirds of a

cash balance of $471,55 in his hands, on settlement of his administration account, Dec. 20, 1842, $314 37

There was also in the guardian's hands, according to his inventory made Feb. 8, 1843, the following personal estate belonging to his wards, viz., — A sum received from N. Turner Bridge Co., $ 54,33

A balance due on note of J. Megquire, 172,94

227 27

In all, 541 64

Of which ⅓, of course, belonged to each ward, $180,54⅔.

On May 22, 1847, he sold, under a license from Probate Court, a piece of land belonging to his wards, for $1200, of which each ward's share was $400.

The duty of a guardian in regard to the management of funds of his ward, coming to his hands, is well settled and familiar. "If he neglects to put the ward's money at interest, but negligently, and for an unreasonable time, suffers it to lie idle, or mingles it with his own, the Court will charge him with simple interest, and, in case of gross delinquency, with compound interest." 2 Kent's Com., 230.

He should have a "reasonable time in which to invest," but what is reasonable must, of course, depend upon the circumstances of each case where the question arises.

In this case it does not appear precisely when the guardian received the several sums composing the $541,64. He was entitled to the amount paid by the administrator, after the 20th Dec., 1842, and the evidence tends to show that he received it not long after that date.

The $54,33 and $172,94, were in his hands on the 8th Feb., 1843, though, how long he had had them is not shown. The $1200 was, or should have been received on 22d May, 1847.

In view of the testimony in regard to the use of the money, I think it would be giving the guardian reasonable time, to require him to charge himself with interest upon the $541,64, (or $180,54, to each ward,) from March 1, 1843,

and, upon the $1200, ($400 to each,) from July 1, 1847, to the arrival of the several wards at full age, in the manner hereinafter indicated.

As to the rents and profits of the real estate of his wards, so long occupied and enjoyed by the guardian, there is no evidence from which to ascertain the amount paid by him for repairs, taxes, &c., but the net income is estimated by witnesses to have been about $50. Of this amount the widow of Mr. Emerson, never having had her dower assigned, being entitled to one-third, the guardian should be charged with $36 per annum, or $12 for each ward, until she became of full age, with interest as indicated hereinafter.

While thus allowing what was expended upon the real estate, by way of repairs, taxes, &c., and requiring of the guardian only the net amount of rents and profits, the claims for large sums expended in the finishing and improvement of old buildings, and the erection of new ones, must be regarded in a different light, and as governed by rules of law. I see no way in which to allow them.

As an investment, the expenditure in either case, seems to me, not that frugal management of his ward's estate required of a guardian by law, but both injudicious and unwarranted. Supposing it to have been, in each case, wholly unobjectionable as an investment in real estate, on any other ground, this very important question arises, — whence did he derive his authority thus to invest? "The guardian must not convert the personal estate of the infant into real, without the direction of the Court of Chancery." 2 Kent's Com., 230. See, also, R. S. of Maine, 1841, c. 110, § 23, with the requirements of which there is no evidence that the guardian of these wards ever complied.

Again, it is in evidence that, some months before he was appointed guardian, he had expended quite a large amount upon the old set of buildings. He certainly had no authority to charge money thus expended, to minors, who afterwards became his wards. After his appointment as guardian, it was several years before he had in his hands an amount

of money belonging to his wards, equal to what he had thus expended,—"some $800" in all.

When he petitioned for license to sell land of his wards, he did not represent any indebtedness on their part to himself or others, but, "the proceeds to be placed at interest for the benefit of said minors," is the language used by him. All these circumstances, moreover, corroborate the statement made by Mrs. Woodbury, that this expenditure was made for his own comfort and convenience, and with the declared intention of purchasing the premises.

When the new buildings were erected, one of the wards had been of age more than a year, the second one became of age soon after they were commenced and before their completion, and both had ceased to be members of their guardian's family. So that, so far as relates to these two, it could not properly be said that there was any expenditure on, or investment in the new buildings, by a guardian for wards.

But, even if the expenditure could have been regarded as a judicious investment in real estate, so far as relates to the third ward, then a minor, was the guardian authorized thus to invest any part of the $1200? Her funds from other sources had long since been exhausted.

In the license, by virtue of which he sold the land which produced this sum, he is directed "to account for the proceeds (of sale) according to the requirements of law." The law, then, required him "to apply the proceeds to the purposes contemplated by his license;" that is, his license being based upon his petition, to put the money at interest for the benefit of his wards. (And we have already seen that he never obtained the authority required by c. 110, § 23.)

The minors having lived and been supported in the family of their guardian for many years, he is entitled to a reasonable compensation for board and clothing, and to charge to them all cash advances made by him on their account.

Whether he did or did not make specific charges to them for such items does not appear, or rather, perhaps, it does

not appear in evidence that he did make such charges, but it is equally doubtful whether he made any such charges against himself for rent, interest, &c. And any impressions which Mrs. Woodbury had in regard to his not intending to charge the wards with board and clothing, are to be considered in connection with the fact that he, at the same time, was having the use of this property, both real and personal, and apparently allowing them nothing for such use and enjoyment.

It is hardly probable, in view of all the testimony, and absence of testimony, that it was his intention to furnish board and clothing, and *give* them to his wards absolutely and without any compensation. And, as he is to be held to account strictly for all funds received by him, and rents and profits, as well as interest thereupon, he should be allowed to charge for board and clothing, as before stated.

While I have no doubt but, that during a portion of the time spent by them in their guardian's family, the wards earned enough by their personal services to pay, and perhaps more than cover their board and clothing, during their earlier years, it is hardly to be expected that they could have done so, nor does the testimony make it at all certain that they did so.

There may be allowed, therefore, the sum of one dollar per week, for board and clothing of each of the wards, from Nov. 1, 1842, as follows, viz.:—in the case of Sarah S., until she was 14 years of age, and, in the other cases, until each was 15 years of age. The guardian to charge to each ward the amount expended by him for her, for board and tuition when at school, cash advanced, or goods furnished during her minority. The charge for commissions cannot be allowed, it being clearly forfeited under the provisions of R. S., c. 67, § 18.

The accounts are to be made up substantially as follows:

The guardian is to be charged with the amount of personal estate belonging to each ward, as it came to his hands, with rent of real estate, as it fell due, and interest at the

end of each year. Deduct from this amount the expenses of the year, and the balance forms a new principal to which the interest thereupon is to be added at the close of the following year, and that year's expenses deducted as before, and so on as long as there are annual expenses to deduct. From the time when they cease, simple interest to be cast upon the balance then due, up to the date of the ward's majority.

The full Court to make such a disposition of the case as law and justice required.

Record, for the appellant.

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

BARROWS, J.—What is the position voluntarily assumed by one who places his name as surety upon a guardian's bond to the Judge of Probate?

He undertakes and promises on his own personal responsibility, and for the more perfect protection and security of the ward, that the individual appointed as guardian, among other things, will faithfully discharge his trust, and will render just and true accounts of his guardianship when by law required.

Can the surety, then, be heard in that forum at every step of the proceedings, or upon a final adjustment of the guardian's account, to allege that the accounts, which he himself has promised shall be "just and true," are not so? Is he at liberty thus to intervene for his own security, necessarily creating expense to those for whose security in this very respect he has placed his name upon the bond? Not at all. The question whether he has sufficient confidence in the integrity, accuracy and responsibility of the guardian whose surety he becomes, to abide and be responsible for his doings in the execution of his trust, is to be settled by the surety with himself before he assumes the position. When he has executed the bond he has made himself individually responsible to the Judge of Probate and those interested in

the ward's estate, for the faithful and correct discharge of the guardian's duty, and he, at least *in that forum* shall not be heard to question it. It is upon the good faith and pecuniary responsibility of the party, whose surety he is, that he must rely. If he is doubtful about these, he may require security from his principal for his own indemnity, before signing the bond. If, by his intervention as surety, an improper person has been imposed upon the Probate Judge in a position of trust, it is to that person and his estate that he must look for indemnity from any consequent loss to himself. For all errors, omissions, neglects and mistakes of that person he has agreed to be and must be held to be responsible. If there has been a fraudulent surcharge in the guardian's account to the detriment of the sureties, the proceedings in probate are so far vitiated by the fraud, that the sureties in a suit upon the bond against them, in a common law court, are at liberty to allege and prove the fraud in defence. *Baylies, Judge*, v. *Davis*, 1 Pick., 206.

But, practically, it would rarely happen that a man could be found, at once so foolish and so base as to assume a fictitious liability that must both immediately and ultimately rest upon himself, in order to fix a contingent responsibility upon those who had become sureties for his fidelity. And where a palpable error of any importance in an account is pointed out, a refusal to rectify it by a reädjustment would go far to establish fraudulent collusion between the guardian and ward, which would relieve the sureties altogether. When errors in probate accounts are discovered, upon proper proceedings had in Probate Court, they may always be corrected upon the settlement of a subsequent account. Even when finally settled in the Supreme Court of Probate, application may be made in that Court for a rehearing, if injustice has been done. *Baylies, Judge*, v. *Davis, ubi supra.*

It is not then necessary to the safety of the surety that he should have the right of appeal from the decree of the Probate Judge, and the power, in the hands of a timid or dis-

trustful person, might unjustly burden the estate of the ward with extraordinary and useless expense. Nor is it conceived that the right would be one of much practical utility, inasmuch as these accounts are seldom settled in the presence or with the knowledge of the sureties, and the state of them is not often brought to their knowledge until long after the time within which an appeal should be claimed has elapsed.

But the right is to be determined, after all, not by considerations of propriety or expediency merely, but by construction of the statute conferring the right of appeal in such cases. It has long been settled that a party can be considered "aggrieved," so as to be entitled to an appeal, only when the decree operates upon his property, or bears upon his interest directly." *Deering* v. *Adams*, 34 Maine, 44, and cases there cited. The interest of the surety is only contingent upon the non-payment, by his principal, of the sum with which the principal, as guardian, stands charged. The surety has no interest whatever in the property, and can be affected only indirectly by the decree, the immediate liability being upon the accounting party, who cannot be presumed to be so neglectful of his own interest as to fail to appeal in proper cases. As we have already seen, the surety is amply protected in another forum, in case the parties directly interested collusively claim to charge him for more than is justly due. The appeal, then, should be dismissed as improvidently claimed by a party who, according to the settled construction of the statute, cannot be considered as aggrieved by the decree.

But the questions raised by the appeal, being such as may probably arise in other cases, it may not be amiss to remark, that we see no reason to doubt the correctness of the conclusions reached by the Probate Judge, in any respect.

The objection to the jurisdiction of the Judge was probably founded upon the fact that the residence of the guardian and ward was in Danville, now included in the county of Androscoggin, and the appointment of the administra-

trix on the estate of the guardian issued from the Probate Court in Androscoggin; but, by § 5 of c. 60, of the laws of 1854, establishing that county, it is provided that, "all business pending in the * * * Probate Courts * * * * in either of the four counties" out of which the new county was carved, "of which this county would have jurisdiction, shall be completed in said counties, the same as if this Act had not passed." And, although, by an additional Act, (chap. 87 of the laws of 1854,) matters pending in the S. J. Court and court of county commissioners, which would have fallen within the jurisdiction of the county of Androscoggin, if it had been established when the processes originated, were transferred with the papers pertaining thereto, no such provision was made with regard to probate matters, and the guardianship, in this case, having originated long before the separation of Danville from the county of Cumberland, the business thereof was by law to be completed in that county.

That the personal representative of a deceased guardian, appointed by the court having jurisdiction of his estate or will, is the proper person to settle his account of his guardianship, admits of no doubt. The practice is sanctioned by long and consistent usage, as well as natural and obvious propriety. No other person can be supposed to have such means for rendering an account that will do justice to all concerned, whether directly or remotely interested.

Nor does the fact that the estate of the deceased guardian has been represented insolvent, before the account was rendered, make any difference in the course of proceedings. The liability to account, unless discharged by the ward after arriving at full age, continues until a final account has been rendered and accepted. Neither the insolvency of the guardian or his estate, nor the lapse of six years after the ward arrives at the age of twenty-one, will operate as a release from that liability, or absolve the guardian or his personal representative from the duty to account.

The Probate Judge carefully discriminated, as he should

do, between the transactions arising between the guardian and ward, after she became of age, and those pertaining to the guardianship, and took cognizance of the latter only.

It rarely happens that an account can be settled precisely at the day when the ward attains his majority, and it follows that the final account must be adjusted subsequent to that period, or be left incomplete. It is no objection that the account is settled after the ward has become of age, so long as it embraces nothing except what accrued during the minority.

The question as to the effect of the statute of limitations, manifestly could only properly arise in a suit upon the bond, brought in a common law court.

No complaint is made that the Judge of Probate erred as to the rules and principles to be observed in the making up of the account, and they seem, upon reference to his opinion filed with the papers in this case, to have been carefully and accurately laid down.

Indeed, it is nowhere suggested by the appellant, that the estate of the guardian stands charged with any sums for which it is not justly accountable. His objections are, — to the jurisdiction of the Court, — to the rendering of an account after such a lapse of time from the expiration of the ward's minority, by the administratrix of the guardian, and after a representation of the insolvency of the guardian's estate.

None of these objections are tenable.

Appeal dismissed with costs.

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

CHARLES R. FROST *& als. versus* JOSEPH ILSLEY, *Adm'r.*

In 1855, the plaintiffs contracted with W. to furnish labor and materials for the entire woodwork of a hotel, to be paid when completed. In 1858, the work was suspended without fault of the plaintiffs. In 1862, W. agreed that he had stopped the work, that the contract was still in force, but that plaintiffs might secure their lien; whereupon an action was commenced for that purpose, during the pendency of which W. died, his estate was represented insolvent and commissioners of insolvency appointed; — *Held*,

1. That, as the statute was when the contract was made, (R. S., c. 91, § 16,) the lien might have been enforced; but,

2. That, by virtue of c. 52 of the Public Laws of 1858, the lien lapsed, in ninety days after the labor was performed and materials furnished.

The lien is no part of the contract, but a merely incidental accompaniment, deriving its vitality from positive enactment, and liable always to be controlled, modified or taken away by subsequent enactment.

It is not competent for a debtor to create upon any portion of his property a lien, which shall have precedence of all other attachments and incumbrances, by admissions that are inconsistent with actual facts.

Nor can he, by making such admissions, restore a lost lien.

ON FACTS AGREED.

ASSUMPSIT, commenced during his lifetime, against John M. Wood, (now deceased, and upon whose estate the defendant is administrator,) "for labor done and performed, and for materials furnished by the plaintiffs for said Wood, at his request, in the erection of a hotel on Middle, Silver and Willow streets, in Portland, for which labor and materials, so performed and furnished, the plaintiffs claim and have a lien upon the said building, and to enforce which lien this suit is brought," &c.

The writ is dated Sept. 9, 1862. Wood died Dec. 24, 1864, and his estate was duly represented insolvent and commissioners of insolvency appointed.

Within sixty days prior to the commencement of this suit, Charles R. Frost, one of the plaintiffs, and Wood went together to the office of plaintiffs' attorney, and then and there Wood stated that the plaintiffs had furnished large quantities of labor and materials for his hotel; that they were

furnished under a contract with him for building the hotel; that Wood owned the land on which it was built; that the contract was made in 1855 for the entire woodwork of the hotel, payment not to be legally due until the entire hotel is finished; that the hotel is not yet finished and the money not due, but that he then agreed to pay for what had been done and wished to secure the plaintiffs' lien for the labor and materials; that the work on the hotel and the contract has never been completed; but has only been suspended from time to time; that the contract is still in force, and that he considered the plaintiffs as still furnishing labor and materials up to that day; but that he then stopped, admitted the debt and liability, and wished the plaintiffs to secure their lien.

The defendant had duly filed the following motion:—

"And now said Ilsley comes and says, that the estate of said John M. Wood has been duly represented insolvent, and that commissioners of insolvency have been appointed thereon; which he is ready to verify. Wherefore he moves that no execution be issued upon the judgment in this case against the goods and estate of said John M. Wood, in the hands of him, the said Ilsley, as administrator."

The case was submitted to the full Court, with the agreement that, if the action was maintainable, the defendant to be defaulted for the amount admitted in his brief statement to be due; and the Court to determine whether, and in what form or manner execution should issue.

J. & E. M. Rand, for plaintiffs.

Statute law respecting mechanics' lien upon buildings, in R. S., c. 91, §§ 16, 21; Stat. 1858, c. 52; Stat. 1862, § 131.

But for the death of Wood, the question of lien could not have arisen in the suit. And, if the Court should be of opinion that it now arises, which we do not admit, it arises only upon and in reference to the question whether an execution shall issue.

The claim of plaintiffs is admitted in defendant's brief statement, and they are entitled to a judgment for the amount admitted; such judgment either to be added to the list of claims or to be enforced as a lien.

The plaintiffs clearly have a lien upon Wood's interest in the building and the land on which it stands. What that interest was, what is to be levied upon, it is not necessary now to determine. But, whatever interest Wood had at the time the labor and materials were furnished, at the time of the commencement of the work, the plaintiffs have a lien upon for the pay.

The facts admitted and stated by Wood, as set forth in the agreed statement, are all that the statute requires to create the lien; and the legal proceedings to enforce the lien will be found to be in accordance with the provisions of the statute.

The labor and materials for erecting the buiding were furnished by plaintiffs, under a contract with the owner, and this gave plaintiffs a lien on the building and on the owner's interest in the land.

A suit to enforce the lien was commenced within 90 days after the labor and materials were furnished, and within 90 days after payment became due. The writ, &c., are in conformity to the statute of 1862.

Should it be said by the defendant, that the labor and materials were not furnished within 90 days prior to the commencement of the suit, as required by the statute of 1858, it may be replied that Wood's statement shows that they were furnished within that time. And, if they had not been, the contract was made in 1855, under the law as it then was, and the statute of 1858 cannot have any effect upon contracts previously made.

We claim that plaintiffs have a lien and are entitled, not only to a judgment, but to an execution running against Wood's interest in the building and the land on which it stands. *Felton* v. *Minot*, 7 Allen, 412.

Davis & Drummond, for the defendant.

BARROWS, J. — John M. Wood, the original defendant in this action, is dead, and his estate has been duly represented insolvent, and commissioners of insolvency have been appointed to examine the claims against the estate.

The case may, notwithstanding this, proceed to *judgment*, at all events, under R. S., § 17, c. 66; and as it is admitted, by the administrator, that a certain sum was due from Wood to the plaintiffs, and the plaintiffs claim to recover no more than that amount, judgment is to be rendered for the plaintiffs as upon a default, for the sum thus agreed upon.

It is to be determined under the agreed statement whether this judgment shall be enforced by execution as contemplated in R. S., § 21, c. 91, notwithstanding the acknowledged fact that the debtor is deceased and his estate represented insolvent.

If there is no valid lien secured by the proceedings here, in favor of the plaintiffs, they must proceed upon the rendition of judgment in the manner prescribed in R. S., § 17, c. 66, — that is to say, the judgment is rendered with the effect and satisfied in the manner provided in cases of appeal from the decision of commissioners of insolvency; no execution, except for costs, shall issue, and the amount of the judgment for the debt is to be entered by the Judge of Probate on the list of contingent debts entitled to dividends.

Unless the claim presented is a preferred, or a lien claim, the issuing of an execution in a case like the present would be contrary to law. It seems to follow that the question of lien or no lien, *must*, in such case, be settled in the suit in which the lien is claimed and alleged.

The whole duty of the administrator as to pending suits is not performed when he has represented the estate insolvent and procured the appointment of commissioners in the Probate Court. He is bound to appear, when summoned into the common law court, in order to make the representation of insolvency appear on the record *there*, either by plea or by motion for the stay of execution; and if he neglects this, and execution is regularly issued in due course,

a levy under it, upon the property of the deceased, would be sustained, and the administrator held personally liable for waste. *Ramsdell* v. *Creasey*, 10 Mass., 170; *Sturgis* v. *Reed*, *Adm'r*, 2 Maine, 109.

In *Ballard* v. *Dame*, *Adm'r*, 7 Pick., 239, the administrator filed a plea admitting the note sued to be due, but setting out the proceedings in insolvency in the Probate Court, and praying that no execution might issue against the estate of the intestate in his hands, but that judgment, if rendered for the plaintiff, might be rendered as against an insolvent estate. PARKER, C. J., in delivering the opinion of the Court, says, — "The plea shows sufficient cause to prevent execution, &c., though judgment is to be entered for the plaintiff, the cause of action being admitted by the plea."

If, in such case, the facts, upon which the existence of the lien depends, are in dispute, a special verdict in relation thereto must be taken, and execution awarded or withheld in conformity therewith.

Under § 21, c. 91 of the R. S., the plaintiffs are entitled to execution as well as judgment, if it appears that they have taken the necessary steps to perfect a valid existing lien. By § 2, c. 131, laws of 1862, it is provided that, "in all cases where the house or building, or the logs or lumber on which the labor was performed, have been or shall be attached, the proceedings shall be deemed sufficient to effectuate the lien, if the writ, officer's return of attachment, and the judgment recovered in the suit are, or shall be in the usual and common forms of the common law, as heretofore understood and practised in all other actions of assumpsit, the declaration disclosing that the suit is brought to enforce the lien."

It is unnecessary to consider the various objections urged by the defendant to the validity and sufficiency of the attachment in this case, for we are satisfied that when this suit was commenced, there was no valid subsisting lien

which the plaintiffs could have enforced by any proceedings, however precise and formal.

The plaintiffs' claim is for labor and materials furnished in the erection of a hotel under a contract made in 1855 with John M. Wood, and by the dates in their own bill of particulars, filed April term, 1866, it appears to be settled beyond controversy that this labor and these materials had all been furnished in or prior to January, 1858. By the terms of the contract, payment was not to be considered as due until the completion of the hotel, which remained unfinished at the time of the conversation between one of the plaintiffs and Wood, in 1862, shortly before the commencement of the action. This conversation is relied upon by the plaintiffs to establish the claim of lien. It seems to have been held purposely to afford evidence of the existence of such lien. In it Wood waived the stipulation in his favor, as to time of payment. Considering the long lapse of time during which the hotel had remained unfinished, without fault on the part of the plaintiffs, so far as appears, we might hold that the original contractor could lawfully waive this provision and consent to immediate proceedings for the enforcement of the lien, without thereby defeating it, and that the lien would still attach to the contract, as thus modified and varied by the original parties to it, if the law, by force of which the lien existed, had remained as it was when the contract was entered into. By the law, as it then stood, the lien continued for ninety days after payment became due, according to the terms of the contract, and might be enforced by attachment within that time, no matter how distant the payday agreed on. But warned by the frequent controversies which arose between lien claimants and subsequent *bona fide* purchasers, ignorant of the incumbrances thus created, the Legislature in 1858, added to the section creating the lien the following proviso: "but such lien shall not continue more than ninety days after such labor is performed or materials furnished, unless an attachment is made, or a memorandum of the contract recorded in the manner provided by law for record-

ing mortgages of personal property, within that time." Laws of 1858, c. 52.

It is claimed in behalf of the plaintiffs that this proviso ought not to be suffered to affect a lien arising upon a contract which was made previous to its enactment. But the statute in terms covers existing liens as well as those thereafter to arise. The lien is the creature of the statute. It is no part of the contract, but a merely incidental accompaniment, deriving its validity only from positive enactment and liable always to be controlled, modified or taken away by subsequent enactment, and such modification or removal cannot be considered as in any degree impairing the obligation of the contract itself. The lien is but a means of enforcing the contract, a remedy given by law, and like all matters pertaining to the remedy, and not to the essence of the contract, until perfected by proceedings whereby rights in the property over which the lien is claimed have become vested, it is entirely within the control of the lawmaking power, in whose edict it originated. *Bangor* v. *Goding*, 35 Maine, 73; *Gray* v. *Carleton*, 35 Maine, 481.

Again, it is said on the part of the plaintiffs, that there is evidence in Wood's statement that the labor and materials were furnished within ninety days before the commencement of the action and the attachment.

But it is not competent for a debtor to create upon any portion of his property a lien which shall have precedence of all other attachments and incumbrances, made after the lien attached, and shall even, in case of the insolvency of the debtor's estate, have the effect to sequester a portion of his property for the payment of a particular creditor, by admissions that are manifestly inconsistent with actually existing facts. Nor can the debtor, by making such admissions, restore a lost lien. No memorandum of the contract appears to have been recorded, as the law of 1858 requires. The plaintiffs' own bill of particulars shows the labor and materials to have been actually furnished more than four years before the commencement of the suit. And Wood's

statement that he "considered" plaintiffs as still furnishing labor and materials, up to the time of the conversation, equivocal in itself, shows nothing but his willingness to concede to them a lien which had in law and in fact long ceased to exist, and which it was not in his power then to renew.

Defendant defaulted for amount agreed upon.

Judgment as against an insolvent estate.

No execution to issue except for costs.

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

CONWAY FIRE INS. CO., *plaintiffs in error, versus* SAMUEL E. SEWALL *& al., Executors.*

A plaintiff in error must affirmatively show, by the record alone, that an error exists.

A declaration upon a policy of insurance against fire, alleging that the company "had due notice and proof of the loss according to the conditions of the policy," but containing no allegation that the company "had due notice and proof of the loss according to the requirements of § 5, c. 34 of the Public Laws of 1861, discloses no error, — it not appearing that notice and proof rquired by the statute are not materially different from those required by the policy.

Such a declaration is amendable, and a judgment rendered thereon will not be reversed for that cause on error, when the question is not raised until after judgment is rendered upon the verdict.

WRIT OF ERROR.

The error principally relied upon was:

"2d. Because said declaration contains no allegation or averment that notice of said loss, and of the destruction of the propety described in said policy by said fire, was given by the insured to said company, in accordance with the provisions of the statute of this State in such case made and provided. Because said declaration does not allege

that the insured, within a reasonable time after said fire, did deliver, or that they have ever since delivered to said company or its agent, as particular an account of the loss and damage as the nature of the case would admit, stating therein what other insurance, if any, existed thereon, in what manner the building insured and containing the property insured was occupied at the time of the fire, and by whom, and when and how the fire occurred, so far as they knew or believed. Nor does said declaration contain any averment that such particular statement or account, if any were so made and delivered to said company, was sworn to before any disinterested magistrate, nor that such disinterested magistrate certified that he had examined the circumstances attending the loss, and had reason to believe, and did believe such statement to be true, though by the statute of this State, in such case made and provided, (Public Laws of 1861, c. 34, § 5,) such particular statement and verification of the same by oath, and such certificate from a disinterested magistrate are required to be delivered to the insurance company or their agent, by the assured, in all cases of loss, under a policy against fire, before commencing an action against such company."

J. W. Symonds, for the plaintiff.

The omission of an averment of the statute notice rendered the declaration insufficient. 1 Chitty's Pl., 320, 321; Yelverton's R., (Amer. ed.,) 76, note by Theron Metcalf. It was condition precedent. Gould's Pl., c. 4, §§ 12 & 16.

The defect is not aided by the verdict. 1 Day's Cases in Error, 186, contains an analysis of the defects cured by verdict, embraced within three clauses. (1,) Informality, and omission of immaterial facts; (2,) Too general, imperfect or ambiguous statement of material facts; and (3,) The omission of material facts, if they are necessary concomitants of other material facts alleged, so that, in finding the facts alleged, the jury must necessarily have found the facts omitted.

But the omission of any material fact, not connected with facts alleged, is not cured by verdict. (1,) Because the opposite party has no opportunity to defend against it, and it could not be proved on trial; and, (2,) because the jury are bound to find for plaintiff, when they find all the facts alleged, and the plaintiff is not obliged to prove more than he has alleged. Also, 2 Day's Cases in Error, 559. This synopsis approved in *Little* v. *Thompson*, 2 Greenl., 228. See, also, *Spiers* v. *Parker*, 1 T. R., 141; *Rushton* v. *Aspinwall*, Douglas, 679; *Smith* v. *Moore*, 6 Greenl., 274; *Harwood* v. *Roberts*, 5 Greenl., 441; *Jewell* v. *Brown*, 33 Maine, 250; Yelverton's R., 76, *sup.*

The identity or similarity of the two notices nowhere appears.

Being no allegation of statute notice, want of denial in specifications admitted nothing.

It is only for defects of form that R. S., c. 82, § 10, forbids reversal.

For defects of substance, judgment will be reversed. *Little* v. *Thompson*, 2 Greenl., 228; *Smith* v. *Moore*, *sup.*; *Hills* v. *Staples*, 19 Maine, 219; *Piper* v. *Goodwin*, 23 Maine, 251; *Jewell* v. *Brown*, *supra*; *Lord* v. *Pierce*, 33 Maine, 350.

What can change the imperative requirements of the statute, "shall notify," "shall deliver," "such statement shall be sworn to," "shall certify," &c.?

T. M. Hayes, also for the plaintiffs, cited—

Woosly v. *Wood*, 6 T. R., 710; *Mason* v. *Harvey*, 8 Exch. R., 819; *Leadbetter* v. *Ætna Ins. Co.*, 13 Maine, 265; *Wellcome* v. *People's M. F. Ins. Co.*, 2 Gray, 480; *Tarbell* v. *Gray*, 4 Gray, 444.

Davis & Drummond, for the defendants.

APPLETON, C. J.—The defendants in error are the executors of the last will and testament of Nathan Winslow, who, in his lifetime, effected a policy of insurance upon certain

property mortgaged to him, which being destroyed by fire, the action, now sought to be reversed, was commenced to recover the amount insured.

The declaration sets forth the policy, the interest of the plaintiffs' testate in the property insured, its loss by fire, and that the defendants, (now plaintiffs in error,) "had due notice and proof, according to the conditions of said policy." The action was duly entered, a trial had, and a verdict rendered in favor of the defendants in error. Exceptions to the ruling of the presiding Justice, and a motion to set aside the verdict as against evidence, was seasonably filed, and, upon argument before the full bench, overruled. *Fox & al.* v. *Conway Fire Ins. Co.*, 53 Maine, 109.

After all this, the plaintiffs in error bring this writ to reverse the judgment rendered in the original action, because the writ contained no allegation that the original defendants "had due notice and proof of the loss, according to the requirements of the statute of 1861, c. 34, § 5."

It is to be observed, that issue was joined, that no valid exceptions to the sufficiency of the declaration, by demurrer or otherwise, or to the proof offered in evidence, or to the rulings of the presiding Justice were taken. The plaintiffs in error having had every opportunity to take advantage of the alleged omission of a material fact in the declaration, and having neglected seasonably to do it, now seek to reverse the judgment, which, if the error relied upon was available, might have been prevented, unless cured by amendment.

Whether there is any error, or not, in the former proceedings, is to be determined from the record alone. If that fails to disclose an error, we are not to seek for it *ab extra*. The record is presumed to be correct. The burden is on the plaintiff in error to allege and prove errors upon which he relies. A judgment will not be reversed, when, from aught that appears, it may have been legally rendered. *Spaulding* v. *Rogers*, 50 Maine, 123. "It can never be enough," observes BELL, C. J., in *Peebles* v. *Rand*, 43

N. H., 337, "to show that there may be an error in their proceedings. The party who brings the writ of error is bound to show that it exists, by proper averments."

The error alleged, and upon which the principal reliance is placed, is, that the declaration contains no averment that the proof and notice of the loss was in conformity with the statute of 1861, c. 34, § 5.

The declaration avers that the proof and notice of loss were according to the conditions of the policy. The record does not otherwise disclose proof and notice given. The policy is not before us. *Starbird* v. *Eaton*, 42 Maine, 569. The declaration shows a good cause of action, if the proof and notice required to be given by the statute are not materially different from those required by the policy. It is not enough that there may be error. To reverse the judgment, it should be affirmatively shown that the variance is such, and so important, that the plaintiffs in the original suit had no cause of action. This is not even attempted. For aught that appears, they may be identical. There is certainly no presumption of law that they are variant. The presumption rather would be, that they are in accordance with the statute, rather than the reverse.

It is urged that the notice and proof required by the statute are to be deemed part of the policy and incorporated therein. If so, then the notice and proof according to the statute would be the notice and proof required by the policy. They would be identically the same. That is, if the statute is part of the policy, then notice according to the policy is notice according to the statute, and would be no cause of complaint.

The plaintiff in error might have demurred to the declaration, if insufficient, or by requested instructions have presented the objection upon which reliance is now placed. This was not done. When objection to the form of a writ might have been taken by plea in abatement, it cannot be assigned as error to reverse the judgment. Objections to the form of the writ or declaration are cured by verdict

or judgment on default. *Piper* v. *Goodwin*, 23 Maine, 251. Error does not lie, when the party could have taken exceptions for the same cause and had a summary decision. *Flanders* v. *White Mountain Bank*, 43 N. H., 383. "It has long been the practice," remarks BELL, C. J., in *Peebles* v. *Rand*, 43 N. H., 337, "to consider objections which are not taken at the time, or which are not insisted upon, as waived, and no injustice or inconvenience has ever resulted, so far as we are aware, from that rule. And we think it may well be considered that a party has waived any objection to an order or decision of the Court, to which, being present and having an opportunity to object, he has, at the time, taken no exception."

But, if the declaration was insufficient, it might have been amended while the cause was on trial, by inserting the allegation that notice and proof of the loss was in conformity with the statute, to which reference has been had. All that is required in amendments is, that the cause of action should remain the same. Within this limit, amendments, to reach the merits of the case, are most liberally allowed. A declaration so defective, that it would exhibit no sufficient cause of action, may be cured by an amendment, without introducing any new cause of action. *Pullen* v. *Hutchinson*, 25 Maine, 249.

The Legislature, unwilling that judgments should be arrested or reversed, after a fair trial, have enacted by R. S., 1857, c. 82, § 26, that "no motion in arrest of judgment, in a civil cause, can be entertained," and, by § 10 of the same chapter, that "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 or case can be rightly understood." It would be a reproach to the law, if the plaintiff in error were permitted to lie by, and, after the expense and delay of a trial, to deprive the defendant of a judgment to which it would seem he was justly entitled.

In *Lord* v. *Pierce*, 33 Maine, 350, the action was trover,

but there was no allegation of a conversion by the defendant. This defect was held amendable, and the judgment was not reversed. In *Page* v. *Danforth*, 53 Maine, 174, it was held that a declaration, defective in not alleging a promise to the assignee in whose name the action was brought, was amendable, and the original judgment was affirmed.

It is not necessary to determine the true construction of the Act of 1861, c. 34, for, even if the counsel for the plaintiff in error were to be regarded as correct in his exposition of its meaning, still this writ cannot be maintained for a defect amendable, if the amendment had been asked, and to which the attention of the Court was not called till after the expense and delay of a trial had been incurred. *Vigilantibus non dormientibus, servit lex.*

Judgment affirmed.

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

CHASE W. ATWELL *versus* SAMUEL B. GOWELL.

When the payee of a negotiable promissory note, tainted with usury, sells it for no more than the amount of money actually loaned thereon, with lawful interest, he will not be regarded as a recipient of illegal interest, although the maker has paid the full amount, including the usurious interest, to the indorsee.

ON REPORT.

CASE, to recover $111,21, money alleged to have been received by the defendant as usurious interest.

The writ was dated September 16, 1865.

It appeared in evidence, that the plaintiff received from the defendant the following sums of money, for which the

former gave the latter six negotiable promissory notes, as follows:—

Nov. 11, 1862,	cash $200,	note $208,50,	payable in	two months	without	int.
Dec. 1, 1862,	" $534,	2 notes $286,50, each,	"	60 & 75 days,	"	
Dec. 7, 1862,	" $313,	note $327,	"	20 "	"	
Dec. 22, 1862,	" $465,	2 notes $322, & $192,	"	67 & 9 "	"	

It also appeared that, on Feb. 12, 1863, the plaintiff paid to the defendant, on one of said notes, $121; that, on the 27th of June following, he secured the notes by mortgage on personal property; that the mortgage and notes were assigned to one Wood, on October 17, 1864, for seventy cents on a dollar, and their full amount paid by the plaintiff to Wood, Dec. 24, 1864.

After the evidence was all in, the case was withdrawn from the jury and continued on report, the Court to draw such inferences as a jury might, and to enter judgment, according to the rights of the parties.

B. D. Verrill, for the plaintiff.

This action being between the original borrower and lender, it matters not to whom the amount due on the notes was finally paid by the borrower. It is sufficient that the defendant has indirectly received or retained the illegal interest, and that plaintiff, the borrower, has paid it. *Webb* v. *Wilshire*, 19 Maine, 406. The attempted avoidance of the statute responsibility, by negotiating the notes at a discount, is contrary to the spirit of the laws. The statute must be so construed as to give it effect.

The law regards the extra interest as having been received by the defendant at the time it was paid by the plaintiff. *Stevens* v. *Lincoln*, 7 Met., 525.

Howard & Cleaves, for the defendant.

WALTON, J. — The law provides that if any person directly or indirectly receives or retains usurious interest, it may be recovered back in an action on the case. R. S., c. 45. Public Laws of 1862, c. 136.

This is such an action, and the question is whether pay-

ment to the assignee or indorsee of a negotiable note tainted with usury, will authorize a suit against the original holder, provided the latter, when he sold the note, received from the purchaser no more than the amount of money actually loaned with lawful interest.

We think it will not. To maintain such an action the plaintiff must show that the defendant has directly or indirectly received or retained the usurious interest sued for, — a proposition that cannot be maintained when in fact the defendant has never received or retained from either the maker or the purchaser of the note more than the amount of money actually loaned and lawful interest.

The plaintiff in this case testifies that he gave the defendant certain promissory notes in which was included usurious interest, and that he afterwards paid those notes to a person to whom the defendant sold them. But there is not only no evidence that the defendant received the full amount due on them, but on the contrary the defendant swears that he sold them at a discount so large that he did not obtain so much money as he originally loaned the plaintiff, exclusive of all interest, legal or illegal. Surely such a state of facts as these do not maintain the proposition that the defendant is the recipient of illegal interest.

When, as in *Webb* v. *Wilshire*, 19 Maine, 406, the payee of a note, tainted with usury, sells it for the full amount due on it, and the maker afterwards pays that amount to the holder, an action against the payee can be maintained, because in such a case he has indirectly received the usurious interest. But when, as in this case, the payee sells the note for less than the amount due upon it, exclusive of usurious interest, the proposition that he is the recipient of illegal interest cannot be maintained, and an action will not lie against him. *Judgment for defendant.*

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

JOHN MUZZEY, *Appellant*, *versus* OLIVER H. DAVIS.

The plaintiff, owning a lot of land in Portland, in 1820, purchased the necessary materials, including granite curbstones, and, with the consent of the city authorities, constructed, at his own expense, a sidewalk in front of his premises. In 1865, the city constructed a drain culvert under the outer edge of the sidewalk, and, for that purpose, took up the said curbstones, substituting others, and sold the former, the defendant assisting in carrying them away; — *Held*, that the defendant was liable to the plaintiff, in trespass, for the value of the curbstones.

The dedication of the use of a sidewalk to the public, for the purpose of passing over it, is not shown to be complete without proof of an acceptance.

ON FACTS AGREED.

TRESPASS *de bonis asportatis* for sundry curbstones.

In the year 1820, the plaintiff being the owner of a lot of land on the corner of High and Danforth streets, in Portland, purchased the necessary materials, including the granite curbstones in controversy, and, with the consent of the proper authorities, constructed, at his own expense, a sidewalk in front of his said premises, — which has remained to the present time.

In the month of August, 1865, the city of Portland constructed a drain culvert under the outer edge of said sidewalk; and, for that purpose, took up the stones in controversy, and substituted others. The city then sold the stones in controversy, — and the defendant assisted in carrying them away. In what the city did, they acted through their proper officers.

If, upon the facts, the plaintiff could recover, judgment should be entered in his favor, and the damages to be assessed by the Court; otherwise judgment to be entered for the defendant.

Davis & Drummond, for the defendants.

If one annexes anything to the realty of another, in such manner that it becomes a part thereof, it at once becomes the property of the latter. "*Quicquid plantatur solo, solo*

cedit." *Elmes* v. *Marr*, 3 East, 38. If the soil of the street did not belong to the plaintiff, he lost all property in the materials put into the sidewalk.

If his land extended to the middle of the street, by constructing the sidewalk, he dedicated it to the public. The construction of the sidewalk was done with the consent of the proper authorities, and has all the elements of dedication. Building a bridge on a public highway, is *ipso facto*, a dedication. *Springfield* v. *Co. Commissioners*, 10 Pick., 59.

If a man builds a house on land of another, the builder is presumed to have intentionally transferred his property in the materials to the owner of the soil; and, if the owner of the soil tear down the house and sell the materials, the builder cannot maintain trespass therefor. Broom's Legal Maxims, 355. (Am. ed. 269.)

If the dedication is limited to the purposes and objects for which it was made, it includes the liability and consequent right of the city to keep the whole way, including the sidewalk, in repair. When repaired, who owns the repairs? If an old brick is taken out and a new one substituted, does the city own the new one and the plaintiff the remainder?

In *Harrison* v. *Parker*, 6 East, 154, the bridge dedicated was built upon the land of the plaintiff, and he might well maintain an action for plank taken therefrom by a wrongdoer. That case not applicable to case at bar.

When a bridge is erected on a highway and dedicated to the public and accepted, the dedication carries with it all the incidents, in every respect, of one built by the public authorities. The right of making repairs and converting the old materials replaced with the new, are incidents.

The qualification of the transfer of the property in the materials must correspond with the purpose for which the dedication was made; and, by constructing the sidewalk in the highway, the plaintiff transferred such a property in the materials as gave the public, and all third parties, the same

rights as they would have in a sidewalk constructed by the public authorities, he retaining no more rights in it than if it had been so constructed.

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

DANFORTH, J. — The case finds that the curbstones in controversy were originally the property of the plaintiff. It is a fundamental principle of law, that he can be divested of that property only by his own consent, or by due process of law. In this case it is not pretended that it has been taken from him by any process of law. The only question, then, involved in the case, is one of fact. Has he ever consented to part with his property? His ownership having been admitted, the burden of showing a change rests upon the defendant. How and when was this accomplished? It is suggested that, by voluntarily putting his materials into a sidewalk, they became annexed to and a part of the realty. This may be so; but it does not necessarily follow that his property is gone. The defendant does not claim title in himself, as the owner of the land; nor does the case show that any person other than the plaintiff is the owner. On the other hand, it does show that the plaintiff was "owner of a lot of land on High and Danforth streets, and constructed the sidewalk in front of his premises." In such case, in the absence of all proof to the contrary, the legal presumption is, that he owns to the middle of the street, and that he built the sidewalk upon his own land. By such an act, he surely does not part with any title to his property.

It is further suggested that the plaintiff dedicated his property to the public. But where is the proof of this? It is true the case finds that with the stones he built a sidewalk, which, it is to be expected, the public would use; but he built it in front of his own premises, and might well have done so for his own convenience, or to gratify his own taste. There is nothing in the case to show that he might not have taken it up at any time he chose; and it is not to

be presumed that he dedicated it to the public, unless the circumstances lead to that conclusion. The fact that it was in the street, would undoubtedly authorize the public to pass over it, but would not necessarily authorize the inference of a grant of the property itself.

But, if we should infer a dedication, it can only be a dedication of the use for the purpose of passing over it, and, before that dedication could become complete, there must be proof of an acceptance. There is, however, no such proof in this case. It does not appear that any repairs had ever been made by the city, or that the city had exercised over it any acts of ownership whatever, up to the time of the alleged trespass. But, if it were otherwise, and perhaps, in any event, so long as the walk was in the street, the city would undoubtedly be bound to keep it safe and convenient for travellers. This, of course, would give them the right to repair, with all its incidents. It may be conceded, even, that the city had the right, not only of repairing, but to make changes in the location of the materials, taking them from one place and using them for repairs in another. But it is to be borne in mind that the act complained of was not one of repair, nor were the materials taken used for the purposes of repair; they were simply taken away and sold; an act which the city could not authorize, even in the case of a legally located street. The utmost limit to which they could go would be to take material and perform such acts as may be necessary for repairs. *Adams* v. *Emerson*, 6 Pick., 56.

If any objection had been made to the repairing of the walk by the city, or, if the alleged trespass had grown out of any acts incident to, or done for the purpose of repairing, another and a very different question would have arisen, as to which we now do not indicate any opinion. When such a question arises, the argument of defendant's counsel, drawn from inconvenience, will be entitled to great weight, but it has no applicability to the case before us, as we view it.

Another suggestion entitled to consideration, and which

appears to be decisive of the case, is that, if there was a dedication to the public, the act of the defendant was not only inconsistent with the right of use, which the public had, but was entirely subversive of it. If done by authority, it would operate as a legal discontinuance of it. If done without authority, it was no less an actual discontinuance, and, when the rights of the public cease, the property would revert to the original owner.

Defendant defaulted, to be heard in damages.

APPLETON, C. J., KENT and WALTON, JJ., concurred.
TAPLEY, J., concurred in the result.

WILLIAM H. H. CALEF, *Libellant, versus* NORA M. CALEF.

The Supreme Judicial Court of this State cannot divorce from the bonds of matrimony a husband and wife who were married without the State, and who since their intermarriage have only been in it for a few days on a visit, and never as residents.

LIBEL FOR DIVORCE.

The only question was as to the jurisdiction of the cause.

Davis & Drummond, for the libellant.

"Cohabitation" does not include the idea of "residence" or "domicil," in their legal acceptation, but means "living together as husband and wife." Webster's Dict. It expresses the relation of the parties to each other. They may cohabit in a place without residing there. These parties "lived together in this State as husband and wife." Sexual intercourse is not an essential element in cohabitation. Cohabitation is used to express the idea of living together as husband and wife a single night. *Gardner* v. *Gardner*, 2 Gray, 434. The parties here lived together in this State four days as husband and wife.

In Massachusetts unlawful cohabitation is a crime. Would

not it sustain an indictment for this crime, to show that the parties lived together as husband and wife four days?

APPLETON, C. J.—This is a libel for a divorce, the libellee being a resident of Massachusetts.

By R. S., 1857, c. 60, § 2, "a divorce from the bonds of matrimony may be decreed by any Justice of the Supreme Judicial Court, at any term thereof in the county where either party resides at the time of filing the libel, when, in the exercise of a sound discretion, he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society, if the parties were married in this state, or cohabited here after marriage."

The parties to this libel were married in Rhode Island on 18th June, 1860. They never resided together in Maine, but, soon after their marriage, they came into this State on a visit and spent four days here, living together as husband and wife.

The question presented is whether visiting is cohabiting within the Act under and by virtue of which a divorce is claimed?

The primary meaning of the word cohabit is to dwell with some one—not merely to visit or see them. It includes more than that. Such, too, is the meaning as determined by its derivation, being compounded of *con*, with, and *habito*, to dwell. Worcester defines the word thus; "to dwell with another in the same place." Webster's definition is, "to dwell with; to inhabit or reside in the same place or country. To dwell or live together, usually or often applied to persons not legally married." Richardson gives the meaning thus, "to have, hold or keep a dwelling or abiding place, to dwell or abide together with." Bouvier defines cohabitation as "living together." The law presumes the husband to cohabit with his wife, even after a voluntary separation has taken place between them." It is otherwise when there has been a sentence of separation.

In England, in the ecclesiastical courts, matrimonial in-

tercourse is distinguished from matrimonial cohabitation. The case of *Orme* v. *Orme*, 2 Addams, 382, was a suit brought by a wife against the husband for restitution of conjugal rights. It was there held that the Court can only interfere in the way of restitution, when matrimonial cohabitation is suspended; that the single duty it can enforce by a decree, in a suit of this nature, is that of married parties living together; that it cannot attempt to enforce anything in addition to this. Hence it is incompetent for the wife to sue the husband, or the husband the wife, "for restitution of conjugal rights," pending cohabitation. So, Sir WILLIAM SCOTT, in *Foster* v. *Foster*, 1 Hag., 144, adopts the remark of Dr. Harris, that "the duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may." As to the meaning of the word cohabitation, see 1 Bishop on Marriage and Divorce, § 777, note 1, where the question is fully and ably discussed.

We do not think the Legislature intended to confer jurisdiction over every traveller, who was journeying in the State, or on a mere visit to a friend. They intended the section to apply to those who were living together in one house as their home,—to those who were dwelling together in some place in the State, and not to foreigners, who were temporarily in the State on a visit of friendship or pleasure, and not residing and having no intention to reside in this State.

Libel dismissed.

KENT, WALTON, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

OREN B. THOMPSON *versus* INHABITANTS OF BRIDGTON.

Where a town voted a bounty "to every person who may volunteer and be mustered into the service of the U. S., on the quota of the town under" a specified "call for troops," and the plaintiff, on his own motion and without the knowledge or consent of any agent of the town, volunteered and caused himself to be mustered in and credited on such quota; — *Held*, that the plaintiff must, in order to recover the bounty, prove that, at the time he enlisted, the quota of the sub-district comprising the town, was not full.

A letter, signed by the head clerk of the district provost marshall's office, and addressed to the selectmen of the town, stating that he is "directed by the provost marshall of the district to inform them that the credits of two drafted men (specifically named therein,) have, by order of the provost marshall general, been revoked," is not legal evidence of the facts therein stated.

ON REPORT.

ASSUMPSIT to recover a town bounty for enlistment into the service of the United States, April 12, 1865. The town, at a regular meeting, among other things, chose an agent to fill the quota, and "fully empowered him to make contracts with any and all persons for the purpose of filling the quota, and to procure men to be credited on said quota," &c. The remaining essential facts appear in the opinion.

David Hale, for the plaintiff.

Strout & Gage, for the defendants.

KENT, J. — The plaintiff claims to recover of the defendants six hundred dollars, as due to him under and by virtue of a vote of the town of the following tenor: —

"Voted, that there be paid to each of the following classes of persons the sum of seven hundred dollars, less the sum that may be actually paid them by the paymaster or other constituted authority of the State of Maine.

"1st. To every person who may volunteer and be mustered into the service of the United States *on the quota* of the town under the present call for troops."

The plaintiff in his writ alleges that he did thus enlist and that he was duly mustered into the service of the United States. He does not allege or claim that he made any contract with any officer of the town, or that the town or any of its agents or officers knew of his intention to enlist, or that he had enlisted, until after he had been mustered in. On the contrary, he testifies that "he volunteered for Bridgton on his own motion, and without any agreement either with the committee of the town to fill the quota, or any of the town officers." But he claims that he did in fact do all that the vote required to enable him to claim and recover the bounty promised in the vote. It is clear that, when a man thus assumes to act without consultation with or reference to the municipal authorities, he at best places himself in a position which requires the strictest proof of the existence of all the facts necessary to establish the liability. He must show, as the foundation of his claim, that, at the time he enlisted, the quota of the town was not full, that there was a deficiency existing, which the town, or rather, strictly speaking, the inhabitants residing within its limits and liable to draft, must supply. Towns, in their corporate capacity, were under no legal obligation to furnish recruits.

The prominent point in the specifications of defence in this case is, "that when the plaintiff enlisted, the quota for Bridgton, for the call for men mentioned in the plaintiff's writ, was filled." What are the facts, as they appear upon the papers and the testimony, on this point? It is admitted by the counsel for the plaintiff that, at the end of March, 1865, according to the rolls and records, kept by the proper authorities, there was no deficiency in the quota of Bridgton. But it is alleged that, between that date and the 12th of April, when the plaintiff enlisted, two of the credits before given had been revoked, and therefore a deficiency existed at that time. How far it was legal for the authorities of the United States to revoke and annul a credit before given, where the men had been accepted, mustered in and

counted on the quota, it is not necessary to consider. We can find no proper or sufficient evidence that any such revocation was ever made by any officer authorized to make it.

The plaintiff relies for legal proof of this fact upon a letter dated April 8, 1865, addressed to the selectmen of Bridgton, from the provost marshal's office of the first district of Maine, and signed by R. I. Hull, clerk, which informs the selectmen that he (the clerk) is directed, by Capt. C. H. Doughty, to inform them that the credits of I. E. Gammon, and I. E. Mills, drafted last September, have (by order of the provost marshal general) been revoked. "When the men are found they will be allowed."

It requires no argument or authorities to show that this letter is not legal or sufficient evidence of the facts therein stated. It is not testimony on oath, and not even a transcript of any record. It does not state that the act of revocation has actually been performed. It simply says, that Capt. Doughty directs him to inform them that two credits have been revoked. But notification to a party that a certain act has been done is not legal evidence that it has been done. If it were so, then a notice by a notary public to an indorser that a note had been presented, and payment demanded and refused, would itself be proof of those facts. If the facts stated in a notice are otherwise proved, then the statements in the letter show, and only show, that the selectmen were notified of the facts. But it cannot dispense with proof that the thing was in truth and fact legally done. This it does not purport to do.

The circulars from the provost marshal's office, put into the case, are simply directions to govern the action of the assistants, but are not in themselves decisions in particular cases. They do not order the officers in charge to strike off or cancel any credits already given, and where the men have been accepted and mustered in.

The testimony of R. I. Hull, on this point, is, that "the credit of two drafted men, under a previous call, was made under an order by the provost marshal general." This

shows that the men had been credited by the proper authority. Mr. Hull also says, that it was not the custom (in the office) to hold towns responsible to supply the places of drafted men, who had been examined and then deserted. When a drafted man was examined and accepted, he so far became a soldier, that the town was entitled to be credited for him, even if he afterwards deserted.

This would also seem to be confirmed by the views of Capt. Doughty, as expressed in the letter before quoted, when he says that "when the two men are found they will be allowed." From this it would seem, that the ground on which the credit was revoked, was the *desertion*, and not the fact that they had been *wrongly credited originally*.

The witness Hull further says, that the revocation was not made under the directions of the circular in the case, "but he *supposed*" they received another order, which was not produced, to revoke the credits of drafted men, and then they revoked this credit, and wrote upon the book of quotas and credits, under the record on the February return, that being the month in which the credits were first made, the words, "these credits revoked by order of the provost marshal general."

But *that order* is not produced, nor its non-production accounted for. The witness only says he supposes such an order was received. It is not pretended that the credits were cancelled by any other officer or by any other order, or that they could be. On the last day of March, the quota, as it is admitted, was full. The town then stood clear on the record. If, between that day and the 12th of April, the record *could be* altered, so as to charge the town again, it could clearly only be done by a distinct and definite order to that effect. The understandings, beliefs and suppositions of clerks or assistants cannot supersede the necessity of the production of the order, or a sufficiently authenticated copy of it.

The plaintiff, therefore, has failed to produce legitimate and sufficient proof that, on that 12th of April, after the surrender of Gen. Lee, when he, without the request or

knowledge of the town or its agents, procured himself to be credited on the quota of the town, the quota was not full, but that a vacancy existed, into which he might foist himself and then claim the promised bounty of six hundred dollars.

This view renders it unnecessary for us to consider several other grave and weighty objections to the plaintiff's recovery, which have been presented.

According to the terms of the report, the entry must be

Judgment for the defendants.

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

TAPLEY, J., did not concur.

JAMES A. FENDERSON *versus* JOHN W. OWEN.

Where it is necessary to determine the date of a promissory note in suit, and offered in evidence, and the name of the month is so inartificially written that, upon inspection, the presiding Judge cannot determine whether it should be read June or January, extraneous evidence is admissible to show the true date.

And the question is a proper one to be submitted to a jury.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note.

The writ was dated June 4, 1864, and described the note as "bearing date June 5, 1858."

Plea, general issue and statute of limitations. Upon the production of the note at the trial, the defendant claimed that it appeared on its face to be dated Jan. 5, and not Jun. 5, and thereupon objected to its admission on the ground of variance. The plaintiff claimed that it appeared on its face to be dated Jun. 5, 1858. The plaintiff then called a witness to testify that the written date upon the note was Jun. and not Jan.

The defendant seasonably objected to this testimony, claiming that it was not admissible at all; but, if admissible, it should be addressed to the Court and not to the jury; that the Court must not only construe the written contract, but determine what the writing in fact was; and requested the presiding Judge so to rule and direct. The defendant also objected to the note's being read to the jury, until the presiding Judge had determined what the written date was, and whether there was a variance or not; but the Judge overruled the objections, admitted the testimony, directed it to go to the jury as to what the written date was, admitted the note, and declined to determine or rule upon the alleged variance.

After the testimony was all before the jury, the presiding Judge instructed them that the letters of the dating month were so inartificially made, he could not determine by inspection of the note, whether it should be read June 5, 1858, or January 5, 1858, and that they would determine, from all the evidence in the case, what was the true date; that the plaintiff had declared on a note dated June 5, 1858, and, to entitle him to a verdict, the proof must correspond with the allegation; and that, unless they found, from the evidence, that the true date of the note was June 5, 1858, their verdict should be for the defendant.

The verdict was for the plaintiff, and the defendant alleged exceptions.

Strout & Gage, for the defendant.

Written contracts are to be construed by the Court; and the same rule necessarily requires the Court to ascertain from the paper itself what its contents are, which are to be thus construed by it; and evidence *aliunde* is not admissible. 7 Miss., 550, cited in 4 U. S. Dig., 450; *Com.* v. *Riggs*, 14 Gray, 376; *Com.* v. *Davis*, 11 Gray, 9; 1 Greenl. on Ev., § 280.

If evidence is admissible, it should be addressed to the Court, and not to the jury. *Rennan* v. *Hayward*, 2 Ad. &

El., 666. Variance is always a question for the Court. *Prescott* v. *Hayes*, 43 N. H. 593; *Gorten* v. *Hadsell*, 9 Cush., 511; *Jenkins* v. *Davis*, 10 Ad. & El., N. S., 323; *Dole* v. *Thurlow*, 12 Met., 159; *Boyle* v. *Wiseman*, 33 Eng. Law & Eq., 393.

W. H. Vinton & L. B. Dennett, for the plaintiff,

Cited 1 Greenl. on Ev., § 49; *Jackson* v. *Stanly*, 10 Johns., 133; *Sanderson* v. *Piper*, 5 Bing., (N. C.,) 425; 1 Greenl. on Ev., § 297, note 2, and cases there cited; *Norman* v. *Merrill*, 4 Vesey, 769, (U. S. Dig., 732, § 1718,); *Gibbett* v. *Beachy*, 3 Sim., 24; *Sweet* v. *Lee*, 3 M. & G., 452; *Farm. and Mech. Bank* v. *Day*, 13 Vt., 36.

WALTON, J. — When it is necessary to determine the date of a paper offered in evidence, and the name of the month is so inartificially written that upon inspection the presiding Judge is unable to determine whether it should be read June or January, extraneous evidence is admissible to show the true date, and the question is a proper one to be submitted to the jury. So held in *Armstrong* v. *Burrows*, 6 Watts, 266, where the question was fully considered.

The same word was in dispute in that case as in this, namely, whether the name of the month in the date of a paper should be read June or January; and the Court held that the question was for the jury, and not the Court.

This is so upon principle as well as authority. To the Court belongs the duty of declaring the law, but it is the province of the jury to weigh evidence and determine facts. Whether certain characters were intended to represent one word or another, is not a question of law; it is a question of fact; and when the fact is in dispute, and to ascertain the truth it is necessary to resort to extraneous evidence, (circumstantial and conflicting it may be,) its ascertainment would seem upon principle to belong to the jury and not to the Court.

It is undoubtedly the duty of the Court to interpret written contracts. But reading and interpreting are very different matters. A blind man may interpret, but he cannot read. The language must be ascertained before the work of interpretation commences. It does not follow that because it is the duty of the Judge to interpret, it is therefore his duty to read the paper in controversy.

Exceptions overruled. — Judgment on the verdict.

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

LYMAN C. BRIGGS *& al. versus* GRAND TRUNK RAILWAY CO.

Duplicity of a declaration can only be taken advantage of by special demurrer, pointing out the objection and the grounds of it.

ON EXCEPTIONS.

CASE, for damages for an alleged unjustifiable delay in the transportation of flour.

The defendants filed a general demurrer at the first term, which the presiding Judge sustained, and the plaintiffs alleged exceptions.

P. Barnes, for the defendants.

Davis & Drummond, for the plaintiffs.

No briefs came into the hands of the Reporter.

KENT, J. — The objection to the declaration, as stated in argument, is, that it is bad for duplicity. It may be so, but the demurrer is general and not special. According to long established rules of pleading, duplicity can only be taken advantage of on *special* demurrer, pointing out the objection and the grounds of it. *Scott* v. *Whipple*, 6 Greenlief, 425. *Otis* v. *Blake*, 6 Mass., 336. *Commonwealth*

v. *Tuck*, 20 Pick., 361; 1 Chitty Pleadings, 512; 2 Johns., 433; 20 Johns., 404. *Exceptions sustained.*
Demurrer overruled.

APPLETON, C. J., WALTON, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

THOMAS H. WESTON *& als. versus* GRAND TRUNK RAILWAY COMPANY.

In an action against a common carrier for damages in not seasonably transporting flour, the decline in its market value between the time when it actually arrived at its place of destination, and when, in the exercise of proper diligence on the part of the carrier, it might have so arrived, is a material element proper for the consideration of the jury in ascertaining the actual damages sustained by the shipper.

ON EXCEPTIONS.

CASE, to recover damages for alleged unjustifiable delay in the transportation of flour. The count in the writ contained an allegation that, during the time of such delay, "the market value of said flour fell and depreciated a very great amount, which said amount, by reason of such detention, was wholly lost to the plaintiffs."

The remaining facts sufficiently appear in the opinion.

P. Barnes, for the defendants, cited

Wilbert v. *N. Y. & E. R. R. Co.* 19 Barb., 36; *Jones* v. *N. Y. & E. R. R. Co.*, 29 Barb., 633; *Conger* v. *Hudson River R. R. Co.*, 6 Duer, 375; *Smeed* v. *Ford*, 1 E. & E., 602; *Merrill* v. *Dixey*, 14 Louisiana, 298; *Denny* v. *N. Y. Central R. R. Co.*, 13 Gray, 481.

Davis & Drummond, for the plaintiffs, cited

Brackett v. *McNair*, 14 Johns., 170; *O'Connor* v. *Watson*, 11 Watts, 418; *Medbury* v. *N. Y. & E. R. R. Co.*, 26 Barb., 564; *Henry* v. *S. & M. R. R. Co.*, 14 Ill., 156;

King v. *Woodbridge*, 34 Vt., 565; *Ingledew* v. *Northern R. R. Co.*, 7 Gray, 86, 88; *Rae* v. *G. & C. R. R. Co.*, 18 Ill., 488; *Kent* v. *Hudson River Railroad Co.*, 22 Barb., 273; *Lawrent* v. *Vaughan*, 30 Vt., 90; *Sisson* v. *Cleveland & Toledo Railroad Co.*, 14 Mich., 489; *Cushing* v. *Grand Trunk Railroad Co.*, Mass., not reported; *Wilson* v. *Lancashire Railroad Co.*, 99 Eng. Com. Law., 632.

The facts sufficiently appear in the opinion of the Court.

APPLETON, C. J. — The defendants are common carriers. The jury, under instructions, to which no exceptions have been taken, have found that there was unreasonable and unnecessary delay on the part of the defendants in the transportation of the plaintiff's flour, and that he has sustained damage by reason of such delay.

The only question presented in argument relates to the true rule of damage. The defendants deny that they are liable for more than interest on the purchase money, during the delay. The Court instructed the jury that they might take into consideration the decline in the market value of flour between the time when it actually arrived at its place of destination, and when, in the exercise of proper diligence on the part of the defendants, it might have so arrived. By this ruling the defendants were held to remunerate the plaintiff for the decline in the price of flour and the loss arising from their neglect of duty.

In case of the non-performance of a contract of sale, the measure of damage is the value of the article sold, at the time and place of delivery, if the price has been paid; and the difference between that and the contract price, if not paid.

If a common carrier contracts to deliver an article and it is lost, he is liable for its value at its place of destination, at the time of the loss. *Blumenthal* v. *Brainerd*, 38 Vt., 403; 2 Redfield on Railroads, § 151; *Lawrent* v. *Vaughan*, 30 Vt., 90.

When a carrier contracts to deliver an article, and by his

neglect it is not delivered at the time and place when and where, in the due performance of the contract, it should have been delivered, and, at the time of its actual delivery, there is a diminution of its market value, the loss thus arising is held to be the necessary consequence of the carrier's negligence, for which he should be made liable. The difference between the value at the time of the actual delivery, and that when, in the performance of his contract, it should have been delivered, seems to be recognized as the true measure of damages. "In cases of this kind," observes THOMAS, J., in *Ingledew* v. *Northern Railroad*, 7 Gray, 88, "the rule of damages seems to be the diminution in value of the goods, as articles of merchandize, at the time of their arrival, by reason of the delay. What were the goods worth less, at the time of their arrival, than they would have been if they had come without delay, or in the usual course of transportation?" In *King* v. *Woodbridge*, 34 Vt., 566, the plaintiff, in a case like the present, was held entitled to recover as damages the difference between what he was obliged to sell the property at when it did arrive, and what he would have received at the time it should have arrived, if the defendant had performed his contract. These views seem to have been adopted in *Henry* v. *S. & M. Railroad Co.*, 14 Ill., 156; *Sisson* v. *Clev. & Tol. Railroad Co.*, 14 Michigan, 489, and in *Rae* v. *G. & C. Railroad Co.*, 18 Ill., 488.

In *Wilson* v. *Lancashire Railway Co.*, 99 E. C. L. 632, WILLIAMS, J., says,—"Two questions of law were raised during the argument on the part of the defendants. The first was, whether in a case like this, of an action against a common carrier for negligence in not delivering goods entrusted to him within a reasonable time, the consignee has a right to claim in the shape of damages the profit he would have made upon the sale of them, if they had been delivered in proper time. We are all of opinion he is not. Then comes the other question, whether he is entitled to recover the difference between the value of the goods to him, if they

had been delivered in proper time, and their value at the time when they were actually delivered. I am of opinion that the consignee is entitled to recover such difference in value." "It is admitted," remarks BYLES, J., in the same case, "that deterioration in quality is to be taken in account in estimating the damage the plaintiff has sustained; it is admitted also, that loss or diminution in the quantity is to be taken into account; and I do not see why a loss in the exchangeable value of the goods should not also be taken into account." So, in *Smith* v. *N. H. & N. Y. R. R. Co.*, 12 Allen, 531, the damages resulting from a wrongful delay on the part of the carrier were held to be the difference in the market value, between the time when the goods ought to have arrived and when they did arrive at the terminus of the road. Upon a careful examination, we think the weight of authority is decidedly adverse to the rule, as claimed by the learned counsel for the defendants, and that the decline in the market value of an article, between the time when it actually arrived at its place of destination and when, in the exercise of proper diligence on the part of the carrier, it might have arrived there, was a material element proper for the consideration of the jury in ascertaining the actual damages sustained by the plaintiff, and such was the ruling of the presiding justice. *Exceptions overruled.*

KENT, WALTON, DANFORTH and TAPLEY, JJ., concurred.

BARROWS, J. — I concur in overruling the exceptions, but it seems to me that it is laying down the rule of damages too broadly to say that the damages in all such cases should be the difference in the market value between the time when the goods ought to have arrived and when they did arrive. There may be cases where the plaintiff would not really suffer to that extent by reason of the non-delivery. Plainly, he would not, if he had on hand more than he could sell on the falling market.

SARAH T. CASSITY, *Ex'rx*, *versus* FRANCIS COTA & *Tr.*

Where the Court had, at the time of the entry of the action, no jurisdiction either of the person or by the attachment of the property of the defendant, the case will, on motion seasonably filed, be dismissed, although personal service were made before a hearing upon the motion.

ON EXCEPTIONS.

BARROWS, J.—The plaintiff brought her action at the January term of this Court, A. D. 1864, against a person not residing in this State, nor at that time within the jurisdiction, summoning an alleged trustee, who at the return term disclosed and was discharged. The action was nevertheless suffered to remain upon the docket of the Court, and, some two years later, personal notice, having been ordered, was served upon the defendant, who had then come within the jurisdiction. A motion to dismiss having been seasonably filed, the question seems to be, whether parties plaintiff can be permitted to cumber the dockets of the Court with actions in which, *at the time of entry*, the Court has no jurisdiction either of the person or property of any parties defendant, relying upon the chance of finding the defendant within the State at some future time.

Writs are to be made returnable in the several counties at the term next after they are sued out, if sued out in season for service, if not, then at the next succeeding term, and the question of jurisdiction must be settled by *the facts existing at the time of the entry of the action.* If jurisdiction has been acquired by due personal service, or if goods, estate, effects or credits of any defendant are found within this State, and attached on the original writ, jurisdiction will be sustained in all actions commenced in any court proper to try them. R. S., c. 81, §§ 5 & 18.

In this case, when it appeared, by the discharge of the alleged trustee, that the Court had no jurisdiction in either of these modes, it was the duty of the plaintiff's attorney to

have the action dismissed. It is a misprision to take order of notice where the Court has no jurisdiction either of the person or by attachment of the property of any defendant.

Exceptions sustained. — Action dismissed.

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

Williams, for the plaintiff, cited R. S., c. 81, § 18.

J. D. & F. Fessenden, for the defendant.

STATE *versus* SOLOMON ELDER.

An indictment for being a "common seller of intoxicating liquors," or one for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, by one holding a license to sell such liquors under the internal revenue laws of the United States, cannot be removed into the Circuit Court of the United States, for trial, under U. S. stat. of 1833, c. 57, § 3.

Nor is either of such indictments within the U. S. stat. of 1864, c. 173, § 50.

INDICTMENTS, one charging the defendant with being a "common seller of intoxicating liquors," &c., and the other with keeping and maintaining a nuisance by reason of the illegal keeping and sale of intoxicating liquor, &c.

The defendant was brought in upon a capias, when he pleaded not guilty. Thereupon writs of *habeas corpus cum causa*, issued by the Circuit Court of the United States for the district of Maine, addressed to the United States marshal for the district, under the Act of Congress of 1833, c. 57, § 3, alleging that the defendant had presented his petition to that Court, setting forth that these indictments had been commenced against him in this Court, for and on account of acts done by him under the revenue laws of the United States, and by color thereof, and for and on account of acts done by him under authority of said laws; that the

same had not been tried, and the same were commenced against him by capias, served on him within the district, and representing that he was duly authorized and licensed by those laws to keep, sell and retail the liquors named in those indictments, in manner and form as he was charged in the indictment, &c., were served upon the clerk of this Court, then in session. The sheriff having the custody of the defendant, refused, on demand by the marshal, having such writs, to deliver the defendant into the custody of the marshal. Subsequently, a motion was made, *pro forma*, by the prosecuting attorney, to proceed to the trial of the defendant on these indictments, which motion was resisted upon the ground that they had been removed to the Circuit Court, and this Court could not lawfully exercise any further jurisdiction in the premises.

The foregoing facts were reported for such adjudication as the law required.

Howard & Cleaves, for the defendant.

1. The defendant in this case seeks relief under the laws of Congress, and it is sufficient for the State Court, that the defence involves the construction and effect of a law of Congress.

2. The statutes of the United States, c. 57, § 3, of U. S. statutes of 1833, provide for the removal of such cases to the United States Circuit Court. Brightley's Dig., 128, 129.

3. The law under which the removal was made is valid.

4. It has been literally adhered to in the steps taken to accomplish the removal, and all proceedings in the State Court, after the service of the writ of *habeas corpus cum causa* upon the "clerk of the State Court," and while the case was pending in the United States Circuit Court, were null and void, according to the express terms of the statute under which the removal was made. Brightley's Digest, p. 129, § 20; Act of March 2, 1833, § 3; 4 Statute, 633.

J. A. Peters, Att'y Gen'l, contra.

State *v.* Elder.

APPLETON, C. J.—It was decided by the Supreme Court of the United States, in *McGuire* v. *Commonwealth*, 3 Wallace, 387, that a license granted by the United States, under the internal revenue Act of July 1, 1862, to carry on the business of a wholesale liquor dealer in a particular State named, does not, though it may have been granted in consideration of a fee paid, give the licensee power to carry on business in violation of the laws of a State forbidding such business to be carried on within its limits.

The defendant was indicted for being a common seller of intoxicating liquors, contrary to the form of the statute of this State. The offence is against the laws of this State, and is to be tried by its tribunals. The Courts of the United States have no jurisdiction and cannot properly try the offence. The case is not within U. S. stat., 1833, c. 57, § 3, for this is not a civil suit, nor a prosecution for any penalty accruing under the Acts of the United States. Nor is it within the Act of Congress of 1864, c. 173, § 50, for the defendant was not indicted for any act done "under the laws for the collection of internal duties, stamp duties, licenses or taxes, which have been or may hereafter be enacted;" nor "for or on account of any right, authority or title set up or claimed by him under any such law," but for a violation of the law of this State, for which his license affords no justification. *Com.* v. *Keenan*, 11 Allen, 262.

The case is properly before this Court. The Acts under which it is claimed to remove this cause to the Circuit Court of the United States do not apply. The indictment, for aught that has been disclosed, must proceed to trial. The grounds of this conclusion are fully set forth in the able opinion of Mr. Justice GRAY, in *Com.* v. *Casey*, 12 Allen, 214, in which we fully concur.

The indictment to proceed to trial.

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

NATHANIEL WILSON *versus* BARNARD GANNON.

Levies, in which illegal fees may have been included, remain unaffected by R. S., c. 76, § 20, and are not to be defeated for that cause.

The return of the levying officer that he "delivered seizin and possession to" a person named, "attorney for the said" creditor "for the purpose of receiving seizin and possession," &c., as per his receipt hereon, is *prima facie* evidence that the person named was the attorney, and received seizin and possession of the premises.

The omission of the person thus named as attorney, to certify that he had received seizin and possession, is no contradiction of the officer's return, and cannot divest the creditor of the rights secured by the levy.

And a writ of entry, subsequently brought by the execution creditor claiming title under the levy, adopts the levy and affirms the agency of the attorney.

ON REPORT.

WRIT OF ENTRY.

Both parties claim under one Kelley, — the plaintiff by virtue of a levy made July, 1856, and duly recorded, and the defendant by a deed of warranty, made, executed and recorded subsequent to the record of the levy.

The judgment, upon which the levy was based, was recovered April, 1856, and was for $72,92 debt, $17,73 cost, making in all, $90,65.

The officer stated, in his return upon the execution, that he "delivered seizin and possession of the above described real estate to Gilman L. Blake, attorney for the said Nathaniel Wilson, for the purpose of receiving seizin and possession, to hold," &c., "as appears by his receipt hereon." Upon the back of the execution a formal receipt of seizin and possession was written, but it bore no signature. The officer's fees and charges were taxed at $21,70, or $8,77, in excess of legal fees.

N. Wilson, pro se.

R. A. Frye, for the defendant.

APPLETON, C. J.—It has been repeatedly held, that a levy is not to be avoided because the officer has taxed, and caused to be satisfied in the extent, fees not authorized by law. *Sturtevant* v. *Frothingham*, 10 Maine, 100. The officer in such case is liable to the debtor, but the levy is held valid. The creditor is not to suffer by reason of such extortion on the part of the officer. *Holmes* v. *Hall*, 4 Met., 419; *Odiorne* v. *Mason*, 9 N. H., 24; *Glidden* v. *Chace*, 35 Maine, 90; *Keen* v. *Briggs*, 46 Maine, 469.

If, however, the levy exceeds the amount due on the execution, and the costs and charges as taxed by the officer, though illegally taxed, the value of any coin which is a legal tender, it is void. *Glidden* v. *Chace*, 35 Maine, 90. The levy in such case is void, though the excess be but fifty-two cents, as in *Thayer* v. *Mayo*, 34 Maine, 142, or but fourteen cents, as in *Glidden* v. *Chace*.

By R. S., 1857, c. 76, § 20, "when, by an error of the officer in a levy already made or to be made, the amount for which it was made exceeds the amount of debt or damage, costs, interest and cost of levy, by a sum not greater than one per cent., of said amount, such levy shall be legal and valid, if otherwise legally made; and the debtor or owner of the estate may maintain an action against the officer or his principal to recover any damages occasioned thereby, or a bill in equity against the creditor to have such error corrected, and the Court may correct it, in any manner that may be just and equitable, or decree a pecuniary compensation for the injury."

This Act was passed to remedy the evils resulting from the class of decisions already referred to, in which there was a trifling excess of the value of the land taken over and above the execution, interest thereon and costs of levy, as taxed on the execution. It was not the purpose of the Legislature to render void what by the previous decisions had been declared valid. The levies, therefore, in which illegal fees may have been included, remain unaffected by the statute and are not to be defeated for that cause.

By R. S., 1857, c. 76, § 5, among other requirements, the officer is to state in his return "that he delivered seizin and possession to the creditor or his attorney." The officer in the case before us, in his return, states that he "delivered seizin and possession to Gilman L. Blake, attorney for the said Nathaniel Wilson, for the purpose of receiving seizin and possession," &c. The sheriff's return is at least *prima facie* evidence that Blake was the attorney, and received seizin and possession of the premises upon which the levy was made. If this were doubtful, the plaintiff has adopted the extent and affirmed the agency of his attorney by the present suit. *Odiorne* v. *Mason*, 9 N. H., 24. The omission of Blake to certify that he had received seizin and possession, is no contradiction of the officer's return, and cannot divest the plaintiff of the rights thereby acquired. The Court will be governed by the officer's return, and that is sufficient. *Bamford* v. *Melvin*, 7 Maine, 14.

As no other objections to the levy are alleged to exist, there must, according to the agreement of the parties, be judgment for the plaintiff. *Defendant defaulted.*

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

JOSEPH CUMMINGS *versus* ISAAC I. YORK *& als.*

The mere act of issuing a citation to a creditor does not disqualify the justice issuing the same from hearing the disclosure, as a justice selected on the part of the debtor.

And the fact that such justice was counsel for the debtor, in an action subsequently brought upon the bond given to procure the release of the latter from arrest upon the execution, will not affect the disclosure.

ON REPORT.

DEBT on a poor debtor's bond, dated May 25, 1865, given by the defendant York, to procure his release from arrest

upon an execution issued upon a judgment duly recovered. Within the time mentioned in the bond, York applied under R. S., c. 113, § 23, to Enoch Foster, Jr., a justice of the peace and quorum within and for the county of Oxford, (where the arrest was made,) who duly appointed a time and place for the examination of York, and issued a citation to the creditor, which was duly served. At the time and place appointed in the citation, York appeared and selected the said Foster, who, it was admitted, was a disinterested justice of the peace and quorum as aforesaid, "except so far as the fact that he issued the citation, and is counsel in this action, may render him interested." The creditor appeared by his counsel, selected a justice, and filed a written protest against the said Foster's acting in the premises, because he issued the citation.

The disclosure was perfected, the oath prescribed in § 28 administered, and the certificate provided for in § 31 was duly made and delivered to the said York, within the six months mentioned in the bond. The bond was admitted to be a statute bond. It also appeared that the same justice was counsel for the defendants in this action.

The full Court were to render such judgment as the legal rights of the parties entitled them to.

S. F. Gibson, for the plaintiff.

The bond being a statute bond, a strict compliance with the statute is essential.

The Court, before which the debtor disclosed, was not "disinterested" and legally competent as required by R. S., c. 113, § 25. Objection was seasonably filed. Foster was legally incompetent under R. S., c. 83, § 22. Proceedings had under R. S., c. 113, constitute "civil proceedings;" and the issuing of a citation is a "commencement of a civil action," a "civil action" being a "legal demand of one's rights."

The case of *Lovering* v. *Lamson*, 50 Maine, 334, relates particularly to the point of disinterestedness, and does not settle the question of abatement provided in c. 83.

The Legislature had in view the fact that a justice commencing an action would be interested, and they, by force of c. 83, § 22, intended that any interest of that kind should operate as a disqualification. He is interested in sustaining papers drawn by him.

The first act of the justices of a poor debtor's court is to pass upon the sufficiency of the citation.

Lovering v. *Lamson* came before the Court upon exceptions, this case on report. The Court has the "power" desired in the former.

W. W. Virgin & E. Foster, Jr., for the defendants.

KENT, J.—The only question presented to us is whether one of the justices, who took the disclosure and administered the oath and gave the certificate, was "disinterested," within the meaning of the statute. The first objection is, that he issued the citation to the creditor. This we understand to establish the fact that he, as a justice of the peace, signed the citation. This was a mere ministerial act, requiring no exercise of judgment, and touching in no way the question whether the debtor was entitled to his discharge on the disclosure to be afterwards made. It might as well be contended that a clerk of the courts, who signs a writ and affixes the seal, was acting as counsel for the party who sues it out. This point has been expressly decided by this Court, in *Ayer* v. *Woodman*, 24 Maine, 196. And in a more recent and much stronger case, *Lovering* v. *Lamson*, 50 Maine, 334.

The other objection is, that the same justice is now counsel in the present action on the bond. It is sufficient to say of this objection that it relates to matters subsequent to the time of examination and discharge.

The question of "disinterestedness" must be determined upon the facts existing at the time of the disclosure. If the magistrate was *then* competent to act, his subsequent action and relations could not deprive a poor debtor of the benefit of his discharge. If a magistrate, who took a dis-

closure, he then being disinterested, should afterwards by marriage become related to the creditor, within the degree of second cousin, could that fact be invoked to establish a disqualification at the time of the disclosure?

If, then, the fact stated, would in itself create such new relations between the parties, as would render it illegal for the justice to act at the present time, yet, being subsequent to the hearing and adjudication, it cannot affect the case.

The entry, under the agreement of the parties, must be

Judgment for defendant.

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

JOSIAH EMERY *versus* LUCIEN N. PRESCOTT *& al.*

Words in a declaration of libel, not in themselves libellous, are not enlarged or extended by an innuendo.

The words, to "carry the" plaintiff "back to Thomaston, where he came from," are not of themselves libellous.

Nor does the innuendo that Thomaston means "the State prison situated in the town of Thomaston, which place is known by the name of the town," unexplained by introductory matter, make the words actionable, which, without innuendo, would not be libellous.

ON EXCEPTIONS.

CASE, for publishing a libel against the plaintiff. In the first count, the libellous matter was alleged to be, — "It is said that when the conductor (meaning the conductor of the Androscoggin railroad,) turned the fellow (meaning the plaintiff,) up to the light, and found who it (meaning the plaintiff,) was, he (meaning said conductor,) at once issued orders to the engineer (meaning the engineer of a train of cars that run from Farmington to Lewiston on said day,) to steer straight for Thomaston, (meaning the town of Thomaston, in the county of Lincoln, in which town the

State prison is situated,) and carry that 'delegate' (meaning the plaintiff,) back where he (again meaning the plaintiff) came from." In the second count the words were, — "preparatory to the great mass convention at Auburn, last Saturday, extra trains were ordered on the Androscoggin road for carrying 'fifteen hundred' demi-Johnsons. A tremendous head of steam was put on at the start of the extra from Farmington with one delegate, (meaning the plaintiff,) 'all aboard,' hailing from the town of Industry, (meaning, &c.) It is said that when the conductor (meaning, &c.,) turned the fellow (meaning the plaintiff,) up to the light," &c., same as in the preceding count.

In the third count the words "steer straight for Thomaston" were followed by the innuendo; "meaning the State prison situated in the town of Thomaston, which prison is known by the name of said town." The count concluded,— "thereby maliciously charging and insinuating that the plaintiff was then and there a convict, and had been sentenced to said prison for crime, and that said conductor, on board of said train of cars, ordered the plaintiff carried back to said prison."

The defendants demurred and the plaintiff joined. The presiding Judge sustained the demurrer, and the plaintiff alleged exceptions.

H. L. Whitcomb, for the plaintiff,

Cited 2 Greenl. on Ev., § 418; 6 Cush., 71; Oliver's Prec., 393 and cases *infra*; R. S., c. 82, § 24; *Parkhurst* v. *Ketchum*, 6 Allen, 406; *Leonard* v. *Allen*, 11 Cush., 241; *Chapman* v. *Ordway*, 5 Allen, 593; 1 Hill. on Torts, 465; *Stone* v. *Varney*, 7 Met., 86; 6 Mass., 518; *Commonwealth* v. *Benner*, 9 Met., 410.

Robert Goodenow, for the defendants.

APPLETON, C. J. — The plaintiff has brought his action for an alleged libel in the following words; — "Preparatory to 'the great mass convention' at Auburn, last Saturday, extra

trains were ordered on the Androscoggin road for carrying 'fifteen hundred' demi-Johnsons. A tremendous head of steam was put on at the start of the extra from Farmington, with one delegate, 'all aboard,' hailing from the town of Industry. It is said that when the conductor turned the fellow up to the light and found who it was, he at once issued orders to the engineer to steer straight for Thomaston, 'and carry that delegate' back where he came from."

It is claimed that these words are libellous, as charging the plaintiff with having been sent to the State prison at Thomaston for the commission of some crime. In the absence of any introductory matter by way of explanation, "carrying the delegate back" to Thomaston would be no more libellous than carrying him back to Industry. Nor does the innuendo that Thomaston means "the State prison situated in the town of Thomaston, which place is known by the name of the town," unexplained by introductory matter, make the words actionable, which, without innuendo, would not be libellous. An innuendo "is only explanatory of some matter already expressed; it serves to point out when there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add to or enlarge or change the sense of the previous words." 1 Chitty on Pleading, 407; *Craft* v. *Boite*, 1 William's Saunders, 243 a, n. 4.

Upon its face, then, the libel contains no words charging the plaintiff with having been convicted and sent to the State's prison in Thomaston. It is sought by innuendo to make these words libellous, but, as has been seen, the authorities concur in the proposition that an innuendo cannot enlarge or alter the meaning of the words which constitute the alleged libel.

In the present case the words do not naturally convey the meaning imputed to them by the innuendo. Carrying a delegate back to Thomaston, no more means carrying him back to State prison in Thomaston than carrying him back to Brunswick or Augusta means carrying one back to the college in the former and to the Insane Asylum in the lat-

ter place. "If the libel or words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show that they are actionable, it must be expressly shown that such matter existed and that the slander related thereto. * * When what is complained of in the declaration as a libel does not upon the face of it apply to the plaintiff and impute a libel, there must be an inducement stating such facts as will support an innuendo and show the libellous application of the statement to the plaintiff." 1 Chitty on Plead., 401. In *Angle* v. *Alexander*, 20 E. C. L., 71, the words were "he is a regular prover under bankruptcies;" meaning that the plaintiff was accustomed to prove fictitious debts under commissions. The declaration was held ill. "The innuendo," remarks TINDAL, C. J., "is larger than the natural meaning of the words; and the rule is, that an innuendo cannot enlarge the meaning of the words, unless it be connected with some matter of fact before expressly averred. * * Here, without an averment that it had been a practice with the defendant, by the words complained of, to impute the proof of fictitious debts under commissions of bankruptcy, the innuendo cannot be supported."

In the present case, the declaration has no reference to extrinsic matter and contains no introductory averments supporting the innuendo. "The innuendo cannot supply the omission of a necessary inducement of matter; and an innuendo introducing new facts, or otherwise than by reference to previous inducement, is fatally defective." 1 Chitty on Plead., 407; *Robinson* v. *Day*, 28 E. C. L., 151; *Goldstein* v. *Foss*, 13 E. C. L., 128; *Bloss* v. *Tobey*, 2 Pick., 320; *Com.* v. *Child*, 13 Pick., 198.

Exceptions overruled.

KENT, BARROWS, DANFORTH and TAPLEY, JJ., concurred.

WALTON, J. — I concur in the opinion of the Chief Justice, but desire to add that the argument of the plaintiff's

attorney, in which he calls his client's crime a "miss step," and his detection and sentence to the State prison "unfortunate," and any allusion to these facts "base and cowardly," and says that "it was the very fact of the plaintiff's having been in prison that his feelings would be wounded by such base and cowardly allusions," and "that men with the least regard for honor would feel an extreme delicacy in making any allusion to a subject of that kind," is exceedingly unfortunate in not meeting or even alluding to the real difficulty under which his case labors. The question is not whether State prison convicts may rightfully claim to be treated with peculiar and "extreme delicacy," but whether the plaintiff's attorney succeeded in making a good writ. The Court is of opinion that he did not, and it is upon this point alone that the case is decided.

REUBEN JONES, *Appellant*, *versus* JAMES W. PERKINS.

Parol evidence is inadmissible to prove that an award, upon which a judgment was rendered, was founded upon matters not presented by the pleadings.

The parties exchanged horses, and agreed that, if the horse which the defendant let the plaintiff have, did not recover of his lameness within six months, defendant should pay plaintiff ten dollars. Subsequently the plaintiff brought an action against the defendant for deceit, which was referred, and a judgment for ten dollars damages rendered upon the award. The horse did not recover, and this suit was brought to recover the boot money; — *Held*, that the defendant could not be allowed to prove by one of the referees that their award was for the boot money.

ON REPORT.

ASSUMPSIT for boot money agreed to be paid on certain conditions, by the defendant to the plaintiff, in exchange of horses.

The facts appear in the opinion.

H. L. Whitcomb, for the plaintiff.

The referees were limited to the subject matter contained

in the writ. *Gay* v. *Willis*, 7 Pick., 217; *Manny* v. *Harris*, 2 Johns., 24.

The boot money was not due under the condition, when the former action was commenced.

Upon the point of admissibility of parol evidence, *Wood* v. *Jackson*, 8 Wend., 9; *Kitchin* v. *Campbell*, 3 Wil., 308.

J. H. Webster, for the defendant.

The sum sued for has been recovered in the former suit. Parol evidence is admissible to show it. *Sprague* v. *Wait*, 19 Pick., 455; *Dunlap* v. *Glidden*, 34 Maine, 517; *Rogers* v. *Libbey*, 35 Maine, 200; *Emery* v. *Fowler*, 39 Maine, 326, 332.

Former recovery need not be pleaded. 1 Chitty's Plead., 198, 478; *Howard* v. *Mitchell*, 14 Mass., 241; *Wood* v. *Jackson*, 8 Wend., 1; *Dunn* v. *Nims*, 3 N. H., 259; *Wight* v. *Butler*, 6 Wend., 288.

TAPLEY, J. — This is an action of assumpsit brought to recover the sum of ten dollars according to an account annexed.

The case comes to this Court by report, wherein "it is agreed, that the parties exchanged horses at Phillips, on or about Dec. 25th, 1863. That the horse which the defendant let the plaintiff have was lame at the time of said exchange, which lameness was then supposed to be in the left hind foot. That it was agreed between the parties, that if said horse recovered of his lameness, or plaintiff put him away before the end of six months, they should swap even; but, if the plaintiff kept the horse six months, and the horse did not recover from his lameness within that time, defendant should pay the plaintiff the sum of ten dollars as boot. The plaintiff kept the horse six months, and he did not recover within that time."

The plaintiff, on the first day of April, 1864, brought an action against said defendant for deceit in the exchange of said horses, alleging lameness in the left hip or stifle, which action was entered at the April term of this Court, 1864,

and referred to Sylvanus D. Davis, James E. Thompson and Ira Fuller, who notified and heard the parties and made a report which was accepted at the October term of this Court, 1865, and judgment entered thereon against the defendant, which judgment the defendant has paid.

The referees reported, that they "award and determine that the within named Reuben Jones shall recover of said James W. Perkins the sum of ten dollars, and that each party shall pay his own costs of court, and that the said Jones and Perkins each shall pay the sum of four dollars and fifty cents of the costs of this reference, which is taxed at nine dollars."

The ten dollars here awarded, the defendant claims is the same he promised to pay if the horse did not recover from his lameness, and the same now sued for, and, to prove this fact, he offers the testimony of two of the referees, who testify substantially that the ten dollars allowed by them was not for deceit, but for the amount which the defendant agreed to pay.

The plaintiff and his counsel testify that they disclaimed all right to recover in that action, "the ten dollars as boot between the horses." The defendant and his counsel and the referees say they do not recollect any such disclaimer. It is not, however, contended by any that there was any authority given the referees to act upon matters not embraced in the action referred to them.

The plaintiff seasonably objected to the admission of the testimony of the referees, and now claims it is inadmissible as tending to contradict and vary the record.

The defendant does not claim that the record alone will constitute a defence, but claims that it is competent for him to show by parol evidence what in fact the award was made upon.

The *record* now shows the award was made upon the allegations of the plaintiff in his writ, none of which authorize the referees to allow the ten dollars now sued for. But the defendant says, they did in fact find for him on the allega-

tions of the plaintiff's writ, and did in fact allow the ten dollars now sued for, and that he has paid it; these facts he claims he has a right to show by this testimony.

There are cases where parol evidence is admissible in aid of the record.

Where it appears several issues were presented for adjudication under the declaration and pleadings of the case, and the record fails to show upon which in fact the judgment was rendered, it is competent in some cases to show the fact by evidence *aliunde*. *Dunlap* v. *Glidden*, 34 Maine, 517; *Rogers* v. *Libbey*, 35 Maine, 200; *Emery* v. *Fowler*, 39 Maine, 326; *Cunningham* v. *Foster*, 49 Maine, 68.

So, where a particular fact in controversy has been, by the same parties, under an issue legitimately raised by the pleadings, litigated, parol evidence is admissible to prove the consideration and determination of that fact, if the record fails to disclose it. Such evidence is admitted in aid of the record and must always be consistent with it. *Chase* v. *Walker*, 53 Maine, 258.

It is never allowed to contradict or vary the record. *Gay* v. *Wells*, 7 Pick., 217; *McNear* v. *Bailey*, 18 Maine, 251; *Sturtevant* v. *Randall*, 53 Maine, 149.

The evidence must be confined to the proof of such facts and issues as were, or might have been legitimately decided under the declaration and pleadings. If otherwise, it might contradict or vary the record.

The record is *conclusive* evidence that the judgment was rendered upon some one or more of the issues legitimately raised by the pleadings of the parties.

The parol proof is only to distinguish which of those several issues were decided, or to show that some particular fact was decided in the determination of some of those issues.

It cannot be admitted to prove the verdict, or award, upon which the judgment was rendered, was founded upon matters not presented by the declaration and pleadings, for that would be varying and contradicting the record. The record is a record of the adjudication upon the issues rais-

ed by the declaration and pleadings, (which constitute the pleadings of the parties,) and not a record of the decision or determination of matters outside of these. Were parties allowed to prove such matters to affect the record, the force of the record might lie entirely in parol evidence, and be subject to the uncertainties attending that kind of evidence.

Upon recurring to the writ in the action which was referred, it will be found the allegation there made was a *fraudulent* affirmation, knowingly made, concerning the *character* and *seat* of the disease. There is no averment that anything is *due* upon a *contract*. The six months mentioned in the trade had not expired. That there had been no breach of the contract was *apparent* from the writ and declaration. There was no complaint made concerning it. The complaint was that a deception was practiced upon the plaintiff by a false and fraudulent affirmation concerning the *character* and *seat* of the disease. That he was lame is admitted, but it was not such a lameness as the defendant represented it was, and that he knew it was not. The whole gist of the complaint is *deceit*, and nothing else. Unless the defendant was guilty, the referees were not authorized to find against him. The *record* is, that they did find against him, and that the judgment of this Court was, "that the said Reuben Jones recover judgment against the said James W. Perkins, *in this action*, for the sum of ten dollars, damages, and four dollars and fifty cents, costs of suit." This is a record of the findings upon the allegations in that suit.

The defendant now proposes to show the findings were not upon the allegations in that suit, but upon the terms of a contract unbroken when that suit was commenced.

This would clearly and manifestly contradict and vary the record, and there must be judgment for the plaintiff.

Judgment for the plaintiff for ten dollars, and interest from date of writ.

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

INHABITANTS OF KINGFIELD *versus* ALVIN H. PULLEN.

Neither a party nor a witness can be allowed costs for travel beyond the line of the State.

ON EXCEPTIONS.

The writ described the defendant as of Sparta, in the State of Wisconsin, and real and personal estate were attached upon it in this county.

Notice was ordered and complied with, and, at the second term, the defendant appeared personally and by counsel, and, upon trial, the plaintiffs became nonsuited.

The defendant made affidavit that his place of residence was seventeen hundred miles from the place of trial, and that he came to this county for the sole purpose of attending to this suit.

He claimed costs for actual travel, which the clerk allowed. From this taxation the plaintiffs appealed, and the presiding Judge sustained, *pro forma*, the decision of the clerk, and the plaintiffs alleged exceptions.

H. L. Whitcomb, for the plaintiffs, cited

R. S., c. 116, § 14; Mass. R. S., c. 156, § 27; *White* v. *Judd*, 1 Met., 293; *Melvin* v. *Whiting*, 13 Pick., 184.

Hannibal Belcher, for the defendant.

DANFORTH, J. — Neither a party nor a witness can be allowed travel beyond the line of the State. Therefore the exceptions must be sustained, and the bill of cost corrected so as to allow travel from the line of the State.

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

Elisha Keyes *versus* Joseph Winter.

A waiver of demand and notice may be proved by parol, or may be inferred from acts and circumstances, in an action against the indorser of a negotiable promissory note.

Defendant, applying to the plaintiff for a loan of money, was informed by the latter that, if he would get, and indorse in blank, defendant's brother's note, and give his word upon honor that, if his brother did not pay it he would, he would loan him the money. Defendant replied that he was willing to give his word, and that he expected to be holden, if he got the money; adding, that he desired the plaintiff to wait as long as he could for his pay, and, if his brother did not pay, he (defendant) would. In an action upon such a note, given the next day; — *Held*, that there was a waiver of demand and notice.

On Report.

Assumpsit against the defendant as indorser of a negotiable promissory note, dated August 25, 1856, given by the defendant's brother Elisha to the defendant for labor, and by the defendant indorsed in blank, and payable on demand.

The writ bore date September 16, 1865. The defence was (1,) statute of limitations; and (2,) want of demand and notice.

It appeared from the report that the defendant was absent from the State, "out west," from the date of the note to November, 1858, and that he served in the 6th Maine Battery, in Virginia, from Feb., 1863, to June 17, 1865.

The plaintiff testified: — "I know the defendant and his brother Elisha well. In August, 1856, defendant came to me and wanted to hire some money with which to go out west. Said he had been at work for his brother Elisha, who could not pay him. I told him I could let him have $130, for a spell. He asked me what security he could give me for the money. I told him if he would get his, Elisha's, note for what he owed him, and put his name to the back of it, and leave it with me, and give his word upon honor that, if Elisha did not pay it he would, I would let him have it. He

said, 'I am willing to give my word, and I expect to be holden for the money if I get it.' He said, 'if I leave my brother's note with you, I want you should agree to wait on him and not sue him at present. Elisha thinks he will pay the interest as it becomes due, and I want you to indorse it on the note and that will cancel so much of the interest on the money I have of you.' He asked me how long I could wait. I told him a year or two, perhaps more. He then asked me if I would agree to wait three years. I told him I would not. He then said, 'well, wait as long as you can, and if my brother does not pay you, I will.' He came down next morning, left the note, and took the money."

After the testimony was all in, the case was withdrawn from the jury to be submitted to the full Court, with jury powers, the Court to render such judgment as the law and evidence required.

E. T. Luce, for the plaintiff, —

Upon the question of the Statute of Limitations, cited R. S., c. 81, § 114; Public Laws of 1862, c. 106, § 4. Upon waiving demand and notice, 2 Greenl. on Ev., § 190; *Ticonic Bank* v. *Johnson*, 21 Maine, 426; *Fullerton* v. *Rundlett*, 27 Maine, 31; *Fuller* v. *McDonald*, 8 Maine, 213; *Sturtevant* v. *Randall*, 53 Maine, 149; *Smith* v. *Morrill*, 54 Maine, 48; *Boyd* v. *Cleveland*, 4 Pick., 525.

Bolster & Richardson, for the defendant, —

Cited *Field* v. *Nickerson*, 13 Mass., 131; *Sylvester* v. *Crapo*, 15 Pick., 92; *Wyman* v. *Adams*, 12 Cush., 210; *Barker* v. *Tuttle*, 44 Maine, 459; *Stevens* v. *Bruce*, 21 Pick., 193; *Gorton* v. *Dallheim*, 6 Greenl., 476; *Barry* v. *Morse*, 3 N. H., 132.

KENT, J., — This action is not barred by the statute of limitations. After deducting the time of the absence of the defendant from the State, after the cause of action accrued against him, we find that the term during which the statute ran is less than six years. R. S., c. 81, § 114.

It is also clear that no demand and notice was given *in fact*, so as to charge the indorser. The only question is whether there was a waiver of such demand and notice by the defendant. The evidence on that point is, that the defendant applied to the plaintiff for a loan of money; that he first offered the note of his brother Elisha Winter, but the plaintiff declined it, as he did not consider his brother in a condition to pay it. Defendant then asked plaintiff what security he must give him. Plaintiff replied, that if he would get his brother's note for what he owed him, and put his name to the back of it, and leave it with him, and give his word upon honor, that if his brother did not pay it he would, he would let him have it. Defendant said he was willing to give his word, and said, "I expect to be holden for the money, if I get it." Defendant then requested the plaintiff, if he took the note proposed, that he should agree to wait on him, and not sue him at present; saying that his brother would probably pay the interest. The plaintiff said he could wait a year or two, and perhaps more, but would not agree to wait three years. Defendant then said, "well, then, wait as long as you can, and, if my brother does not pay you, I will."

The note in suit was delivered on this agreement, and the money paid by the plaintiff to the defendant.

It is now too well settled to be questioned, that a waiver of demand and notice may be proved by parol, or may be inferred from acts and circumstances. According to numerous cases in this State and Massachusetts, the facts in this case clearly make out such a waiver. Indeed, many of the cases present a state of facts much less conclusive and imperative than those before us. *Fuller* v. *McDonald*, 8 Maine, 213; *Lane* v. *Stewart*, 20 Maine, 98; *Fullerton* v. *Randlett*, 27 Maine, 31; *Boyd* v. *Cleaveland*, 4 Pick., 524; *Taunton Bank* v. *Richardson*, 5 Pick., 436.

The defendant contends that there has been such delay and neglect and laches, that the plaintiff should be estopped from recovering. This would be the result, doubtless, if

demand and notice were required to be proved. But they have been waived, and the case stands relieved of the requirement. In such a state of the case, there can be no neglect or laches, in not doing what is not required. The defendant borrowed the plaintiff's money and agreed to be holden to pay, without action on the part of the lender. It was his duty to see that the note was paid, — and, if there is any *laches*, it is in his neglect to do what both law and justice required him to do.

Judgment for plaintiff for amount of note and interest.

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

LEWISTON FALLS MANUF. CO. *versus* FRANKLIN COMPANY.

Where the only relief sought to be obtained by a bill in equity is by way of injunction, the bill must specifically pray for an injunction, or it will be dismissed on demurrer.

BILL IN EQUITY.

The bill substantially charges that the complainants are owners of certain mills for manufacturing purposes, and of certain water rights in the Androscoggin river, therewith connected for the operation of the same, subject, however, to certain limitations, conditions and restrictions contained in the several deeds under which they claim; that the respondents are part owners of the water and privileges of said river, the same having been conveyed to them long after the deeds under which the complainants hold; that the respondents have, since said grants to the complainants, erected certain water tight dams and canals upon said river above the complainants' works, for the purpose of operating certain factories other than the complainants'; that the re-

spondents, for the purpose of working the complainants' mills, have erected a gate and sluiceway in said dams for the passage of water at all times thereto, (as by law they were obliged to do,) and, through which sluiceway the water of said river did actually flow at all times, until Oct. 4, 1865, when, without lawful right, excuse or notice, the respondents closed said gate and sluiceway, and thus stopped the water of said river from flowing to the complainants' mills, and thereby deprived them of all use of said water, and still continuing to do so at the date of said bill, (Oct. 9,) thereby causing great injury and loss to the complainants.

The complainants allege that they further show that said respondents ought to be compelled forthwith to open said gate and sluiceway, and be forever restrained from closing the same, and opposing any other obstruction to a free and full flow and passage of said water to their mills, by an injunction. The prayer of the bill is, that the respondents may make full answer, &c., that the complainants "may have such further or other relief in the premises as the nature of the circumstances of this case may require;" and for subpœna, &c.

Notice was ordered upon the bill Oct. 10, 1865, returnable Oct. 12, when, upon a hearing before DAVIS, J., a temporary injunction was issued.

At the January term, the respondents filed a demurrer which was joined.

T. A. D. Fessenden and *Wm. P. Frye*, for the complainants.

There is a prayer for the writ, and the necessity for it is clearly and concisely stated in the bill. Rule 29. The language of the bill imports a prayer. There is an asking for the injunction, though not perhaps in a strictly technical form. The Court can understand from the language what is desired. "Should be clearly and concisely stated," &c., means "ought to be clearly," &c.

"When special orders and personal processes are required,

founded on particular circumstances, such as writs of injunction, &c., they are usually made the subjects of special prayer." Equity Draftsman, 5. Though the complainant should mistake the relief to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right under the prayer for general relief, provided it is such a relief as is agreeable to the case made by the bill. Story's Eq. Pl., § 40; *Franklin* v. *Greene*, 2 Allen, 519.

The bill sets out a "nuisance," although it does not contain the word. *Bardwell* v. *Ames*, 22 Pick., 333; *Ballou* v. *Hopkinton*, 4 Gray, 327, and thus affirmatively sets forth a case within the equity jurisdiction of the Court. What is termed the "jurisdiction clause" is not necessary; and if the bill is in other respects sufficient it will be sustained. Eq. Draftsman, 5, which cites Story's Eq. Pl., §§ 10–34. The bill itself must state a case within the proper jurisdiction of a court of equity. *Chase* v. *Palmer*, 12 Shepley, 341. See also *May* v. *Parker*, 12 Pick., 34; *Wright* v. *Dame*, 22 Pick., 55.

"Independent power," as used in *Smith* v. *Ellis*, 29 Maine, 422, means a power independent of the equity jurisdiction of the Court, or of a bill in equity. The Court in that case do not deny their power to grant an injunction as a distinct or independent thing, in a case of equity jurisdiction provided for by statute upon a bill in equity.

H. C. Goodenow & J. W. May, for the respondents.

APPLETON, C. J.—The only relief sought to be obtained by this bill is by way of injunction. The bill, however, does not pray specifically for an injunction.

The law seems well established in such case. An injunction will not ordinarily be granted under a prayer for general relief. It must be specifically prayed for. Story on Eq. Plead., § 41. The prayer for an injunction must not only be in the prayer for relief, but in the prayer for process. *Wood* v. *Bradell*, 3 Sim., 273. When a bill prays for relief by way of injunction, but does not pray for the process

of injunction, the process cannot be granted. *Union Bank* v. *Kerr*, 2 Maryland Chancery Decisions, 460.

Demurrer sustained.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concured.

OSSIAN C. PHILLIPS, *in Equity*, *versus* LEE LEAVITT.

A mortgager of real estate, who has conveyed the mortgaged premises by deed of warranty to a third party, cannot maintain a bill to redeem.

An unexecuted verbal agreement to discharge a mortgage by a release is void by the statute of frauds.

BILL IN EQUITY.

The case was heard on bill, answer and proofs. The complainant substantially alleges that, on Sept. 19, 1860, he being seized in fee of an undivided fifth part of a certain farm, in Turner, conveyed the same in mortgage to the respondent, to save him harmless from a note of $500, signed by the complainant as principal and the respondent as surety; that, on June 22, 1861, the complainant conveyed his interest in the mortgaged premises to one Pratt, by joint deed of warranty with his co-tenants; that he so conveyed at the request and with the knowledge and consent of the respondent and said Pratt, and paid the sum of two hundred and fifty dollars, (the amount Pratt paid for the complainant's interest,) to the payee of the said note, at the request and with the consent of the respondent, which was indorsed thereon; that said amount was in full payment and satisfaction of said mortgage; that the respondent agreed to release his interest in the mortgaged premises upon the payment of said sum, but refuses so to do, &c.

Prayer of the bill was that the respondent might be required to release to the complainant.

Respondent denied that the complainant conveyed said premises to Pratt at his request, or with his knowledge or consent; or that the money was ever paid and indorsed on said note at his request, or with his knowledge or consent.

It appeared from the complainant's proofs, that, in 1858, he hired $500 of the treasurer of the Ministerial and School Fund of Turner, giving therefor his note also signed by the respondent; that he purchased with this money ten acres of land with the buildings thereon and mortgaged the same to respondent to secure him for signing the note; that, in Sept. 1860, complainant's father having died, and devised his farm to his five children, the complainant mortgaged his interest in the farm to the respondent, securing the same note, with an agreement that when the complainant caused to be indorsed upon the note the amount of complainant's interest in the farm, the latter mortgage should be satisfied; that he sold his interest in 1861, giving a deed of warranty (jointly with his brothers and sister) for $250, which was the full value thereof, and it was forthwith paid and indorsed upon said note; that all of these transactions were done at the request and with the knowledge and consent of the respondent; and that the respondent had foreclosed his mortgage on the ten acre place.

Nahum Morrill, for the complainant.

M. T. Ludden, for the respondent.

APPLETON, C. J. — On the 19th September, 1860, the complainant mortgaged certain premises to the respondent, to secure him for having signed, as security, a note for five hundred dollars, given to Job Prince, as treasurer of the Ministerial and School Fund of Turner. On the 22d June, 1861, the complainant, by deed of warranty, conveyed the mortgaged premises to Edward Pratt, for the sum of two hundred and fifty dollars, with an agreement, as he says, that this amount, when paid, should be indorsed on the note before referred to, and that the mortgage should be released.

The amount was paid by the grantee and the indorser on the note, but the defendant, denying said agreement, refuses to discharge the mortgage or to release the same.

The complainant brings this bill to compel the respondent to release to him "all his pretended interest in said mortgaged premises, and that his title thereto may be perfected," &c.

The mortgager or his assignee may redeem upon paying, or offering to pay what is due, after deducting the amount already received and the value of one other tract, of which the mortgage has been foreclosed by him, it having been given to indemnify the respondent for signing as surety. But this complainant has parted with the equity of redemption and is not entitled to maintain the bill. R. S., c. 90, § 6, 13. When the assignee of the mortgager has conveyed the land by deed of warranty, he has no such interest as will enable him to maintain a bill in equity against the mortgagee to redeem the mortgage. *True* v. *Haley*, 24 Maine, 297; *Elder* v. *True*, 32 Maine, 105.

But there is another difficulty in the way of the complainant's bill, arising from the fact that the alleged agreement was not reduced to writing. In *Leavitt* v. *Pratt*, 53 Maine, 147, it was held, upon the same facts as are now asserted to exist, that an unexecuted verbal agreement made by a mortgagee to discharge a mortgage by a release, is void by the statute of frauds. *Bill dismissed, without costs.*

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

STATE *versus* LUTHER J. VERRILL.

The second clause of § 6, of art. 1, of the constitution of this State requires simply, that all the elements of, or acts necessary to, the crime charged in an indictment, shall be fully and clearly set out.

An indictment for murder need not set out the "manner in which and the means by which" the killing was perpetrated.

An indictment, alleging that the accused, on a day, and at a place named, in and upon the body of a person named, "feloniously, wilfully and of his malice aforethought, did make an assault, and her, the said" person named, "then and there feloniously and of his malice aforethought, did kill and murder," &c., will sustain a verdict of guilty of murder in the first degree under the statutes of this State.

ON EXCEPTIONS.

Indictment, founded upon Public Laws of 1865, c. 329,* of which the following is a copy, omitting the merely formal parts:—"That Luther J. Verrill and Clifton Harris, both of Auburn in said county, laborers, on the seventeenth day of January, in the year of our Lord, one thousand eight hundred and sixty-seven, at Auburn aforesaid, in the county of Androscoggin aforesaid, in and upon the body of one Susannah Kinsley, feloniously, wilfully and of their malice aforethought, did make an assault, and her, the said Susannah Kinsley, then and there feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace of said State, and contrary to the form of the statute," &c.

At the arraignment of the accused, Harris pleaded guilty, but Verrill pleaded not guilty, and, upon trial, a verdict of guilty of "murder in the first degree" was rendered against

* *Stat. of* 1865, *c.* 329.—"In any indictment for murder it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased."

him. Whereupon his counsel moved that judgment be arrested for the following reasons: —

"1. Because the nature and cause of the accusations, against the said Verrill, are not alleged or set forth in said indictment.

"2. Because the indictment charges the said Verrill with the murder of the said Susannah Kinsley and does not allege, as set forth, 'the manner in which and the means by which' the alleged murder was effected or accomplished, 'fully and plainly, substantially and formally;' as required by the law of the land.

"3. Because the indictment and the allegations, and matters therein contained, are not sufficient in law to authorize a verdict and judgment against the said Luther J. Verrill. And any enactment of the Legislature of the State of Maine, attempting to legalize an indictment in manner and form as the above, if declared valid, would take away the rights of the accused to demand the nature and cause of the accusation against him; would deprive him of his liberties and rights, in violation of the law of the land and the express provisions of the constitution of the State of Maine.

"4. Because said indictment is in other particulars informal, uncertain and insufficient in law.

"5. Because the said indictment does not charge the said Verrill with having murdered the said Susannah Kinsley 'with express malice aforethought, or in perpetrating, or attempting to perpetrate a crime punishable by death, imprisonment for life, or for an unlimited term of years,' and is, therefore, an indictment for murder in the second degree only; but the jury returned a verdict for murder of the first degree, which was unauthorized and void."

The presiding Judge overruled the motion and the defendant's counsel alleged exceptions.

C. Record & M. T. Ludden, in support of the exceptions.

In order that a person charged with crime may know the precise nature of the offence, it is necessary to set forth in the

indictment the "manner in which and the means by which" the offence was committed. 3 Greenl. on Ev., §§ 10, 130; 1 Bishop on Crim. Procedure, c. 22, on the constitutionality of statutes regulating the indictment. *Rex* v. *Shawin*, 1 East's P. C., 341, cited in 2 Bishop on Crim. Procedure, in note to § 517; 2 Sharswood's Blackstone, page 306 and note 7; 1 Wharton's Am. Crim. Law, § 285, note g; also §§ 364, 370, 373, w. v.; *Ib.* §§ 399, 1067, 8 and 9; also §§ 1059, 1066; *State* v. *Learned*, 47 Maine, 426; *Saco* v. *Wentworth*, 37 Maine, 165; *Commonwealth* v. *Webster*, 5 Cush., 320; *Commonwealth* v. *Fox*, 7 Gray, 585; *State* v. *Conly*, 39 Maine, 78; *People* v. *Aro*, 6 Cal. 207, cited in note to § 1054, 1 Wharton; *Commonwealth* v. *Phillips*, 16 Pick., 211; *Commonwealth* v. *Davis*, 11 Pick., 432; *Lambert* v. *The People*, 9 Cowen, 577. Per Senator Spencer.

While, by the common law, homicide is in two degrees, murder and manslaughter; by the statute of this State it is divided into three degrees,—murder of the first degree, murder of the second degree, and manslaughter, and the punishment in each case varies according to the degree of the offence. By this statute, murder of the first degree is the unlawful killing of a human being "with malice *express* aforethought." R. S. c. 118, § 3.

As the indictment in this case does not allege the murder to have been committed "with express malice aforethought," and so only charges murder in the second degree; the verdict cannot be sustained, as it is for murder of the first degree. 2 Bishop's Criminal Procedure §§ 562–597. Title, "The form of the "Indictment for murder of the first degree, as distinguished from murder of the second degree, under our statutes." *The King* v. *Vandercomb and Abbott*, 2 Leach, C. C., 708; Eastman's P. C., 519, cited in 2 Leading Crim. Cases, by Bennett & Heard, page 542.

W. P. Frye, Att'y Gen'l, contra.

The statute of 1865 is not in conflict with § 6 of the "Declaration of Rights." *Cathcart* v. *Com.*, 37 Penn., 108;

1 Wharton's Crim. Law, § 218, and note, also §§ 285 & 302. This statute is a transcript of the statute of Victoria.

The indictment is good, although it does not allege the means, method, or circumstances of the killing. *Murphy* v. *State*, 24 Miss., 591, 594; *Cathcart* v. *Com.*, *supra; Noles* v. *State*, 24 Ala., 672 & 693; *Thompson* v. *State*, 25 Ala., 41; *State* v. *Comstock*, 27 Vt., 553.

The judgment may be a bar to any future prosecution for the same offence. *Com.* v. *Pray*, 13 Pick., 353; *Com.* v. *Stark*, 13 Pick., 307.

R. S., c. 118, §§ 1, 2 & 3, comprehend all degrees of murder, murder in the first degree being nothing more than murder.

It need not appear on the face of the indictment of what degree the murder is, the degree is to be found by the jury. R. S., c. 118, § 4; *Hewes* v. *State*, 8 Humph., 597; *Mitchell* v. *State*, 5 Yerger, 340; 8 Ib., 514; *White* v. *Com.*, 6 Binney, 179, 182; *Com.* v. *Flannagan*, 7 Watts & Sergent, 415, 418; *Com.* v. *Earle*, 1 Wharton's Crim. Law, 525; *Johnson* v. *Com.*, 12 Harris, 366; *Ford* v. *State*, 12 Maryland, 514; *People* v. *Doe*, 1 Michigan, 451; *People* v. *Patten*, 5 Michigan, 1; *Tudy* v. *People*, 6 Michigan, 273; *People* v. *Butler*, 3 Parker's Crim. R., 382; *Newcome* v. *State*, 37 Miss., 383; *Wall* v. *State*, 18 Texas, 682; *People* v. *Murray*, 10 Cal., 309; *State* v. *Dempsey*, 4 Minn., 442; *White* v. *State*, 10 Texas, 206; *People* v. *Lloyd*, 9 Cal., 54; *People* v. *Dolan*, 9 Cal., 576; *Com.* v. *Gardiner*, 11 Gray, 440; *Com.* v. *Greene*, not reported.

DANFORTH, J. — A verdict of "guilty of murder in the first degree" having been rendered against the respondent, he now moves in arrest of judgment, and assigns several causes therefor. The first four are substantially the same, and may be considered as one. The objection to the indictment, assigned in these several causes, is that it does not set out "fully and plainly, substantially and formally, the manner in which and the means by which the alleged murder was effected or accomplished." Formerly, in capital cases, this was held to be necessary, though in crimes of a lower

grade it was not. From an examination of the decided cases, it appears that this distinction was made, not on account of any principle involved in the higher crime different from those of a lower, but solely from the great care and tenderness which judicial tribunals manifested for the life of the citizen. This mode of framing indictments in the higher crimes may be considered, therefore, as having been established rather by precedent and authority than by any legal principle involved. It was, however, soon found that this method served rather to secure the escape of the guilty than the accomplishment of justice. It was often difficult, and sometimes impossible for prosecutors to ascertain the means by which a murder had been effected, when the testimony left no doubt as to the guilty party. In such case the indictment must necessarily be drawn in a great measure from conjecture, and the chances for the escape of the guilty party were greatly increased from the liability of the failure, or variance of the proof as to some of the allegations. To avoid this, the courts have sometimes decided that certain allegations need not be proved, and at other times that a variance between the allegations of means and those proved, as when those proved and those set out were of a similar nature, was not material. Wharton's Amer. Crim. Law, § 1059. Such decisions were clearly a violation of law, or else the law did not require the means to be set out, for it would be very difficult to understand how the allegations in an indictment could give any protection to the accused, if they were not to be proved, and still less could it be so when the prosecutor was permitted to prove others. Thus the courts, feeling bound by ancient precedents and authorities, in their efforts to get rid of absurdities involved in them, were led into decisions almost as absurd. This, the principles of the common law could never require without forfeiting its just title as the perfection of human reason. In this state of the authorities arose the case of *Commonwealth* v. *Webster*, 5 Cush., 295. In this case, it was impossible to ascertain by what means the deceased came to his death, and yet it was very clear, from the testimony,

that he was murdered, and by whom the crime was committed. By the strict rules of ancient pleading there would seem to be no way to avoid the escape of the guilty party, or, so far as the means were concerned, to convict upon conjecture. The prosecuting officer, however, after putting into the indictment several counts in the usual form, perhaps for the first time in the history of capital trials, elected to meet the question fairly, and inserted a count in which the simple elements, or acts constituting the crime, were set out, without any statement of means by which the murder was committed; merely stating that they were unknown. Now it is very clear that this averment of ignorance added nothing to the validity of the indictment. If the rights of the accused, or the principles of law, made it necessary to declare the means, these surely could not be set aside by ignorance. The Court, after consideration, declared that count to be good; and, we apprehend, that decision commends itself to the good sense of every intelligent man. We must, therefore, come to the conclusion that the principles of the common law, notwitstanding ancient precedents and authorities may be to the contrary, require in capital cases only such rules of pleading as pertain to all crimes.

It may properly be that more care is used in the proceedings of a trial where a man's life is at stake, than in one where he is accused of simple larceny. Still, he is entitled to the protection of the great principles of the common law, in the one case as well as in the other; just as in civil trials, more time and more thought will and ought to be expended where a large amount of property is in issue than where a small amount is in dispute. Yet no one ever supposed that the same principles of law were not alike involved in each.

But, to relieve this matter of all doubt, our Legislature wisely enacted the law of 1865, c. 329. The indictment in the case at bar was drawn under this law, and it is not contended that it does not, in all respects, conform to it. It is, however, claimed that the law is not in conformity with

the constitution, which requires, just what a fair interpretation of the common law requires, "that no person shall be held to answer, until the accusation against him is formally, fully and precisely set forth, that he may know of what he is accused, and be prepared to meet the exact charge against him." *State* v. *Learned*, 47 Maine, 432.

This provision applies to all crimes alike of whatever grade, and has always been understood to require simply, that all the elements of, or facts necessary to, the crime charged, shall be fully and clearly set out. It requires no argument to show that "the manner in which and the means by which" a crime has been committed, are no part of the crime itself. The means by which a thing is accomplished, from the very nature of the case, cannot be the thing itself. The way which leads to the end cannot be the end. There are cases where an act may be criminal or otherwise, according to the circumstances under which it is done. If made criminal by the circumstances, then they become constituent elements of the crime and must be set out. Otherwise they are not a part of the crime and need not be set out. "When circumstances are constituent parts of the offence, they must be set out, but when the crime exists without them, they may be alleged in aggravation, but are not absolutely requisite. The omission of any fact or circumstance necessary to constitute the offence will be fatal." Wharton's Crim. Law, vol. 1, § 285. In the learned and elaborate argument of the prisoner's counsel, it is not even suggested that any element necessary to constitute the crime of murder has been omitted in the indictment under consideration. Nor could such a suggestion have been made with truth, for, in this respect, it is full and complete, containing all that is requisite under the law or constitution. It does not differ in any material respect from the fourth count in the case against Webster already referred to. As the law of 1865 requires all that the constitution requires, and, as a strict compliance with its provisions tends to the advancement of justice, there can be no reason for pronouncing it

invalid. The accused has no reason to complain; certainly not, if he is guilty, even though his chances of escape are diminished; nor if he is innocent, for then he finds no traps from allegations not to be proved, or sustained by proof variant; but the precise charge he is called upon to meet, and just what the government must prove, is fully, formally and clearly set out.

The next objection raised is, that the indictment does not set out a murder in the first degree, and is therefore insufficient to sustain the verdict. This objection was evidently founded upon a mistaken construction of the provisions of the R. S. of 1857, c. 118.

The first section of that chapter defines murder substantially as the common law does. The second and third sections do not in any respect qualify the first, but defines the different degrees of murder. Notwithstanding these provisions, the killing of a human being with malice aforethought is still murder, whether that malice be express or implied. There is still but one crime denominated murder, as at the common law, although by the provisions of the statute there are two degrees of that crime, liable to different punishments. The first degree of murder under the statute is precisely the same as the highest degree at common law. It is not claimed that this indictment is not sufficient in this respect, at common law, to set out the highest degree of murder. On the other hand, it contains apt words for that purpose. The words, "malice aforethought" would ordinarily be understood to express the same idea as "express malice;" and include cases of implied malice, only as the greater includes the less. It is perhaps clear that, under an indictment like this, alleging that the killing was done with "malice aforethought," it would be necessary to prove express malice even at common law, but for the principle of law, that the greater contains the less, or for the other principle of law, that in certain cases malice may be implied with the same effect upon the crime as though express were proved. It would therefore seem necessarily to follow that the indict-

ment is sufficient to sustain the verdict. These views are confirmed by the very able opinion of the Court in Massachusetts, in the well considered case of *Green* v. *The Commonwealth*, 12 Allen, 170, and the cases there cited. It is true that the statute of that Commonwealth, in defining murder of the first degree, uses the words "deliberate and premeditated," instead of the word "express," as used in our statute, but this does not in the slightest degree change the principle involved. Nor does it affect the question, that by the Massachusetts statute it is provided that the provision relating to the different degrees shall in no manner require any modification of the existing forms of indictment. Because, under their constitution, as well as under ours, a person can only be held to answer to a charge "duly and technically set forth in apt and proper words." Case of Green, above cited.

In several other States statutes have been enacted similar to ours in relation to both of the questions raised here, and by the courts of those States have been sustained; not only as to the general form of the indictment, but also, so far as known, as to the sufficiency of the common form to sustain a verdict of murder in the first degree.

The provisions of the fourth section of R. S. c. 118, brings us to the same conclusion. By that section, in all cases, the jury or Court are to determine the degree of murder. This clearly would be unnecessary, if the statute contemplated two crimes and different modes of setting them out. For, whatever the crime charged, a verdict of guilty simply is sufficient to convict of that crime. Hence, if the form set out murder in the first degree, or murder in the second degree, if two such crimes existed distinct from each other, a verdict of guilty would be sufficient without stating the degree. Neither objection to the indictment can avail the prisoner and the exceptions must be overruled. *Exceptions overruled.*

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

CAROLINE R. JORDAN *& al. versus* SPRAGUE KEEN.

The object of the statute, requiring specifications, is, that notice may be given of the nature and demand of the claim on which the action is based.

The specifications will not be held insufficient as against a subsequent purchaser where a judgment has been regularly obtained, unless it appears certain that no judgment could be legally given on the money counts for the causes or claims stated in the specifications.

An attachment of real estate, made on a writ specifying that "the claims intended to be proved under the foregoing money counts, are money obtained of plaintiffs by defendant, on notes" specifically described, may be valid as against a subsequent purchaser, although neither of the notes mentioned was due at the time the writ issued.

ON EXCEPTIONS.

TRESPASS *quare clausum*, for breaking and entering plaintiffs' close, and cutting and carrying away five loads of hay.

Plea, general issue, with specifications of defence, denying plaintiffs' title and claiming title in the defendant to the *locus in quo*, by virtue of an attachment made June 20, 1863, on a writ in favor of the President, Directors & Co. of the Auburn Bank, against one Charles F. Jordan, in whom the title was admitted to be at that time. Previous to the rendition of judgment, the plaintiffs in that action duly assigned that suit to the defendant, who duly levied the execution upon the land in dispute. No question was raised concerning the validity of the levy or the assignment.

The writ, upon which the attachment was made, bore date June 20, 1863, and contained only the following money count and specifications:—

"For that the said defendant, at said Auburn, on the day of the purchase of this writ, was indebted to the plaintiffs in the sum of three thousand dollars, for money before then lent by the plaintiffs to the defendant, at his request; and also for other money, before then paid by the plaintiffs, for the use of the said defendant, at his request; and also for other money, before that time had and received by the said defendant, for the use of the plaintiffs; and also for other

money, for interest upon other moneys, then due and owing from said defendant to said plaintiffs, and by the plaintiffs lent and advanced to said defendant, at his request, for divers long spaces of time then elapsed; in consideration thereof, then and there promised the plaintiffs to pay them the several moneys on demand.

"The claims intended to be proved under the foregoing counts, are money obtained of plaintiffs by defendant, on notes described as follows:—

"Note signed by Frank Storer, dated April 4, 1863, on four months, payable at Auburn Bank, Auburn, for one hundred and fifty dollars, to the defendant, and indorsed by him and Moses Megquier.

"Also a note signed by William Parkes, dated April 4, 1863, on four months, for four hundred and sixteen dollars and sixteen cents, payable to defendant, and indorsed by him and one John Megquier, payable at the Auburn Bank, Auburn.

"Also another note signed by defendant, dated May 12, 1863, on six months, for fifteen hundred dollars, payable to the plaintiffs, at their banking house, and bearing the names of John Megquier and Sprague Keen on the back thereof.

"Also a note signed by John M. Allen, dated May 14, 1863, on four months, payable at Auburn & Lewiston Bank, for one hundred and seventy-five dollars, to defendant, and by him indorsed to the plaintiffs.

"Also a note for two hundred and eighteen dollars, signed by Moses Megquier, dated April 1, 1863, on four months, payable at the Auburn Bank, Auburn, to defendant, and by him indorsed to the plaintiffs."

The plaintiffs claimed title by virtue of a deed from C. F. Jordan, dated June 20, 1863, but received into the registry of deeds June 22, 1863.

The plaintiffs objected to the sufficiency of the levy under which the defendant justified,—first, because the writ, on which the original attachment was made, contained only a money count, and that the specification annexed was not

sufficient to authorize an attachment of real estate, and second, because the action was brought and judgment was rendered on notes which, at the time the suit was commenced, were not due.

Plaintiffs also objected, that the attachment itself, upon the writ, upon which the judgment was rendered, execution issued and levy made, under which defendant justified, was invalid and of no effect, and created no lien upon any of the real estate of the defendant in that suit, and could constitute no defence in this suit.

The case was withdrawn from the jury and submitted to the presiding Judge for decision, each party reserving the right to except to all rulings in matters of law.

The presiding Judge ruled that the attachment, judgment and levy, under which the defendant justifies, were valid, and ordered judgment for the defendant, to which rulings the plaintiffs alleged exceptions.

T. A. D. Fessenden and *Wm. P. Frye*, for the plaintiffs.

The writ, *Auburn Bank* v. *Jordan*, on which the pretended attachment was made, disclosed no cause of action at the time of its date. Neither of the notes mentioned in the specifications was then due, and, upon such a declaration, the notes must be the evidence of the cause of the action.

"Any agreement which would accelerate the time of legal payment would be a change of the contract, and must be made in such form, and on such consideration as would be sufficient to constitute a substantive contract." *Mechanics' Bank* v. *Merchants' Bank*, 6 Met., 13. Any action, then, must be brought upon the new contract. A demurrer to such writ would be sustained. If the notes had been due, the action would have been maintainable. To entitle a plaintiff to judgment, his cause of action must be set out in the declaration. The specifications show the utter want of a cause of action. The language used in the specifications is the language which any pleader would adopt in claiming to recover upon the notes, — "money obtained by

defendant of the plaintiffs on notes described as follows," &c. It was an attempt to evade the law, to do indirectly what the law would not permit to be done directly.

There is no allegation of fraud in the specifications. The notes were valid notes, and described in the specifications as valid, — no insinuation of fraud or any undue means.

Unless the count was upon the notes, then the "nature and amount of the claim" of Auburn Bank was not "set forth in proper counts, or a specification thereof annexed to the writ." R. S., c. 81, § 31.

The writ did not "furnish such information to subsequent attaching creditors and purchasers as would enable them to know what the demand was." *Saco* v. *Hopkinton*, 29 Maine, 268. If the writ claimed to recover upon the notes, the attachment was void. *Swift* v. *Crocker*, 21 Pick., 241; *Pierce* v. *Jackson*, 6 Mass., 244. If, upon the ground of fraud, then there were no proper allegations.

C. W. Goddard, for the defendant.

KENT, J. — The only question presented to us is whether the attachment made on the writ, Auburn Bank against Charles F. Jordan, created a lien against a subsequent purchaser. That writ contained the money counts only. This was clearly insufficient, without specifications of the demand on which the plaintiff founded his action and the nature and amount thereof. This is not denied. But it is contended that the specifications annexed to the writ were sufficient. And this is the question on which the case depends.

The specifications were, in substance, that, "the claims intended to be proved under the foregoing counts, are money obtained of plaintiffs by defendant on notes described as follows" — then follows a description of five notes, signed or indorsed by different persons, and all bearing the name of defendant in that suit, either as signer or indorser. One of the notes is described as "bearing the names of John Megquier and Sprague Keen on the back thereof." Accord-

ing to the description none of the notes were payable, according to their terms, at the date of the writ. The objections, as stated in the exceptions, were that the specifications annexed were not sufficient to authorize an attachment of real estate, and because the action was brought and judgment rendered on notes, which, at the time the suit was commenced, were not due.

It becomes important, therefore, to consider the object of the statute, requiring specifications under the money counts.

It is within the momory of many of us, when no record was required of the attachment of real estate. Secret attachments were very common, and often not known or disclosed, until a levy on execution was made. In order to protect, particularly subsequent *bona fide* purchasers, the Legislature, in 1838, provided for the record of attachments in the registry of deeds. This operated to remedy the chief objection to secret attachments. But another difficulty was to be guarded against. Suits were instituted often on a general count without any indication of the demand, or of the instruments to be offered to sustain it, or of the actual amount claimed to be due. A subsequent purchaser or attaching creditor, when he examined the records or the writ, found only a general claim, perhaps for thousands of dollars, covered by a single independent count for money had and received. It was therefore deemed just and proper, to require a more particular specification, so that any inquirer might ascertain, not merely the fact that an attachment of real estate had been made, but, approximately at least, the actual amount of the debt or claim sued; and so that the addition of new claims or the substitution of other claims, not set forth in the specifications, might be prevented.

The law has also, at a comparatively recent period, provided that a subsequently attaching creditor, who believes that a prior suit is collusive or fraudulent against him, may take the place of a colluding defendant in court and defend against the plaintiff's claim. But there is no such provision in favor of a subsequent purchaser. If he would invalidate

a prior attachment or levy on the ground of fraud, he can only do so in a real action, in which the title can be determined. But he can also, in such a suit, put in issue the validity of the attachment, although he does not set up any fraudulent or collusive act or intent. But it is important to consider the grounds on which the last named objection rests. It is that he has not had sufficient notice of the nature and amount of the claim or demand on which the action is based.

In the case before us, we have no copy of the judgment, and are, therefore, ignorant of all subsequent proceedings, except that a judgment was obtained, and that an execution issued, and a levy was duly made on the premises in question. We are thus remitted to the attachment and the questions arising under it. The judgment would seem to be regular in form, and to be binding on the parties to it, until reversed on error. The specifications in this case, it is claimed, show on their face that no action could possibly be sustained under them. But this is denied.

We are not prepared to say that *any* specification of the grounds of claim, however incongruous or inconsistent with the nature of the action set forth in the declaration, must be held sufficient. If, for instance, under a single count for money had and received, the only specification was damages for an assault and battery, it would seem that a subsequent purchaser or attaching creditor might safely disregard the attachment. If, on the declaration and specifications, *it is certain* that no judgment could possibly be legally given, for the causes or claim stated in the specifications, it would, at least, seem to be unreasonable to hold that a purchaser was bound to regard the attachment on such a writ, as creating a legal lien on real estate against him. But we are not called upon to determine such an extreme case, for we do not find an example of the kind in the case before us.

The count in the writ gave notice that the plaintiffs in the suit claimed to recover money in the hands of the defendant, which he ought in equity and good conscience to pay to them. Or, as well stated by the counsel for the

plaintiffs, — "this form of action is a simple one, and a conscientious one, and about the only thing required to maintain it is, that one man has another man's money which he has not a right conscientiously to retain." Under this count, the plaintiff did not specify that, to maintain it, he should offer the notes named, or claim to recover on the promises therein set forth. But the notice was that they should claim to recover under the counts "money obtained of plaintiffs by defendant *on* notes, described as follows." Now it seems to us, that any person would at once conclude, from the peculiar language used, and from the fact that on the face of the statement, no one of the notes was due, that the claim to recover was not based on all or any one of the notes described, but on some other ground, on which the defendant could as plaintiffs believed, be held liable to refund or pay them money, arising out of some transaction relating to the notes.

We cannot say that there could not possibly be any concurrence of circumstances, or any state of facts which would enable the plaintiffs to recover on the money counts for money obtained on notes. There are many cases of fraud, or fraudulent misrepresentations, which would justify a party in rescinding a contract and which would enable him to maintain an action to recover back money paid or lent. If money is loaned, and notes, represented as genuine, are taken as collateral security, and it is ascertained that they are forged, and the credit is given because they are considered good, may not the money be recovered back, although none of the notes or the original contract have matured and become payable by their terms? We know nothing of the particular facts in this case. All we decide is, that we cannot say that, upon the papers before us, there was a legal impossibility of recovery by the plaintiffs. The plaintiffs in this suit had notice that the bank claimed $3000 for money obtained on notes, amounting in all to $2459. The result is, that the exceptions must be overruled. *Exceptions overruled.*

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

ASHAEL GOODWIN *uersus* GEORGE BOWDEN.

If a debtor, having funds in the hands of his agent, verbally orders him to pay a creditor, and the agent promises to execute the order, and the creditor accepts and relies upon the agent's promise, the debtor's power to control so much of the funds as is necessary to redeem such promise is gone.

In such case, the agent's promise becomes an original undertaking, and the funds in his hands are a sufficient consideration for his engagement.

ON EXCEPTIONS.

ASSUMPSIT for money had and received.

WALTON, J. — Action for money had and received. The plaintiff introduced evidence tending to prove that one Ramsdell was indebted to him, that Ramsdell had in the hands of the defendant funds more than sufficient to pay him, that out of these funds Ramsdell ordered the defendant to pay the plaintiff, and that the defendant promised so to do.

The defendant introduced evidence tending to prove that Ramsdell afterwards revoked the order and directed him not to pay the plaintiff.

The plaintiff contended, and requested the Court to instruct the jury, that Ramsdell had no power to revoke the order or change the appropriation of the money after the same had been assented to by the plaintiff and the defendant; that, by virtue of the agreement between the plaintiff and the defendant and Ramsdell, the funds were held by the defendant in trust to pay the plaintiff, and that such trust could not be revoked without the plaintiff's consent.

The Court declined to give this instruction, and instructed the jury "that the plaintiff had no vested right in the funds of Ramsdell in the hands of Bowden, and that if there was a revocation by Ramsdell before any payment to Goodwin by the defendant, then the plaintiff had no right to recover; that if, before Bowden made the payment, or before this suit was brought, the principal revoked his

orders, then he (Bowden) was bound by the orders of his principal."

When this instruction was given, we think the presiding Judge either overlooked or did not attach sufficient importance to the fact that the plaintiff's evidence tended to prove that, before the attempted revocation by Ramsdell, the defendant expressly promised the plaintiff to pay him out of the funds in his hands.

If a debtor, having funds in the hands of his agent, orders him to pay a creditor, and the agent promises to execute the order, and the creditor accepts and relies upon the agent's promise, the debtor's power to control the funds is gone. The agent becomes an original promisor, and the creditor may have an action of assumpsit against him if he does not keep his promise. No consideration need pass as between the agent and the creditor. The funds in his hands are a sufficient consideration for his engagement.

Being grounded upon the consideration of funds in his hands, it is an original undertaking, and the promise is not within the statute of frauds and need not be in writing. It is not a promise to pay the debt of another, but a promise to discharge an obligation resting upon himself. Having funds in his hands for which he is already liable, he agrees to discharge his liability by disposing of the funds as the owner directs. And when by reason of the agent's promise a right of action against him accrues to the creditor, the debtor's authority over the funds ceases. After such a promise has been made by the agent and accepted by the creditor, to allow the debtor, at his own will and pleasure, to nullify the engagement, and by withdrawing his funds destroy the security he has voluntarily given, would not only violate the obligation of a contract, but, as declared by Judge STORY, would be against the clearest principles of justice and equity. In fact it would seem to be a self evident proposition that the defendant's promise, made upon sufficient consideration and accepted by the plaintiff, creates a contract between them of the benefits of which the plain-

tiff cannot be deprived except with his own consent. Story on Agency, § 477; 2 Greenl. on Ev., § 119; *Dearborn* v. *Parks*, 5 Maine, 81; *Hilton* v. *Dinsmore*, 21 Maine, 410; *Maxwell* v. *Haynes*, 41 Maine, 559; *Hall* v. *Marston*, 17 Mass., 575; *Arnold* v. *Lyman*, 17 Mass., 400; *Brewer* v. *Dyer*, 7 Cush., 337; *Carnegie* v. *Morrison*, 2 Met., 381; *Warren* v. *Batchelder*, 16 N. H., 580.

Exceptions sustained.—New trial granted.

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

E. B. Smith, for the plaintiff.

Drew & Hamilton, for the defendant.

NATHANIEL BRACKETT *versus* JOSEPH RIDLON.

If an attempted attachment of real estate be void, but the succeeding levy valid, the creditor's title will, in the absence of intervening claims, take date from the time of the levy; and the officer's reference to the attachment, in his return upon the execution, will not affect the validity of the levy.

The title of a tenant in a real action cannot be affected by "actual notice" of a prior unregistered deed, on the part of any of his predecessors in title, if the former be an innocent purchaser for value, without actual notice of said deed.

When the term "fee simple" is used in the appraisers' certificate as descriptive of the nature of the debtor's estate appraised by them, it means that the estate was owned by the debtor "in severalty," and that it was an estate "in possession;" and is a sufficient compliance in this particular with R. S., c. 76, § 3.

In the absence of satisfactory proof to the contrary, the Court sitting *in banc* will presume that the officer and appraisers making a levy made their return upon the "back of the execution." The mere fact that copies produced are not thus made, is not satisfactory, especially when they speak of the "within named creditor" and of "this execution."

On Exceptions.

Writ of Entry to recover certain premises, the title to which was admitted to have formerly been in one James W. Weeks. The plaintiff claimed title through a deed of warranty from said Weeks to I. & N. Brackett, dated March 24, 1851, but not recorded until September 29, 1865; and several other mesne conveyances, all of which latter named were duly recorded prior to the attachment hereinafter to be named.

The defendant derived his title as follows: — The Weeks deed not having been recorded, one Moore, on Dec. 21, 1858, caused a general attachment of said Weeks' real estate in the county to be made, on a writ dated Dec. 18, 1858, and returnable at the Sept. term, 1859, in York county. Judgment was duly rendered in that action, and the execution issuing thereon was extended upon the premises in controversy, Nov. 8, 1859, and seizin delivered to Moore by the officer.

Prior to the levy, the premises had been in possession of the demandant; from and after the levy, Moore and those deriving title from him have been in possession.

The essential part of the appraisers' certificate was, that they proceeded with the officer (named) to view and examine, so far as was necessary to a just estimate of its value, the "following lands and tenements, to wit: — a parcel of land lying," &c., "and bounded," &c., "containing one-eighth of an acre, with the store and shed thereon, being shown to us by the within named Moore, the creditor, as the estate in fee simple of the within named James W. Weeks, the debtor, and we have appraised said lands and tenements as the estate in fee simple of said Weeks at," &c.

The verdict was for the defendant, and the plaintiff alleged exceptions.

E. B. Smith, in support of the exceptions.

I. As to the time when the Moore title must be deemed to have accrued.

It accrued Dec. 21, 1858, when Moore "attached on the original writ," and its validity depends on facts then existing. Drake on Attachment, § 221; *Stanley* v. *Perley*, 5 Greenl., 369; *Nason* v. *Grant*, 21 Maine, 164; *Emerson* v. *Littlefield*, 12 Maine, 148; *Brown* v. *Williams*, 31 Maine, 406; *Osgood* v. *Holyoke*, 48 Maine, 410.

Moore exercised his power of choice and elected to have his title to accrue that day. He seeks that advantage and must take disadvantages also. (See officer's return of levy.)

There having been, then, no specification of claim annexed to the writ, he obtained no lien by his attachment, and his title fails. R. S., c. 81, § 31; *Fairbanks* v. *Stanley*, 18 Maine, 296; *Saco* v. *Hopkinton*, 29 Maine, 268; *Osgood* v. *Holyoke*, and *Nealy* v. *Judkins*, 48 Maine, 410 & 566.

II. If Moore had actual notice of plaintiff's title, he acquired and could transmit none. So, of subsequent purchasers prior to tenant.

III. Moore's levy void; error apparent on the record.

Title by levy is statute conveyance. Statute must be strictly complied with. *Gorham* v. *Blazo*, 2 Greenl., 232; *Pope* v. *Cutler*, 22 Maine, 105; *Lumbert* v. *Hill*, 41 Maine, 475; *Benson* v. *Smith*, 42 Maine, 414; *Metcalf* v. *Gillett*, 5 Comstock, 400; *Morton* v. *Edwin*, 19 Vt., 77; *Pierce* v. *Strickland*, 26 Maine, 277.

R. S., c. 76, § 3, was construed in *Roop* v. *Johnson*, 23 Maine, 335; c. 94, § 7 of R. S., 1841, said to be "obscure." To remedy obscurity, language was changed in R. S., 1857, c. 76, § 3.

Under R. S., 1841, c. 94, § 7, co-tenant, reversion and remainder-man could not tell whether or not their titles were denied. To remedy this mischief, the R. S., 1857, c. 76, § 3, provides, in relation to the return of appraisers, as follows: —(1,) That it shall be made by them "on the back of the execution," (this is not, but annexed, and might have been fraudulently removed, which is what the statute intended to prevent,) and (2,) state the nature of the estate, i. e. whether lands, tenements, &c., and whether gristmill, house,

factory or shop, &c., (3,) and its "value." Then (4,) "and whether it is in severalty or in common," (5,) a fee simple or less estate, (6,) in possession or reversion, &c., (7,) its location.

The word "and" implies addition; it here adds an essential element to an appraiser's return. Webster's and Worcester's Dict's. Its emphatic repetition in R. S., c. 76, § 3, noticeable. Observe change of mood of verb; indicative instead of subjunctive.

IV. The appraisers' return bad and levy void, because—

1. They do not "state" whether the land was held by Weeks "in severalty or in common." (They do not even say it is Weeks', but only that Moore "shows it as his.") *Gault* v. *Hall*, 26 Maine, 569.

2. Meaning of "fee" and "fee simple," is simply inheritance. Co. Litt., § 1, a; 1 Washb. Real Prop., 51; 4 Kent's Com., *5. It designates the quantity and not the quality of the estate. 1 Washb. on Real Prop., 406. A fee simple may be owned in severalty or in common, by two or more. Coke Litt., §§ 280, 181, *et seq.*; 2 Black. Com., *192; 1 Wash. on Real Prop., 416. It may be in possession, reversion or remainder. 4 Kent's Com., *198; 1 Washb. on Real Prop., 416; 4 Dane's Abridgm't, c. 114, art. 20.

V. Reason for particularity required by § 3, c. 76, R. S. Debtor entitled to know all the facts; proceedings *in invitum*. *Morton* v. *Edwin*, 19 Vt., 77, and cases cited *ante*.

Other joint owners and reversioners entitled to know if their estate be admitted or denied.

1. The statute must be so construed as to effect this, its intention, and to remedy the mischief. See cases cited *ante* and *passim*.

2. Being *in invitum* it must be strictly construed as against the creditor who resorts to this statute and takes title from it. See cases cited *ante*; *Davis* v. *Maynard*, 7 Mass., 246; *Lancaster* v. *Pope*, 1 Mass., 86. Its requirements are in the nature of a condition precedent and must have been strictly complied with to pass title. *Martin* v.

Edwin, 19 Vt., 77, cited *sup.*; *Wellington* v. *Gale*, 13 Mass., 489; *Perry* v. *Dover*, 12 Pick., 206; *Williams* v. *Amory*, 14 Mass., 29; *Pierce* v. *Strickland*, 26 Maine, 277.

3. As to defendant's innocent joint owners and reversioners, to be construed "liberally."

4. To be so construed as to give every word force and meaning. *Opinion*, 22 Pick., 573; *James* v. *Dubois*, 1 Har., 285; *U. S.* v. *Warner*, 4 McLean, 463; *Hutchins* v. *Niblo*, 4 Blackf., 148.

The occupant has a right to know whether or not his possession is to be disturbed, or only the reversion or remainder levied on. R. S., c. 76, § 3.

1. Appraisers should state whether they appraised an estate in "possession, reversion or remainder," in order to let us see if appraisal be fair.

2. We can presume nothing upon this point, because the statute is to be construed strictly in this respect. Cases *supra*.

A fortiori it cannot be presumed that it was in the debtor's possession in this case, because it would be presuming against the facts stated in exceptions. Moore, if he acted fairly, (as we are bound to presume he did,) could not have shown the estate to them as in possession of Weeks, for we had given him actual notice to the contrary.

It may be inferred from the amount of the appraisal, that they did not consider the estate in the possession of Weeks at the time of the levy. Defendant and presiding Judge inferred that they did. This shows it should be stated as required by law; no inference authorized.

VI.—1. In construing a statute regard must be had to the language of the Legislature, whether it convey the idea the Court think it should or not. *Ellis* v. *Page*, 1 Pick., 44; *Rutland* v. *Mendum*, Ib., 156; *Buck* v. *Spofford*, 31 Maine, 36; *Pierce* v *Atwood*, 13 Mass., 344. Therefore it is only in doubtful cases and expressions, that the argument *ab inconvenienti* will have weight. *Langdon* v. *Potter*, 3 Mass., 221; *Gore* v. *Brazier*, 3 Mass., 53; *Putnam* v *Longley*,

11 Pick., 490; *Coffin* v. *Rich*, 45 Maine, 511; *Ingalls* v. *Cole*, 47 Maine, 540.

2. If the same language be used in later statutes as in former, the same construction applies. *Com.* v. *Hartnett*, 3 Gray, 450. And the converse is true; a change of terms implies a change of intention.

3. The subsequent Acts of 1863, c. 165, shows that § 3 of c. 76 must be construed as plaintiff contends.

4. Change from Acts of 1841, by the R. S. of 1857, not for condensation; because it occupies more room in revision of 1857.

VII. As to officer's return.

1. Officer's return cannot help omission in that of appraisers. The statute authorizes him "to adopt theirs;" not them his. It shows that theirs is to be completed before he makes his. He does not know what they appraised otherwise than from their return; his statement of what was shown them is extra official.

2. His return is silent as to import and fact of possession.

VIII. Seizin was taken by creditor within the year; it should have been. R. S., c. 76, § 15. *Darling* v. *Rollins*, 18 Maine, 405; *Downer* v. *Hazen*, 10 Vt., 418.

IX. Courts should consider effect of decision to make plaintiff pay his adversary's lawyer in a suit where plaintiff prevailed after long litigation. Broom's Legal Max., 174.

X. — 1. One co-tenant entitled to possession of whole estate, as against a stranger. The requested instruction should have been given. "Unity of possession" essential to tenancy in common. 4 Dane's Abridg., c. 134, art. 2, § 12; 4 Kent's Com., *367; Co. Lit., 188, b.

Their possession is a unit, each one as against everybody, by his co-tenants, possesses and is entitled to possess the whole estate. Possession of one tenant is possession of all. 4 Kent's Com., *370; 1 Washb. on Real Prop., 417; *Buckmaster* v. *Needham*, 22 Vt., 617.

"Either has an actual right to actual possession." The entry of one is the entry of both. *Colburn* v. *Mason*, 25

Maine, 435; *Barnard* v. *Pope*, 14 Mass., 438; *Shumway* v. *Holbrook*, 1 Pick., 14; *Kirk* v. *Kirk*, 3 Dana, (Ky.,) 53.

See, directly in point, *Allen* v. *Gibson*, 4 Rand., (Va.,) 468; *Knox* v. *Silloway*, 10 Maine, 214; *Wass* v. *Bucknam*, 38 Maine, 360; *Gowen* v. *Shaw*, 40 Maine, 56; *Loomis* v. *Pingree*, 43 Maine, 311.

A voluntary surrender of possession by a disseizor, held to put all the tenants in possession. *Vaughan* v. *Bacon*, 15 Maine, 455. Judgment in favor of one for possession would have same effect.

2. Writ of entry is for possession. R. S., c. 104; *Wyman* v. *Brown*, 50 Maine, 144. And the struggle is to show which party has the better title to the possession in himself.

Sect. 10, c. 104, R. S., provides for one tenant suing alone for possession of common lands.

Sect. 11 provides for suit by one tenant against his cotenant. In this case demandant has perfect title in fee of one-half of the premises and to possession of the whole. Tenant has no title. Possession is only *prima facie* evidence of title, (50 Maine, 144,) and tenant does not rely upon that, but puts in specific title, which fails.

We are entitled to judgment for possession of whole, and the instruction should have been given. *Loomis* v. *Pingree*, 43 Maine, 311.

Moore, *Drew* and *Hamilton*, for the defendant.

WALTON, J.—Real action. Verdict for defendant. Plaintiff excepts. Several questions are presented for consideration.

1. One link in the chain of the defendant's title is a levy. The plaintiff claimed that there was evidence on the face of the writ, to show that the only schedule of items contained in or annexed to it was annexed after the attachment; and the defendant offered evidence tending to prove the contrary. The presiding Judge instructed the jury that, as the demandant did not claim to have obtained his title between

the time of the attachment and levy, the testimony was immaterial; that if the fact was as the demandant alleged, and the attachment was void, the creditor's title would be deemed to have accrued on the day of the levy. The demandant contends that this ruling was wrong; that inasmuch as the officer's return upon the execution states that the land levied upon had been attached on the original writ, the attachment is thereby made the basis of the creditor's title, and if the attachment was not valid, his title fails; that it cannot stand upon the levy alone as it would if no attachment on the original writ had been attempted, or the levy had been made without reference to the attachment. We think this view of the law cannot be sustained. If the attachment and levy are both valid, then the creditor's title will relate back to the attachment and take date from that time. If the levy is valid and the attachment void, then the creditor's title will take date from the time of the levy; and the fact that the officer refers to the attachment in his return upon the execution, will not affect the validity of the levy. We see nothing erroneous in the rulings of the presiding Judge upon this point.

2. A deed from the debtor, through which the demandant claims title, was not recorded till long after the levy. The demandant introduced evidence tending to prove "actual notice" of this deed to the creditor before the attachment, and to some of his successors in title; but the presiding Judge instructed the jury that unless it was shown that the tenant had actual notice of the deed before acquiring his title, notice to the parties preceding him would not avail; that the tenant's title could not be affected by such notice to his predecessors in title, if the tenant was himself an innocent purchaser for value in good faith without actual notice of the deed. To this ruling the plaintiff excepts. He contends that if the attaching creditor had notice of the unrecorded deed, he acquired nothing by his levy, and could transmit no title to his grantee, — certainly not if the latter also had notice of the deed, — and that the latter could

give no title even to a *bona fide* purchaser without notice. This reasoning is more plausible than sound. It must be remembered that without giving effect to the unrecorded deed the tenant's title cannot be defeated, and that the law expressly declares that such a deed shall not be effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice thereof. (R. S., c. 73, § 8.) If the tenant is neither the grantor, nor his heir, nor devisee, how can the deed be allowed to affect his title without violating the express provisions of the statute? Clearly it cannot. We think the ruling of the presiding Judge was correct.

3. The presiding Judge ruled that the levy was valid; that the then existing provisions of law were substantially complied with. To this ruling the plaintiff excepts. He contends that the appraisers' certificate is defective in not stating whether the estate appraised by them was an estate in severalty or in common, in possession, reversion or remainder, as required by the Revised Statutes, c. 76, § 3. The appraisers say they viewed a parcel of land shown to them as the estate in fee simple of the debtor, and that they appraised it as the estate in fee simple of the debtor. A "fee simple" is the largest estate known to the law, and when this term is used, and no words of qualification or limitation are added, does it not necessarily imply an estate owned in severalty, and an estate in possession? An estate not in possession, not owned in severalty, must be less than a fee simple. It is undoubtedly true that a person may own a remainder or reversion in fee. But such an estate is not a "fee simple;" it is a fee qualified or limited. So, when a person owns in common with another, he does not own the entire fee, a "fee simple;" it is a fee divided or shared by another. When, therefore, the term "fee simple" alone is used, it means an estate in possession and owned in severalty. In other words, it means the largest estate known to the law, one which embraces the entire value of the land, not an estate that must be waited for, or shared

with another. We think the ruling of the presiding Judge on this point was correct. *Boynton* v. *Grant*, 52 Maine, 220; *Stinson* v. *Rouse*, 52 Maine, 260.

4. The demandant requested the presiding Judge to instruct the jury, that if they found the demandant had title to the premises as tenant in common with others, that he was entitled to possession of the whole as against a tenant holding only by possession; but the presiding Judge declined to give this instruction. The plaintiff concedes that, inasmuch as the jury found that he owned no estate in the premises, this instruction becomes unimportant, and need not be examined.

5. Another point urged against the validity of the levy is that the certificate of the appraisers and the return of the officer are not written upon the back of the execution as the law requires. (R. S. c. 76, §§ 3 and 5.) No such point appears to have been taken at the trial, and there is no evidence before us that satisfies us that they were not upon the back of the execution. The copies in the case are on separate sheets of paper fastened together, but we do not think it would be safe to infer from that fact that the originals are in the same condition. The appraisers' certificate speaks of the within named creditor, and of this execution, and the officer's return uses similar expressions. The language, therefore, indicates that they are written upon the back of the execution. In the absence of more satisfactory proof to the contrary, we shall act upon the presumption that the officer and the appraisers did their duty in this particular.

Exceptions overruled.

Judgment on the verdict.

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

FREEMAN BROWN *versus* CYRUS ALLEN *& als., Appellants.*

When an appealed action is dismissed from this Court on account of the illegality of the recognizance, the appellee is entitled to recover costs incurred for the travel and attendance of his witnesses.

ON EXCEPTIONS from *Nisi Prius.*

APPEAL from the judgment of a trial justice. After being opened to the jury, the action was, on motion of the plaintiff, dismissed from this Court, because the recognizance contained a condition unauthorized by the statute. Whereupon, the plaintiff claimed costs accrued here for the travel and attendance of his witnesses, which the presiding Judge disallowed, and the plaintiff alleged exceptions.

Libbey & Snow, for the defendants.

1. The case shows no error. If the witness fees could be legally disallowed on any state of facts, the case shows no error in law.

2. Court had no jurisdiction. It was apparent upon the record, that the appeal was void. It was proper for the plaintiff to appear and suggest want of jurisdiction and for that recover costs. Should have presented that question before bringing his witnesses. He should not be allowed for witnesses when it is apparent on the record that there can be no trial. Formerly no costs were allowed in cases like this, but latterly courts have allowed parties for appearing and submitting the question of want of jurisdiction. *Bergen* v. *Jones*, 4 Met., 371; *Jordan* v. *Dennis*, 7 Met., 590; *Cary* v. *Daniels*, 5 Met., 236; *Bowler* v. *Palmer*, 2 Gray, 553; *Hunt* v. *Hanover*, 8 Met., 343; *Elden* v. *Dwight Man. Co.*, 4 Gray, 201; *Call* v. *Mitchell*, 39 Maine, 465.

E. Kempton, for the plaintiff,

Cited *Hilton* v. *Longley*, 30 Maine, 220; *French* v. *Snell*, 37 Maine, 100; *Dolloff* v. *Hartwell*, 38 Maine, 54; *Call* v. *Mitchell*, 39 Maine, 465.

APPLETON, C. J. — This was an action of trespass *quare clausum*, originally brought before a trial justice, by whom judgment was rendered in favor of the plaintiff, from which the defendants appealed.

When the cause came for trial in this Court, upon the plaintiff's motion, the appeal was dismissed on account of irregularity in the recognizance. In such case this Court have jurisdiction so far as to allow costs to the prevailing party. *Call* v. *Mitchell*, 39 Maine, 465. In all cases in which an action is dismissed for want of jurisdiction in the court in which it is commenced, the defendant is entitled to a judgment for costs. *Hunt* v. *Hanover*, 8 Met., 343; *Elden* v. *Dwight Manufacturing Co.*, 4 Gray, 201.

In the taxation of costs, the plaintiff taxed for his own travel and attendance and for that of his witnesses, who were present when the action was dismissed. The presiding Justice disallowed the taxation of the plaintiff's witnesses and allowed the remaining costs as taxed. No reason is shown for this discrimination. The plaintiff was bound to be ready for trial. He could not foreknow the result of his motion, and, if adverse, he would have no excuse for want of readiness. By R. S., 1857, c. 82, § 94, "in all actions, the prevailing party shall recover costs, unless otherwise specially provided." There is no special provision depriving this plaintiff of his costs. The burden is on the party objecting to their taxation to show good cause for their disallowance. This he has not done. No reason appears in the exceptions on account of which they were disallowed. The presumption is that they should have been allowed, no cause being shown to the contrary.

Exceptions sustained.

CUTTING, WALTON, DICKERSON and TAPLEY, JJ., concurred.

AMERICAN BANK *versus* HENRY COOPER, JR.

When the steps mentioned in § 2,* of c. 284, of the Public Laws of 1865, have been regularly taken, the surrender of the charter is effected, though no notice of it is published as required by § 3.†

Chapter 37 of the Special Laws of 1866‡ extended the time for the American Bank to close its concerns to January, 1867, and allowed the receivers such time within that period, for the discharge of their duties, as the Supreme Judicial Court should deem necessary.

By the several statutes and the proceedings under them, notwithstanding the surrender of its charter, the legal capacity of the bank to maintain actions for the conversion of its assets within the time specified by law, remained unimpaired.

The injunction upon the bank and the appointment of receivers did not incapacitate the bank for maintaining actions for the collection of debts due it in its own name, at the instance of the receivers.

The receivers need not be sworn.

---

* SECTION 2. (As amended by the statute of 1865, c. 284, § 1.) Any bank in this State is hereby authorized by a vote of the owners of a majority of its stock, at any meeting of the same duly called, to surrender its charter; and any banking company so surrendering its charter shall continue in its corporate capacity for the term of two years from the time of filing notice with the Secretary of State of the vote to surrender its charter, which notice shall be in writing, certified by the clerk of the corporation, and filed with the Secretary of State within thirty days from the passage of the vote; and for such term of two years, such banking company shall retain all the powers necessary for collecting debts due the corporation, for selling and conveying its property, or for finally closing its concerns.

† SECT. 3. Any bank surrendering its charter shall publish for twelve weeks successively in some newspaper printed in the county, where said bank is located, and in some newspaper published in the city of Boston, a notice of the surrender of its charter and of the time when its liability to redeem its bills will expire; and the publication of this notice shall commence within two months from the date of the vote to surrender.

‡ Special Laws of 1866, c. 37. The corporate powers of the American Bank at Hallowell are hereby continued for two years from the fifth day of January, 1867, for the purpose of collecting the debts due said bank, and paying the just claims against the same; and the receivers of said bank, appointed by the Supreme Judicial Court, shall have such time as the Court may allow, for the discharge of the duties imposed upon them by law, within the time aforesaid.

ON REPORT.

ASSUMPSIT against the defendant as indorser of a promissory note. The plaintiffs introduced note and protest. Thereupon the defendant introduced the petition for an injunction upon the plaintiff bank, dated Sept. 6, 1865; the injunction, dated Sept. 12, 1865; the stockholders' vote to surrender their charter, dated Dec. 26, 1864; copy of the certificate of surrender, filed with the Secretary of State Jan. 5, 1865; and the Boston Advertiser, containing notice of the surrender.

Plaintiffs then put in the appointment of receivers, dated Sept. 1865; an application by the receivers, dated March, 1866, for an extension of time for converting the assets of the bank and making their final report; and an order extending the time one year from Sept. 12, 1866.

H. K. Baker, called by the plaintiffs, testified that he was one of the receivers of the American Bank, and that this suit is prosecuted by the receivers for the benefit of the bank. It was admitted that the receivers were not sworn. The Court to enter such judgment as the law and evidence required.

J. Baker, for the plaintiffs.

A. G. Stinchfield, for the defendant.

A corporation's right to sue and be sued ceases when the corporate rights are extinguished by repeal of their charter or otherwise. *Crease* v. *Babcock*, 23 Pick., 334; *Read* v. *Frankfort Bank*, 23 Maine, 318; *Whitman* v. *Cox*, 26 Maine, 335.

Plaintiffs' power ceased when its liabilities ceased, which was two years from the time certificate of surrender was filed with Secretary of State, i. e. Jan. 5, 1867.

The injunction could in no sense prevent the operative force of the surrender. Surrender of a charter is a statute mode of repealing it.

The legislative extension of time excepts "such as were in the hands of receivers."

The receivers should have been sworn. Laws of 1858, c. 24; R. S., c. 2, § 46; Const., Art 9, § 1; 3 Greenl., 372. Spec. Laws of 1866, c. 37, does not affect the exception mentioned in the Act of 1863.

DICKERSON, J.—Assumpsit against the defendant as indorser. The requirements of the law with regard to demand and notice appear to have been complied with, and the action is maintainable if the bank, as a corporation, has the legal capacity to maintain a suit at law.

As the vote of the stockholders of the bank, surrendering its charter, was duly filed with the Secretary of State, and an injunction issued, and receivers were appointed before this action was commenced, the counsel for the defendant argues that the bank has lost its legal capacity to maintain this action, and that no action can be maintained in its name by the receivers.

1. The surrender of the bank charter.

Section 2 of c. 217 of the statutes of 1863, as amended by § 1 of c. 284 of the statutes of 1865, provides that the owners of a majority of the stock of a bank, may vote to surrender their charter, at a meeting duly called for that purpose, and that the corporate capacity of such bank shall continue for the term of two years from the time of filing a written notice of such surrender, certified by its clerk, with the Secretary of State, within thirty days from the passage of the vote. When these steps have been taken, the surrender of the charter is effected, though no notice of the surrender is published, as required by § 3. The publication of the notice forms no element in the process of surrendering the charter, but is simply declarative of that fact. The bank cannot avail itself of its omission to comply with the requirement in regard to the publication of notice of an act, in order to defeat its validity, when such act is valid without such publication.

The time allowed for the bank to close up its business would have expired in January, 1867, but for c. 37 of the

special laws of 1866, which extended the time to Jan. 5, 1869, and allowed the receivers such time within that period, for the discharge of their duties, as the Supreme Judicial Court should deem necessary. At the August term of the Court in the county of Kennebec, for 1866, the time for converting the assets of the bank into available funds, by the receivers, was extended to Sept. 12, 1867. By these several statutes, and the proceedings under them, notwithstanding the surrender of its charter, the legal capacity of the bank to maintain actions for the conversion of its assets, within the time specified by law, remained unimpaired.

2. The injunction and appointment of receivers.

These considerations do not incapacitate the bank for maintaining actions in its own name, at the instance of the receivers. R. S., c.47, § 67. Nor does the omission of the receivers to be sworn vitiate their proceedings. They are appointed by the Court, and are the officers of the Court. The statute does not require them to be sworn. Their proceedings are subject to revision by the Court, and the oath may be dispensed with for the same reason that it is not required in the case of assessors of damages, or a master in chancery appointed by the Court.

The defendant must be defaulted for the amount of the notes. *Judgment, also, follows for the plaintiff in the other actions,* —

American Bank v. *Henry Cooper, jr., et. al.; American Bank* v. *Henry Cooper, jr.*

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

STATE *versus* CHARLES H. DEARBORN.

An indictment alleged that defendant, on a day and at a place named, "with force and arms, in and upon the body of" a person named, "the said" person "being then and there a deputy sheriff within and for the county of Kennebec, legally authorized and duly qualified to discharge the duties of said office, and being then and there in the due and lawful execution of the same, did make an assault, and him, the said" person, "did then and there beat, wound and ill treat, and, in the due and lawful execution of his said office, did then and there unlawfully, knowingly and designedly obstruct, hinder and oppose, * * contrary to the form of the statute," &c.; *Held*, on demurrer,

1. That the indictment charged an assault and battery;
2. That the averments as to the official position of the person assaulted, and to the effect of the assault in hindering him from the performance of his official duties, are to be taken only as allegations in aggravation of the assault;
3. That it is not bad for duplicity; and
4. That judgment could be properly rendered upon the indictment, whether the matter alleged in aggravation were supported by proof or not.

ON EXCEPTIONS.

INDICTMENT, alleging that "Charles H. Dearborn of Winthrop, in said county of Kennebec, on the twelfth day of October in the year of our Lord one thousand eight hundred and sixty-six, with force and arms, at Readfield, in the county of Kennebec aforesaid, in and upon the body of one Josephus Stevens, the said Stevens being then and there a deputy sheriff within and for said county of Kennebec, legally authorized and duly qualified to discharge and perform the duties of said office, and also being then and there in the due and lawful execution of the same, and also being then and there in the peace of said State of Maine, did make an assault, and him the said Josephus Stevens did then and there beat, wound and ill treat, and, in the due and lawful execution of his said office, did then and there unlawfully, knowingly and designedly obstruct, hinder and oppose; and other wrongs to the said Stevens then and there did, to the great damage of him, the said Stevens, and

against the peace of said State, and contrary to the form of the statute in such cases made and provided."

To this indictment the defendant demurred, and, for cause of demurrer, alleged,

1. That the indictment is double, uncertain and informal; and

2. That the indictment, by concluding "contrary to the form of the statute," &c., charges a violation of the statute, whereas, if there be but one offence set forth, it is an offence at common law, if any.

Whitehouse, for the defendant.

1. The indictment is uncertain and informal. Because it does not show that the process was legal. *State* v. *Downer*, 8 Vt., 424; *State* v. *Hooker*, 17 Vt., 658; *McQuoid* v. *The People*, 3 Gil., (Ill.,) 76; *Cantrell* v. *People*, Ib., 356; 1 Wharton's American Crim. Law, § 1293.

Because it does not show that the process was in the hands of a proper officer. 5 East, 306; *State* v. *Hailey*, 2 Strobhart, (S. C.,) 73; 2 Chitty's Crim. Law, (3d Amer. ed., 144, note a,); the precedents in the same volume; the precedents in Archbold's Crim. Pleading, and the form given in Train & Hurd's Precedents of Indictments, and further authorities, requiring that the indictment shall show what the process is; that it is legal and in the hands of a proper officer.

It is important that the description of the offence should embrace these particulars, since the grade of the crime depends upon the character of the process in the officer's hands. 2 Hawk, P. C., c. 17, § 1; 1 Russ. on Crimes, 409.

2. If obstructing an officer is properly charged, the verdict is double, since an assault is properly set forth and is not alleged to have constituted a part of the principal offence.

An assault is not necessarily an element of the offence, because there are other means of obstructing an officer. 2 Chitty's Crim. Law, 144, note (a); 1 Bishop's Crim. Law, § 364.

3. The indictment is bad, because it describes a common law offence, and concludes "contrary to the form of the statute." 1 Wharton's Crim. Law, 183; *State* v. *Hart*, 34 Maine, 36.

This is not a mis-statement within the meaning of § 12, c. 131, R. S., but a wrongful statement. This statement occurred in *Damon's, alias Flint's, case*, 6 Maine, 148, and *Butman's case*, 8 Maine, 113.

The distinction between mis-statement and wrongful statement is real. Webster's Dict., art. mis-statement, p. 846.

BARROWS, J. — The substantive offence charged in this indictment is the commission of an assault and battery upon the person of Josephus Stevens. The averments as to the official position of Stevens, and as to the effect of the assault in hindering him from the performance of his official duties, are to be deemed and taken only as allegations in aggravation of the charge. There can be no doubt that the assault is well charged, in appropriate and technical terms. Judgment could properly be rendered upon the indictment, whether the matter alleged in aggravation were supported by proof or not.

Nor is the count bad for duplicity. It is both common and proper to insert, in a count charging an assault, the various matters that may tend to aggravate the offence. Nothing more is done, or attempted, here. The indictment seems to be a transcript, *mutatis mutandis*, of the one in *Commonwealth* v. *Kirby*, 2 Cush., 577, where the Court held the allegations "sufficient to authorize judgment and sentence against the defendant for an assault upon a constable while in the discharge of the duties of his office."

Exceptions overruled. — Judgment for the State.

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

MARGARET CARLETON *versus* HENRY LOVEJOY.

By the common law, the personal property of the wife, which she had in possession at the time of the marriage, in her own right, such as money, goods and chattels, and moveables, vested immediately and absolutely in the husband upon such marriage.

Actual or constructive delivery is essential to constitute a valid gift whether *inter vivos* or *causa mortis*.

When personal property comes rightfully into the possession of the defendant, a demand and refusal are prerequisites to the maintenance of trover for its value.

ON EXCEPTIONS from *Nisi Prius*.

TROVER for the value of numerous articles of household furniture and dress, including a brass fire-set belonging to the plaintiff and borrowed of her by the defendant's former wife in her lifetime.

The plaintiff testified, that the defendant's second wife was her sister, that she died March, 1864, that she sent particularly for the plaintiff about a fortnight before her decease, and gave her the furniture, and other articles specifically named in the writ, that, being feeble, she did not go over the house to show them to the plaintiff, but expressed the wish that the latter would do so. She further testified that the defendant was absent at the time, that when he returned, she communicated the facts to him and he agreed to carry the things to plaintiff's house, that the plaintiff took some things, that she subsequently called for the others and the defendant refused to deliver them. The plaintiff also testified as to the value of each article, that her said sister bought most of the articles sued for before her marriage, in 1843, and the remainder since, with her earnings. Plaintiff also testified, in cross-examination, that the defendant's wife gave her the things the day before she left, that no one else was present, that the plaintiff and defendant's wife were sitting in the kitchen when the gift was made, that her sister said she wanted plaintiff and another sister to have all her things, that she was not able to talk

any more, she was so feeble. There was no evidence of any demand for the fire-set.

Mary J. Averill, called by the plaintiff, testified that she saw defendant when he carried plaintiff home, and that he said he could not bring down the other things until better travelling. Plaintiff replied that the parlor furniture might remain during the summer, that she wanted the spoons and ottoman, and would go up soon and see about them, he said come up.

The plaintiff rested; whereupon the presiding Judge ordered a nonsuit, and the plaintiff alleged exceptions.

A. G. Stinchfield, for the plaintiff.

S. Lancaster, for the defendant.

APPLETON, C. J. — This is an action of trover for various articles of personal property particularly described in the writ. The plaintiff claims title thereto under an alleged gift of the same from her sister, the wife of the defendant, made shortly before her decease.

The goods in controversy consist principally of articles of household furniture and of dress. They were purchased by the wife before marriage, or since with the funds of her husband.

The marriage took place before the passage of any Act conferring rights upon or removing the disabilities of married women. The title to the property in dispute must be determined by the rules of the common law, as existing before they were changed or modified by statute.

By the common law, the personal property of the wife, in possession at the time of the marriage, in her own right, such as money, goods and chattels, and moveables, vested immediately and absolutely in the husband upon such marriage. 2 Kent, 143. The defendant is not shown to have parted with his title. His wife, then, had nothing to give.

If it were otherwise, a delivery is necessary to constitute a valid and effective gift, whether *inter vivos* or *causa mortis*. Without actual or constructive delivery, the title

does not vest. The owner must part with all present and future dominion over the property. *Marston* v. *Marston*, 1 Foster, 491; *Dole* v. *Lincoln*, 31 Maine, 422; *Allen* v. *Polereczky*, 31 Maine, 338. The proof fails to show any valid gift. The gift must be complete. *Jones* v. *Lock*, 1 Law Rep. Chy. Ap., 24. "To constitute a title of this kind," remarks SARGENT, J., in *Cutting* v. *Gilman*, 41 N. H., 151, "under a gift *causa mortis*, the donor must not only give, but he must deliver, and the delivery must be actual when the subject matter of the gift is capable of actual transfer."

It is in evidence that the wife of the defendant borrowed a fire-set of the plaintiff. When, it does not appear. The fire-set came rightfully into the defendant's possession. No demand upon him for the property is shown. No act of conversion by him is established.

Exceptions overruled. — Nonsuit to stand.

CUTTING, WALTON, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

MARY C. EVELETH *versus* JAMES G. BLOSSOM.

The owner of goods transported by an express company, may, after tender of the sum legally chargeable against such goods, and after demand and refusal, maintain replevin therefor against the agent of such company having the care of the goods in one of the company's places of deposit.

ON REPORT from *Nisi Prius*,

REPLEVIN. Plea *non cepit*, with specifications of defence.

The defendant testified, that he was never agent of the Eastern Express Company, but was in the employment of one Williams, who was depot master and express agent at Monmouth. When bills were forwarded with goods the instructions were to collect on delivery, and he had no other authority to deliver goods. Told the plaintiff he could not

deliver her trunks and chest until the full bill of $41,25 was paid. She demanded the goods of him at the depot, in the Eastern Express Company's office, where they were deposited, after having tendered him $18,50. Williams was commissioner of enrollment, spent his time at Augusta in summer of 1864, and defendant acted for him in his absence; acted for Williams from June, 1863, till October following; then absent two months; resumed in Jan., 1864, and continued till July, 1865. No other agent from Jan., 1864, to Nov., 1864. When goods came by express, the defendant received them, and had the custody and control of them until they were delivered.

The sum of $41,25 claimed, was made up of $13, as freight by Turner's Express, $5,50 as freight by the Eastern Express Company, and sundry other charges for storage, cartage, &c., making the balance. There was testimony tending to show that the plaintiff agreed that the company should retain a lien upon her goods for the other items, but this was denied by the plaintiff.

The remaining facts, so far as they are essential to an understanding of the law herein settled, are stated in the opinion.

J. Baker, for the plaintiff.

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

The defendant exercised no act of ownership, nor any act tending to show a claim of ownership in himself which can be construed into a conversion. He had no such possession as would enable him to intermeddle only upon the condition that the owner should first pay the whole bills which were forwarded with the property. Otherwise, intermeddling would have rendered him liable to the Express Company. The office in which the property was deposited was not the defendant's, but the company's. He was not authorized to accept less than the whole bill, although the whole bill may not have been due. If the amount claimed was not paid, his duty was to keep the property in the custody of the

company until the plaintiff adjusted the matter with the company. Such detention is no act of ownership on his part, neither shows any intention of conversion. 2 Hilliard on Torts, c. 25, § 9.

If the action is maintainable against any one, it is against the Express Company alone, which had actual possession through the defendant as servant. The defendant had the mere care of the property while in the actual possession of the company. Even if he was a depositary of the property, the action is not maintainable. 2 Hilliard on Torts, 583, and the cases cited in the note; *Miller* v. *Blake*, 21 Pick., 318. Defendant did not prevent plaintiff from taking the goods from the possession of the company; he merely told her he could not deliver except upon payment of the amount claimed. He did not touch the goods, but merely declined to do what he was forbidden to do by the company, which is not conversion. *Rand* v. *Sargeant*, 23 Maine, 326. Neither trover nor replevin can be maintained against defendant, because he never had personal possession.

Absolute refusal to deliver goods is not always evidence of conversion, as where a servant having the custody of goods, apparently his master's, refuses to deliver them without an order from his master. 2 Greenl. on Ev., 526. Servant's possession or detention is that of his master. His care of the goods is in effect like the possession of a railroad station agent of the moneys and other property in his hands. For the same reasons this action cannot be maintained. *Pettingill* v. *And. R. R. Co.*, 51 Maine, 370. Counsel also cited 1 Hilliard on Torts, 593; *Matterman* v. *Bently*, 13 Barbour, 641; *Fernald* v. *Chase*, 37 Maine, 289.

TAPLEY, J.—This is an action of replevin brought by the plaintiff to recover two trunks and a chest with their contents, committed originally to Turner's Express for transportation from St. Johns, New Brunswick, to Monmouth, Maine. After about one year's delay, the plaintiff found her

goods in the possession of the defendant, who claimed to hold them as the agent of one Williams, depot master, and express agent of the Eastern Express Co., at Monmouth; as a condition of their delivery he demanded the sum of $41,25, which he alleged was due the Eastern Express Co., for transportation and money paid on them.

The plaintiff denied the right of the carriers of her goods to charge such sum, and tendered the sum of $18,50 for their release, which was refused. The plaintiff being unable to obtain her goods without the payment of the sum claimed, commenced this action, and the evidence in the case is now submitted to the Court, with power to draw such inferences as a jury might, and to render such judgment in the case as the law and the evidence require.

Neither the property in the goods, the refusal to deliver, or their detention is denied, but it is claimed that the Eastern Express Co., had a lien upon the plaintiff's goods, for the sum of $41,25, and evidence has been adduced for the purpose of proving this allegation.

Upon a careful examination, we are of opinion that the goods were not subject to a lien for that amount, and that the sum tendered was sufficient to cover all charges legally existing against the goods, and that the plaintiff, upon the tender of the sum of $18,50, was entitled to the possession of her goods.

It was contended, by the learned counsel for the defence, that however this may be, that inasmuch as the defendant was acting as the agent of the Express Co.'s agent, and only authorized by them to deliver upon the payment of $41,25, he cannot be held liable in this action, for he would make himself liable to the Express Company if he delivered upon the payment of a less sum.

While it is not admitted that such would have been the effect of a delivery to the plaintiff of her property upon the tender of all that was due thereon, yet if such had been the effect of the defendant's contract with the Express Co.,

it could not authorize him to withhold the plaintiff's goods from her after she was legally entitled to their possession.

Whatever rights of holding the defendant had, he claims from, by and under the Eastern Express Co. If they could not legally hold the goods after tender of the actual amount due, by the plaintiff, certainly their agent could not. They could confer no greater powers upon their agent than they possessed themselves. The agent cannot withhold where the principal cannot. These principles are nowise in conflict with the cases cited by the counsel for defendants.

The authority referred to in Hilliard on Torts, note to page 583, of vol. 2, is correctly quoted by the counsel as follows: — "An action cannot be sustained against a mere depositary of money, unless his situation has been changed, *either by a wrongful refusal to pay the money upon proper request*, or by a wrongful appropriation of it."

In other words, the depositary having received the money rightfully, is not liable to an action until he does something wrong, which may be done by "*refusal to pay the money upon proper request.*" So, in the case at bar, the goods having come to the possession of the defendant rightfully, no action could be maintained against him until he had done something wrongful concerning them. They were under his control. He had the power to deliver. He was the keeper. If the amount demanded by him had been paid, he would have delivered. That amount not having been paid, or tendered, he chose to retain them. This was wrongful as to this plaintiff. It was the retention of her goods after she was entitled to the possession. Whether wrongful, or rightful, as between the agent and his principal, will depend upon their contract, and however it may be, it cannot affect the plaintiff's rights.

The cases cited relative to conversion are in perfect harmony with these views. In the case of *Fernald* v. *Chase*, 37 Maine, 289, cited by defendant's counsel, SHEPLEY, C. J., says, "to make out a conversion, there must be proof of a wrongful possession, or of the exercise of a dominion over

it in exclusion of the owner's rights, or of an unauthorized and injurious use, or of a wrongful detention after demand."

Applying this rule to the case at bar, we find the defendant exercising a dominion over the plaintiff's property in exclusion and defiance of her rights. He tells her, pay me $41,25 and I will deliver you your property, otherwise, I will retain it. We find him detaining after tender and demand. Now it can make no difference with the plaintiff, that the defendant thus exercises dominion over the plaintiff's property, and thus detains it, by virtue of a contract and engagement with the Express Company, so to do. It is as wrongful to her and as injurious to her as if there was no such engagement.

His contract is of avail between him and them, and not between him and persons not parties to it.

Replevin lies by our statute for a wrongful detention as well as a wrongful taking, and either is sufficient to maintain the action. No other tortious act need be proved but the wrongful detention. *Seaver* v. *Dingley*, 4 Maine, 306; R. S., c. 96, § 8. Such were the decisions in Massachusetts, — *Badger* v. *Phinney*, 15 Mass., 359; *Baker* v. *Fales*, 16 Mass., 147; *Marston* v. *Baldwin*, 17 Mass., 606.

The case of *Woodward* v. *Grand Trunk Railway Co.*, 46 N. H., 524, cited by the counsel from the Law Register for April, 1867, simply decides that, at *common law*, to maintain replevin there must be an unlawful taking, with the single exception of a distress of cattle damage feasant, or of chattels for rent in arrear. The doctrine of the common law is adhered to in New Hampshire, except as modified by statute in relation to beasts impounded and goods attached in mesne process. N. H. Comp. St., 520.

Therefore, when the goods came into the possession of defendant lawfully, detention would not sustain the action. It is otherwise in this State, the common law rule being modified by statute so as to include unlawful detention as a cause.

The defendant having wrongfully detained the plaintiff's

goods after the tender and demand, she is entitled to recover. Upon the proofs here adduced she will be entitled to nominal damages only. *Judgment for the plaintiff, and for one dollar as damages.*

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

ANNA K. GILMAN *& al., Ex'rs, in Eq., versus* WINTHROP W. GILMAN.

A plea in abatement, alleging the non-joinder of the complainants' co-executors in a bill in equity, brought against a residuary legatee, avowedly to compel him to make an election under the will, is bad, unless it aver that the persons named as co-executors in the plea have given the bond required by the R. S., c. 64, § 5.*

Election defined.

Where such a bill alleges that the respondent is, by the will, made a residuary legatee and devisee of the estate, and that, by said will, the testator directs that the respondent "have no portion of the estate until he has fairly accounted for and settled the amount charged against him on my (testator's) books, for money advanced by me for him, with interest thereon;" and it then sets forth specifically the items of debit and credit as they appear on the testator's books containing the memorandum — "the balance, if not settled for, to come out or affect his part of my estate, with all the interest;" — *Held*, on demurrer, that the bill is really one of inquiry, only, to ascertain whether a legatee or devisee will or will not accept a legacy or devise, — and not one to compel an election; and is not maintainable.

An executor, though qualified as such by the laws of another State, has no authority by reason of such qualification to act as such in this.

BILL IN EQUITY, brought in the name of two of the five persons named as executors of the last will and testament of the late Nathaniel Gilman.

The respondant pleaded in abatement, "that said complainants, Anna K. Gilman and Charles B. Gilman, are not the only executors named in the said will of the said Nathaniel

* See opinion.

Gilman, mentioned in their said bill of complaint, who were duly appointed to said trust, accepted the same and gave bond and entered upon the duties of said trust, as therein alleged, and that the other persons, to wit, Isaac Redington, Edward McLellan and George F. Gilman, were duly appointed and qualified as executors of the said will, and entered upon the duties of said trust, which said last three named executors ought to be made parties to the said complainant's bill," &c.

To this plea the complainants replied, "that the complainants are the only executors named in the will of Nathaniel Gilman, deceased, who have been duly appointed to said trust by the laws of this State, and accepted the same, and given bond and entered on the duties thereof, without this, that one Isaac Redington, Edward McLellan and George F. Gilman were never appointed to said trust, accepted the same, gave bond or entered on the duties thereof, according to the laws of this State."

The respondent rejoined, "that the said Isaac Redington, Edward McLellan and George F. Gilman, named as the executors in the said will of the said Nathaniel Gilman, deceased, were duly qualified as executors of the said will, in the State of New York, under the laws of said State of New York, where said will was duly proved, and entered upon the duties of said trust, and are now living and in the performance of the duties of said trust."

The respondent also demurred to the bill, and the complainants joined.

The material allegations of the bill appear in the opinion.

J. Baker, for the complainants.

Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both. 2 Story on Eq., § 1075. See illustration, *Ibid*, § 1076. Case at bar is an alternative legacy, both beneficial to the lega-

tee. The mere fact that it is alternative creates the necessity of an election. Both, or only one, may be beneficial to the legatee. *Ward* v. *Ward*, 15 Pick., 511,–523. *Ward* v. *Ward* is the same in principle as case at bar. The principle that pervades all the cases is, that where an alternative is presented, and it is manifestly the intention of the testator that but one should be enjoyed, an election must be made by the beneficiary; and, if he does not elect within a reasonable time, equity will compel him.

"If any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will." *Hyde* v. *Baldwin*, 17 Pick., 303, 308. "A man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own * * * which shall defeat, or in any way prevent the full effect and operation of every part of the will." *Ibid.* The testator provides that the respondent shall be entitled to a residuary share of his estate; but shall have no such share "until he has fairly accounted for and settled the amount charged against him on my books," &c. It was the intention of testator that the amount due from respondent should go into the estate and constitute a part of the fund to be distributed to all the heirs under the residuary clause, before the respondent should be entitled to any share. This balance, owed by the respondent to the estate, is a debt which the testator has actually disposed of by his will, and given it to the residuaries. Withholding the debt, and taking his share, defeat the purposes of the will. If he declines to pay his indebtedness, his tenth of the *residuum* is made a compensation to the remaining beneficiaries for the loss of this debt. They will receive one-ninth instead of one-tenth.

The case also comes within the rule laid down by Sir Wm. Grant as quoted in 2 Redfield on Wills, 741. For if the respondent declines to pay his indebtedness, it will deprive the other beneficiaries "under the will of the benefit to which they would be entitled, if the first legatee permit-

ted the whole will to operate." This debt was long since outlawed. See dates in bill. It could not have been enforced by the testator when he made his will, in 1858, nor by the respondents since his death. Thus this amount, by the statute of limitations, had ceased to be the property of the testator, and became the indefeasible property of the respondent. It is a right in the respondent. A right to withhold the $10,000 debt, which he can maintain independent of the will.

The Court has the power. 2 Story on Eq., §§ 1076, 1080 and 1081.

Bradbury & Sweat, for the respondent.

APPLETON, C. J.—It was determined, in *Gilman* v. *Gilman*, 52 Maine, 165, that the domicil of Nathaniel Gilman, at the time of his death, was in this State, and that his will should be admitted to probate here.

These complainants were named with others as executors in the will of said Gilman, and have given the bonds required by the statutes of this State, and have taken upon themselves the trust to which they were appointed.

The defendant has pleaded in abatement the non-joinder of certain persons, named in the will as executors, who have never given bonds as required by our statutes, but have qualified as executors according to the laws of New York, and have there entered upon the duties of their trust.

An executor, though qualified as such by the laws of another State, has no authority to act in this. By R. S. 1857, c. 64, § 5, "every executor before entering on the execution of his trust shall give bond, with sufficient sureties resident in this State, in such sums as the Judge of Probate orders, payable to him or his successors," with certain conditions specified in the same section. By § 7, "when two or more persons are named executors in any will, none shall act as such or intermeddle except those who give bonds as aforesaid."

As the plea does not allege that the persons named there-

in as co-executors have given the bonds required by the statute of this State, they could not, according to its express provisions, be parties to the bill. The plea in abatement must be adjudged bad.

The bill alleges that the complainants are executors of the last will and testament of Nathaniel Gilman, late of Waterville, deceased, that they were duly appointed to said trust, gave the bond required by law and entered upon the duties of their trust; that, by said will, the defendant is made a residuary legatee and devisee of said estate; that, by the 19th section of said will, the testator directs "that Winthrop W. Gilman have no portion of my estate until he has fairly accounted for and settled the amount charged against him in my books, for money advanced by me for him, with interest thereon."

The bill then sets forth the debits and credits as they appear on the books of the testator. The account is thus headed,—"Winthrop Watson Gilman debtor to Nathaniel Gilman to the following sums, if not settled for and paid before my death, to be taken from his part of my estate, with interest."

The items charged then follow.

The credits are preceded by the following clause:—

"Winthrop Watson Gilman is to be credited and allowed of the above demand the following sums."

After specifying the items of credit, the account has this memorandum:—

"Waterville, Oct. 3, 1844.—These credits, and all others that are clearly just, are to be subtracted from the amount of moneys advanced and debts due me. The balance, if not settled for, to come out or affect his part of my estate, with all the interest.

"Watson has probably paid me about six or seven thousand dollars, and does now owe me, after deducting his payments and casting interest to this date, about ten thousand dollars. Oct. 3, 1844. "Nath. Gilman."

The bill alleges that the complainants have repeatedly called on the defendant fairly to account for and settle these charges, but that he has neglected and refused so to do; that they cannot administer upon and settle the estate, and make distribution, until the defendant makes his election whether to fairly account for and settle said charges or forfeit his residuary share in the estate.

The prayer of the bill is, that the defendant answer upon oath, and that the Court decree that he shall fairly account for and settle said charges or forfeit his share.

To this bill the defendant demurs, and the question arises whether, upon the facts set forth in the bill and admitted by the demurrer, the bill can be maintained.

"The definition of what is meant by election under a will may be thus stated, — that every person whom the instrument proposes, in any particular, to benefit, must elect whether he will claim under the will or against its provisions. This implies, of course, that the person thus put to an election, has some rights in regard to the same subject, which he could maintain independent of the will." 2 Redfield on Wills, 737. "Where the testator assumes to dispose of any estate or interest, which belongs to any devisee or legatee under the will, such devisee or legatee must elect to take under the will or against it." Ib., 740. Sir WILLIAM GRANT defines election thus, — "When one legatee under a will insists upon something by which he would deprive another legatee, under the same will, of the benefit to which he would be entitled, if the first legatee permitted the whole will to operate." Ib., 741.

"Election * * is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to

take, has a choice; but he cannot enjoy the benefits of both." 2 Story's Eq., § 1075. "It seems clear, to constitute a case of election, there must be an actual disposition of the property belonging to the person who is to be put to his election." 2 Redfield on Wills, 744.

The authorities cited by the counsel of the complainant and of the respondent, are alike adverse to the maintenance of this bill. The respondent has no claims against the provisions of the will and no rights independent of the will, so that he should be called upon to determine whether "he will claim under the will or against its provisions." The testator disposes of no estate belonging to any devisee or legatee under the will. The defendant has no inconsistent or alternative rights or claims between which to choose. There is no disposition of any property of his, to which he must assent before he can be allowed to claim under the will. 2 Spence's Equitable Jurisdiction, 585.

The will is not before us, but, from its contents as stated in the bill, this would seem to be the common case of a bequest to a son, owing the estate, of his share subject to the deduction of such indebtedness. The books of the testator are referred to in the will, and the amount due, as appears, is to be deducted from the defendant's share, — and such further sums as "are clearly just." "The balance, if not settled for, to come out or affect his part of my estate." If the defendant neglects to settle, then the defendant would be entitled to his share, after the specified sums are "taken from his part of my (the testator's) estate."

It would hardly seem that the testator intended a forfeiture in any event, so far as we can judge from what is set forth in the bill. If, however, on examination of the whole will, the construction should be that the legacy is on condition, it would be for the defendant to see that the condition on his part is performed. In case of non-performance the peril and the risk are his.

The bill really is one of inquiry to ascertain whether a legatee or devisee will or will not accept a legacy or devise;

not to compel an election between conflicting and contradictory rights, where the defendant is not entitled to both. If the bill should be maintained, it is not easy to perceive how these complainants could better proceed with the administration of the estate. If the defendant should elect to settle, they would have no greater power to effect a settlement than they now have. If he should decline any further settlement, the account as stated on the books of the testator must control. It is for the respondent to establish additional credits, if any there be, to which he is justly entitled.

If this bill can be sustained, it is not readily perceived why it cannot be brought in every case against a devisee or legatee, to ascertain whether he will accept his devise or legacy or not, which would be absurd. Either imports a bounty and the acceptance is to be presumed.

Bill dismissed with costs.

CUTTING, WALTON, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

CHARLES B. GILMAN *versus* ALBEN EMERY.

When the owner of a shade tree finds another's horse hitched to it, he may immediately remove him to a place of safety; and such removal will not be a trespass.

In order to sustain exceptions to the refusal of a presiding Judge to allow an amendment to a writ, the bill of exceptions must show that he ruled, as matter of law, that the proposed amendment was one which could not be allowed.

ON EXCEPTIONS.

TRESPASS to recover damages to plaintiff's horse and wagon.

It appeared that the plaintiff started with his brother to drive two heifers, from his stable, in Waterville, to another town. As they were passing defendant's premises, leading

plaintiff's horse attached to his wagon, and driving the heifers, one of the latter turned and ran back. Whereupon, the plaintiff hitched his horse to a shade tree, twenty-two inches in diameter, standing upon the defendant's premises, but within the limits of the highway, and went back for his heifer. The defendant seeing plaintiff's horse so hitched, removed him and hitched him to a post a few feet from the tree. When the plaintiff was returning for his horse, some twenty minutes afterwards, he saw his horse running through the streets, with halter dragging, and the wagon broken. There was no evidence as to the precise manner in which the defendant hitched the horse, or as to how he was freed from the post.

Plaintiff moved to amend by adding a count alleging a wrongful taking by the defendant, a negligent use and control of said horse and wagon, whereby they became injured and unfit for use. The presiding Judge overruled the motion, and ordered a nonsuit, and the plaintiff alleged exceptions.

E. F. Webb, for the plaintiff,

On the question of amendment, cited *Moulton* v. *Smith*, 32 Maine, 410; *Moulton* v. *Witherell*, 52 Maine, 237; R. S. c. 82, § 13.

Upon the question of nonsuit, 1 Hilliard on Torts, chap. 111, § 6; *Laflin* v. *Willard*, 16 Pick., 64; *Tuttle* v. *Walker*, 46 Maine, 280; *Harvey* v. *Dunlap*, Hill & Denio, 193; *Wright* v. *Gray*, 2 Bays, 464; *Gibbs* v. *Chase*, 10 Mass., 128; 15 Barb., (N. Y.,) 210. Use of ways, hitching, &c., Angell on Highways, § 312; 3 Scam., (Ill.,) 520; 12 Ill., 29; 3 Yerg., (Tenn.,) 390; Angell on Highways, § 227.

Reuben Foster, for the defendant.

Every interference with the goods of another is not a trespass. 2 Greenl. on Ev., § 622; Chit. on Pl., 172, note; *Cary* v. *Little*, 6 N. H., 213; *Humphrey* v. *Douglass*, 10 Vt., 71; *Wheeldon* v. *Lowell*, 50 Maine, 504; Public's

rights in a highway, *Stackpole* v. *Healey*, 16 Mass., 33; 3 Kent's Com., 533, note a; *Ibid*, 532, note c.

WALTON, J.—Travellers have no right to hitch horses to shade trees. It is well known that most horses have a propensity to gnaw whatever they are hitched to. Hitching posts of the hardest wood have to be capped with iron or they are soon so badly gnawed as to be ruined. Too many beautiful shade trees, planted at great expense and watched for many years with anxious care, have been destroyed by having horses hitched to them, not to know that the practice is exceedingly dangerous. When, therefore, the owner of a shade tree finds a horse hitched to it, he may immediately remove him to a place of safety, and such removal will not be a trespass.

In this case the defendant found a horse hitched to one of his shade trees. He unhitched him and led him a few feet and hitched him to a post set in the ground on purpose to hitch horses to. This was not an act of trespass, and probably the plaintiff would not have complained of it, but for the fact that his horse afterwards broke loose from the post and ran away and broke his wagon. But there is no evidence that the defendant did not use ordinary care in hitching the horse, and the plaintiff's writ does not charge him with negligence; it simply charges him with trespass *vi et armis*, in taking and carrying away the horse, buggy, &c.

The presiding Judge, being of opinion that the action could not be maintained, ordered a nonsuit, to which the plaintiff excepted. We cannot doubt that the nonsuit was rightly ordered.

The plaintiff moved for leave to amend his declaration by inserting a new count charging the defendant with negligence in not hitching the horse securely. Leave was not granted. To this refusal the plaintiff also excepted. Exceptions do not lie to the refusal of a Judge to allow an amendment, unless the bill of exceptions show that he

ruled, as matter of law, that the proposed amendment was one which could not be allowed. The bill of exceptions does not show that he so ruled in this case. It is to be presumed therefore that he ruled, as matter of discretion, not to allow the amendment, because under the circumstances justice would not in his opinion be thereby promoted. To such a ruling, as before stated, exceptions do not lie; and it is not important to determine whether the proposed amendment was one which could legally be made or not.

Exceptions overruled.

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

WILLIAM G. SIBLEY *& als. versus* ANDREW RIDER *& al.*

The validity of a levy having been once tried and determined by a court of competent jurisdiction, the unreversed judgment thereon is conclusive between the parties and their privies.

Where a mortgage of real estate was given to secure the fulfilment of a bond of defeasance, conditioned for the support and maintenance of the mortgagee, and the mortgager's assignee in possession paid and satisfied, within the time limited therein, a conditional judgment rendered upon such mortgage: — *Held*,

1. That the bond and mortgage were thereby completely satisfied;
2. That no action could thereafterwards be maintained upon either;
3. That such payment was equivalent to a redemption;
4. That the legal title thereby became vested in such mortgager's assignee, leaving no equitable rights to be adjusted between the parties; and,
5. That he could maintain a writ of entry against the assignee of the mortgagee in possession.

ON REPORT.

WRIT OF ENTRY.

The plaintiffs claimed title as heirs at law of William Sibley, deceased. The record title stood as follows:—

March, 1843, R. P. Ryder conveyed the premises in mort-

gage, to Jonathrn Ryder, to secure a bond for the maintenance of the latter and his wife during their natural lives.

April, 1846, Isaac Mitchell made a levy upon R. P. Ryder's interest, and took possession under his levy.

April, 1846, Jabez Hutchins received a quitclaim deed of Jonathan Rider's interest in the real estate and bond, through Jonathan Ryder, Jr., to whom Jonathan Ryder had conveyed the same, March 20, 1845.

August, 1847, Jabez Hutchins brought a writ of entry against said Isaac Mitchell, then in possession under his levy, and recovered a conditional judgment, as of mortgage, (the damage in said judgment being for the breach of the bond) which was duly satisfied by the said Mitchell within two months, and while he was in possession. May, 1850, Isaac Mitchell conveyed in mortgage his title to William Sibley, which mortgage was duly foreclosed, July, 1855.

The defendant derived his title from Jonathan Ryder, through Jabez Hutchins, and their grantees.

The return of the levy, *Mitchell* v. *Ryder*, shows that the officer selected an appraiser for the debtor, alleging that the debtor did not reside in the county, without alleging whether or not he had an attorney within the county.

After the evidence was all in, the case was withdrawn from the jury and reported to the full Court, who were to render such judgment as the law and evidence required.

Libbey & Snow, for the plaintiff.

E. F. Pillsbury, for the defendant.

The levy was invalid. *Lumbert* v. *Hill*, 41 Maine, 475.

If Mitchell acquired any title by the levy, it was but an equitable interest, and not sufficient to sustain a writ of entry. The remedy, if any, is in equity. *Eastman* v. *Fletcher*, 45 Maine, 302; *Wilson* v. *Ring*, 40 Maine, 116; *Hill* v. *Moore*, 40 Maine, 515.

The assignment of the bond to Hutchins was in trust to enable him to prosecute the suit againt Mitchell for Rider's

benefit. It did not operate as a discharge of the bond or mortgage.

DICKERSON, J. — Writ of entry. Both parties claim title under R. P. Rider; the plaintiffs, as heirs of William Sibley, deceased, under a levy in favor of Isaac Mitchell, of April 17, 1846, and a mortgage, Mitchell to the said William Sibley, dated May 10, 1850, and duly foreclosed July 30, 1855; and the defendants, under mortgage, R. P. Rider to Jonathan Rider, dated March 29, 1843, and transferred to them through several intermediate conveyances, including one from Jabez Hutchins.

The first mortgage, R. P. Rider to Jonathan Rider, was given to secure the fulfilment of a bond of the same date, R. P. Rider to said Jonathan, conditioned to support the latter and his wife during their natural lives.

In 1846, Jabez Hutchins received a quitclaim deed of Jonathan Rider's interest in the premises, and an assignment of the bond from him. In August, 1847, Hutchins brought a writ of entry against one Isaac Mitchell, then in possession under a levy made April 17, 1846, and duly recorded, on an execution in his favor against R. P. Rider. A conditional judgment, as of mortgage, was rendered for the demandant in that action, which was duly satisfied by the tenant while in possession.

The plaintiffs have acquired whatever rights Mitchell had by virtue of his levy, and satisfaction of the conditional judgment rendered against him; and the defendants have succeeded to the rights of Hutchins.

The effect of the judgment in that suit, and of the satisfaction thereof, are thus brought directly in question. The right of the defendant to a conditional judgment depended solely upon the validity of his levy. If there had been no levy, or if the levy had been invalid, the judgment would have been absolute. This is apparent from the record. The validity of the levy having been once tried, and determined by a Court of competent jurisdiction, the judgment thereon

is conclusive between the parties until it has been reversed. *Walker* v. *Chase*, 53 Maine, 258.

The condition in the mortgage being one of defeasance only, and not one for the performance of covenants and agreements, there can be but one action for the recovery of damages brought on the mortgage. It is not like the case of a mortgage given to secure the payment of certain sums of money by instalments, where an action lies, and a conditional judgment may be rendered for each and every breach of the conditions of the mortgage. The cause of action is entire and indivisible; there is no severance of the damages resulting from a breach of the respective stipulations in the general conditions of the bond; a single breach is a breach of the whole, then and thereafter, and a single recovery is a bar against all subsequent actions for damages. The true measure of damages is a present equivalent for full performance, but, if the parties submit without exceptions to a less sum, the judgment will nevertheless be conclusive. *Philbrook* v. *Burgess*, 52 Maine, 271.

When Jabez Hutchins held both the bond and the mortgage, he brought an action against the plaintiff's grantor, Mitchell, for possession, recovered a conditional judgment against him, and damages for a breach of the conditions of the bond named in the mortgage. This conditional judgment was duly satisfied, while Mitchell remained in possession. This was a complete satisfaction of the bond and mortgage, and no action could thereafterwards be maintained on either. These proceedings, unreversed, were equivalent to a redemption of the mortgage, and divested Hutchins of all right and authority to convey the demanded premises to the defendant's grantor, and vested the legal title in Mitchell, the plaintiff's grantor. There were no equitable rights or interests remaining to be adjusted between the parties; the levy, conditional judgment, and satisfaction, settled these and remitted the assignee of the mortgager to his legal title. The mortgagee had no longer any right to take possession,

and any such entry made by him or his grantee would be treated as the entry of a stranger without right.

Can the grantee of a mortgagee under a quitclaim deed, given after these proceedings, enter upon the premises, and keep the grantee of the mortgager out of possession until he brings a bill in equity against him? This is not the case of a mortgagee entering for conditions broken, and refusing to relinquish possession, after payment of the mortgage debt by the mortgager. In such case the process is by bill in equity, as the mortgager might be liable to the mortgagee for repairs made, while in possession, and the mortgagee might be liable to the mortgager for rents; and the right to demand these, depending upon statute or the rules of equity, can only be enforced under equity process. But this is a case where the mortgage debt was paid in accordance with a judgment of Court before the mortgagee had ever been in possession. A mortgagee, or his grantee, who should enter into possession under such circumstances, would have no claim for disbursements on account of repairs, nor could the mortgager claim rents under a mortgage which was *functus officio* when the mortgagee went into possession. There is, therefore, no call for the exercise of equity powers, and the only judgment a court of equity could render would be the same as that of a court at law. It is contrary to the principles of equity jurisprudence to make a court of equity perform the office of a court of common law. The rule for the interposition of equity ceases with the reason for it.

Our conclusion, therefore is, that the satisfaction of the conditional judgment before the mortgagee went into possession, was a discharge of the mortgage, and that the legal title of the estate is vested in the plaintiffs so as to authorize them to maintain a writ of entry.

Judgment for plaintiffs.

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

RUFUS DWINEL *versus* S. P. BROWN.

In the event of his failure to faithfully "do and perform each and every condition and stipulation expressed in" a certain license and agreement, for carrying on a lumbering operation upon the plaintiff's land, the defendant bound himself in writing to the plaintiff, "in the full and liquidated sum of $1000, over and above the actual damages which the plaintiff might sustain by reason of such non-performance. In an action to recover the $1000: — *Held*, that the sum named was liquidated damages, and recoverable.

Rules for construing contracts with reference to "liquidated damages," "penalties," &c.

ON REPORT.

ASSUMPSIT for the recovery of liquidated damages arising from the non-performance of the defendant's agreement to put teams upon the plaintiff's land and carry on a lumbering operation thereon, and pay an agreed amount for stumpage.

The writ is dated Jan. 6, 1865. The plaintiff introduced the permit or contract signed by the parties, dated Oct. 10, 1860.

The concluding clause of the permit is as follows: —

"And the said grantee hereby agrees with the said grantor to go upon the premises with the said three or more teams well manned and furnished, in due and proper season, and cut and remove timber as aforesaid, and truly and faithfully do and perform each and every condition and stipulation expressed in this license and agreement, hereby binding himself in the full and liquidated sum of one thousand dollars, well and truly to be paid to the said grantor on demand, over and above the actual damage which said grantor may sustain by the non-performance of any agreement hereinbefore contained."

The case was thereupon withdrawn from the jury, to be reported to the full Court, with the agreement that, if the plaintiff is entitled to recover the thousand dollars liquidated damages, defendant was to be defaulted.

J. W. Bradbury, for the plaintiff.

J. Baker, for the defendant,

Cited 3 Parsons on Cont., 161, c. 8, § 2, and cases in note.

DICKERSON, J. — In the event of his failure to "do and perform each and every condition, and stipulation" in a certain license, and agreement for carrying on a lumbering operation upon the plaintiff's land, the defendant bound himself to the plaintiff, "in the full and liquidated sum of one thousand dollars, over and above the actual damage" which the plaintiff might sustain in consequence of such non-performance; and the plaintiff brings this action to recover said sum, as liquidated damages, for the breach of the contract by the defendant.

The question presented for our determination, is whether the sum named in the contract to be paid by the defendant on his failure to fulfil its conditions, is a penalty or liquidated damages.

It is competent for the parties, in making a contract, to leave the damages, arising from a breach of its provisions, to be determined in a court of law, or to specify the amount of such damages in the contract itself. If the contract is silent in respect to damages, the law will allow only the actual, proximate damages. In order, however, to provide for consequential damages, or secure the profits which are expected to arise from business, or contracts that depend upon the performance of the principal contract, or to save expense, or to render certain what would otherwise be difficult, if not impossible to ascertain, it is sometimes desirable that the contract should fix the amount of the damages. If, for instance, a party has a contract for building a ship at a large profit, conditioned upon his having her completed at a specified time, it would be competent for him, in contracting for the materials, to make the damages, in case of breach, sufficient to cover his prospective profits in building the ship. While, to persons unacquainted with the circumstances of the case, the damages stipulated in such a contract might seem greatly disproportionate to the loss sus-

tained by a breach of it, they might, in fact, be insufficient to indemnify the party against the loss he might sustain in being prevented from completing the ship according to his contract. The parties themselves best know what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure, and when they have mutually agreed upon the amount of such damages in good faith, and without illegality, it is as much the duty of the Court to enforce that agreement as it is the other provisions of the contract. As in construing the other parts of a contract, so in giving construction to the stipulation concerning damages, the intention of the parties governs. The inquiry is, what was the understanding of the parties; and when it is said, in judicial parlance, that certain language of the parties *is held* to mean liquidated damages, and certain other language, a penalty, this is affirmed of the intention of the parties, and not of the construction of the Court in contradistinction from such intention. It is the province of the Court to uphold existing contracts, not to make new ones. It is not for the Court to sit in judgment upon the wisdom or folly of the parties in making a contract, when their intention is clearly expressed, and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties, when the contract was made, scan the motives and weigh the considerations which influenced them in the transaction, so as to determine what would have been best for them to do, who was least sagacious, or who drove the best bargain. Courts of common law cannot, like courts where the civil law prevails, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon by the parties. The bargain may be an unfortunate one for the delinquent party, but it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence, where these contracts are free from fraud and illegality.

The controversy in the courts as to whether the particu-

lar language of a contract in regard to damages is to be construed as a penalty, or liquidated damages, arises mainly from a desire to relieve parties from what, under a different construction, is assumed to be an improvident and absurd agreement. When, however, it is considered how little courts can know of the modifying circumstances of the case, how far the particular provision was framed with reference to the personal feelings of the parties, what fluctuations in the market were anticipated at the time, and what effect the contract in question was expected to have upon other business engagements or negotiations, there is, perhaps, less cause for departing from the literal construction of the language used than might, at first view, be supposed. These considerations should at least admonish us that, in straining the language of a contract to prevent a seeming disadvantage to one of the parties, we *may* impose upon the other party the very hardship which both intended to protect him against by the terms of their agreement. The interests of the public are quite as likely to be subserved in maintaining the inviolability of contracts as they are in contriving ways and means to make a contract mean what is not apparent upon the face of it, to save a party from some conjectural inequity growing out of his supposed inadvertence or improvidence.

While entire uniformity of judicial opinion is unattainable upon this controverted question, owing to the liability of the particular tribunal to be influenced, in a greater or less degree, by a desire on the one hand to prevent a supposed hardship, and on the other to give a strict construction to the language of the contract, courts, nevertheless, substantially agree upon the following general principles of interpretation.

1. The words "penalty," "forfeiture," or "liquidated damages" are not conclusive, and the Court will examine the other provisions of the contract, its subject matter, the situation of the parties and the course and usages of trade, as well as this particular language, and gather the intention of the

parties from the whole taken together. If it is impossible, or difficult to compute the actual damages, the use of the word "penalty" will not prevent the Court from regarding the sum named in the contract as liquidated damages. On the other hand, if it would produce manifest wrong, or be clearly absurd to treat the sum named as "liquidated damages," in that light, the use of that term will not conclude the Court from construing it as a penalty. *Fletcher* v. *Dyche*, 2 T. R., 32; *Astley* v. *Weldon*, 2 Bos. & Pul., 346; *Kemble* v. *Farren*, 2 Bing., 141; *Lynde & al.* v. *Thompson*, 2 Allen, 456; *Bagly* v. *Peddie*, 16 N. Y., 469.

2. Generally, if the actual damages can be readily ascertained, or if the intention of the parties is doubtful, the sum named will be deemed a penalty, but if it is clearly the intention of the parties to fix the amount of the damages, the sum specified will be regarded as liquidated damages, though it should seem disproportionate and inequitable. *Chrisdee* v. *Bolton*, 14 Eng. C. L., 547; *Brewster* v. *Edgerly*, 13 N. H., 275; *Clement* v. *Cash*, 21 N. Y., 253.

3. If the instrument provides for the payment of a larger sum, in future to pay a less one, the larger sum will be regarded as a penalty in respect to the excess over the legal interest, whatever be the language used; and if the contract consist of several stipulations, the damages for the breach of which, independently of the sum named in the instrument, are uncertain and cannot well be ascertained, the sum agreed upon is to be treated as liquidated damages. *Orr* v. *Churchill*, 1 H. Bl., 227; *Astley* v. *Weldon*, *ante*; *Mead* v. *Wheeler*, 13 N. H., 351; *Atkyns* v. *Kinnier*, 4 Exch., 776.

In the case last cited, PARKE, B., thus lays down the rule of law where there are several stipulations in the contract, and only one sum named as the measure of damages. "If a party," he observes, "agrees to pay £1000, on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty and not as liquidated damages. But if there be a contract consisting of one or

more stipulations, the breach of which cannot be measured, the parties must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty. In this case there is no pecuniary stipulation for which a sum certain, of less than £1000, is to be paid, but all the stipulations are of uncertain value. Possibly this may have been a very imprudent contract; but with that we have nothing to do. Upon the true construction of the deed, the amount is payable by way of liquidated damages, and not as a penalty."

In the case at bar, the defendant bound himself to the plaintiff "in the full and liquidated sum of one thousand dollars, over and above the actual damage," in the event of his failure "to do and perform each and every condition and stipulation" in his contract. Language can scarcely make the intention of the parties to fix the amount of the damages more clear and emphatic. The sum named is not only "liquidated," but, as if to exclude all possibility of its being a penalty, it is declared to be "over and above the actual damages." Whether it was to afford an additional stimulus to secure the fulfilment of the contract, or to provide against other losses, or compensate for other advantages, contingent upon this contract, or from the difficulty of ascertaining the actual damages or for some other reason, it is manifest that other damages than the legal damages were taken into the account by the parties when they incorporated this provision in their agreement. Besides, the contract contains several distinct conditions and requirements for the non-fulfilment of which, respectively, no sum is specified; and it is impossible to ascertain such damages from the very nature of these stipulations. What actual damages would result to the plaintiff, solely from the defendant's omission to land the logs at a suitable place, or to notify the scaler seasonably, or to mark the logs, or drive them as early as practicable, or to cut clear without waste, or to perform the dozen other stipulations of the contract, is practically beyond the power of a judicial tribunal to as-

certain with anything like accuracy. The case clearly comes within the second clause of the third rule of interpretation, that when parties incorporate several distinct stipulations in a contract, the breach of which cannot be respectively measured, they must be taken to have meant that the sum agreed upon was to be liquidated damages, and not a penalty. That such was the intention of the parties, moreover, as drawn from the particular language of the contract upon this point, cannot admit of a doubt.

According to the agreement of the parties, the defendant is to be defaulted for the sum of one thousand dollars, with interest from the date of the writ.

CUTTING, KENT and DANFORTH, JJ., concurred.

TAPLEY, J., concurred in the result.

APPLETON, C. J., dissenting. — The plaintiff, on 10th Oct., 1860, gave the defendant a permit to cut timber on land owned by him, on certain conditions and stipulations therein expressed. The concluding clause of the permit is in these words: — "And the said grantee hereby agrees with the said grantor to go upon premises with the said three or more teams well manned and furnished, in due and proper season, and cut and remove timber as aforesaid, and truly and faithfully do and perform each and every condition and stipulation expressed in this license and agreement, hereby binding himself *in the full and liquidated sum of one thousand dollars*, well and truly to be paid to the grantor on demand, *over and above the actual damage* which said grantor may sustain by the non-performance of any agreement hereinbefore contained."

The plaintiff claims one thousand dollars as liquidated damages. What are liquidated damages?

In case of a contract, damages are the pecuniary satisfaction to which the injured party is entitled by way of compensation for its breach. Liquidated damages are damages agreed upon by the parties, as and for a compensation for and in lieu of the actual damages arising from such breach.

They may exceed or fall short of the actual damages, —but the sum thus fixed and determined binds the parties to such agreement. When this sum is paid, all damages are paid.

In the case at bar, the sum of one thousand dollars was not liquidated damages. It was not for damages at all. The contract so expressly and unqualifiedly states it. It was a sum "over and above the actual damages." The plaintiff, by its terms, was further entitled to recover "the actual damage" which he might sustain by "the non-performance of any agreement hereinafter contained." Suppose the actual damages were five thousand dollars, would not the plaintiff be entitled to recover that sum? Most assuredly. The actual damages are therefore excluded from the sum of one thousand dollars, and yet remain to be assessed.

It is difficult to conceive of a clearer case of a penalty, than that where a party is required to pay one thousand dollars over and above what he owes. If that is not a penalty, what is or what can be?

The intent of the parties is to be ascertained from the agreement. The mere use of the words "penalty," "forfeiture," or "liquidated damages," is not at all decisive of the question. In *Kemble* v. *Farrar*, 6 Bing., 141, the sum of £1000 was "declared by the parties to be liquidated and ascertained damages, and not a penalty, or penal sum, or in the nature thereof," yet, notwithstanding these sweeping words, the Court, upon an examination of the contract, decided that the sum must be taken to be a penalty, and that it was for the jury to assess the real damages sustained by reason of the breach of the agreement in suit.

Liquidated damages are fixed, settled and agreed upon in advance, to avoid all litigation as to those actually sustained. They are a compensation for and in lieu of actual damages, never in addition thereto. The language of the agreement leaves no room for any other conclusion than that the sum fixed is a penalty. It is not for damages, by the terms of the contract. It is not, therefore, a sum agreed upon in

liquidation of damages,—but is a penalty and so must be regarded.

WALTON and BARROWS, JJ., concurred.

GEORGE MARSTON *versus* OLIVER B. MARSTON *& ux.*

A conveyance made without consideration, and for the purpose of defrauding creditors, is void as well against subsequent as prior creditors of the grantor.

A conveyance being void, the title is regarded as remaining in the fraudulent grantor so far as creditors are concerned, and a judgment creditor, by a levy, acquires such seizin as enables him to maintain a real action against the fraudulent grantor.

The fact that the judgment, on which the levy was based, was founded upon a note given since such fraudulent conveyance, but in renewal of a prior indebtedness, will not affect the rights of the plaintiff in such real action.

ON FACTS AGREED.

APPLETON, C. J.—On 17th Feb., 1857, the defendant, Oliver B. Marston, being the owner of the demanded premises, conveyed the same to his brother Joseph Marston for the consideration of fifteen hundred dollars, as expressed in the deed, for which sum he received the note of Joseph Marston. The same day Joseph Marston deeded the land of which he had thus acquired the title, to Fanny Marston, the wife of Oliver B. Marston, and took back the note he had just given.

The plaintiff was a creditor of Oliver B. Marston prior to these conveyances. They were without consideration, and their obvious purpose and effect was to hinder, delay and defraud creditors, and such purpose and effect could not but have been known to all the parties to these transactions.

Though the plaintiff renewed his original note by taking a new one since these conveyances, it does not affect his

legal rights, for a conveyance made without consideration, and for the purpose of defrauding creditors, is void as well against subsequent as prior creditors of the grantor. *Clark* v. *French*, 23 Maine, 221; *Wyman* v. *Brown*, 50 Maine, 139.

If the conveyances referred to were fraudulent and void as to creditors, the plaintiff might impeach them. Being void, the title is regarded as remaining in the fraudulent grantor, and the judgment creditor by a levy acquires such seizin as enables him to maintain a real action against the fraudulent grantor or grantee.

In cases like *Houston* v. *Jordan*, 35 Maine, 521, *Low* v. *Marco*, 53 Maine, 45, and *Howe* v. *Bishop*, 3 Met., 28, where the legal title was never in the judgment debtor, the creditor does not acquire the legal title by a levy. But in the present case the legal title was in Oliver B. Marston, and his conveyance being fraudulent, the plaintiff by his levy acquired the title. *Defendant defaulted.*

CUTTING, WALTON, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

Bean, for the plaintiff.

Vose, for the defendants.

WILLIAM R. GAY *versus* CITY OF GARDINER.
WILLIAM H. BYRAM *& als. versus* SAME.

If interest upon their verdict can be allowed at all by a jury summoned to assess damages sustained by a land owner by the location of a town way, it can be allowed only from the time when the land was taken and not from the time of location.

When the official return of the person appointed to preside at the view and hearing of such a jury has been made and filed in the Supreme Judicial Court, it must be regarded as conclusive, and no motion for an amendment thereof will be entertained.

On Exceptions.

Verdicts of a jury summoned to assess damages sustained by the plaintiffs, by the location of a town way in the city of Gardiner. The proceedings were under R. S., c. 18, § 12, as amended by c. 39* of the Public Laws of 1866.

Numerous objections were urged by the respondents against the verdicts, but the presiding Judge overruled the several points taken, and confirmed the verdicts, and the respondents alleged exceptions.

The remaining facts are sufficiently stated in the opinion.

J. Baker, for the respondents.

A. Libbey, for the plaintiffs.

Walton, J. — The counsel for respondents requested the person presiding to instruct the jury that they were not to allow interest on the damages they might assess.

"On this point," says Mr. Baker, "I instructed the jury, that they were to assess the damages to the petitioners, as they found them to have been at the time of the location, and to add interest thereto, unless they found by the evidence that the petitioners had, by any act of their own, such as refusing a legal and sufficient tender, forfeited their right to interest."

* Public Laws of 1866, c. 39. — Section 1. In all cases where application has been made to the county commissioners for a jury to assess damages, as provided in c. 18 of the R. S., they shall appoint a person well versed in law to preside at the view and hearing; and if, from any cause, he does not attend at the time and place appointed therefor, the officer who summoned the jury shall adjourn the view and hearing till such person does attend, or another is appointed and attends in his place; and the person so presiding, in addition to the duties prescribed in section twelve of said chapter, shall make a certified report of the evidence introduced before him and return the same to the Court.

Sect. 2. Section thirteen of said chapter is so amended that the Supreme Judicial Court shall receive said verdict and the certificate and report of the person presiding; either party interested therein may file a written motion to set aside said verdict, for the same causes that a verdict rendered in Court may be set aside; the Court shall hear any competent evidence relating to the same, adjudicate thereon, and confirm the verdict, or set it aside for good cause, reserving the right to except as in other cases.

If such an instruction was actually given it was erroneous, and the respondents are entitled to a new trial. If interest could be allowed at all, it would only be allowed from the time when the land was *taken*, and not from the time of the *location*. Till then the owners would have no right to demand payment of their damages, and the respondents would not be in fault for not paying them. In the absence of any express promise or agreement to pay interest, the law does not make a party liable for interest till he is in fault for not paying the principal. R. S., c. 18, § 7.

But it is contended that no such instruction was in fact given,—that the official return of the person who presided at the trial is in this respect erroneous, and that it is competent for the Court to allow him to amend his return.

The person presiding at such a trial is "to decide all questions of law arising on the trial which would be proper for the decision of a Judge, to instruct the jury upon any question of law when requested by either party, and to certify to the Court with the verdict the substance of any decision or instruction by him given, when any party shall request it." R. S., c. 18, § 12.

When such official returns have been made and filed in court we think they must be regarded as conclusive. To hold otherwise, and entertain motions for their amendment would be attended with too many inconveniences to be admitted in practice. The proposed amendment of the return cannot therefore be allowed.

This conclusion makes it unnecessary to consider the other objections made to the acceptance of the verdicts.

Exceptions sustained.— Verdicts set aside.

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

DANFORTH J., did not sit.

NATHANIEL TOBEY, *Adm'r*, *versus* ANDREW MILLER.

In trover by the rightful administrator of an intestate's estate to recover the value of the goods and effects of the estate taken by an executor *de son tort*, the defendant cannot file an account in set-off for the intestate's debts, paid by him since the decease.

But, by virtue of R. S., c. 64, § 32, he may "retain" whatever sums actually paid him, which, if withdrawn from his hands, the rightful administrator or executor would be compelled to pay.

ON EXCEPTIONS.

TROVER for the value of certain goods and effects belonging to the estate of the plaintiff's intestate, alleged to have been taken by the defendant as executor *de son tort*. The defendant, on the first day of the autumn term, filed an account in set-off to the amount of $279,99, in which were included expenses of the last sickness of the intestate, together with the necessary funeral charges, amounting to $102,25.

The presiding Judge instructed the jury, *inter alia*, that the administrator was, in this case, entitled to all the money, property and effects of his intestate, of which she died possessed, and the defendant could not set off in this action any claim that he might have against the estate, for what he applied to the payment of funeral expenses or debts for which the estate might be liable. And if they were satisfied from the evidence that the defendant had converted any property included in the writ, he would be liable for the value thereof at the time of conversion, with interest from the date of the writ.

Verdict was for the plaintiff, for $197,07, and the defendant alleged exceptions.

Wales Hubbard, for the defendant.

A. P. Gould, for the plaintiff.

Prior to R. S. of 1841, "no stranger was allowed to collect debts due the deceased or reimburse himself for the

funeral expenses," he could not settle his own claim. *Adams* v. *Butts*, 16 Pick., 343, 347. This is the duty of the administrator, and he must have the funds with which to do it. 2 Greenl. on Ev., §§ 350, 649.

There is, at common law, a difference between the liability of an executor *de son tort* to the rightful administrator, and his liability to a creditor who sues him as executor. In the former case, the lawful administrator was the intermeddler to disaffirm all the latter's acts and recover the property, that it may be administered according to law. In the latter, the creditor seeks to recover his debt of the intermeddler as executor generally, — alleging him to be executor, — and the allegation cannot be denied. *Mountford* v. *Gibson*, 4 East, 441. In the latter case, he may defend as a rightful administrator, and show that he has fully administered the estate, — while in the former case, he cannot. To allow him to retain and apply the estate wrongfully in his possession, to the payment of his own debts, would affirm his administration *quo ad hoc*. If one creditor may seize enough of the estate to pay his debt, so may another.

Was the common law changed by the statute? Its language is peculiar. It seems based upon the assumption that, but for the statute, he might "retain" the effects for a still larger purpose, and to be intended as a limitation of his powers. If it has any effect, it impliedly grants him rights or powers which he had not before.

A statute in derogation of the common law, without more express terms declaratory of its purpose, ought not to change the common law. The statute implies that the Legislature supposed the law to be as assumed.

But, if it is to be regarded as declaratory of the law upon the subject in this State, it should be restricted to such claims as the administrator "would have to pay" in full, — to preferred claims. "Would have to pay," means would be compelled to pay at all events, whether the estate be solvent or insolvent. The solvency of an estate cannot be deter-

mined until the administrator can get possession of the estate and have it appraised, &c.

Defendant's account embraces all classes of cases. But one claim can be "retained" in any event, viz., the charge for funeral expenses. Expenses for last sickness are affected by the question of solvency. If the estate is insolvent, expenses for last sickness are postponed to certain other claims.

The question of solvency cannot be tried in this action, and the statute must have a construction applicable to all cases.

The retained items of the defendant's account are his own claims against the estate. All claims against an estate must be first adjudicated by somebody, before they can be paid. The administrator primarily adjudicates upon "preferred claims," and upon all claims against a solvent estate, except his own. His own must be passed upon by some officer of the law provided by the statute. Can an intermeddler set aside all these safeguards? See *Adams* v. *Butts*, 16 Pick., on page 347; 2 Greenl. on Ev., § 350, and cases *infra*.

Set-off cannot be filed in this action. 1 Chit. on Plead., 165, 604.

APPLETON, C. J.—This is an action of trover. The plaintiff sues as the rightful administrator on the estate of Catherine B. Miller. The defendant interfered with the estate of the plaintiff's intestate, and is liable as executor *de son tort*. He could not in this form of action file an account in set-off.

When an executor in his own wrong is sued, it is provided by R. S., 1857, c. 64, § 32, that "he shall not be allowed to *retain* any part of the goods or effects, except for such funeral expenses, debts of the deceased or other charges actually paid by him, as the rightful executor or administrator would have to pay." That is, he is permitted to retain to the extent indicated. The word *retain* was used to protect the defendant, whatever may be the form of the action when

sounding in damages, by enabling him to retain what, if not paid by him the administrator or executor would have been compelled to pay.

Nor is this provision materially different in its spirit from the common law. The executor is entitled to deduct reasonable funeral expenses from the assets that come into his hands. *Yardly* v. *Arnold*, 41 E. C. L., 239. Where the rightful executor or administrator sues the executor *de son tort*, if the action "be trover for the goods of the deceased, the defendant," observes BUCHANAN, C. J., in *Glenn* v. *Smith*, 2 Gill. & Johns., 493, "cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debts. But, on the general issue pleaded, he may give in evidence such payments, and they will be *recouped* in damages, if they be such as the plaintiff would have been bound to make, or, in the language of some of the books, made in due course of administration. Carth., 104; Bull., N. P., 48; 2 Black. Com., 507; *Mountford* v. *Gibson*, 4 East, 441; *Parker* v. *Kelt*, 12 Mod., 471." This recoupment is allowed when the debts are just and there is no deficiency of assets.

The plaintiff, as administrator, after first making provision for the expenses of administration, if there be a sufficiency of assets, is bound to pay the expenses of the last sickness of his intestate and the necessary funeral charges. These amount, in all, to one hundred and two dollars and twenty-five cents. If the plaintiff will remit this amount, with interest from the death of his intestate, the verdict is to stand for the remainder, otherwise the exceptions must be sustained.

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

WILLARD LEWIS *& al. versus* THOMAS W. CHADBOURNE.*

Seamen in the mackerel fishery, in the absence of any express contract, are neither partners in, nor part owners of the fish caught during a mackerel voyage.

They have only a pecuniary claim to the proceeds.

ON REPORT.

CASE against the defendant, as sheriff of the county of Lincoln, for the default of his deputy, in not keeping property attached, so that it might be seized and sold on execution.

APPLETON, C. J.—The plaintiffs having sued out a writ against one Dexter Lewis, caused an attachment to be made by Thomas Boyd, a deputy of the defendant, of the debtor's interest or share "in a fare of mackerel caught in the schooner Astoria." Judgment having been rendered in that suit, the execution thereupon issuing was placed in the hands of William Cunningham, a deputy sheriff of Lincoln county, by whom a demand was seasonably made upon the officer serving the original writ, for the property thereon attached. Nothing having been surrendered upon this demand, this action is brought against the defendant for the default of his deputy, in not keeping the property attached, so that it could be given up to the officer having the execution, to be by him seized and sold according to law.

If Dexter Lewis had been a sailor for specific wages payable in money, it is obvious enough that he would have had no attachable interest in the mackerel caught upon the voyage.

The general custom, it seems, is for sailors in the mackerel fishery to go on shares. The owners of the vessel have the mackerel, which they or their agents sell, and, after deducting the advances to and the outfits of each, the balance of the share remaining is paid in money. If such was not

* This case has come into the possession of the present Reporter since the issuing of vol. 53.

the bargain, the evidence fails to disclose any interest belonging to Dexter Lewis which could be attached on the writ or sold on the execution. If such was the bargain, the inquiry arises what, if any, interest in "the fare" was attached.

In whaling voyages the sailors usually have a certain lay or share in the proceeds as wages. Their compensation is therefore contingent and dependent upon their success. But they are never regarded as partners, though they may participate in the profits of the voyage. *Reed* v. *Canfield*, 1 Sum., 195; *Mine* v. *Glennie*, 4 M. & S., 240; *Coffin* v. *Jenkins*, 3 Sum., 112. Neither are they tenants in common of what may be caught. *Bishop* v. *Shepherd*, 23 Pick., 492. *The Crusader*, Ware's Rep., 448. Nor can officers and crew join with the owners in a suit for the recovery of the proceeds of the voyage. *Grozier* v. *Atwood*, 4 Pick., 234.

"The men, by their original contract, had no right to their proportion of the oil, and to take it to themselves, but the whole was to be sold, and they were to have their share of the proceeds." *Barney* v. *Coffin*, 3 Pick., 123. The owners of the vessel and the projectors of the voyage are the owners of the product of the voyage. *Baxter* v. *Rodman*, 3 Pick., 439. "The crews claim," observes SPRAGUE, J., in *Taber* v. *Tenney*, Sprague's Rep., 322, "is to a share of the proceeds of the voyage; and they have no property in the oil itself. The contract is, that, out of the proceeds when realized, they shall be paid according to their lays."

It is clear that, in voyages of this description, the sailor has no property in the products of the voyage which can be specifically attached. An officer has therefore no right to attach, for, as is determined in the case last cited, "a seaman in the whale fishery has no property in the oil or bone taken." *Rice* v. *Austin*, 17 Mass., 206.

Now if a similar custom exists in the mackerel fishery, similar results must ensue. Nobody ever supposed that seamen in the mackerel fishery were liable for the debts of the ship or the outfits of the voyage. They are neither

partners in nor part owners of the fish caught. The owners, in the one species of fishery, as well as the other, furnish all the stores, provisions and outfits, and the crew are paid according to the success of the enterprise. "I think," observes SPRAGUE, J., in *Knight* v. *Parsons*, Sprague's Rep., 279, "that, under this contract, the crew are rather to be deemed hired seamen than partners or joint contractors. It has long been decided that, in the whale fishery, the crew have no specific property in the oil, but only a right to the proceeds of the oil; and the contract, in this case, seems to give the owners the right to sell the fish, and the crew have only a pecuniary claim, calculated upon the amount of fish caught."

It is clear, therefore, that the plaintiffs acquired no rights by the supposed attachment of Boyd, and that consequently this action cannot be maintained.

It seems, in whaling voyages, that, if an officer or seaman prefers to have his share in oil specifically, he will be allowed to do so; "but even in this case," remarks SHAW, C. J., in *Bishop* v. *Shepherd*, 23 Pick., 492, "it is clear that he has no property in the oil, until separation and delivery." But, before a seaman would have a right to his specifie share of such oil, he should tender the amount due the owners for his proportion of the outfit and advances. Until this was done he could neither equitably nor legally claim a division. *Wait* v. *Gibbs*, 7 Pick., 145.

But, in the present case, there has been no tender of the judgment debtor's proportion of the outfit and advances, nor any division of the mackerel, nor any proof that they were agreed to be specifically divided, nor that it was the wish of any one that they should be so divided.

Plaintiffs nonsuit.

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

Ingalls & Smith, for the plaintiffs.

Wales Hubbard, for the defendant.

WILLIAM K. LANCEY *versus* JOHN B. CLIFFORD *& al.*

The common law allows the owner of the soil over which a floatable but innavigable stream flows, to build a dam across it and erect a mill thereon, provided he constructs a convenient and suitable passage-way for the public, by or through his dam.

In case, for delaying plaintiff's timber in consequence of such a dam built on defendants' land, across such a stream, proof that the place was suitable for a mill-site, had been used as such for many years, that the dam was built for the purpose of raising water for working water mills, and that, when the dam was built, a suitable sluiceway was constructed in a suitable place, and kept in proper condition, during the time embraced in the plaintiff's declaration, will constitute a valid defence.

It is not necessary that the erection of the mill precede the construction of the dam; but, if the latter was built at a suitable place and for the purpose of raising the water to propel a mill to be subsequently erected there, it is sufficient.

ON REPORT.

CASE, for building a dam across the Sebasticook river, in the town of Benton, whereby the plaintiff alleged he was prevented from floating his logs to market. When the plaintiff's evidence was all in, the defendants offered to prove each of the following propositions: —

That they, in connection with one Asher Hinds were, at the time of the erection of said dam, and during all the time embraced in the plaintiff's declaration, the lawful owners of the land where said dam was erected.

That the stream upon and across which it was erected and maintained was not navigable for vessels or boats of any description.

That said dam was erected for the purpose of raising water for working water-mills; and that the erection of said water-mills was delayed, by reason of portions of the dam having been carried away by freshets.

That the place was suitable for the erection of water-mills and a dam; and had been used and occupied as such for more than fifty years prior to 1840.

That a sluice suitable for running logs, rafts and other

lumber through and by said dam, was by them constructed at the time the dam was erected, and in a suitable place, and kept in proper condition by them during the time embraced in the plaintiff's declaration,

And they also offered to prove the direct effects of the dam upon the stream above, for two miles, in improving the stream and increasing the facilities for running and driving logs and other lumber.

The presiding Judge ruled that neither nor all of these facts offered to be proved, if proved as proposed, would be a defence to the action.

Thereupon a default was entered, with an agreement that, if the ruling was right, the default to stand, and damages to be assessed, as by agreement; otherwise, the default to be stricken off and a new trial granted.

A. Libbey, for the plaintiff.

1. Defendants not protected by the mill Act, R. S. of 1841, c. 126, § 1. Defendants erected no mill, and have never used the dam for the purpose of raising water to work a mill. One cannot thus erect and maintain a dam for a series of years. He must have his mill and then he may maintain a dam to raise water sufficient to work it. A complaint for flowage would not lie against him. *Purrington* v. *Blish*, 14 Maine, 423.

2. The proof offered by defendants is not sufficient to constitute a defence. If all set out in a plea in bar it would not be good. "All hindrances or obstructions to *navigation*, without direct authority of the Legislature, are public nuisances." "The same principle must apply when the river is not navigable in the strict sense in which the word is used in the common law. A dam which *impedes* the rights of the public in floating logs in a stream in which they can be floated in its natural state, must, for the same reasons, be held *pro tanto* a nuisance." *Knox* v. *Chaloner*, 42 Maine, 156; *Veazie* v. *Dwinel*, 50 Maine, 486. No proof in this case that the dam with the sluice did not *impede* the rights of

the public, or did not unreasonably obstruct such use. It might have originally been constructed in such manner, but, after portions were carried away, as defendants' offers assert, there may have been no water running over sluice. All that the defendants offer may be true, and still the action stand.

J. S. Abbott, for the defendants.

DICKERSON, J. — Case, for erecting a dam across the Sebasticook river, in the town of Benton, whereby the plaintiff was prevented from using the same, as a highway, for floating his logs.

After the plaintiff had closed his testimony, the defendants offered to prove certain propositions, but the presiding Judge ruled that the evidence offered would not constitute a defence to the action; and thereupon a default was entered, and the defendants excepted. The exceptions raise the single question of law, whether the evidence offered would be a valid defence to the action.

A stream which, in its natural condition, is capable of being used for floating logs, lumber and rafts, is subject to the public use, as a highway, though it be private property, and not strictly navigable. This right of the public, however, must be exercised in a reasonable manner, since each person has an equal right with every other person to its enjoyment, and the enjoyment of it by one, necessarily, to a certain extent, interferes with its exercise by another. What constitutes reasonable use by the public depends upon the circumstances of each particular case, as the occasions for the use are so numerous and diverse that no positive rule can be laid down to regulate it, in every instance, with anything like entire precision. The various purposes for which such a highway is used by the public, whether for transporting merchandize, rafting, driving or booming logs, or securing them at the mill, afterwards, if necessary, require so much space as temporarily to obstruct the way; but, if

parties so conduct themselves in this business as to discommode others as little as is reasonably practicable, the law holds them harmless. If the rule of law was otherwise, the right of way, in many cases, could not be made available for any useful purpose. *Brown* v. *Chadbourn*, 31 Maine, 9; *Davis* v. *Winslow*, 51 Maine, 264.

As respects the rights of the land owner to streams, it is to be observed that, while he has a property in the *stream*, he has no property in the *water* itself, aside from that which is necessary for the gratification of his natural or ordinary wants. All the rest of the water is *publici juris; aqua curret et debet currere ut currere solebat.* The right of enjoying this flow without disturbance, interference or material diminution by any other proprietor, is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself, without molestation from his neighbors. The right of property is in the right to use the flow, and not in the specific water. Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality, or detain it so as to deprive other proprietors, or the public, of a fair and reasonable participation in its benefits. *Race* v. *Word*, 30 E. C. L. & Eq., 187; *Johnson* v. *Jordon*, 2 Met., 234; *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch., 282; *Tyler* v. *Wilkinson*, 4 Mason, 397.

This rule does not require that there shall be no diminution, abstraction, or detention whatever, by the upper or lower riparian proprietor, as that would be to prevent all reasonable use of it. The same principle in regard to use, by the riparian proprietors, applies, as in the public use of the stream as a highway; it must be a reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who have an equal right to its use. Reasonable use is the touchstone for determining the rights of the respective parties.

Thus, in considering this subject, we find the public right

of way over the stream, and the land owner's right of soil under it, and his right to use its flow. The rights of both these parties are necessary for the purposes of commerce, agriculture, and manufactures. The products of the forest would be of little value if the riparian proprietors have no right to raise the water by dams and erect mills for the manufacture of these products into lumber. The right to use the water of such streams for milling purposes, is as necessary as the right of transportation. Indeed, it is this consideration that oftentimes imparts the chief value to the estate of the riparian proprietors, and without which it would have no value whatever in many instances. Each right is the handmaid of civilization; and neither can be exercised without, in some degree, impairing the other. This conflict of rights, therefore, must be reconciled.

The common law, in its wonderful adaptation to the vicissitudes of human affairs, and to promote the comfort and convenience of men, as unfolded in the progress of society, furnishes a solution of this difficulty, by allowing the owner of the soil over which a *floatable* stream, which is not technically navigable, passes, to build a dam across it, and erect a mill thereon, *provided* he furnishes a convenient and suitable sluice or passage-way for the public, by or through his erections. In this way both these rights may be exercised without substantial prejudice or inconvenience.

In *Brown* v. *Chadbourn*, before cited, which was an action on the case, to recover damages and expenses in getting the plaintiff's logs by the defendant's dam, the Court say,—"the defendant could, by law, erect and continue his dam and mills, but was bound to provide a way of passage for the plaintiff's logs." So, in *Knox* v. *Chaloner*, 42 Maine, 157, the Court affirm the same principle, and hold that "the right of passage remains in the public, for which the mill owner must make suitable provision at his peril." Again, in *Veazie* v. *Dwinel*, 50 Maine, 487, RICE, J., observes, and the Court held that, "while the mill proprietor may erect and maintain his dam, he must, at the same time, keep

open, for the use of the public, a convenient and suitable passage-way through or by his dam."

Upon the principles of these authorities, the evidence offered by the defendants, that the Sebasticook river was not navigable, that they owned the land where the dam was built, that the place was suitable for a mill site, and had been used as such for many years, and that "the dam was erected for the purpose of raising water for working water mills," would clearly establish their right to erect and maintain their dam and mills, provided they furnished a suitable passage-way around them.

We think that this condition was complied with in the offer of the defendants to prove that "a sluiceway suitable for running logs, rafts and other lumber, was by them constructed at the time the dam was erected, and in a suitable place, and kept in proper condition by them during the time embraced in the plaintiff's declaration." If such a state of facts existed, there was no nuisance; the plaintiff was protected in the reasonable exercise of his right of way, and the defendants exercised their right to build the dam, in a reasonable manner. The suitableness of the dam negatives the idea of a nuisance. If the sluiceway was a suitable one, it did not, in legal contemplation, constitute an unreasonable obstruction to the enjoyment of the plaintiff's easement. It was not necessary that the erection of the mill should precede the construction of the dam; the latter properly preceded the former. It was sufficient if the dam was built at a place suitable for a mill site, and for the purpose of raising the water to propel a mill to be subsequently erected thereon.

We think that the evidence offered by the defendants constitutes a valid defence to the action, and that the exceptions must be sustained, the default stricken off, and the case must stand for trial.

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

KENT, J., did not sit.

INHABITANTS OF SOLON *versus* JOSEPH PERRY.

It is discretionary with the overseers of the poor of a town in which there is a county jail, whether or not they will exercise the authority vested in them by R. S., c. 24, § 26, by setting "to work, so far as is necessary for his support, any debtor committed, and then chargeable to any town in the State for his support."

And when a town in which a jail is situated, upon finding a debtor therein, actually destitute and in distress, has paid said debtor's board, and, after due notice, recovered the same of the town in which the debtor has his legal settlement, the latter town, by virtue of R. S., c. 24, § 26, may, in an action of assumpsit, recover the expenses thus incurred, "of the creditor, at whose suit the debtor was committed, at the rate fixed by law for his support."

Courts are liberal in allowing amendments to declarations when the "person and case can be rightly understood:" And the allowance or disallowance of such amendments is a matter of discretion.

ON FACTS AGREED.

ASSUMPSIT by a town, in which a poor debtor in jail on execution had his legal settlement, against the creditor, at whose suit the debtor was committed, to recover for the board of the debtor during his confinement.

The writ originally contained a count of *indebitatus* assumpsit on an account annexed, and another for money paid by the plaintiffs for the use of the defendant, at his request. Under a general leave to amend, the plaintiffs annexed a special count setting forth all the facts, and another for twenty-one dollars, for so much money paid at defendant's request to the town of Norridgewock for the support of a debtor, (named,) from Dec. 26, 1865, to Feb. 14, 1866, whose settlement was then in the plaintiff town, and who was confined in jail in Norridgewock, by virtue of an execution in favor of the defendant, in consideration whereof the defendant promised, &c., to which the defendant seasonably objected and the objection was overruled.

The Court were to decide upon the admissibility of the

amendment, and to enter such judgment as the law and facts required.

O. R. Batcheller, for the plaintiffs,

On the question of amendment, cited R. S., c. 82, § 10; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Herrick* v. *Osborne*, 39 Maine, 231.

On the question of recovery, *Norridgewock* v. *Solon*, 49 Maine, 385; R. S., c. 24, § 26.

N. M. Whitmore, 2*d*, for the defendant.

Original count was *indebitatus assumpsit* upon account annexed; the amended count is upon a statute.

1. It does not appear that the alleged pauper was destitute; this condition precedent to Norridgewock's right of recovery against Solon. The *onus* is upon the party affirming a destitution. *Bangor* v. *Hampden*, 41 Maine, 484; *Norridgewock* v. *Solon*, 49 Maine, 385; *Clinton* v. *Benton*, 49 Maine, 550.

On the question of destitution, as between the town of settlement and the creditor, the town must satisfactorily show that they have made a careful investigation into the alleged pauper's means, and that the debtor cannot support himself, or the town collect pay for his support from the debtor. A town should not be allowed to collect pay for the support of one of its townsmen, or for one having his settlement there, against a stranger because he is his creditor, until they have produced the most satisfactory proof that the debtor is a pauper literally.

Debtor was not a pauper, and Norridgewock paid direct to jailer without investigation.

2. Obligation of creditor is conditional. It does not affirmatively appear that Norridgewock tried to set the debtor to work. R. S., c. 24, § 26. *May* means *must* in this statute.

3. The remedy should be case, and not assumpsit. *Sanford* v. *Haskell*, 50 Maine, 86. Assumpsit for pauper support is limited. R. S., c. 24, § 34.

APPLETON, C. J. — It is admitted, in this case, that Samuel Eaton was legally committed to the jail in Norridgewock in the county of Somerset, on an execution against him and in favor of the defendant, Joseph Perry. The committal was on 26th Dec., 1865, and the debtor refusing to pay his board, to make the statement that he was unable to pay it, to support himself or to furnish security for his support, the jailer immediately notified the overseers of the poor of Norridgewock and claimed of them pay for said Eaton's board. The town of Norridgewock seasonably gave the plaintiff town, in which Eaton had his settlement, due notice of these facts.

The town of Norridgewock paid the jailer for the board of Eaton until April, 1866, when he was discharged. They then brought their action and recovered judgment against the plaintiffs for the amount by them paid. *Norridgewock* v. *Solon*, 49 Maine, 385.

The plaintiffs, having paid the amount recovered against them, bring this action against the defendant for the amount so paid, under the provisions of R. S., 1857, c. 24, § 26, by which "the town where he (the debtor committed) has his settlement is liable to pay the expenses incurred, not so paid by him; and the town incurring them may recover the same of the creditor, at whose suit he was committed, at the rate fixed by law for his support."

It is manifest that the jailer could not have maintained an action under R. S., 1857, c. 113, § 51, because the debtor did not make "a written complaint, by him signed and sworn to, stating that he is unable to support himself in jail, and has not sufficient property to furnish security for his support," &c.

It is objected that the plaintiffs cannot recover because Eaton was not a pauper. But he was in jail, deprived of his liberty, and without apparent means. It was a matter of discretion, with the overseers of the town of Norridgewock, whether or not they should set him "to work so far as necessary for his support." He was actually destitute and in

distress, and, in such case, it was the duty of the overseers of the poor, in the town in which he was so found, to relieve him, and, relieving him, they are entitled to recover for the amount furnished, against the town in which the person thus committed has his legal settlement. *Norridgewock* v. *Solon*, 49 Maine, 385.

Assumpsit is the proper form of action in pauper cases. It lies on an implied promise to discharge a legal obligation created by statute. *Bath* v. *Freeport*, 5 Mass., 327. So, assumpsit upon an implied promise will lie by a creditor to recover of his debtor the amount he has paid the jailer for his board while imprisoned on the creditor's execution. *Plummer* v. *Sherman*, 29 Maine, 555; *Spring* v. *Davis*, 36 Maine, 399.

By the writ, as originally drawn, "the person and case can be rightly understood." R. S., 1857, c. 82, § 10. Courts are liberal in the allowance of amendments for the furtherance of justice. The amendments proposed were allowed by the Court. Their allowance or disallowance was a matter of discretion. *Judgment for the plaintiff.*

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

CLEOPAS BOYD *versus* CYRUS BARTLETT.

If, to an action upon a promissory note, given by the defendant to the plaintiff, the former file an account in set-off, the plaintiff may, by virtue of R. S., c. 82, § 55,* in turn, file and prove an account in set-off to the defendant's demands.

There being no prescribed limitation as to the time for the plaintiff to file such an account, it should be received under such conditions as will effectually protect the defendant against surprise.

ON EXCEPTIONS from *Nisi Prius.*

The material facts appear in the opinion.

* See opinion.

D. D. Stewart, in support of the exceptions.

J. Crosby, *contra*.

The law will not appropriate independent claims in payment of each other. *Nason* v. *McCulloch*, 31 Maine, 158. To allow plaintiff to file and prove his account against defendant, in order to rebut defendant's evidence that plaintiff agreed to allow defendant's account in payment of the note declared on, would admit evidence too remote. The most that could be said of it would be, that it might tend to show that it was not for plaintiff's interest so to agree. Parties are judges of their interests and of their inducements to make agreements. *Hilton* v. *Scarborough*, 5 Gray, 422; *Aldrich* v. *Pelham*, 1 Gray, 510; 1 Greenl. on Ev., §§ 52, 448; *Low* v. *Worcester*, 3 Pick., 462; *Ellis* v. *Short*, 21 Pick., 142; 1 Starkie on Ev., 40.

APPLETON, C. J. — This is an action upon a note of hand signed by the defendant, who filed notes of the plaintiff to himself in set-off, — and an account likewise, which he "claimed should be applied in payment."

The case finds that "the plaintiff asked leave to prove, and proposed to offer evidence, that he had an account against the defendant, and claimed that he had a right to offer evidence of his account to rebut the defendant's account, and also as proper evidence bearing upon the question whether there was any agreement between the parties as to the payment of the note by the plaintiff's account. The defendant testified that there was an agreement on the part of the plaintiff that the account should be applied in payment of the note. The plaintiff testified there was no such agreement. The defendant introduced evidence tending to show such an agreement. The defendant admitted, upon cross-examination, that the plaintiff had an account against him. The plaintiff then offered to prove the items of such account for the purposes before stated; such account and the items thereof being of many years standing. The pre-

siding Judge excluded the evidence of the plaintiff's account."

If the account filed by the defendant was paid by the plaintiff's account against him, then the note in suit would be due, except so far as the amount should be reduced by the notes filed in set-off. The plaintiff claimed to show that the account in set-off was paid by his account against the defendant and, consequently, that it was not and could not have been in payment of the note in suit.

That it was competent for the plaintiff to prove the payment of the defendant's account filed in set-off by his own account, if such was the fact, cannot be doubted.

By R. S., 1857, c. 82, § 4, "demands between plaintiff and defendant may be set off against each other."

By § 55, the trial may proceed in cases of set-off on issue joined without a plea of set-off; and, if an issue is not otherwise formed, the defendant may, except in actions of assumpsit, plead that he does not owe the sum demanded; and the plaintiff will be entitled to every defence, that he might have, by any form of pleading, to an action against him on the same demand."

The section authorizes the use of every defence to the account in set-off that the plaintiff might have by any form of pleading, had an action been brought against him in this demand. By § 46, "the defendant * * must file a brief statement of his demand in substance as certain as on a declaration, which, by leave of Court, may be amended. This is to be regarded in substance as a plea of set-off. The same right of set-off which the defendant has against the plaintiff's claim, the plaintiff may have against the set-off. There is no provision by statute and no rule of Court prescribing the time within which the plaintiff should file his accounts against the defendant's set-off. But, because there is no such statutory enactment, and no rule of Court, the plaintiff should not be deprived of any valid defence he may have to the defendant's claim in set-off. This would be to

annul the statute. The plaintiff's account, if proved, would constitute a defence *pro tanto* to the defendant's account, and it should have been received — and, received under such conditions as would effectually protect the defendant against surprise and enable him to be fully prepared to meet it.

The provision under consideration is most consonant with equity. In *Galligan* v. *Farnum*, 9 Allen, 192, it was held, under the provisions of a statute similar to that to which we have referred, that if the defendant files a set-off, the plaintiff in answer to the declaration in set-off, may, in his turn, file a set-off to the defendant's demands.

It is but just that the plaintiff should be permitted to file and prove his account in answer to the defendant's set-off. *Exceptions sustained.*

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

CUTTING, J. — I concur in the result, on the ground that the evidence was admissible as tending to show the improbability of the defendant's account being received in payment of the note in suit, when the plaintiff had a cotemporaneous account against the defendant.

AVA E. REED *& als., Pet'rs, versus* MARY FOSTER, *Adm'x.*

The heirs of the intestate have no right of appeal from the decree of the Judge of Probate accepting the report of commissioners appointed under c. 115 of the Public Laws of 1859.

ON EXCEPTIONS.

PETITION, under R. S., c. 63, §§ 19 & 21, by the heirs of Joseph Foster, for leave to enter and prosecute an appeal from a decree of the Judge of Probate for the county of Sagadahoc, accepting the report of commissioners appointed

under c. 115 of the Public Laws of 1859, allowing a claim against the estate of said Foster, under administration.

It appeared that the defendant, by petition, represented to the Judge of Probate that a claim which she deemed unjust had been made against the estate of her intestate, and requested the appointment of commissioners under said c. 115, to determine the amount to be allowed upon such claim. Thereupon commissioners were appointed whose report was returned to and accepted by the Probate Court. The petitioners alleged that they had no notice until it was too late for them to enter an appeal. The administratrix (defendant) was notified of the pendency of this petition, by an order of Court. The presiding Judge dismissed the petition for want of proper parties and the petitioners alleged exceptions.

Orr, for the petitioners.

F. Adams, for the respondent.

Barrows, J. — The petitioners, if their interests are likely to suffer by reason of any misdoings of the commissioners, or of the administratrix, have evidently mistaken their remedy. To the proceedings before the Judge of Probate, under c. 115 of the laws of 1859, the only legal parties were *the claimant*, or claimants, and *the administratrix*, representing the estate and the rights of these petitioners (with others) therein.

No other persons are entitled to an appeal in such case, because the rights of no others are *directly* affected by the proceedings. Thus, the several heirs of a residuary legatee are not entitled to appeal from a decree allowing the account of an executor, but the appeal should be made by the administrator of the residuary legatee, he being the person directly entitled to receive that which is finally to be distributed among the heirs of the residuary legatee. *Downing* v. *Porter*, 9 Mass., 386.

If the administratrix has collusively or negligently failed

to claim an appeal, in a case where her duty to the estate which she represents required it, the remedy of those interested in the estate would be by suit upon her bond. Such failure could not authorize an appeal by persons other than the parties to the proceeding. So that this petition must, in any case, have been dismissed, even had the claimant (who was the party in interest opposed to the heirs) been notified of its pendency. And, manifestly, notice to the administratrix, whose legal interest was identical with that of the heirs, was insufficient to authorize any further proceedings upon the petition. *Exceptions overruled.*

Petition dismissed with costs for the respondent.

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

STATE *versus* SANFORD DELANO.

The payment of the U. S. revenue tax upon intoxicating liquors of domestic manufacture, together with a license from the U. S. collector, will not justify the sale of such liquors in this State, in violation of the laws thereof.

ON EXCEPTIONS.

Indictment for being a common seller of intoxicating liquors.

Respondent put in his license to sell.

Plea not guilty. The jury found a general verdict of guilty, and specially that the "ale and whiskey sold by the respondent were manufactured in the United States, and that the U. S. revenue tax had been paid on them."

The presiding Judge held that the license and payment of the revenue tax constituted no defence, and the defendant alleged exceptions.

A. P. Gould, in support of the exceptions.

The payment of the duty imposed by the U. S. statute, 1864, by the defendant, as the jury have specially found, gave him the right to dispose of the property. *Brown* v. *State of Maryland*, 12 Wheaton, 419, 442; 7 Curtis, 262. See Constitution of U. S., art. 1, § 8, (1.) Internal Revenue Act, June 30, 1864, §§ 55, 64.

This statute was passed since the Maine Liquor Law, and, as the Congress of the U. S. had paramount authority, the Act of 1864 supersedes the State law.

The State has no power to prohibit absolutely, the party, who has paid the duty of the U. S. government upon a commodity in his possession, from disposing of it.

It does not appear that the form of the packages had been changed after the payment of the duty. So far as it appears they were in the same condition at the time of sale, as when the duty was paid by him. If he sold them at all, he would become a common seller. To bring the case within the exception of *Brown* v. *Maryland*, the State should have shown that the packages had been broken and become mingled with the general goods of the State.

J. A. Peters, Attorney General, contra.

WALTON, J.—The question is whether payment of the United States excise tax, and a license from the United States internal revenue collector, will justify the sale of intoxicating liquors of domestic manufacture, in this State, in violation of the laws thereof.

For the defendant, it is contended that the State has no power to prohibit absolutely the sale of a commodity by one who has paid the United States excise tax upon it.

We hold otherwise. The revenue laws of the United States expressly provide, that no license shall, if granted, be held to exempt any person carrying on the business specified in the license, from any penalty or punishment provided by the laws of any State, for carrying on such business within such State. Is it reasonable to suppose that the pay-

ment of an excise tax will create an exemption from State penalties, when an express license to do an act will have no such effect? We think not. Neither the payment of the United States excise tax, nor a license from the United States internal revenue collector, will justify the sale of intoxicating liquors, in this State, in violation of the laws thereof. It was never the intention of Congress that the revenue laws should have any such effect. The sole purpose was to raise revenue, not to interfere with or control the domestic affairs of the States. (See 10 Allen, 200.)

Exceptions overruled.—Judgment for the State.

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

ROWLAND JACOBS *& al., in Equity, versus* LEROY COPELAND *& al., & Trustees.*

In a trustee suit, the Court will not entertain a motion for a dismissal of the action, filed, on the eighth day of the second term, *suo motu*, or at the instance of his clients, in behalf of the trustees, by the attorney of the principal defendants, the trustees having counsel of their own who had prepared their disclosure.

Nor a motion for a discharge of the trustees upon their disclosure, filed under the same circumstances and by the same attorney.

ON EXCEPTIONS.

BILL IN EQUITY inserted in a trustee process, in which several persons therein named were summoned to answer as being trustees of the principal defendants.

On the eighth day of the second term, the principal defendants, by their attorney, appeared and filed a written motion praying that the "bill be dismissed as to said trustees," or "that said trustees be discharged from said process," for the reasons therein set forth. The presiding Judge inquired of the moving counsel if he appeared as the attorney of the

alleged trustees. He answered, that he had no authority from the alleged trustees themselves to answer for them. Whereupon the presiding Judge ruled, as matter of law, that the motion could not be entertained.

It appearing that one of the alleged trustees had appeared and filed his disclosure, disclosing his indebtedness to the principal defendants severally, in several sums, amounting to more than $6000, without asking to be discharged, or making any defence, the same counsel moved that said alleged trustee be discharged on his disclosure, which motion the presiding Judge declined to entertain for the same reason.

It appeared that E. Wilson, a counsellor of this county, had appeared for the alleged trustee and filed his disclosure, but was not present when the above motion was made.

The defendants excepted.

Ruggles & Howes, for the defendant.

A. P. Gould, for the complainants.

APPLETON, C. J.—This is a bill in equity inserted in a trustee writ. The counsel for the respondents filed a motion that the bill be dismissed as to the trustees. This motion was filed on the eighth day of the second term after the entry of the bill.

The fact asserted in and by the motion constitutes no bar to the plaintiffs' claim for relief. If it did, it should be embodied in the answer.

If it is to be regarded as a matter in abatement, it was not seasonably filed.

If it were otherwise, it is not perceived that the defendants or their attorney have any right to intervene in this way on behalf of the trustees. Persons summoned as trustees of the principal defendant are parties to the suit. *Dennison* v. *Benner*, 36 Maine, 227. The trustees appeared by counsel of their own selection. Their rights are separate and distinct from those of the principal defendants. They may well claim to be heard as to any adjudication affecting

those rights. They have presented no question for our decision. The ruling at *Nisi Prius*, that the attorney for the principal defendants had no right to appear *suo motu*, or at the instance of *his* clients, in behalf of the trustees, was correct, the trustees having their own counsel, whose name was on the docket, and by whom their disclosure had been prepared.

Upon the disclosure of the trustees, it will then be for us to consider, whether they can be legally summoned and adjudged trustees when the proceedings are on the equity side of the Court. *Exceptions overruled.*

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

SCHOOL DISTRICT NO. 6, IN DRESDEN, *versus* ÆTNA INS. COMPANY.

By R. S., c. 11, § 22, a school district, at any legal meeting called for the purpose, shall have power "to sell and dispose of any school-house or other property, if necessary."

A school district is the exclusive and final judge of the necessity of a sale of its school-house.

If a school district would rescind a sale of its school-house, on the ground of fraud between its selling committee and the purchasers, it must at least offer to restore to the purchasers what was received from them. *Semble.*

ON EXCEPTIONS.

ASSUMPSIT upon a policy of insurance against fire.

A few years prior to March, 1860, school districts numbered three and six, in Dresden, united under the statute and formed the plaintiff district, when it became designated as school district number six. On March 1, 1860, this school district effected a policy of insurance of $1000, for the term of one year, with the defendants, upon its school-house, built after the formation of the district and known as the

new school-house. April 1, 1861, the policy was renewed for one year, no new representation having been made.

But, at a legal meeting, held June 4, 1860, the district, under the article, — "To see if the district will vote to sell the new school-house therein, and pass any votes necessary to accomplish that purpose," voted "to sell the new school-house," and that "Ephraim Alley, Edward Lawrence and Seth H. Whitcomb be a committee to sell" it.

This committee advertised for written proposals to purchase, received one, but did not sell. Subsequently, on July 12, 1860, they advertised a second time, giving a week's notice, by posting notices in three public places in the district, inviting similar proposals, announcing the terms to be "ten per cent. down, the balance in one year, with good security, and interest, sale positive to the party making the best offer." Three written proposals were received, one for "$350 for house, woodshed and all fixtures;" another for "$10 over and above any offer" the committee "have had or may have up to the time notified for receiving proposals," &c.; and the third, for $388, signed by Charles Bickford and Seth C. Houdlette. This last proposal was accepted by the committee, and the same day the committee, upon the receipt of ten per cent. cash and notes for the balance, executed and delivered to Bickford and Houdlette a bill of sale of the new school-house, who, in August following, took possession of, and removed the school-house to an adjoining lot owned by them, where it remained unoccupied until May 11, 1861, when it was destroyed by fire.

The plaintiffs alleged fraud and collusion between the purchasers and the committee. They also contended that the sale was not "necessary," claiming that these questions should be passed upon by the jury. The jury found specially that "it was not necessary that the plaintiffs should sell and dispose of the school-house; and that, in the sale and purchase of it, "there was fraud and collusion between the purchasers and the committee."

The instructions are sufficiently stated in the opinion and dissenting opinion.

The defendants excepted.

A. P. Gould, for the plaintiffs.

School districts are bodies *quasi* corporate for a certain purpose, and with certain definite and very limited powers. Their powers are limited to express grant. Cannot hold and dispose of property generally, nor tax their inhabitants for general purposes. Can acquire and hold property only for educational purposes. R. S., c. 11, § 15. Hold property of the inhabitants *in trust*, for the purposes of education; and, if the trustee attempts to divert the trust fund or property, the Court will restrain him, and treat the attempted transfer as a nullity. If A is seized to the use of B, with authority to convey in a certain contingency, a legal sale could not be made by A upon the mere pretence that the contingency had happened. The validity of the sale would depend upon the occurrence of the contingency in fact. No decision of the trustee himself can preclude the *cestui que trust* from inquiring into it. School districts are under no liability to the inhabitants for the dishonest administration of their trust, and the only mode of protecting the interests of *cestuis que trust* is to declare the attempted perversion of the trust null and void.

The purchaser of school district property is bound to know that it is held for a certain purpose; and, when he sees the purpose violated, and a manifest fraud committed upon the law, and upon the inhabitants of the district, he can acquire no title by the purchase.

A majority cannot oppress a minority by a sale or misappropriation of the property of a school district. Each inhabitant is an owner in the district property, and no action of the majority can take the property except in aid of education. It can be sold only when *necessary* for the purposes of education. The statute does not authorize a district to sell whenever it pleases, but when it "is necessary." This

sale was to hinder and not promote education. Counsel cited *Whitmore* v. *Hogan*, 22 Maine, 564, 568–9. Counsel elaborately argued question of fraud between committee and purchasers.

Wales Hubbard, for the defendants.

APPLETON, C. J. — The school district number six, composed of the previously existing school districts number three and number six, effected a policy on their school-house with the defendant corporation, dated March 1, 1860, for the term of one year.

At a legal meeting of this district on the fourth of June, 1860, it was voted to sell the school-house, and a committee was appointed for that purpose, by whom a sale was made on 19th July, 1860, and the purchasers immediately took possession of the building and removed the same to a lot owned by them.

On the first of April, 1861, the plaintiffs effected a renewal of the policy to which we have referred.

On May 11, 1861, the school-house was burned, and this suit is brought upon the renewal to recover compensation for the loss.

If a school district has authority to sell its school-house, and finally to determine the necessity of such sale, and if, in pursuance of such authority a sale has been made, the plaintiffs would have no insurable interest in the school-house. The simple inquiry, then, seems to be whether a school district has a right to do what it pleases with its own.

In the action of corporations, the controlling principle is that the majority must govern, — the majority of those present and voting, — not of those absent or present and declining to vote. The will of the majority is to be taken as the will of all. It is immaterial whether the vote be unanimous, or with a mere majority of one, the result is the same. In either alternative it is the conclusive determination of the corporation. It is immaterial, too, what may have been the

motives of the opposing voters,—all a court can regard is the ultimate conclusion as expressed in and by the record.

By R. S., 1857, c. 11, § 22, "a school district, at any legal meeting called for the purpose, *shall have* power:—

"First,—To raise money for erecting, repairing, purchasing and removing such school-houses and out buildings *as the wants of the district require;* for purchasing or renting land for them to stand upon, and for yards and play grounds; for purchasing a library, utensils, blackboards, globes, maps and other useful apparatus; for providing water for school-houses by means of wells or aqueducts, with necessary conveniences for the health and comfort of teacher and pupils; and for inclosing the grounds and appurtenances of the school-houses.

"Second,—To determine where their school-houses shall be located.

"Third,—To sell and dispose of any school-house or other property, if necessary."

School districts may raise money for certain purposes, "as the wants of the district require,"—in other words, as the district may deem necessary. They may furnish "*necessary* conveniences for the health and comfort of teacher and pupils." No right of appeal from their judgment is given. What that judgment may be is to be ascertained only by the votes of a majority and, when thus ascertained, it is conclusive. It is not for a jury to say what "the wants of the district require," or what may or may not be "necessary conveniences." No limitation is imposed upon the district as to the exercise of its judgment in respect to the matters over which it has full power to act.

The question was submitted to the jury to determine whether it was necessary for the plaintiffs to make sale of the school-house in controversy, to which they responded, it was not. But the matter of necessity was a fact for the district to consider and settle, and not the jury.

School districts "have power * * to sell and dispose of any school-house or other property, *if necessary*." The term

necessary has relation to the state of mind of the person by whom it is used. The same thing may be viewed as necessary by one and as unnecessary by another. The conveniences in a school-house necessary, — and so regarded in one place, would be viewed as unnecessary in another. The "wants" of one district may "require" much more than those of another. A school-house which one district would deem it "necessary" to sell, might be amply sufficient for and satisfactory to another differently situated. So, the majority of a district may deem the sale of a school-house "necessary," while the minority entertain different and conflicting views. The words "necessary" and unnecessary express only the different states of mind of opposing parties in reference to one and the same act, — and that act is made by law to depend upon the votes of a majority.

The district own their school-house. The voters are interested in the most judicious disposition of its property. They know the present necessities as well as the future wants of the district better than strangers possibly can. Besides, the matter is their business and nobody's else.

If the district is not the exclusive and final judge of the necessity of a sale of its property, — whatever it may be, then it cannot "sell and dispose" of its property, because it cannot give a perfect title. Its action is only tentative and experimental. The purchaser can at best get but a defeasible title. If the jury are the final judges of this necessity, a lawsuit and a verdict are indispensable prerequisites to ultimately determine the validity of a sale by a school district of any of its property.

The same power exists to sell a school-house as to sell an old stove or table, and if the district cannot finally determine the necessity which would require the sale of the former, neither can they of the necessity which would justify that of the latter.

The power to sell is given absolutely. That includes the right to determine the questions, — shall there be a sale, — is it necessary to sell. The district has full power to deter-

mine when to build or buy a school-house. It has none the less to sell or dispose of the school-house it may have built or bought.

The phrase *if necessary*, in article third, is to have the same effect as the expression in article first, "as the wants of the district require," or as "if they think proper," in the fifth article of § 22. In all these, as well as in many analogous instances, the judgment given by the party, to whose action reference is had, is final and conclusive on all.

By R. S., 1857, c. 3, § 26, "the qualified voters of a town, at a legal town meeting, may raise such sums as are *necessary* for the maintenance and support of schools, and the poor; for making and repairing highways, townways, bridges, &c., &c.; and for other *necessary* town charges."

By § 27, towns, cities and village corporations may make such by-laws as they think proper, not inconsistent with the laws of the State, and enforce them by suitable penalties," &c.

Now are not the qualified voters of a town at a legal town meeting to determine what sums are *necessary?* Is not their judgment, whether by a larger or smaller majority, conclusive as to the amount to be raised to meet the *necessary* town charges? Is the validity of an assessment to be submitted to the judgment of a jury and to be held void because the jury should happen to differ in opinion from the majority of the qualified voters as to the necessity of the sums voted to be raised? The town could not contract, its municipal action would be suspended, if it were not permitted to be its own judge of the amount needed for roads, bridges, schools and other necessary town charges.

So the by-laws of towns and cities would be of little avail, if their propriety were to be submitted to a jury. One jury might find their propriety by their verdict, while in the judgment of another, they might be deemed improper. The opinion of those to whom the power is specially entrusted, would be set at naught.

The school district may raise money for erecting, repair-

ing, purchasing or removing a school-house "if the wants of the district require," &c. But, if the district is not the ultimate judge of its wants, but there is an appeal to a jury, who are to determine what its wants require, then the ultimate judgment is by the jury and not by the district. If the jury differ from the district, then the assessment is void, the contract, based upon such assessment and its anticipated collection would be void, because the district can only build or buy such a school-house as its wants require, and, as the jury will have decided that its wants did not require what the voters of the district voted they did require, and as they are not allowed to be judges of their own wants, the contract based upon the hypothesis that they were to determine what the wants of the district required could not be upheld.

The power given in these and numerous other instances must be exercised. There are duties to be performed, the performance of which can neither be avoided nor evaded. The town would be liable to indictment if it should neglect to make due provision for the performance of the various duties imposed by statute. So far as regards the inhabitants of a town or school district, the vote of the majority, as to a matter over which they have jurisdiction, is conclusive, though, as regards the rights of the State, it may be otherwise.

When a power is to be exercised upon a certain contingency, and the existence of such contingency is submitted to the judgment of an individual or a corporation, their determination that the contingency has arisen is final and conclusive. Thus, the Legislature of Maryland, when incorporating the Mayor and City Council of Baltimore, gave the corporation full power and authority "to enact and pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances," &c., within certain limits. In commenting upon one of the ordinances of the corporation, passed in pursuance of this power thus conferred, DORSEY, J., in *Harrison* v. *Baltimore*, 1 Gill., 276,

says,—"To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers, which the general assembly could have exerted. Of the degree of necessity for such municipal legislation, the Mayor and City Council of Baltimore were the exclusive judges. To their sound discretion was committed the selection of the means and manner (contributory to the end) of exercising the powers which they might think requisite to the accomplishment of the objects of which they were made guardians." So, "whenever a statute gives a discretionary power to any person," observes STORY, J., in *Martin* v. *Mott*, 12 Wheat., 31, "to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him sole and exclusive judge of the existence of those facts." Where, by the terms of the power, the executors are to sell if, in their opinion, it shall be necessary for the purpose of paying debts and legacies, the necessity need not be shown, the conveyance being conclusive. *Roseboom* v. *Mosher*, 2 Denio, 51. "It does not seem necessary to inquire into the reasons which actuated the Mayor, Aldermen and Commonalty of the city of New York, in adopting it, (a certain ordinance regulating the running of cars in the city,) nor would such inquiry be proper, because the courts are bound to assume that, when a discretion is vested in a municipal body, exercising functions of a legislative character, good reasons existed for the adoption of a regulation or ordinance which was the result of such discretion." *N. Y. & Harlem Railroad Co.* v. *Mayor, &c. of N. Y.*, 1 Hilton, 562.

These are general principles. Their application has been enforced in cases like the present. In *Williams* v. *School District in Lunenburg*, 21 Pick., 76, the plaintiff claimed to recover back a tax assessed to pay for a school-house. He "offered evidence to prove that another school-house of brick had been erected by the district but a short time before the one for the payment whereof the tax was assessed,

which was sufficient to accommodate all the scholars, and offered to introduce witnesses, inhabitants of the district, who would give it as their opinion that the brick house was all the district required, and that one school-house was all the district intended to have. But the Judge refused to admit the evidence," and directed the jury to return a verdict for the defendant, to which the plaintiff excepted. In delivering the opinion of the Court, SHAW, C. J., says,— "The plaintiff offered to prove that the district had one sufficient school-house, but the evidence was rejected. We know of no law which prevents a school district, when their school-house is, *in their opinion,* too small or ruinous, or when, by a change of districts, a school-house, though within the limits of the district, is in an inconvenient situation, or when, for any other cause, it is unfit for the purposes for which a school-house is intended, to vote to build another before the former is actually taken down." If the evidence offered had been proper for the jury, the exceptions most manifestly should have been sustained. In *Spaulding* v. *Lowell*, 23 Pick., 80, the action was to recover back a tax assessed to pay for a market-house. It was objected, among other grounds, that the house was larger and more expensive than was necessary. "As to the size and other circumstances of the building," observes SHAW, C. J., "if the accomplishment of the object was within the scope of the corporate powers of the town, the corporation itself was the proper judge of the fitness of the building for its objects, and it is not competent in this suit to inquire whether it was a larger and more expensive building than the exigencies of the city required." Accordingly a nonsuit was ordered. In *Haven* v. *Lowell*, 5 Met., 35, a bill in equity was brought to compel the specific performance of a contract to purchase land for a market-house, which the city had made, but refused to perform, on the ground that the land was not necessary for the purpose contemplated by the city. The Court refer to the decision in *Spaulding* v. *Lowell*, approve it and hold that whether necessary or not

was a question for the city to determine, and, having so determined, the contract was held valid and a decree entered for its performance. In *George* v. *School District in Mendon*, 6 Met., 510, an action was brought to recover back a tax assessed for building a school-house. The objection was taken that the house and site were more expensive than necessary. "We cannot," remarks SHAW, C. J., in delivering the opinion of the Court, "take into consideration various other objections, turning upon the question whether the site of the house was a good one; whether the contract was beneficial or judicious, &c.; these were questions for the consideration of the district, to be determined according to their view of their wants of a school-house and its incidents and are entirely within their jurisdiction."

These authorities seem to establish the proposition that, when an act is within the scope of a corporate power, the corporation are the exclusive judges of the necessity of the act and of the means to accomplish it, as between the corporation and its members.

The argument from the possible abuse of a power proves nothing against its existence. The district may err in their judgment as to their wants and the best means of supplying them. But a jury is not infallible, and they too may err. It is difficult to conceive of a power the exercise of which is not susceptible of abuse, but it by no means follows that, for that cause, the power does not exist, or that there should be an appeal from one fallible tribunal to another, at least equally fallible, to correct the possible mistakes of the former or to commit greater ones.

The district had power to build, or purchase, or to sell what had been built or purchased, and to determine the necessity of doing the one or the other. If it cannot determine the size and general form of the structure to be built and raise money to pay for its erection, then no one can safely contract with it, for a jury, accidentally assembled by lot, may differ in judgment, as to the size and cost of the building, and vacate the whole proceedings. So, it may

vote to sell. The purchaser has nothing to do with the district and is not responsible for its action. He finds a duly recorded vote to sell, passed at a legal meeting, upon the strength of which he purchases and pays the price, and removes the building. Is his purchase to be null because a jury happen to differ in judgment from a majority as to the necessity of a sale by the district? If such be the law, it is manifest that the price of a school-house, to be purchased or built, will be increased, or, if to be sold, will be diminished, from the uncertainties in case of controversy, as whether a jury will concur or non-concur in judgment with the district.

In certain instances the power of the district is not nor was it intended to be final, and special provision is made for an appeal from its decision to that of the town, as in § 24, where, in case a majority decline raising a sum of money sufficient in the opinion of the minority, they may have, by their appeal, the judgment of the whole town. So, in case of a disagreement as to the location of a school-house, provision is made by § 27 for a tribunal to settle the controversy. By § 30, the plan for a school-house is required to be approved by the superintending school committee.

When the Legislature do not intend that the action of the district should be final, they give the special right of appeal and not otherwise. But no supervisory power is given to control, — no appellate jurisdiction is granted to correct the doings of a district in reference to the purchase or sale of its own property. It is much more consonant with our institutions that corporations as well as individuals should be allowed to dispose of their property according to their judgment of the necessity and expediency of so doing, — rather than to leave the question to that of any other body of men, howsoever constituted.

In fine, it is for the district to determine whether or not the necessity exists for a sale of its property. Of this necessity they are the conclusive and most fitting judges. The vote of a majority is the legal expression of that judgment.

It follows, that the submission of the necessity of the sale to the jury was erroneous, and that they were required to pass upon a question with which they had nothing to do. The evidence relating to the greater or lesser degree of necessity of such sale should not have been received. The district having acted wisely or unwisely,—the jury, upon evidence of those who voted for or against the sale, should not have been permitted to overrule and nullify the action of the district and determine how they should have voted.

But the jury, it is argued, have found the sale fraudulent on the part of the school district. But there is no pretence of any fraud, save that inferrible and deducible from an alleged want of necessity to sell. The majority of the district voted to sell. The jury think it was not necessary to sell,—and, from that solitary premise, infer fraud. But, if the right to buy, build or sell school-houses was a matter left by statute to the discretion of the district, it is difficult to see how there can be fraud on their part in doing or refusing to do what the statute gives them the power to do or refrain from doing. Their action may be unwise, injurious or inexpedient, but folly, lack of judgment or want of expediency do not constitute fraud.

It is equally difficult to maintain the proposition that a corporation by its own vote can defraud itself. It may be defrauded by others, but, that it can, by its own vote, commit a fraud upon itself, is sheer nonsense.

If the corporators have been wronged or defrauded, they must seek a remedy by such process as the law affords them, but this case presents the astounding novelty of the party seeking to avoid his act on account of his own fraud.

If there has been any violation of any law of the State, the State must proceed according to the recognized mode of procedure. But neither the State nor the corporators invoke the aid of any law or complain of any violation.

The plaintiffs' claim is not aided by the alleged fact that its conduct was fraudulent and in contravention of the object and purpose of the law which provides for the education of

the people. An individual is not allowed to rescind a sale made by him in fraud of his creditors, and base his right of rescission upon his fraudulent conduct. The claim of the district is strong only in the direct proportion of its violation of the objects and purposes of the statute.

If the sale was fraudulent, — with intent to evade the statute and in hostility to great objects of education, still, the district did vote to sell, — a sale was made, — possession taken under that sale, — and the price paid.

The presiding Judge instructed the jury "that the plaintiffs cannot predicate their right to recover in this action on its own want of good faith in voting to sell the school-house or in making sale thereof in pursuance of such vote." If this be law, it is difficult to see on what grounds the plaintiffs can recover, for they constitute the only substantial foundation of their claim.

If a sale is voidable on account of fraud, the party defrauded cannot rescind the sale without placing the party by whom he was defrauded *in statu quo*, or offering to do it. The law cannot be deemed more lenient to the party by whom the fraud is committed. Here, if there be any fraud or violation of law, the plaintiffs are those committing the fraud or violating the law. If therefore they would rescind the sale, they would seem to be bound at least to tender the notes and money received, in other words, to do what is required in cases of rescission.

The district having given authority to sell and a sale having been made in pursuance of such authority, by its legally constituted agent, and the purchasers having taken possession of the school-house, if the district have not rescinded the sale, if it was made under such circumstances as gave it the right of rescission, the renewal of the policy would be void for the reason that district No. six had no then existent title to the property insured.

A sale had been made. If valid, the sellers, after the sale, had no insurable interest. If voidable, the title none the less

passed and, before it could be reacquired, there must be a rescission of the contract of sale.

No rescission is shown. The vote of District No. 6, on 19th March, "to put the new school-house back on the old spot," would not constitute a rescission. The district, by its legal agent, had ten per cent. of the price of the school-house in money and the notes of the purchasers. These have neither been returned nor had they been offered to the purchasers prior to the pretended renewal of the policy.

There had been a change of title between the date of the original policy and the alleged renewal, which was not disclosed to the insurers. This, by the very terms of the policy, rendered it void. It is immaterial to the then defendants whether the sale was valid or voidable. In either event there was a change of title, and none the less a change though the sale may have been made under a state of facts which would have authorized the seller to rescind the sale.

Exceptions sustained — New trial granted.

CUTTING, WALTON and DICKERSON, JJ., concurred.

TAPLEY, J., concurred in the result.

DANFORTH J., having been of counsel, did not sit.

BARROWS, J., dissenting. — This action of Assumpsit upon a policy of insurance is defended upon the following alleged grounds: — 1. *That* the plaintiffs had no insurable interest, estate or title, in and to the school-house which was the subject of the policy: — 2. *That*, previous to a renewal of the policy under which the plaintiffs claim, in pursuance of a vote of the district, a committee thereof had made a bill of sale of the school-house and delivered it with the building to the purchasers, who had removed the building on to an adjoining lot and caused it to be insured in their own names, and that they had possession of it as an unoccupied building at the time of the fire; *that*, by the transfer and removal, the risk was changed, and the same not having been made known to the company, they cannot be held liable under the renewal for the loss.

The case has once before been before the Court, and a verdict for the plaintiffs was set aside and a new trial granted, because the instructions of the presiding Judge, as reported in the exceptions, might have been construed by the jury as requiring them to find that a change of risk, to relieve the defendants from liability, must have been caused *by some act of the district.*

A second trial has resulted in a similar verdict, and the case has come up on exceptions to the rulings and instructions of the presiding Judge, and also upon a motion to set aside the verdict as contrary to law and the evidence in the case.

Besides the general verdict for the plaintiffs, the jury found specially, in reply to separate interrogatories propounded to them in writing, — *that* it was *not necessary* that the district should sell and dispose of the school-house at the time of the sale to Bickford and Houdlette; *that*, in the sale and purchase of the school-house referred to, there was fraud and collusion between the purchasers and the committee who assumed to act for the district; and *that* the risk was not changed after the original representation, and at the time of application for renewal, either within itself or by the surrounding or adjacent buildings.

In support of the exceptions, the first ground taken by the counsel for defendants is, that the instructions were erroneous respecting the right of the district to sell the house. Upon this point the instructions were, that the right was qualified or limited by adding the words "if necessary" to the clause of the statute conferring the power, — *that* a reasonable and liberal construction must be given to these words of limitation, — "they do not require that a case be made out of absolute necessity, or that the house should have become utterly ruinous." By way of illustration of the necessity referred to and which might authorize a sale by a district acting in good faith and intending to advance the cause of education, various cases were put, among which, inconvenient location was one. The jury were further in-

structed that, "of the necessity contemplated by the statute, the district must in the first instance judge and determine, and that decision must stand and be binding unless it is made to appear that no such necessity existed, — that it must appear that the sale was in fact a fraud upon the law, an arbitrary act of power manifestly intended not to be in furtherance of the cause of education, but for an ulterior purpose of hindering or obstructing the maintenance of schools by depriving the district of any suitable place for its schools or other like purpose, by which the proper education of the children of the district would be prevented or embarrassed without any countervailing good, — it must be a case of bad faith, abuse of the power given, not a mere mistake of judgment, where it was obvious that an honest difference of opinion existed as to what was best, having fairly in view the interests of education," and the presiding Judge left it with the jury to determine, under these instructions, whether the sale was *valid* within the statute which authorized it "if necessary."

It is obvious that the defendants could have no cause to complain of instructions thus carefully guarded, unless it was erroneous to allow the jury to pass upon the action of the district at all. Accordingly it is contended that the judgment of the district must be conclusive, and that the Legislature did not intend to deprive school districts of the right to decide finally respecting the necessity of sales of their property, or to introduce the uncertainty of title as to any property once held by a school district, which must result from allowing their decisions to be revised, "especially by so unsuitable a tribunal as a petit jury."

From among the voters in the various towns, who are also the voters in the school districts, an official board in each town is required by law to prepare a list of such persons of good moral character as they shall judge best qualified to serve as jurors.

These lists are subjected to the approval of the voters in

the several towns, who may strike out such names as they think proper, in open town meeting, by a majority of the legal voters present, but not add any. From these lists traverse jurors are indifferently drawn. They are purged of all partiality and prejudice and sworn to decide the issues committed to them according to the law and the evidence. The unanimous concurrence of twelve men, thus selected, is necessary to a verdict. Not claiming infallibility for their decisions, I am still of the opinion, that the determination of questions of fact may, with tolerable safety, be entrusted to such a tribunal, under proper instructions from the Court as to matters of law, especially when a party who considers himself aggrieved by their doings may have them revised by the highest tribunal known to the laws of the State, and reversed if found unsupported by the testimony in the case, or manifestly founded on prejudice or misconception. Issues of life and death are sometimes in their hands. They can hardly be considered "an unsuitable tribunal" to determine, under the law, upon the validity of the sale of a school-house where it comes incidentally in question. They are composed of the more intelligent portion of the class to which the voters in the school district belong, and they are called to pass upon the same question *without any pecuniary or partisan interest in the result.*

But it is argued that, because a ready method of revising the doings of a school district is provided in certain cases, by an appeal from a majority of a district to certain tribunals, which are authorized to decide finally upon the matters in controversy, therefore, where no such tribunal is provided by statute and no such ready appeal given, the doings of the majority must be deemed conclusive. Are they not then subject to revision and correction by some power, when it is evident that they were unauthorized by law? It does not follow that, because the Legislature may have provided for a speedy decision, by a statute tribunal having final jurisdiction in certain cases, where prompt and decisive action is essential to the prosecution of the object for which these

corporations have an existence, therefore the minority of a district are left at the mercy of an irresponsible majority in *other* matters.

Questions as to the *amount* of money to be raised for a purpose for which a district has legal power to raise it, — as to the location or proposed removal of a school-house, — as to a plan for the erection or reconstruction of a school-house, must, when practicable, be speedily decided, and not await the slow progress of litigation in the courts, and the Legislature have provided that they may be submitted to appropriate tribunals outside the district, whose decisions may ordinarily be expected to be impartial and satisfactory. But it can hardly be conceded that the fiat of these tribunals, even, is irreversible, if found to be tainted with fraud and in gross and palpable violation of the duties, interests and objects for which the power was conferred. That a factious, penurious or vindictive opposition to the will of a majority acting in good faith, with a view to the furtherance of the objects for which the school district was created, can gain no encouragement from instructions such as were given in this case, is too plain to need elucidation or remark.

The validity of the sale is not made to depend upon the existence of an error in judgment as to the expediency of the proposed act, but upon that of a design to defeat the end for which alone the district was clothed with any power in the premises.

It is further argued that, inasmuch as the same statute limitation applies to sales by a school district of other property of which they may be possessed, the Legislature could not have intended that the purchaser's right to articles of even trifling value should depend upon the verdict of a jury as to the necessity of the sale. The argument is not sound. The language of the statute is explicit. The words "if necessary," are not tantamount to "if they think proper," elsewhere used, but impose a clear and distinct limitation upon the power of sale, and the necessity must be determined by the same tribunal which is called to pass upon the

validity of the sale. Purchasers in these, as in other cases, must take the risk of the rights of their vendors, and the buyer acquires no greater rights than the seller can legally convey. Various contingencies may demonstrate that a sale of any property by any corporation or individual is either void or voidable, as a jury may find the facts upon which its validity depends, but we do not look upon them as introducing any uncertainty of titles that can operate as a serious check upon legitimate business.

Neither does the fact that other remedies exist for a minority whose rights may be invaded by the illegal acts of a majority of the district, at any meeting thereof, make any difference here. A question arose incidentally in this case as to the validity of an alleged sale. It was submitted to the only tribunal which was competent to pass upon the facts, under instructions quite sufficiently favorable to the defendants, and, if the evidence warranted the jury in finding, as they were required to do, that the attempted sale was an arbitrary act of power, manifestly *intended* not to be in furtherance of the cause of education, but for an ulterior purpose of hindering or obstructing the maintenance of schools, by depriving the district of any suitable place for its schools, or other like purpose, by which the proper education of the children of the district would be prevented or embarrassed, the defendants have no cause of complaint, for the attempted sale was *simply void, — no title passed by it,* — the district retained its insurable interest in the school-house, and the first ground taken in defence of the action fails. But the counsel argues that this is depriving the purchasers of their property by a judgment, in a suit to which they are not parties. By no means. If they are not parties nor privies to the suit they are not bound by the judgment.

Complaint is also made of the instructions upon the question of fraud and collusion, between the committee who assumed to make the sale of the school-house and the purchasers, and a large portion of the ingenious and elaborate argument for the defendants is devoted to these matters. But

it is plain that, if the attempted sale was unauthorized by law and void, because the necessity contemplated by the statute did not exist, any question whether or not, if the district could have made a sale otherwise legal, *this* sale was voidable by the district because of fraud and collusion between the purchasers and the agents of the district, and was in fact repudiated by the district, became entirely immaterial. Error in instructions upon this point, if there were any, could not have injured the defendants.

It is further objected that the special interrogatory propounded to the jury confined their inquiry as to the necessity, to the time of the sale to Bickford and Houdlette. But the jury could not have failed to understand, seeing the nature of the matters they were directed to consider in determining as to the necessity, that the time of the *vote* to sell was included in the phrase "at the time of the *sale* to Bickford and Houdlette."

Again, it is urged that, because the policy declares the insurance to be void in case of any transfer or change of title, the defendants are not liable. But here were neither. The acts of Lawrence and others, *assuming to act for the district, being unauthorized by law*, if the special finding of the jury that the sale was not necessary be sustained, were simply inoperative and void. What they did could have no more effect upon the title than as if one man were to undertake to transfer or change the title of another's land by executing a deed in his name without any authority therefor.

Was the finding against law or evidence on the question of necessity? School districts are invested with certain *limited powers*, to be exercised only with an eye to the advancement of the object for which such corporations are created, the education of the youth in public schools, to which all shall have access. That object is dear to all who truly love our country and its institutions. No sordid or vindictive spirit can be permitted to interpose any unlawful impediment to its advancement. Honest but mistaken zeal may err as to the measures best calculated to promote it and we

can afford to wait till experience corrects the error. But acts which are manifestly designed to defeat the end for which the district was created and to embarrass the operations of the schools, by depriving them of suitable existing accommodations, without any apparent countervailing good, from which it might be inferred that the *motive* was right, even if the acts were ill advised, must be held to be "in fraud of the law," and entirely beyond the scope of any authority conferred by it.

Here, two adjoining districts, large in territory, but having the bulk of their population at their contiguous extremities, had united under the Act of 1852, c. 243, (R. S. of 1857, c. 11, §'26,) and formed one district for the purpose of supporting a system of graded schools. They had recently erected, at an expense of $1500, a convenient school-house, commodiously located for the district as a whole. There was no other suitable place for the schools within the limits of the district. A committee, *assuming* to act for the district, negotiate a sale of this new building for about one-fourth of its cost. The only legitimate motive that is now suggested in argument, is, that a few families lived at an inconvenient distance from the new school-house. That this was merely specious, is shown by the uncontradicted testimony that a part of the families who lived at the greatest distance were in favor of the new system, and that most of those opposed to it had no children. And the man who appears most active in bringing about the sale testifies that the object was to divide the district, that that was *his* object. The jury seem to be justified in finding that the movement for a sale had no legitimate object, but was hostile to the interests of education and designed to thwart the extension of the superior advantages of a system of graded schools to the children of the district, and that the attempted sale was therefore not necessary nor valid in the eye of the law.

The truth of the finding that "the risk was not changed either *within itself* or by the surrounding or adjacent build-

ings," between the time of the original representation and that of the application for renewal, is more questionable.

The risk may be changed *within itself* by other matters besides a mere mechanical or material alteration of the building, although the context, "or by the surrounding or adjacent buildings," would seem to favor the other interpretation of the stipulation. But how far the existence of adverse claims to the property, not known to the insurers, ought to be permitted to affect the right of the real owner to recover his insurance in case of loss, need not be discussed here. It may be that such claim, however unfounded, and the fact that the building was not regularly occupied, did enhance the risk. It may be that, had the question been submitted to the Court for determination, they would have come to a different conclusion from that to which the jury arrived. It was however a question for the jury, and two juries have found at different trials of the case, under careful instructions from the Court, that there was no material change of risk. The removal of the building was but a few feet on to an adjoining lot, not more exposed by reason of surrounding buildings than the previous location. There is uncontradicted testimony that the agent of the Insurance Company was informed, at the time of the application for renewal, that the building had been removed and that there was trouble in the district. Upon the whole, we are not satisfied that law and justice require that the case should be sent to a third trial on account of error on the part of the jury.

KENT, J., concurred.

INHABITANTS OF BREMEN *versus* INHABITANTS OF BREWER.

Supplies furnished to a soldier and his family, by a town in which they fell into distress, while there temporarily on a visit, cannot be considered as furnished under Public Laws of 1862, c. 127, or of 1863, c. 205.

Expenses incurred for supplies thus furnished may be recovered of the town in which such soldier had his legal settlement.

ON REPORT.

ASSUMPSIT for supplies, medical assistance, nursing, &c., furnished to James H. Erskine and his wife and child, and burial expenses of Erskine and child.

On December 31, 1863, Erskine, being then an inhabitant of and having his legal settlement in the defendant town, reënlisted in the U. S. service. In January, 1864, he came home on a furlough, and went, with wife and child, to the plaintiff town, on a visit, where he, wife and child sickened with the small pox, and he and child died and were buried by the plaintiffs.

Notice and denial were according to the requirements of the statute.

The main question was whether the defendant town was liable. Defendants offered to show that, before any supplies were furnished and immediately after reënlistment, Erskine's family took up their residence in Bangor, where they continued to reside up to the time of this trial.

The case was continued on report, with the agreement that, if the plaintiffs can recover, defendants to be defaulted and heard in damages, otherwise plaintiffs to become nonsuit. And, if plaintiffs have made out a *prima facie* case, and the evidence offered by defendants be material, cause to stand for trial.

A. P. Gould, for the plaintiffs.

J. A. Peters, for defendants.

Plaintiffs' construction results in making Erskine a pauper upon Brewer, because he fell sick in Bremen, when he would not have been a pauper had he sickened in Bangor.

The soldier would hardly understand why he should be disgraced as a pauper, if sick in Bremen, but supported by his country, as its benefactor, if sick in Bangor. A soldier cannot become or be made a pauper while a soldier, whatever, wherever or however the distress may be. *Veazie* v. *China*, 50 Maine, 518; *Milford* v. *Orono*, 50 Maine, 529.

Bangor was bound to fully support this soldier and family. How can they be thrown as paupers upon Brewer? Public Laws of 1863, c. 205, § 1.

Bremen might recover of Bangor on implied assumpsit.

Bremen should have notified Bangor, who was bound to render the aid; if Bangor refused, Bremen, or any one else, could from necessity furnish the support, and assumpsit upon an implied promise would lie against Bangor for such necessaries.

Otherwise public burdens are unequal. By the reported cases, *supra*, Brewer must support soldiers' families residing there but having no settlement there, and also support those who do not reside in that town but who have a settlement there. How can Brewer be bound to support, either as soldiers or paupers, persons whom Bangor is bound at the same time to support?

Had Bremen notified Bangor of Erskine's condition, Bangor would have been suable. *Weston* v. *Davis*, 24 Maine, 374.

If Erskine's family had a right to call upon Bangor, Bremen need not and should not have incurred expense. *Southbridge* v. *Charlton*, 15 Mass., 248.

With the right to receive support from Bangor, the family were in no such distress as would render them paupers, because they had a provision to fall back upon.

APPLETON, C. J.—The R. S., 1857, c. 24, defines and establishes the rights, duties and obligations of towns in reference to those falling into distress within their limits, and determines when and under what conditions towns, thus furnishing supplies, can recover remuneration for supplies

furnished against the towns in which those receiving supplies have their settlement. This statute governs and controls except when modified by subsequent enactments.

The plaintiffs' right to recover is unquestioned, unless the defendants can bring their case within some modification of the statute. This they attempt, and claim exemption under the provisions of the statute of 1863, c. 205, § 1.

By the Act of 1863, c. 205, § 1, cities, towns and plantations were required to raise money "by taxation or otherwise, to be applied to aid in the support of the wife or dependant mother, father, brother or sister, and minor children, *being inhabitants* of such city, town or plantation, of any soldier, sailor or marine, who may be actually engaged in the military or naval service of the United States or of this State, in any recognized company, battalion or regiment of this State, or on board of any armed vessel of the United States, during the present rebellion," &c. This statute is limited in its application. It refers only to supplies furnished and aid rendered by a city, town or plantation, to certain relatives of their respective inhabitants in the military or naval service of the United States. Neither Erskine nor his family were inhabitants of Bremen. They had no settlement there. The case finds they were there only on a visit. This statute imposed no obligation upon the plaintiff town. The supplies for which this suit is brought were furnished under the general law of the State in relation to paupers, (R. S., 1857, c. 24,) and not under the Act of 1863; or under any of the subsequent Acts upon the same subject.

So, the city, town or plantation furnishing aid under the provisions of the Act of 1862, c. 127, § 2, or that of 1863, c. 205, § 2, may be reimbursed by the State. But the plaintiff town is not entitled to be thus reimbursed, because the aid was not furnished under either of these Acts.

In *Veazie* v. *China*, 50 Maine, 518, and in *Milford* v. *Orono*, 50 Maine, 529, it was decided that the statute of 1861, c. 63, and that of 1862, c. 127, were mandatory in

their character and not permissive, and that supplies furnished under their requirements, by a city, town or plantation, to an inhabitant thereof in actual service, should not create any pauper disabilities of any kind on the part of the absent soldier or his family. The effect of supplies furnished to relieve distress in all other cases remains unaffected by their provisions.

The provision by the Act of 1863, c. 205, § 5, is, that no pauper disabilities shall be created by reason of receiving the aid provided for "in *this* Act." No aid was received by Erskine or his family under the provisions of *this* Act. This section, therefore, has no bearing upon the question.

There is no evidence tending to show a settlement in Bangor, but the reverse, at the time the supplies were furnished.

The plaintiffs are entitled to recover.

Defendants defaulted, to be heard in damages.

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

TAPLEY, J., did not concur.

JOANNA B. GILMAN, *in Equity, versus* CHARLES B. GILMAN *& al., Executors.*

Under a decree for an allowance, providing that the widow may "select any portion thereof" "from any articles" of the estate "at the appraisement thereof in the inventory,"— she may select a judgment founded upon a promissory note returned upon the inventory; and, as accessary to the principal, she is entitled to the interest which accrued after the appraisal.

Where such a judgment had been recovered by the executors, and partially satisfied by a levy upon personal and real estate, and the time of redemption had expired: — *Held*, in a bill in equity against the executors, that the widow is entitled to the proceeds of the levy upon the personal property, together with a release from the executors of the unredeemed real estate.

BILL IN EQUITY by the widow of the late Nathaniel Gil-

man, against the executors of his last will and testament, alleging substantially, —

That, as such executors, the respondents returned an inventory of such property belonging to the estate of the testator as was found within this State; that, among such property was a promissory note [described]; that the respondents, as such executors, commenced a suit upon this note in the county of Kennebec, recovered judgment thereon, April, 1864, and afterwards collected on said judgment and the execution thereon, by levies on personal and real property of the judgment debtor, the sum of $5,946,82 in part satisfaction of said execution and judgment, of which sum thus satisfied, $3,215,72 was by levy on real estate, and $2,731,10 on personal; that the avails of said personal estate, and said real estate unredeemed, now, and for more than two years have remained in the hands of the respondents as such executors; that the complainant waved the provisions made for her in the will, and, after due proceedings, obtained a decree for an allowance out of the personal estate of the testator; that said decree authorized her to select any part of the personal estate inventoried, at the appraisal thereof, towards the satisfaction of her allowance; that, on Nov. 24, 1866, under said decree, she did select the judgment aforesaid, in part satisfaction of her allowance, and notified the respondents thereof, said judgment being entirely founded on said note; that, on Nov. 24, 1866, the respondents assigned the judgment to her, but that they had previously collected a part of such judgment, the amount heretofore received, and still held the avails thereof; that, on Dec. 29, following, she demanded the amount thus collected, and also a release from them to her of the real estate by them held in part satisfaction of said judgment and execution, to be applied in part satisfaction of her allowance, and at the same time tendered them a receipt of the following tenor: —

"Waterville, Dec. 29, 1866.

"Received of Anna K. Gilman and Charles B. Gilman,

executors of estate of Nathaniel Gilman, seventeen thousand four hundred and thirty-four dollars and seventy-two cents, being appraised value of a note of George F. Gilman, which came into your hands and belonged to said estate, I having selected the same under the decree of the Probate Court, allowing to me $85,000 out of said estate, and you are also authorized to charge to me the costs of recovering judgment on said note and the costs of levying on real estate in part satisfaction of said judgment, in your settlement of said estate. "Joanna B. Gilman;"

that the respondents utterly refused to pay her the moneys so held by them, or to release to her the real estate then held by them in part satisfaction of the same judgment; which refusal is a breach of the trust reposed in them as such executors, and contrary to equity, &c.

The prayer was that the respondents might answer, be required to pay over the moneys collected on such judgment, and release to her their interest in such real estate as is held by them, in part satisfaction of said judgment, and for a decree to that effect.

One of the respondents answered and the other demurred.

W. B. S. Moor & S. Heath, for the complainant.

J. Baker, for Charles B. Gilman.

A. Libbey, for Anna K. Gilman.

1. This Court has no jurisdiction. R. S., c. 77. The object of the bill is to enforce specific performance of a decree of the Probate Court, which this Court has no authority to do. *Bubier* v. *Bubier*, 24 Maine, 42. Nor can it enforce its own decrees by bill in equity. It is not a *trust* created by the parties, or resulting from their acts, or created by the will of the testator, or arising in the settlement of his estate within the meaning of the statute. *Given* v. *Simpson*, 5 Maine, 303. It is not a case where the demand is owned by the plaintiff and sued in the name of the respondents; for the land was taken, time of redemption had expired, and the title become absolute before complainant

had made her election. Nor did the assignment of the judgment, on Nov. 24, 1866, convey to the complainant any equitable right to the land which can be enforced in equity. The office of administrator is in the nature of a trust. But the enforcement of such a trust is in the probate courts, courts of law, and not in equity. A bill in equity does not lie to enforce a decree of distribution; but action upon the administrator's bond is the remedy; and in the case of real estate, by partition and not in equity. R. S., c. 65, § 24.

2. Complainant could not select the judgment. It was never inventoried. It is not same as note, but embraced costs which complainant did not offer to pay. If note and judgment are the same, they are *rights of action* embraced in the inventory which she was not authorized to select. See decree, *Gilman* v. *Gilman*, 53 Maine, 184. Choses in action are not appraised. R. S., c. 64, § 30. The decree, taken with the statute, authorized complainant to take the articles of personal property separately appraised. To entitle her to receive a chose in action, statute authority must be given. R. S., c. 65, § 14. She has no right to the interest accruing after appraisal.

3. She has no right to the land taken by the levy. The title had become absolute in the respondents, and they can convey only by virtue of a license from Probate Court. R. S., c. 65, §§ 22 to 24.

The land had ceased to be collateral, and could be conveyed only by virtue of a decree to that effect. R. S., c. 65, § 14.

APPLETON, C. J.—By R. S., c. 65, § 13, a widow, in certain cases therein specified, is "entitled to so much of the personal estate, besides her ornaments and wearing apparel, as the Judge decrees necessary, according to the degree and estate of her husband and the state of the family under her care; * * and such allowance, when recorded, shall vest the title in her."

By § 14, the allowance thus made may include debts due the estate.

By c. 75, § 8, provision is made for the distribution of personal estate, "except that portion assigned to his (the) widow by law and the Judge of Probate." The widow's allowance precedes any distribution of the personal estate.

In the inventory of the estate of Nathaniel Gilman there was a promissory note of George F. Gilman, dated May 18, 1855, for $12,626,24, on interest, which was appraised at $17,434,72.

The amount of the complainant's allowance was determined by this Court in *Gilman* v. *Gilman*, 53 Maine, 184, and she was authorized to select any part of the personal estate inventoried by the defendants at the appraisal thereof. The only criterion the Probate Court has to determine the values of the different articles of personal property is the inventory as returned under oath. The decree there made was in accordance with the uniform practice since the existence of the State.

After, and in pursuance of the decree of this Court, the complainant selected the note of George F. Gilman, before referred to, and receipted to the defendants, as executors, for the amount at which it was appraised, to be applied in part satisfaction of her allowance. At the date of this receipt, Dec. 29, 1866, the note of said Gilman had become merged in a judgment at the suit of the executors; a part had been collected in money, and a part satisfied by a levy on the real estate of the debtor. After receiving this receipt, the defendants assigned to the complainant this judgment, but refused to pay her the money collected thereon and to convey her the real estate acquired by levy on the execution issued upon said judgment, the time of redemption having expired.

By R. S. 1867, c. 65, § 22, "when the deceased held any real estate in mortgage, without having foreclosed the right of redemption, or the executor or administrator has taken any for a debt due the estate, such executor or administra-

tor shall hold it in trust for the persons who would be entitled to the money if it was paid; and it shall be accounted for as personal assets in his hands, and, if redeemed, the money shall be received by him for the same trust, and he may release the estate."

By § 24, "if such real estate is not redeemed or sold as aforesaid, it shall be distributed among those who are entitled to the personal estate," &c.

The executors hold the money and real estate acquired by the levy in trust for those "who would be entitled to the money if it was paid." The real estate is to be regarded as personal for the purposes of distribution. The complainant, having under the decree of the Court taken the note and receipted to the defendants for the amount,—has thus received satisfaction *pro tanto* of her allowance. The defendants have had the full benefit of the judgment in and by the receipt thus given. They can neither legally nor equitably retain the fruits of that judgment and be allowed the full amount of the note upon which it was based and interest in the settlement of their account. Holding the money and real estate obtained by virtue of the judgment and execution against Gilman *in trust*, and the complainant being entitled to the same under the decree of this Court, and by virtue of having receipted to the defendants for the whole judgment, they must be decreed to execute this trust and pay over and convey to the complainant, if upon proof the allegations in the bill shall be established.

The objection taken that the complainant has not accounted for the costs is erroneous in fact. The receipt covers "the costs of recovering judgment * * and the costs of levying." These are to be deducted from the complainant's allowance.

The interest in the Gilman note between the time of the appraisal, as set forth in the inventory, is accessory to the principal and follows that. As the complainant is entitled to the note and its avails, she is entitled to the interest ac-

cruing on the note. It is but an equitable compensation for the delay arising from the contesting her allowance.

The demurrer of the defendant Anna K. Gilman, to the bill, must be overruled and she must answer over.

As to Charles B. Gilman, the bill being in substance admitted, it must be taken *pro confesso*.

CUTTING, WALTON, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

ORLANDO M. MARRETT *versus* EQUITABLE INS. CO. AND JOSEPH W. DYER, *Trustee*.

A note payable to an insurance company or order for a sum certain, "and such additional premium as may become due on" a policy named, and at a time therein specified, is not negotiable.

And the maker may be charged as trustee of the insurance company.

ON EXCEPTIONS to the ruling of WALTON, J., charging the alleged trustee upon the following disclosure:—

"*Answer*. Said Company held against me, at time of the service of the writ upon me, a premium note, of which the annexed is a true copy. Said note was given by me to said company as the consideration for insurance, by said company, by policy issued at the same time said note was given, and as a part of the transaction of the barque Wallace, in the sum of $10,000, against the usual marine perils, for the term of one year from said fifth day of June, A. D. 1865. Said policy is now in full force, and the term has not expired; it contains the usual provisions that in case of loss the premium note is to be deducted therefrom. No loss has yet occurred to my knowledge."

(COPY OF NOTE.)

Stamp, 45 cts.

On Bk. Wallace.

No. 28171.

$801 "Boston, June 5th, 1865.

"For value received, I promise to pay the EQUITABLE SAFETY INSURANCE

COMPANY, or order, in twelve months from date, with grace, and interest after till paid, the sum of Eight Hundred and One Dollars, and also such additional premium as may become due on Policy No. 28171.

"Payable at North Bank, Boston.

"(Sg'd) JOSEPH W. DYER,
"*By his Attorney*, C. A. STACKPOLE."

The following clause contained in the policy made a part of the disclosure:—

"And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof; the amount of the premium note, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted, and all sums becoming due being first paid or secured to the satisfaction of the said President and Directors, they discounting interest for anticipating payment."

The trustee excepted.

J. D. & F. Fessenden, for the trustee.

1. Trustee is not chargeable, because his only liability to the principal defendant, is by reason of a negotiable promissory note. R. S. c. 86, § 55; *Aspinwall* v. *Meyer*, 2 Sanford, (N. Y.,) 180; *Cargill* v. *McElrath*, 3 Sanford, 176; *Formiss* v. *Gilchrist*, 1 Sanford, 53.

2. The risk had not terminated, and hence nothing due absolutely. It was subject to any set-off by the policy, which might arise from a loss. If the note is not negotiable, but a part of a contract of which the policy is the supplement, the policy has not become absolute.

3. Note was not due when the writ was served.

W. L. Putnam, for the plaintiff.

DANFORTH, J.—By the disclosure of the alleged trustee, it appears that, at the time of the service of the plaintiff's writ upon him, he was indebted to the principal defendants in the sum of $801, for which he had given his note, payable in twelve months from its date, June 5, 1865. This note is not negotiable. *Dodge* v. *Emerson*, 34 Maine, 94.

The trustee, then, must be charged, unless the disclosure shows some reason to the contrary.

There are two grounds upon which the discharge of the supposed trustee is claimed. That the debt is a contingent one, and that the alleged trustee has a claim which he is entitled to set off against the note.

Neither the disclosure or the note, shows any contingency attached to the debt, but the contrary. The note by its terms is payable absolutely, and, in the disclosure, no suggestion is made that under any circumstances it is not to be paid, according to its tenor. The provision in the policy, which was the consideration for the note, that in case of loss the note, if unpaid, should be deducted from the amount, so far from relieving the maker of any liability on the note, secures its full payment. The only contingency arising from this clause, is as to the time of payment, and not as to the payment itself. It may hasten the payment, but cannot, in any event, delay or excuse any part of it.

Nor has the alleged trustee any claim against the principal defendants, which, by the provision of the R. S., c. 86, § 64, he can set off against the note. The policy, at the time of the service of the plaintiff's writ, was in force, but it was only a contingent claim, and could not, in any way known to the statute, have been filed in set-off to the note, for no loss had then happened. *Ingalls* v. *Dennett*, 6 Maine, 79. It is possible, that in some cases arising out of contingent liabilities, a trustee may be discharged, or charged, according to the facts as they exist at the time of the disclosure,—and, in such cases, the Court would allow the action to be continued until the contingency had become reduced to a certainty. *Smith* v. *Stevens*, 19 Pick., 23; *Boston Type Foundry* v. *Mortimer & trustee*, 7 Pick., 166.

It appears, by the disclosure in this case, that, on the 16th day of October, 1866, long after the year had expired during which the policy was to run, and after the note had become payable, and the supposed trustee liable to a suit thereon, no loss had happened. So that, at the time of the

disclosure, the trustee had no means of defending himself against a suit in favor of the principal defendants, except this attachment. It does not appear that the trustee desired any further delay, to ascertain whether a loss would happen before the expiration of the policy. By the arrival of the vessel, and by the principles of law settled in the cases above cited, he must be holden.

Exceptions overruled.

WALTON, J., concurred.

APPLETON, C. J., KENT, BARROWS and TAPLEY, JJ., concurred in overruling the exceptions, because it does not appear from the disclosure that the trustee had any demand against the principal defendants, of which he could avail himself by way of set-off, under R. S., c. 86, § 64; but expressed the opinion that a trustee could not, under our present statutes, be charged upon the facts stated in *Ingalls* v. *Dennett*, *ubi supra*.

CHARLES J. ABBOTT *versus* CITY OF BANGOR.
CALEB HOLYOKE *& al. versus* SAME.

The statutes of this State, as they existed in 1865 and 1866, taken in connection with the Act of Congress of June 3, 1864, c. 106, §§ 40 and 41, did not authorize the assessors of a city or town, in which a National Bank was located, to assess taxes for State, county and municipal purposes, upon the stocks of such bank owned by non-residents.

ON REPORT.

ASSUMPSIT.

The facts are stated in the opinion.

C. J. Abbott, *pro se*.

A. W. Paine, for the defendants, elaborately argued the following propositions.

1. Stocks of National Banks are taxable. U. S. Stat. at

Large, 1864, c. 106, § 41. "Place" signifies *tax district* within which the bank is situated. Opinion of Judges, 53 Maine, 594; *First National Bank of Portsmouth* v. *Portsmouth*, not yet published; *Utica* v. *Churchill*, 33 N. Y., 161; *People* v. *Com's.*, 35 N. Y., 423. The theory and policy of our whole tax law conforms to this construction. The discussions in Congress conclusively lead to the same conclusion. Cong. Globe, part 3, session 1863–4, 1957–9, 2207, 2451, 2622 and 2639.

If such is not the construction, where can holders of stock residing out of the State be taxed?

2. The Act of Congress is constitutional. Cases before cited are based upon its constitutionality.

3. The Act of Congress binds the assessors. Congress does not make laws for Legislatures to reënact, nor laws which depend on State laws to effectuate. A supreme government, acting within the scope of its powers, is not obliged to wait on an inferior jurisdiction for the enactment of rules to make its laws effectual.

In all national affairs, the laws of Congress act directly on individual citizens, and not alone on States. We are all citizens of the United States first, — of our States after that.

The National Bank Act, in all its provisions, is a national affair, and is binding upon the officers to whom it has delegated the rules for the government of the taxation.

Congress intended that the assessors should, without any enabling Act of the State, exercise the power of assessing taxes on the stock as prescribed. Uniformity in the several States was necessary. It was not limited to one State, but extended to all.

Had Congress intended to give the State a right to tax the stock when they chose to do so, the special and detailed provisions of §§ 40 and 41 would have been unnecessary.

Our State law makes bank stock taxable and gives the rules for taxation, — one of which requires it to be assessed at the residence of the owner. This rule has been superseded by the paramount law of Congress, simply by chang-

ing the *place* of assessment. The assessors virtually act under R. S., simply changing the *place* of taxation in accordance with the law as it reads in its totality after the Act of Congress is effective. Hence the peculiar phraseology of the Act,—"nothing shall be construed to prevent," &c. As if it had provided that the stock shall be taxed according to the laws of the State, save in this, viz.,—it shall be taxed in the "place," &c.

These views are sanctioned by authority. *Sinnot* v. *Davenport*, 22 How., 227; *Hamilton* v. *Dudley*, 2 Pet., 526; 1 Abbott's U. S. Digest, 528 § 55.

Congress has power to enact laws bearing directly upon the citizen, as in this case upon the assessors. *McCullock* v. *Maryland*, 4 Wheat., 316, 403; *Rhode Island* v. *Mass.*, 12 Pet., 657, 721; *U. S.* v. *Fisher*, 2 Cranch, 358; *Prigg* v. *Penn.*, 16 Pet., 539; *North Carolina* v. *Maryland*, 4 Wheat., 316, were also cited.

BARROWS, J.—The plaintiffs in the above entitled cases are inhabitants respectively of Castine and Brewer, and own stock in certain National Banks located in Bangor. Thus situated, in 1865 and 1866, they paid, under protest, taxes assessed upon that stock against them, for State, county and municipal purposes, by the assessors of Bangor, and now claim, in these actions, to recover back the sums thus paid.

One and the same question is presented in both cases.

Could the assessors of towns and cities in which National Banks, established under the authority of an Act of Congress, were located, rightfully assess State, county and municipal taxes upon stock in such banks, owned by parties resident in other towns or cities within this State, as the law stood in the years above named?

If not,—the plaintiffs, here, are respectively entitled to judgment, as on a default, for the sums specified in these reports, which present no other question to us for decision.

This species of property is manifestly included in the description of *personal* taxable estate, given in R. S. c. 6, § 5.

By § 10, c. 6, of the R. S., it is provided that all personal property, except in certain enumerated cases, not embracing property situated like these stocks, shall be assessed to the owner in the town where he is an inhabitant, on the first day of April in each year.

Unless these provisions of our own statutes are controlled by an Act of Congress of paramount authority, the stock owned by the plaintiffs could rightfully be assessed to them, for State, county and municipal purposes, at the places where they respectively resided at the time of the assessment, and not elsewhere. Under and by virtue of these provisions, Bangor would have no power to assess and collect such tax as against these plaintiffs.

But it is claimed and elaborately and ingeniously argued by the learned counsel for the defendants, that §§ 40 and 41 of the Act of Congress of June 3, 1864, (to provide for the national currency and for the organization of national banking associations,) not only override our statute as to the place where taxes on this kind of property shall be assessed, but are in and of themselves mandatory to assessors of taxes for State, county and municipal purposes, and *require* them to assess taxes for these purposes upon all shares in National Banks located in their municipalities, irrespective of the residence of the owners of the shares.

It cannot be so. The very nature of the power and objects of taxation, aside from the language of the Act of Congress, which is plainly permissive and not imperative, forbids such a construction.

Montesquieu, in his Spirit of Laws, Book xiii., c. 1, thus happily defines the object and true principles of taxation: — "The revenues of the state are a portion that each subject gives of his property, in order to secure or to have the agreeable enjoyment of the remainder. To fix these revenues in a proper manner, regard should be had to the necessities of the state and to those of the subject."

The duties, for the performance of which we look to the Federal Government of these independent but united states,

are those pertaining to the common defence and general welfare of the country as a whole, embracing all the States and territories under its jurisdiction. Its necessities for a revenue arise from the performance of these, its appropriate functions and duties. Beyond guarantying to the citizens of the several States the maintenance of a republican form of government by all the States composing the Federal Union, it has no concern with the administration of justice under local laws, and no one expects it to provide means for defraying the expenses of the various counties and municipal corporations into which the States are subdivided.

Accordingly, we find conferred upon Congress by the Constitution of the United States, not an unlimited and indefinite and absolute power to levy and collect taxes, duties, imposts and excises for any and all purposes whatsoever, but to enable them effectually to exercise the powers specifically granted by the several States to the general government, it is provided, (Art. 1, § VIII) that "Congress shall have power to lay and collect taxes, duties, imposts and excises, *to pay the debts and provide for the common defence and general welfare of the United States.*"

It is not within the scope either of their duty or their authority, in the loyal and well ordered State of Maine, to provide by taxation the means of defraying the expenses of those municipal corporations which owe their existence to an independent State government, or to furnish the proportional part which those municipalities are bound to contribute towards the expenses of the county or State in which they are situated. Nor is there anything in the language of the Act of Congress of June 3, 1864 indicating that they designed or undertook to do it. To guard against the assumption that they intended to exempt entirely the shares in these banking associations, which they had created to meet a financial exigency of the general government and the country at large, from taxation under State authority for State and municipal purposes, they simply say, in § 41, 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*, but not at a greater rate than is there assessed upon other moneyed capital in the hands of individual citizens of such State."

An unlimited power to tax being in effect a power to prohibit or destroy, Congress seems to have considered it necessary and proper to place such limitations upon the concurrent authority of the individual States to tax these shares, as would preclude them from imposing such unequal burdens upon this species of property as might prevent investment therein, and this was accordingly done by various provisos similar in character and design to the one above recited. Under these limitations the matter of taxation, by or under State authority, is left open to the action and effect of State legislation. Where the general tax laws of the State permitted the assessment of these shares and conformed to the restrictions imposed by the Act of Congress, no further action on the part of the State Legislature was necessary. Nothing in the Act of Congress was to be construed *to prevent* such assessment. But it was equally foreign to the design of Congress so to intervene in the matter of the assessment of taxes by or under State authority, as *to require* such assessment, or to change or control the effect of any State law, by virtue of which it must be made (if made at all) for State and local purposes.

Congress had an unquestionable right to establish these associations, and to give them such privileges as were necessary to enable them to fulfil the great public purposes of their organization. They had a legal existence in this State, the Act of Congress establishing them being of paramount authority to the statutes of this State, (R. S., c. 47, §§ 79, to 82, inclusive,) by which private, associated, and foreign banking are prohibited except when specially authorized by the Legislature. But the liability of the shareholders in

them, to taxation for State, county and municipal purposes, must depend upon State legislation, which is found to be not in contravention of the limitations imposed by Congress. By the law, as it stood in 1865 and 1866, taking our own general tax law, with the limitations superadded by the Act of Congress for our guide, it appears that, while shares in these associations, held by inhabitants of *the place where the bank was located* might be legally assessed, there was an utter failure of legal authority to tax the shares belonging to persons who resided *elsewhere* within this State.

With the apparent inequality resulting from this state of the law, it is the province, not of the judiciary, but of the law making power to deal. It is not the *first*, it will not probably be the *last* instance in which property by reason of its peculiar situation escapes taxation.

Defendants defaulted.

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

DANFORTH, J., concurred in the result.

SAMUEL C. RAMSDELL *versus* SILAS BUSWELL.

Replevin is maintainable only against a person having possession or control of the chattels to be replevied.

Sayward v. *Warren*, 27 Maine, 453, overruled.

ON EXCEPTIONS.

APPLETON, C. J.—Replevin for a stove. There was evidence tending to show that, prior to the date of the writ, the defendant had sold the stove in controversy to his father, and that at that time the same was in the possession and under the control of the father, and not of the son. The defendant requested the presiding Justice to instruct the

jury, if the stove was thus in the possession and control of the father and not of the son, that, in such case, the action could not be maintained against the son, but he ruled otherwise, and that the action was maintainable.

The question presented is whether in a replevin suit, A against B, the officer by virtue of his process may replevy the goods in controversy in whose soever hands they may be found, they being neither in the possession nor under the control of the defendant.

The action of replevin is to a certain extent a process *in rem*. It lies for the recovery in *specie*, of any personal chattel which has been taken and detained by the defendant from the owner's possession, with damages for its detention. The action must be against the person having possession of and unlawfully taking or detaining the chattel to be replevied.

The action of replevin is regulated in this State by R. S., 1857, c. 96. The statute assumes that the property to be replevied is in the possession of the defendant, from whom the officer is to take it and restore the same to the plaintiff, upon his giving the bond required by law. If the plaintiff recovers, he is entitled to damages. If he fail, the goods are to be restored to the defendant, who may recover damages for the taking. A writ of return issues and, if not restored, the defendant in replevin has his remedy on the replevin bond as well as the writ of reprisal. The statute in all its provisions implies that the property replevied was in the possession of the defendant, that it was taken from his possession by the writ, and, in case of failure on the plaintiff's part, is to be restored to the possession of the defendant.

The form of the writ is prescribed by R. S., 1821, c. 63, § 9. The direction is to the sheriff that he replevy the goods and chattels following (here describe them) belonging to P. D. of B., in the county of P., *now taken, detained or attached* (as the case may be) *by* S. P. of B., county of P., at said B, and them deliver unto the said P. D., &c. The

goods to be replevied are *now*, that is, when the writ is made and served, taken, detained and attached by the defendant. The mandate of the writ is to take the goods from the person taking and detaining them, and not from the public generally.

The defendant is to "answer unto the said plaintiff in a plea of replevin; for that the defendant, on the day of A. D. 186 at said unlawfully and without any justifiable cause, *took* the chattels of the said plaintiff as aforesaid, and them unlawfully detained *to this day*," &c. The declaration, it will be perceived, implies, not merely a wrongful taking, but a wrongful and continuing detention.

The officer is to serve the process "provided he, the said plaintiff, shall give bond to the said defendant, with sufficient sureties, in the sum of dollars, being twice the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such *damages* and costs as the defendant shall recover against and also to return and restore the same goods, in like good order and condition as when taken, in case such shall be the final judgment." The person from whom the goods are taken is the person to whom they are to be restored. He is the only person injured, if replevied without right. He is the one who can claim damages. In the case at bar, the case finds that the defendant neither owned the property nor had it in his possession at the date of the plaintiff's writ. The defendant, therefore, was entitled neither to a return nor to damages. The real owner, who was in possession, is thus left without protection. At any rate, he could not vindicate his rights in this action. His property is taken from him by a process to which he is a stranger.

It seems to have been held that, at common law, replevin would not lie for an unlawful detention, but that in such case *detinue* or trover was the proper remedy. *Meany* v. *Head*, 1 Mason, 319. But, in this State, it was early decided that the statute so far altered the common law, that this action may be maintained for goods unlawfully detained,

though the original taking was lawful. *Seaver* v. *Dingley*, 4 Greenl., 300. The same was held to be the law in Massachusetts. *Baker* v. *Fales*, 16 Mass., 151.

The ruling of the presiding Justice is based upon the decision in *Sayward* v. *Warren*, 27 Maine, 453. But, upon a careful examination of the opinion in that case, we are satisfied it is against the spirit of the statute as well as against the weight of judicial authority. The decision is predicated upon the assumption that trespass *de bonis asportatis* and replevin are concurrent remedies. The Court cite the remarks of SUTHERLAND, J., in *Chapman* v. *Andrews*, 3 Wend., 240, in which he says, "the doctrine of this Court I consider as settled, that replevin lies for such a taking as will sustain an action of trespass *de bonis asportatis*." But such cannot be regarded as sound law. If the chattel is destroyed it cannot be replevied, though the owner may bring trespass *de bonis*. So, in case of a tortious detention, when the taking was lawful the owner may bring trover or replevin, though he cannot maintain trespass for such detention. It is obvious one may be maintained and the other not. The remedies, therefore, are not in all cases concurrent. *Sharp* v. *Wittenbach*, 3 Hill, 576; *Roberts* v. *Randel*, 3 Sandf., 707.

In *Pangburn* v. *Partridge*, 7 Johns., 140, the Court say, "the old authorities are, that replevin lies for goods taken tortiously, or by a trespasser." In this as well as in the other cases cited, as *Thompson* v. *Bullen*, 14 Johns., 84, *Clark* v. *Skinner*, 20 Johns., 465, and *Chapman* v. *Andrews*, 3 Wend., 240, the articles replevied were in the possession and under the control of the defendants. The language of the court has reference to the existing state of facts. The remedies are concurrent, if the trespasser has the goods in his possession, and while and as long as they remain under his control. With this qualification, and only as thus qualified, can the conflicting authorities be reconciled.

"In Comyn, title Replevin, A, it is laid down," remarks WHITMAN, C. J., in *Sayward* v. *Warren*, "even, that if

cattle, after the taking, return to the owner, still, that replevin lies for the wrongful taking." By recurring to Comyn, it will be found that his reference is to *Fitzherbert de Natura brevium*, 69, H, where the law is thus laid down:—"And if the lord distrain his tenant's cattle wrongfully, and afterwards the cattle return back unto the tenant:—yet the tenant shall have replevin against the lord for these cattle, and shall recover damages for the wrongful distraining of them, *because he cannot have an action of trespass against his lord for that distress;* but against a servant or bailiff he may. 1 H, 6, 7." This reasoning cannot be regarded as having any weight at the present day; certainly not as against the plain intent of the statute.

The result is that the action of replevin for chattels is only maintainable against the individual having them in possession, either personally or by his servant. Such is the law in Massachusetts, as determined in *Richardson* v. *Reed*, 4 Gray, 441, and in Pennsylvania, as decided in *English* v. *Dalbraw*, 1 Miles, 160. *Exceptions sustained.*

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

BARROWS, J., dissenting.—I am unwilling to concur in overturning what seems to me the righteous and well considered decision of our own Court, in *Sayward* v. *Warren*, 27 Maine, 453. It covers precisely the point presented in this case. By it the wrongful taker is held responsible to the true owner, in an action of replevin, for such wrongful taking, accompanied by a continued detention of the property by the wrongdoer's grantee. Why should he not be? He is privy to the detention. It is continued *by his authority*, not only up to the time of the making and service of the writ, but up to the time of the trial, except so far as the service of the writ places the property in the custody of the law. Can *he* be permitted to say that that is not *his* act which is done solely by the authority which he has assumed to confer? By the act of selling, which he puts in evidence,

he asserts title in himself to the property in controversy, as against the plaintiff in replevin. That puts an end to any question *between them as to the taking and detention by the defendant.* The main question then is,—which is the true owner? Now when he finds that question likely to be decided against him, shall he invoke and receive the assistance of the Court to change the issue which he has been litigating, and defeat the true owner's right to recover damages and costs against him, because, forsooth, without the knowledge of the owner, he had transferred his wrongful possession to some third party, who, under and by virtue of *his authority*, continues the wrongful detention?

I do not think that any technicalities pertaining to the action of replevin under our statutes require us to do any such piece of injustice. If they do, the value of replevin as a remedy is greatly impaired,—for, if the defendant's title seems likely to fail, it needs only the intervention of some convenient and irresponsible father, brother, son, or friend, to convert defeat into victory, at the last moment, by testimony which the owner of the property would seldom or never be able to controvert.

R. S., c. 96, § 8, provides, in substance, that the owner or person entitled to the possession of personal chattels, may cause them to be replevied when unlawfully taken or detained from him. The remedy can be pursued only in cases where the officer serving the writ can get possession of the property so as to deliver it to the plaintiff. *When that is done*, I see no valid objection to allowing the plaintiff to maintain the suit against any one who would be liable to him in trespass for the wrongful taking. It is, doubtless, in view of *that* condition of things that the various *dicta* treating trespass *de bonis* and replevin as concurrent remedies have been enunciated. When that condition of things *does* exist, *why* are not such *dicta correct* and applicable? The judgment is not conclusive except upon the parties and their privies. The rights and the remedies of no third parties, claiming by an independent title, are in the least degree

affected or interfered with. If the person summoned as defendant has not wrongfully taken or detained the plaintiff's goods, let him plead a simple *non cepit*, and, if the plaintiff fails to establish a tortious taking or detention by him or his authority, he has his judgment for costs, as in case of any other defendant wrongfully sued. But when he asserts a title to the property, and has had it in his possession by a tortious taking, do not let him defeat the owner's claim against him for damages and costs, after he has put the owner to the proof of his title, by saying, what in plain English amounts to just *this*,—"true, I have taken this man's goods and detained them from him, but, before he could get his writ made, I shuffled the control of them, without his knowledge, into the hands of a third person, who, when the officer came with the writ, had a possession unknown to the plaintiff and claimed title *under me*. The plaintiff has proved that the goods are his and not mine, but let him pay me my costs and litigate the matter anew with my grantee." It seems to me that this is limiting § 8, c. 96, in a way which the Legislature never designed.

Against whom shall the owner of goods unlawfully taken pursue the remedy given in that section? Why not against the man who (as the owner knows and can prove) unlawfully took the goods, and who claims the right to take and to dispose of them? It seems to me that the sale by the wrongful taker is, *quoad* the owner, *res inter alios*, and not admissible to affect his rights.

Stress is laid upon the fact that the bond required of the plaintiff is to run to the defendant, and the Chief Justice remarks as follows:—"If the plaintiff recovers, he is entitled to damage. If he fail, the goods are to be restored to the defendant;" and again, "the statute in all its provisions implies that the property replevied was in the possession of the defendant," that it was taken from his possession by the writ of replevin, and, in case of failure on the plaintiff's part, is to be restored to the possession of the defendant." I do not suppose that he means that a judgment for a re-

turn is in all cases a necessary accompaniment of a judgment in favor of the defendant, or a necessary consequence of the failure of the plaintiff to maintain his suit. *But then the argument fails*, for it seems the Legislature *did* contemplate cases where a defendant in replevin might make a successful defence, and yet not be entitled to damages or a return. Chapter 96, § 11, provides for a judgment of return with damages, only, "*if it appears that the defendant is entitled to a return.*"

It may be worth while to remark that, while the *dicta* in *Richardson* v. *Reed*, 4 Gray, 441, cover the case at bar, the two cases are totally dissimilar. It was decided there that the attaching creditor could not be joined as defendant in replevin with the officer making the attachment, — METCALF, J., remarking, that "attached goods are in the legal custody and possession of the officer *only*. The attaching creditor has no property in them, general or special; no right to the possession of them, and no right of action against a third person who may take them from the officer or destroy them. How then can goods be returned on a writ of return or reprisal to him who *never had* the possession of them nor the right of possession?"

The distinction between that case and this is, that the attaching creditor *never had* possession nor the right of possession, and never *claimed* to have had either property or possession. Otherwise, here.

He cannot say that he does not *now* detain them, whose grantee is detaining them. As WHITMAN, C. J., says, "he virtually did detain it till replevied." It can hardly be considered as certain that the Massachusetts Court will ever push the *dicta* in *Richardson* v. *Reed* to *this* extent by an actual decision in a similar case. My conviction is, that the exceptions here ought to be overruled.

J. A. Peters, for the defendant.

F. A. Wilson, for the plaintiff, cited *Sayward* v. *Warren*, 27 Maine, 453.

SAMUEL TAINTER *versus* JAMES A. LOMBARD.

In 1859, the plaintiff and son, residing in one family, gave their joint and several note for a wagon, which was to remain the property of the former until the note was paid by the son. The wagon was used by the family until August, 1862, when the son took the wagon by force, and sold it to the defendant. In July and Dec., 1862, the plaintiff and son passed mutual receipts "in full of all indebtedness." It was in evidence that the parties to the latter receipt expressly agreed that the matters in relation to the wagon were not included in the receipt. In replevin for the wagon:— *Held*, that the presiding Judge properly declined to instruct the jury that, if the father was to hold title to the wagon as security for signing the note till paid for by the son, and signed as surety and afterwards gave the receipt of July, 1862, such receipt, if uncontradicted, would be a discharge of the sums so paid and the plaintiff would no longer be entitled to hold the wagon.

ON EXCEPTIONS.

REPLEVIN for a wagon.

The facts are sufficiently stated in the opinions.

J. A. Peters, in support of the exceptions.

A. W. Paine, for the plaintiff.

CUTTING, J.—Replevin for a wagon. The general issue was pleaded, and a brief statement alleging property in the defendant, who claimed title under one Robert B. Tainter, son of the plaintiff, and the only question presented was one of title, whether the wagon was the property of the father or son.

It appeared in evidence that the wagon was purchased of one Reuben Dunning, to whom the father and son gave their note payable jointly and severally, secured by a mortgage of a yoke of oxen belonging to the former. That the wagon was to be the father's until paid for by the son. The plaintiff testified that he paid the notes and the son had never reimbursed him in any amount. Whereas the son swore that the notes were paid by himself.

It further appeared that, subsequent to the purchase, there had been some business transactions between them, and, on

July 30, 1862, they passed mutual receipts, of which the following was from the plaintiff.

"Received from Robert B. Tainter five dollars in full of all accounts, notes and indebtedness of every description, up to this date, except an obligation given this date for hay, apples, potatoes, &c. "Samuel Tainter."

There was no evidence that the sums paid for the wagon were included in the receipt, nor any on the subject. But subsequently, on Dec. 3, 1862, after this suit was commenced, the same parties had another settlement and gave mutual receipts, — that from the plaintiff as follows: —

"Rec'd of R. B. Tainter five dollars in full of all accounts, notes, suits and indebtedness of every description, up to this date. "Samuel Tainter.

"Witness, Daniel B. Hanson."

The attesting witness testified that it was agreed, by the parties at the time, that the matters in suit in this case were not included in that settlement and receipt, and that these must abide the decision of the Court.

The Judge had instructed the jury that, — "If the sale was made to the father, who was to hold the title until paid for by the son, and the son had not so paid, then their verdict should be for the plaintiff. But, if the son had so paid, or if the sale was made to him and the father signed the note as surety merely, without any agreement that he should hold the wagon, then their verdict should be for the defendant." To which rulings no exception is taken. Thereupon the counsel for defendant requested the Judge to instruct the jury that, — "If the father was to hold title to the wagon as security for signing the notes, till paid for by the son, and signed the notes as surety, and afterwards gave the receipt of July 30, 1862, such receipt, if uncontradicted, would be a discharge of the sums so paid, and the plaintiff would be no longer entitled to hold the wagon, which instruction was not given." To which refusal the defendant's counsel has excepted, and the correctness or otherwise of such refusal presents the sole question for consideration.

The case finds that, "after the purchase of the wagon, July 9, 1859, it was used in the family until August 30, 1862, when the son took it away from the plaintiff violently, while riding in it on the highway, and then sold it to defendant." Wherefore it appears, that the wagon had been in the possession of the plaintiff for a period of nearly three years, and was still under his control at the date of the receipt, July 30, 1862. Consequently, the parties to that receipt may have supposed that, after such lapse of time, the property in the wagon had become absolute in the father, and the receipt had no relation to that subject; at least such fact was for the consideration of the jury.

It will be perceived that the Judge had already instructed the jury upon the evidence embracing the receipt; that, if the son had paid the father, they should return their verdict for the defendant. This ruling brought to their consideration all the evidence, both oral and written, which had been produced by both parties at the trial. But the requested instruction was calculated to isolate one species of testimony and make it independent of all the rest; whereas the receipt was subject to an explanation, and evidence had been introduced for that purpose. The plaintiff had sworn "that he had paid the notes and his son had not repaid any part of the money." Besides, the subsequent receipt of Dec. 3, 1862, was of the same tenor as the first, equally as comprehensive; yet the attesting witness, called by the defendant, explained the agreement of the parties at the time, that it was not intended or designed to affect the plaintiff's rights in this suit, then pending; an arrangement somewhat novel, if the first receipt was intended to defeat the plaintiff's claim on, or title to the wagon.

The requested instruction was not only hypothetical, but based upon the idea that the receipt of July 30, 1862, was "*uncontradicted*," whereas the whole evidence tended very strongly to show the fact to be otherwise.

The counsel for the defendant, in asking the request, must have supposed that, because there was no evidence in-

troduced bearing directly and specifically upon the receipt, it must be conclusive, but, if the Judge had so ruled, it would have at once withdrawn all the other evidence from the jury, and their verdict must have been for the defendant, — thus settling the issue upon an isolated point, whereas they were instructed to consider, as it was their province, the whole evidence. *Exceptions overruled.*

DICKERSON, BARROWS and DANFORTH, JJ., concurred.

KENT, J. — The only exception taken, is to the refusal of the Judge to give the specific instruction requested. In such a case, we are only called upon to determine whether the Judge was bound to give the precise instruction requested. But if the requested and refused ruling cover the whole ground, and contain the true rule which should have been given, the party may sustain his exceptions. *Marshall* v. *Oaks*, 51 Maine, 308.

A party must take care to incorporate into his request every element or fact necessary to sustain the principle he contends for.

In the request in this case, the defendant assumes as its basis, that the father was only surety for the son for the payment of the whole price of the wagon bought by the son, that the father held the title to the wagon as security for signing the notes, until paid by the son. On these facts, he asks the Court to instruct the jury, that if afterwards the receipt of July 20th was given, such receipt, if uncontradicted, would be a discharge of the *sums so paid*, and plaintiff would no longer be entitled to hold the wagon.

This request simply regards the father as a surety, holding title until relieved of his liability. The receipt of July 20 is produced to show that all indebtedness from the son to the father was paid and discharged.

Admit such is the true construction, and that it did discharge all debts due for money paid by the father to the son, *then* and on that day existing, *non constat*, that all the liability of the father on the notes had been discharged before

that time. The request does not state this important fact. It may be true, that if, before the date of the receipt, the father had paid a part, it would debar him from any claim for that sum. But this was a question of *title* to the wagon. The father was to hold that title until his whole liability was released or discharged.

The infirmity in the request is, that it does not assume or state that, before the date of the receipt, the father or son had paid the whole debt to Dunning. On the proposition, as presented to the Judge, the father's liability on the note might still continue, and, as long as it did continue, the title was in him.

The request was in substance, that the Judge should say to the jury, that the receipt, uncontradicted, would discharge "the sums so paid" and that, if it did discharge *those sums*, that the *title* to the wagon would thereafter be out of the plaintiff. But this is a *non sequitur*. It might be, if those "sums" had been stated to be all that he was ever liable for,—or that the father had paid all and had, at the time of the receipt, a debt or claim against the son for that money paid, and no remaining liability.

Exceptions overruled.

APPLETON, C. J. concurred.

URIAH WINCHESTER *versus* BENJAMIN BALL.

By the common law, a mortgagee of personal property, upon the failure of the mortgager to perform the condition of the mortgage, acquires an absolute title to the chattel.

Under our statute, if the debt secured by the mortgage is not paid, when the time of redemption has expired, the title of the mortgagee becomes absolute.

Acceptance of a part payment of the principal of a note secured by a chattel mortgage, after the expiration of time of redemption, is a waiver of the forfeiture.

And the time for redemption commences to run again from the time when the last partial payment is made and accepted, upon chattel mortgages made prior to the enactment of c. 23, of the Public Laws of 1861.

Chapter 23, of the Public Laws of 1861, is not applicable to chattel mortgages less than $30, and they become forfeited by failure to perform their conditions.

On Exceptions.

Trover by the mortgager against the mortgagee for a mare and three cows. Writ dated Oct. 16, 1864.

The plaintiff introduced a mortgage from himself to the defendant, covering the mare and two of the cows sued for, dated April 24, 1860, given to secure a note for $300, payable in seven months, on the back of which were two indorsements; the latter bearing date January 16, 1862. Likewise, another mortgage from himself to the defendant, covering the other cow, dated January 8, 1862, given to secure a note for $25, payable in sixty days.

Abraham Sanborn, called by the plaintiff, testified substantially that, on Sept. 10, 1864, by direction of the plaintiff, he calculated the amount due upon the former note and tendered the amount, $125, to the defendant, in U. S. legal tender notes, who declined to accept it, whereupon the witness demanded the mare and two cows mentioned in the mortgage; but the defendant refused to deliver them.

The plaintiff testified substantially, that on Sept. 12, 1864, he tendered to the defendant $30, in U. S. legal tender notes, as the amount due upon the latter note and mortgage, and demanded the cow referred to in that mortgage, but the defendant declined to accept the money and deliver the cow, — that, after the indorsements upon the $300 note, defendant held a note for $26 against him for which he gave him a new note, — that, on July 15, 1862, defendant cast interest on the $300 note, — that plaintiff gave his note to defendant for $76,86, payable in six weeks, in which was included the interest above mentioned, and the interest was to be indorsed upon the $300 note, but was not, — that paid the $76,86 note seven days after the defendant took mortgaged property by writ of replevin, Sept. 1, 1862,

that the replevin suit was disposed of by nonsuit, but no return ordered,—that, on Sept. 10, 1864, the mare was worth $200,—that defendant sold mare,—that the two cows were worth $50 each, and the last mortgaged cow $75.

Upon this evidence, the presiding Judge ordered a nonsuit, and the plaintiff alleged exceptions.

A. Sanborn, for the plaintiff.

The several acceptances of part payment of the note were so many waivers of the forfeiture. *Deming* v. *Comings*, 11 N. H., 474; *Batchelder* v. *Robinson*, 6 N. H., 12; *Quint* v. *Little*, 4 Greenl., 495; *Dexter* v. *Arnold*, 1 Sumner, 109, 118; 1 Washb. on R. Prop., 543, and cases cited, and 591; *Andrews* v. *Senter*, 32 Maine, 398. A demand of payment of balance of a note, long after due, is a waiver of forfeiture of property mortgaged to secure it. *Green* v. *Dingley*, 24 Maine, 137. Counsel also cited *Clark* v. *Cummings*, 5 Barb., 359; *Jackson* v. *Brownson*, 7 Johns., 227; 1 Pars. on Con., 427, and note; *Bowen* v. *Bowen*, 18 Conn., 535.

Acceptance of interest on $300 note, Sept. 8, 1862, was a waiver of forfeiture. This was after commencement of replevin suit. After waiver, demand of balance is essential before breach of condition can obtain again. Condition was to pay on demand. Condition cannot be broken so as to work a forfeiture without demand; otherwise, there can be a breach without violation of promise of the mortgager.

Rowe & Appleton, for the defendant.

APPLETON, C. J.—The plaintiff, on April 24, 1860, mortgaged to the defendant the mare and two cows in controversy, to secure a note given by him for the sum of three hundred dollars, payable in seven months, which was not paid at maturity.

"A mortgagee of personal property, upon the failure of the mortgager to perform the condition of the mortgage,"

remarks SUTHERLAND, J., in *Langdon* v. *Buel*, 9 Wend., 80, "acquires an absolute title to the chattel. This is well established to be the legal effect and operation of a mortgage of personal property. *Brown* v. *Bement*, 8 Johns., 96; *Ackley* v. *Finch*, 7 Cowen, 290." Such is held to be the common law in this State. *Flanders* v. *Barstow*, 18 Maine, 357.

By R. S., 1857, c. 91, § 3, a right of redemption is allowed "within sixty days after breach of condition." At the expiration of that time, if the debt secured by the mortgage is not paid, the title of the mortgagee becomes absolute. *Clapp* v. *Glidden*, 39 Maine, 448.

After the defendant's title became absolute, the plaintiff paid a part of the mortgage debt. The mortgagee, by receiving this payment, must be regarded as having waived his strict legal rights. The rights of the parties were the same as if the payment of the note had been thus extended. The mortgagee might redeem within sixty days from the last payment. Neglecting to do that, his equity of redemption was foreclosed. The mortgagee, by waiving a forfeiture, is to be in no worse condition than if his note had become due at the date of the partial payment. In *Flanders* v. *Barstow*, 18 Maine, 357, the mortgagee, by parol, extended the time of payment fifteen or twenty days. "The plaintiff," remarks WESTON, C. J., "having failed to pay the first note, at the time stipulated, was a breach of the condition, if the time had not been enlarged. Being enlarged, the condition was saved, until the extended time had run out." The mortgagee, by receiving the money, did not enlarge the time of payment indefinitely.

The plaintiff's rights are not saved by statute of 1861, c. 23, as by § 8 it is specially provided that "its provisions shall be applicable only to mortgages subsequently executed."

The mortgage of Jan. 6, 1862, given to secure a note of $25, is not within the provisions of the Act of 1861, c. 23,

as that applies only to a "mortgage of personal property to secure the payment of more than thirty dollars." It became forfeited by failure to perform its condition.

Exceptions overruled.

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

STATE *versus* DANIEL C. HURLEY.

Exceptions do not lie to the refusal of the presiding Judge to quash an indictment

Section 32, c. 33 of the Public Laws of 1858, providing that "whenever an unlawful sale" of intoxicating liquor "is alleged, and a delivery proved, it shall not be necessary to prove a payment, but such delivery shall be sufficient evidence of sale," is constitutional.

ON EXCEPTIONS.

INDICTMENT against respondent for being a common seller of intoxicating liquors in violation of law. The indictment contained two counts, alleging a former conviction.

Respondent seasonably moved that the indictment be quashed for uncertainty and insufficiency, and because the penalties for convictions under the two counts were different. But the presiding Judge overruled the motion.

The respondent requested the presiding Judge to instruct the jury that the clause of § 32 c. 33 of the Public Laws of 1858, providing that "delivery shall be sufficient evidence of sale," is contrary to the constitution and void; but the presiding Judge declined to give the requested instruction, and thereupon the respondent alleged exceptions.

Wilson, in support of exceptions.

Frye, Att'y General, contra.

APPLETON, C. J.—The law is well settled that exceptions do not lie for refusing to quash an indictment. *State* v. *Burke*, 38 Maine, 574. No motion has been made in arrest of judgment.

By the Act, approved March 25, 1858, c. 33, § 32, "Whenever an unlawful sale is alleged, and a delivery is proved, it shall not be necessary to prove a payment, but such delivery shall be *sufficient* evidence of sale."

The counsel for the respondent requested the presiding Justice to instruct the jury that this section was contrary to the constitution and void, which he refused to do, whereupon exceptions were duly alleged because of such refusal.

The meaning and purpose of this section are obvious. In liquor prosecutions, difficulties early arose from the reluctance of witnesses to testify to all the facts attending the sale, and from the frequency of evasion on the part of unwilling witnesses. The Legislature saw fit to dispense with the proof of payment, and to enact that "delivery shall be sufficient evidence of sale." Delivery in the absence of all other proof, is made "sufficient evidence of sale,"—sufficient when no other proof is offered. It is open to disproof from every source. It may be explained by the attendant circumstances. The party delivering is not estopped by the fact of delivery. The government is not required to make proof of payment. The sale may be on credit. The fact of delivery is to be deemed sufficient, if not explained by the circumstances accompanying the delivery, or if the inference is not negatived by disproof. This rule of evidence is obviously in accordance with general, though not universal experience. It is no hardship on the defendant, as he can explain the fact, if susceptible of explanation.

The power of the Legislature to change or modify existing rules of evidence, or to establish new ones, has been exercised too long to be a matter of doubt. In *Com.* v. *Thurlow*, 24 Pick., 374, it was held that the prosecution was bound to prove, by competent evidence, that the defendant was not duly authorized to sell. The Legislature of Massa-

chusetts, subsequently, by stat., 1844, c. 102, declared the legal presumption to be, that in all prosecutions under the liquor laws the legal presumption should be, that the defendant had *not* been licensed, so that henceforth it is made incumbent on the defendant, if he relies on the fact, to prove the fact by the production of the record. This was the establishment of a new rule of evidence, the constitutionality of which is fully implied in the opinion of the Court in *Com.* v. *Tuttle*, 12 Cush., 502. Substantially, the same question as the one now before us arose in Massachusetts, and it was there held, after a careful examination of the authorities, that, in liquor prosecutions, a provision that delivery in or from any building or place other than a dwelling place "shall be *prima facie* evidence of sale," was constitutional and valid. *Com.* v. *Williams*, 6 Gray, 1. The authority of the Legislature to prescribe new rules of evidence is affirmed, and full reference is made to the legislative exercise of this power. Such is the law as decided by our Court in *Berry* v. *Lisherness*, 50 Maine, 118. *Exceptions overruled.*

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

STATE *versus* INTOXICATING LIQUORS, *claimed by* DANIEL H. JONES *& als.*, *Appellants.*

The remote and minute corporate interest which a judge of a police court has in intoxicating liquors forfeited to the city of which he is an inhabitant, does not disqualify him from taking cognizance of cases of libelled liquors seized within such city.

The Legislature may constitutionally provide that such interest shall not be a legal objection to such judge's jurisdiction.

ON EXCEPTIONS.

The facts appear in the opinion. The principal question was whether the Judge of the Police Court of Bangor had ju-

risdiction to decree intoxicating liquors forfeited to the city of which he was an inhabitant, that being the place in which they were seized.

A. Sanborn, for the respondents.

The police judge, being a resident of Bangor, was directly interested in the result of the trial. Such interest disqualified him from trying the case. The statute establishing the court expressly provides that he shall exercise jurisdiction in certain cases," except when interested." Public Laws of 1856, c. 207, § 2. This prohibition of jurisdiction is in furtherance of the great, unchangeable, eternal principle lying at the foundation of all the civil courts in this country. So long as judges are human they will possess human infirmities. Exclusion of interest, however small, is absolutely essential to the upright administration of justice. It is impossible to establish any rule fixing the amount or degree of interest which shall disqualify a judge or take away his jurisdiction.

The Legislature has no power to give to a judge jurisdiction over a case in which he is interested. The people cannot delegate this power and thus commit civil suicide. If they can, it can only be done by the most deliberate declarations. It cannot be inferred from silence. No ratification of its exercise can be implied from any want of express disaffirmation.

The decisions in Massachusetts are put upon necessity that the law would "remain unexecuted without" the power on the part of such judge. This impliedly declares that such interest *does* disqualify in fact when others are not so interested, and the law may be executed by other courts.

Any justice residing in any other town in this county has concurrent jurisdiction of cases similar to the one at bar, and hence the plea of necessity does not apply.

Justice should not be sacrificed to inconvenience.

Frye, Att'y General, contra.

KENT, J. — The complaint against the liquors and the persons keeping them was duly made, according to law, and after a full hearing on the answers and claim of the respondents, the liquors were adjudged forfeited by the judge of the police court of the city of Bangor. From this judgment the respondents and claimants appealed to this Court where a trial was had before a jury and a verdict returned, affirming in substance the allegations in the libel. After verdict a motion in arrest of judgment was filed, alleging that "the judge of the police court for the city of Bangor, when the hearing of the case was had before him, had no jurisdiction thereof." This motion was overruled by the presiding Judge, and exceptions taken.

Without discussing the question whether this motion was filed in season, or whether there are facts enough on the face of the papers to show that the police judge had no jurisdiction, we will consider the case on the facts claimed as existing by the respondents.

The motion does not state any fact or reason, except the general allegation that the judge "had no jurisdiction." It is not denied that the police court had jurisdiction of the case by the terms of the Act of 1858, (c. 33, § 23,) — but it is alleged that the judge was disqualified to act in the case by reason of an interest in the forfeiture, and therefore, although coming within the language of the Act, the judge had no jurisdiction. The fact is conceded, although it does not directly appear in the papers, that the judge was a resident and citizen of Bangor, liable to be taxed therein, at the time of the trial before him.

His interest is traced in the following manner: — By the decree of forfeiture of the liquors, according to the provisions of § 18, of c. 33, (1858,) they are to be delivered to the "Mayor and Aldermen of the city to which they were forfeited" by the decree. The city fathers thus become the possessors of the condemned liquors, but are not at liberty to drink them themselves or to divide them among the citizens *per capita*. But they are to examine the same and, if *they* shall *de-*

termine that any portion is fit to be sold for medicinal, mechanical or manufacturing purposes, they shall deliver *such* portion to the agent of the city to be sold by him according to law. The portion found and adjudged by this board *unfit* is to be cast out and spilled upon the ground.

The interest of the judge, then, is not only extremely minute, but is contingent and dependent entirely upon the judgment and decision of another tribunal. If all the liquor is unfit for such sale, (and, considering the vile character and adulteration of most of that seized, the probability in a given case is that all is so,) then the judge will have no benefit, immediate or remote. It may well deserve consideration, whether such a possible, but contingent interest, depending entirely upon a new judgment and decree by another board and tribunal, and not upon the decree by himself, can be a disqualifying interest in any event. But, even as to the liquor adjudged "fit to be sold," the judge's interest is still contingent upon the profits or the fact that the amount for which it is sold, exceeds the expenses of the agency, sale and other charges. It is quite clear, that the prospect for any great increase of his property is not brilliant, or likely to very seriously affect his judgment. It is to be observed that this is not a case where a penalty or a part of it goes directly into the town treasury in money, by virtue of the decree or judgment of the court. But, if it were such a case, we have no doubt that the court would not be ousted of its jurisdiction by such interest.

In the first place, it appears that the Legislature has given to the judges of the municipal and police courts jurisdiction in these words: — "may try those brought before them for offences within their jurisdiction, though the penalty or fine accrues wholly or in part to their town."

By the Act of 1858, (commonly called the liquor law,) c. 33, § 23, the provision in relation to jurisdiction in a case of seizure like this is, that "judges of municipal courts and police courts, and justices of the peace, having jurisdiction in other criminal matters, in the places where they

reside, shall have jurisdiction by complaint, original and concurrent with the Supreme Judicial Court, of all prosecutions under this Act."

The only question would seem to be, whether the Legislature had a constitutional power to pass these Acts. This appears to be the view taken of this point by the counsel for the respondents. He has urged with earnestness and force the proposition, that such a disregard of even a remote, minute, or even contingent interest cannot be tolerated, and must forever prevent the people, through their constitutional organ, from allowing any Judge to sit or act where such a remote interest can be traced.

This argument, if carried out to all its logical results, would prevent the imposition of any fine to and for the use of *the State*, by *any* magistrate in it, whether a justice of the peace or a judge of the Supreme Court. For all are citizens of the State and pay taxes, and have an interest in having the treasury supplied by penalties and fines, — in the same manner as a judge of a police court of a city has in replenishing the city treasury by like means.

It has been contended that, when the Legislature has, in express terms, given jurisdiction in cases where the magistrate might have a minute and remote interest, without in terms, or by implication, excepting such cases, — the fair construction is, that jurisdiction is given notwithstanding such interests, and although there may be other courts of concurrent jurisdiction. However this may be, we are satisfied that the Legislature may give jurisdiction of cases where, in their judgment, the interest is too minute or remote to warp the judgment. Our Legislature has determined that a magistrate may try a case, although the fine or penalty may accrue to the town or city in which he resides.

The limit and extent of the provision is within legislative discretion and determination.

In Massachusetts, questions have arisen similar to the one before us. It was held there, before any special statute provision giving jurisdiction, notwithstanding a remote or mi-

nute interest in the penalty, that where a court or magistrate had exclusive jurisdiction of the offence, that it must be assumed that the Legislature knew that no other tribunal could hear and determine the case, and therefore, by implication, annulled the objection of interest. Otherwise the offence must go unpunished. *Commonwealth* v. *Ryan*, 5 Mass., 90.

The same doctrine is reaffirmed in *Hill* v. *Wells*, 6 Pick., 104, and in *Commonwealth* v. *Emery*, 11 Cushing, 411. In the latter case, C. J. SHAW adds the following distinct recognition of the power of the Legislature to give jurisdiction, notwithstanding an interest, in their discretion. He says, — "We may go further and add, that, it being quite competent for the Legislature to provide, as they have in many cases, that such a municipal minute interest, shall not disqualify a judge, juror, appraiser or other similar officer, when a jurisdiction is given to a magistrate, who, by force of the same act, may have some remote municipal interest, it was their intention to remove such disqualification."

We see no ground on which this motion in arrest can be sustained. *Exceptions overruled.*

Judgment on the verdict.

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

STATE *versus* DAVID DRESSER.

Upon the issue raised by a replication to a plea of misnomer, that the defendant was known as well by the name in the indictment as by that in the plea, the presiding Judge, after stating to the jury the question at issue, illustrated it as follows: — "If a stranger should go * * where the defendant is known and inquire for the house of "the person named in the indictment, "would those of whom he inquired recognize the man inquired for as well by that name as by the name used in the plea?" "If so, the issue is made out for the government;" — *Held*, the illustration is unexceptionable.

State *v.* Dresser.

Upon a general demurrer to an indictment, it is the duty of the presiding Judge to rule.

If the indictment is adjudged good, the prisoner may except.

If his exceptions are overruled, or if no exceptions are taken, judgment will be rendered for the State, unless, at the time of demurring, the accused has, with the consent of the prosecuting officer, reserved the right to plead anew.

And, in these respects, there is no distinction between felonies and misdemeanors.

On Exceptions.

Indictment for Larceny.

Defendant seasonably filed a plea in abatement, alleging that his name was David *D.* Dresser, and not David Dresser, and that he has never been called or known as well by the latter as by the former. To this plea, the attorney for the State replied, that the defendant was known as well by the one name as the other. Thereupon the issue was submitted to the jury.

It appeared in evidence that, until recently, the defendant had resided in Stetson,—that his father and brothers lived there. There was also testimony on both sides as to the name he was known by. It was admitted that his true name was David D. Dresser.

The jury having returned a verdict for the government, the instructions of the presiding Judge upon this issue (see opinion) were excepted to by the defendant. Thereupon the defendant filed a general demurrer to the indictment, which was joined. The defendant then contended that the issue of law, thus made, carried the case to the full Court; that the presiding Judge had no right to rule upon this issue; and that the defendant had the right to have the issue of law settled by the full Court, before a trial upon the merits could be had. But the presiding Judge ruled that it was his duty to rule upon the demurrer, to which ruling the defendant might except; that such was his proper mode of carrying the case to the full Court, and thereupon overruled the demurrer and ordered the defendant to trial on the merits. And the defendant excepted.

Kimball, for the respondent, contended—

That the rule concerning a plea of misnomer in abatement is, that every person charged with crime shall be prosecuted under his real name; and, to defeat a plea of misnomer, it should appear that a portion of the community know him by the name alleged in the indictment, and not by the name in the plea; and that those who know him by the name in the plea, do not know him by the name in the indictment.

C. P. Stetson, County Attorney, contra.

CUTTING, J.—The defendant was indicted for the larceny of certain personal property, and pleaded misnomer in abatement. Issue was joined on the replication that he was known as well by the name of *David Dresser* as *David D. Dresser*, and the jury so found. It appeared in evidence, that the defendant, until a short time prior to the trial, resided in the town of Stetson, where also resided his father and mother.

The presiding Judge, after stating to the jury that the question for them to decide was whether the defendant was known as well by the one name as the other, gave them the following illustration, viz.:—"If a stranger should go into Stetson, where the defendant is known, and should inquire for the house of *David Dresser*, would those of whom he inquired recognize the man inquired for as well by *that* name as by the name of *David D. Dresser*. If so, the issue is made out for the government." To this illustration an exception is taken.

The issue was not whether the defendant was as *well known* by the one name as the other, for in such case the evidence should leave the scales, in which the two names were placed, *in equilibrio*; but the true issue was whether he was known by one name as well as by the other, in which issue an equipoise is not required; for it is enough if he be known by both names. Thus, to say of a person, he is virtuous as well as happy, by no means implies, that he possesses both attributes in equal degree. The illustration was

proper in elucidating that distinction, and therefore unexceptionable.

The next stage in the progress of the trial was a general demurrer to the indictment; whereupon the defendant's counsel contended that the jurisdiction at *Nisi Prius* was terminated until the question of law should be settled by the Court sitting in *banc;* but the Judge, being otherwise impressed, overruled the demurrer, awarded a *respondeas ouster*, and ordered the case to proceed, which, on the general issue, resulted in a verdict of guilty. To which ruling a further exception is taken.

Upon this point it is contended, (or has been in another case,) that even at common law a demurrer to an indictment terminated all further proceedings in inferior, and transferred them into the superior court,—that, by a certain process, called a writ of *certiorari*, upon the happening of such an event, all the inferior courts of England from time immemorial have been ousted of their jurisdiction and the cases were carried directly up to the King's Bench. If such be their practice, it would seem that unscrupulous counsel might soon furnish that court with business sufficient to enable young criminals to become quite aged before their cases could be reached on the criminal calendar. But the common law is susceptible of no such reproach. By its provisions, criminal trials were carried up to the King's Bench, neither by an appeal, exceptions nor demurrer, but by a writ of error after judgment, or by *certiorari* at any time during the progress of the trial, without regard to the state of the pleadings. *Certiorari*, however, was not a writ of right, but only of discretion.

"It is, therefore, in the case of applications, on the part of the *defendant*, that the Court are most frequently called upon to exercise that discretion, with which, in all cases, except where the crown itself is concerned, they are invested. And, in the exercise of this discretion, they seldom grant the writ of *certiorari* at the request of the defendant, when the offence charged against him is serious, and particularly

affecting the public. Thus they generally refuse to remove an indictment for forgery, or any heinous misdemeanor, because the delay tends to discourage, if not wholly to defeat the prosecution. So they are still more reluctant to grant these applications without the assent of the prosecutor, when they are made to remove proceedings before justices of assize or jail delivery, or from the Old Bailey, or from the Middlesex sessions, or any other court where any of the judges preside." 1 Chitty's Crim. Law, 309; and numerous common law cases there cited.

But in this State the common law has been so far changed as to allow exceptions by the prisoner to any rulings, or decisions of the presiding Judge in matters of law, as of *right*, and not of discretion. He, therefore, is not obliged to resort to the common law process of *certiorari*, which we have seen was granted only at discretion. See statute of 1860, c. 133, § 1, where it is provided that even in a capital trial one Judge of the Supreme Judicial Court may preside, and the only provision for bringing questions of law before the law court is upon his "rulings or decisions." A demurrer, therefore, without a ruling or decision of the presiding Judge, would give the law court no jurisdiction. Are minor offenders, whose lives are not put in jeopardy, to be more highly favored, if it be a favor to delay their trials for an indefinite period of time. A motion to quash, in arrest, and a demurrer, present the same identical questions, and yet it is contended that, although the presiding Judge may rule upon the two former, still he is prohibited from ruling upon the latter, because it alone presents a question of law. Such cannot be the logical conclusion, if it be the legal one; and, if the latter, it must be by force of some statute. No statute can be cited which authorizes the transfer of an indictment from an inferior to the superior court, simply by force of a demurrer, which only implies, according to its common law definition, that the party filing it will "*wait*" the judgment of the presiding Judge, whether he is bound to answer.

Thus, § 21, c. 97, of the Revision of 1840, defining the jurisdiction of District Courts, provides that,—"Any person *convicted* of an offence, (in that Court,) may allege exceptions to any opinion, direction or judgment of said Court, which shall be allowed and signed by the presiding Judge," &c. That section alone gave jurisdiction in criminal cases, cognizable by that to this Court, not by an appeal or demurrer, but only on exceptions after conviction.

Then, in the Revision of 1857, (after the District Court was abolished,) § 3 of c. 77 provides, that this Court has "the jurisdiction, civil, criminal and appellate, of the former District Court, *and may exercise it as that Court was authorized to do*, or as the law prescribes." And it has been shown, that that Court was authorized to adjudicate upon demurrers. It is idle to contend that the Legislature did not intend to confer as much power on a Judge of the Supreme Judicial Court as they formerly had upon a Judge of the inferior court.

But much stress is laid on § 17 of the last cited statute, which enacts,—"That the following cases only come before the court as a court of law; cases in which there are motions for new trials upon evidence reported by the Judge; questions of law arising on reports of cases; bills of exceptions; agreed statements of facts; cases, civil or criminal, presenting a question of law; cases in equity, presented to demurrer to the bill, or when prepared for a final hearing," &c. It is urged that "*cases, civil or criminal*," would embrace a demurrer; but why a demurrer more than motions to quash, or in arrest, or any preliminary questions of law, which naturally arise before judgment or sentence? But the same Revision, c. 82, § 19, expressly prohibits a civil suit from being so removed, for, while it authorizes either party to demur in any stage of the proceedings, it at the same time requires the Judge to rule on it, subject to exceptions. *Stevens* v. *Webster*, 45 Maine, 615. Still, cases, civil and criminal, are placed in the same catagory; both must present a question of law; if exceptions in a civil suit, to the

ruling on a demurrer, present a question of law, how can exceptions to a demurrer in a criminal suit fail to do the same?

In § 17, a demurrer is but once named, and that only in connection with bills in equity. *Expressio unius est exclusio alterius.* *Again*, mark the expression,—"cases, civil or criminal, presenting a question of law." The mode of presentation as to civil cases has already been adverted to. Section 27 of c. 77 refers to the same subject matter, and provides that, "when the Court is held by one Justice, a party aggrieved by any of his opinions, directions, or judgments in any civil or criminal proceeding, may, during the term, present written exceptions," &c. A criminal proceeding manifestly includes every step in the trial from the arraignment to the judgment; after which, and before sentence, the accused can have his exceptions to all errors in the rulings, if presented before the final adjournment. Section 28 refers to a dilatory plea in a civil suit for the purpose of authorizing the Judge to impose terms, and has no relation to the prior section so far as a criminal proceeding is concerned.

Any other construction might militate with that provision in the declaration of rights, which provides that the accused shall have "a speedy, public and impartial trial." Demurrers are reciprocal, and if they *per se* postpone all proceeding, while the guilty might avoid a speedy conviction, the innocent could not obtain a speedy deliverance.

But § 26, c. 134, of the Revision of 1857, would seem to settle the question. It enacts that,—"A question of law allowable by exceptions may be reserved on a report signed by such Justice; and, in such case, and when exceptions are allowed, he shall require the defendant to recognize with sufficient sureties to appear at the next term of said Court, and abide the final judgment in the case, and commit him if he does not so recognize," &c.

That section fully recognizes and provides the only mode by which criminal cases may be brought before the full

bench, viz.; on a question of law allowable by *exceptions*. If a demurrer could be carried up without exceptions, then the Judge at *Nisi Prius* would have no authority to require such recognizance. The defendant would only have to demur and then bid defiance to the officers of the law.

It now remains to be considered what the practice has been in this Court at *Nisi Prius* since its present organization, in 1852, so far as criminal cases have been reported, and embraced in volumes from 34 to 51,—some one hundred cases, more or less, all of which have come up either on exceptions to the rulings of the Judge to the jury, or to his rulings on motions in arrest of judgment, with the exception of the following cases:—*State sci. fac.* v. *Hartwell*, 35 Maine, 130; *State sci. fac.* v. *Brown*, 41 Maine, 535; *State, in a plea of debt*, v. *Boies*, 41 Maine, 344, were actions brought on recognizances and transferred on demurrer. These were civil suits, and were so transferred in violation of c. 82, § 19, before cited, which probably escaped the attention both of Court and counsel.

State v. *Hanson*, 39 Maine, 337; *State* v. *Estes*, 46 Maine, 150, and *State* v. *Witham*, 47 Maine, 165, were severally transferred on demurrer, and are the only cases so transferred to be found in our Reports during the period before stated.

Whereas, in *State* v. *Merrill*, 37 Maine, 330, (in 1853,) SHEPLEY, C. J., overruled the demurrer, and the case went up on exceptions. *State* v. *Moran*, 40 Maine, 129, was submitted from *Nisi Prius* to the full Court on a report,—judgment to be either a *nolle prossequi* or a remand to the criminal term for trial. In the opinion, RICE, J., gave the parties a mild reproof for not bringing the case regularly before the Court, yet a question of law was presented, but not legally presented.

State v. *Elden*, 41 Maine, 165, came up on exceptions to the ruling on the demurrer to the defendant's plea in bar. In this case, decided in 1856, TENNEY, C. J., in his opinion, expressed a doubt (less than a *dictum*) whether the Judge at

Nisi Prius was called upon to rule on the sufficiency or insufficiency of the defendant's plea, citing R. S. of 1840, c. 96, § 22, omitting to notice the preceding sections 17 and 18 of that Act.

But, in 1859, in the celebrated case of *State* v. *Noyes*, 47 Maine, 189, the same learned Judge ruled upon the demurrer, and exceptions were taken.

So, in 1860, in *State* v. *Pillsbury*, 47 Maine, 449, exceptions were taken to a judgment overruling a demurrer.

So, in 1861, in *State* v. *Baker*, 50 Maine, 46, and likewise in *State* v. *Plummer*, 50 Maine, 217, which is the last case reported touching this subject.

Our investigation leads to this result: — when the accused demurs to the indictment, it is the duty of the presiding Judge to rule upon the demurrer. If the indictment is adjudged bad, the prisoner will be at once discharged, for the State cannot except. If the indictment is adjudged good, the prisoner may except. If his exceptions are sustained, judgment will be rendered in his favor. If the exceptions are overruled, or if no exceptions are taken, judgment will be rendered for the State, unless at the time of demurring, the prisoner has, with the consent of the prosecuting officer, reserved the right to plead anew. And in these respects there is no distinction between felonies and misdemeanors.

In this case the presiding Judge permitted the prisoner to plead anew without such reservation. This was a favor to which he was not legally entitled. But, being a ruling in the prisoner's favor, he cannot except. It gives him two chances of escape, when by law he was entitled to but one.

Exceptions overruled. — Judgment for the State.

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

APPLETON, C. J. — The prisoner demurred to the indictment. A demurrer admits the facts duly set forth therein. The general rule is, that judgment may be rendered upon

demurrer as upon confession. Referring to a demurrer to an indictment, ALDERSON, B., in *Regina* v. *Faderman*, 4 Cox, C. C., 359, remarks as follows:—"On full investigation, I have no doubt that the judgment must be final. It appears to me clear enough, that any plea in confession and avoidance of a felony, if decided against a prisoner, subjects him at once to all the consequences of a confession. This is according to every rule and principle of pleading." And why should it not be so? The demurrer admits every fact duly set forth. If the indictment be true, why should not the party admitting its truth suffer the penalty imposed by law upon the commission of the acts admitted. Any other rule would tend to defeat the administration of justice.

"It has been settled, in misdemeanors, that, if the defendant demur to the indictment," remarks HOWARD, J., in *State* v. *Merrill*, 37 Maine, 330, "and fail on argument, the decision will operate as a conviction." This is unquestionably sound law; but the learned Judge proceeds to intimate that, in cases of felony, the law is held otherwise. It may be that English decisions may be found looking in that direction, but the latest and best considered cases make no distinction in the consequences resulting from a demurrer between indictments for misdemeanors and for felonies. In a recent case, the English Judges held, that, where there was a general demurrer to an indictment for a transportable felony, and it was overruled, final judgment must pass; inasmuch as, by a general demurrer, the prisoner confesses all the material facts charged against him in the indictment; though, in the case of a demurrer of a special nature, which is usually called a demurrer in abatement, it might be otherwise." *Regina* v. *Faderman*, 1 Den., C. C., 468; 1 Bishop on Criminal Proceedings, § 458; 1 Bennett & Heard's Crim. Cases, 333, n. No distinction on principle can be perceived between a demurrer to an indictment for a misdemeanor and for a felony. Whatever the demurrer admits in one case, it equally admits in the other. Whatever consequences flow from a demurrer in the one case, equally follow in the other.

When there is a demurrer and joinder at *Nisi Prius*, the Justice presiding should rule thereon. His adjudication is conclusive and the cause is ended unless the defendant excepts. If, upon exception to a ruling at *Nisi Prius*, the indictment is adjudged good, final judgment is to be rendered, unless in a capital case, when *in favorem vitae* the Court may, as in civil suits, *in its discretion* allow the prisoner to plead anew. But such allowance is not a matter of right. The defendant in any cause, may, in his demurrer, reserve the right to replead, and, if the prosecuting officer assents to such reservation, a repleader will be allowed.

When the object of a demurrer is to ascertain the true construction of a penal statute, or to determine the validity of an indictment, and thus save the expenses of a jury trial, and the reservation has the assent of the prosecuting officer, or there is any other good and sufficient cause shown, the Court may, in criminal, equally as in civil causes, *in its discretion*, allow a defendant to plead anew. But as the defendant can by motion to quash, or in arrest of judgment, obtain all his legal rights, if he demurs for the mere purpose of delay, he cannot complain if judgment is rendered against him upon his own admissions deliberately made, and with a full knowledge of the legal consequences following such admissions. Every criminal would demur, trusting to accident and time for the loss of testimony then existing and forthcoming for his conviction, if he were entitled as a matter of right to a trial by jury, after his demurrer upon solemn argument has been decided against him. The law does not sanction a practice so calculated to defeat the ends of justice.

In the case before us, the defendant demurred. The case should have ended here by a ruling upon the indictment by the presiding Judge. If there was an acquiescence in such ruling, judgment would follow. If the defendant wished to carry the cause to the full Court, it should have been by exceptions, and if those were overruled, there would be judgment for the State. But the cause proceeded to trial.

Judgment on the demurrer should have been against the defendant. The verdict of the jury, upon a full hearing of all the evidence, established the defendant's guilt. The defendant,—guilty by his own admissions deliberately made,—guilty by the verdict of a jury,—has no ground of complaint. That his guilt is thus made doubly certain can afford no reasonable ground for disturbing a verdict, when no just cause of exception can be found in the rulings of the presiding Judge at the trial. The verdict of the jury left him in the same condition as the demurrer.

Exceptions overruled.—Judgment for the State.

APPENDIX.

STATE *versus* VERRILL.

DICKERSON J.—This case comes before the court on a motion for a new trial, on newly discovered evidence. The motion is based principally upon the confessions of Clifton Harris, a negro, who was the principal witness against the prisoner, and who was convicted of the same murder on his own confession. Since the verdict against the prisoner, Harris has confessed under oath that he committed the murder unaided and alone, and that the prisoner is innocent.

The motion for a new trial, after verdict, in civil cases, is not founded in absolute right, but is addressed to the discretion of the Court, and is grantable only when it is in furtherance of substantial justice. If, upon a view of the whole case, it appears that justice has been done in the premises, and that the verdict is substantially right, no new trial will be granted, though there may have been some mistakes committed at the trial, or a failure to introduce all the evidence that would make in favor of the losing party. 1 Pet., 170.

In civil cases, a new trial will be granted where a principal witness, whose testimony was adverse to the party applying for a new trial, has ascertained that he was mistaken in a material part of his testimony; or when such witness is guilty of perjury, or there is evidence showing subornation of perjury; or where it is discovered that a party has made confessions inconsistent with his right to prevail in the suit; or where new and material evidence has been discovered which could not have been known to the defeated party by the exercise of proper diligence. But in all such cases the applicant for a new trial must furnish the court with sufficient evidence to warrant the belief that the allegations in his motion are true in fact, as well as in his own

opinion, or in the mind of the witnesses called to substantiate them. It is not sufficient that a witness THINKS that he was mistaken in his former testimony; the Court must be satisfied that he was in fact mistaken, before it will grant a new trial; otherwise there would be danger that unscrupulous litigants might induce such belief in the mind of witnesses of weak intellect, when no such mistake had in fact been committed; and the wholesome maxim of the law, that it is for the interest of the republic that there shall be an end of litigation, would be thereby violated. *Warren* v. *Hope*, 6 Maine, 477; *Hewey* v. *Nourse*, 54 Maine, 256; *Fabrillius* v. *Cox*, 3 Burr. 1771; *Great Falls Man. Co.* v. *Matthews*, 4 N. H., 574.

If a new trial may be granted for these causes, in civil suits, where the verdict is predicated upon a mere preponderance of evidence, and affects only the property or the reputation of a jury, shall a new trial be refused, under the same circumstances, in a criminal case, where the law presumes that the accused is innocent, until every reasonable doubt of his guilt is removed, and the verdict deprives him of his personal liberty, or even of life itself? How, too, can the Court stand acquitted before the tribunal of conscience in refusing to grant a new trial, and in pronouncing the extremest sentence of the law, when, if the accused were sued in an action at law, it would be authorized to allow him to re-try his case.

The law, in its humanity, guards the personal liberty and life of the citizen with its protecting shield, as well as his property and reputation. Indeed, the more serious the consequences of a verdict are to a party, the greater the necessity that a discretionary power should be reserved in the Court to give him an opportunity to re-try his case, when, from some irregularity in the proceedings at the trial, or some mistake, or perjury of the witnesses, or newly discovered evidence, there is probable ground for apprehension that the verdict is wrong. The principles which regulate judi-

cial discretion in granting new trials are substantially the same in criminal as they are in civil cases.

The constitutional provision, that the accused shall not be put in jeopardy of his life but once in the same case, is a personal privilege, secured to him for his benefit, which may be waived by him, at any time, for the same purpose. Besides, where sufficient cause exists for granting a new trial, and one is granted, it is as though no trial had been had in the case. So scrupulously does the law guard the rights of the accused, that the Court in New Hampshire granted a new trial in a capital case, where there had been an improper separation of the jury during the trial, though there was no evidence that the prisoner had been prejudiced thereby, on the ground that, as the law presumes the accused to be innocent until his guilt has been proved beyond a reasonable doubt, he is entitled to the benefit of the presumption that a disregard of the provisions for his security had been prejudicial to him, and that he is at least entitled to require, at the hands of the government, satisfactory evidence that he has not received detriment from such irregularity, and is not required to show, affirmatively, that such departure from the customary mode of trial has been the probable cause of his conviction. *State* v. *Prescott*, 7 N. H., 287; 18 Johns., 218.

It has been repeatedly held that a separation of the jury under like circumstances, in civil causes, affords no ground for a new trial; and the reasoning of Mr. Justice PARKER, in *State* v. *Prescott*, is consistent with this distinction. If the law, in its jealous watchfulness of the rights of the accused, requires a more strict observance of the recognized course of proceedings in criminal than in civil trials, it would seem that at least as broad and liberal judicial discretion may be exercised in the former as in the latter class of cases. In *Fabrillius* v. *Cook*, 3 Burrow, 1771, the defendant moved for a new trial, on the ground that "the whole was a fiction supported by perjury, which he could not be prepared to answer; that since the trial many cir-

cumstances had been discovered to detect the iniquity and to show the subornation of witnesses." The Court, after a strict scrutiny of the newly discovered evidence, believed it to be true, and granted a new trial, and the plaintiff never dared to try the case again, though at the trial a verdict was rendered in his favor for £2400. So in *Thurrell* v. *Bowman*, 1 Bing., 339, the Court granted a new trial on affidavits disclosing a conspiracy against the defendant which did not come to his knowledge till after the trial.

Though the reported cases of new trials, granted because of the insufficiency of the evidence, or the discovery of new evidence, or other causes, are less numerous in criminal than in civil cases, yet, when they do occur, they are found to rest upon the same broad views of enlightened jurisprudence. In *Grayson* v. *The Commonwealth*, 6 Grattan, 712, a capital case, the Court granted a new trial because there was not sufficient evidence to justify the verdict. In *Wise* v. *Georgia*, 24 Geo., 31, which was an indictment for stealing part of a harness, a new trial was ordered upon the discovery of a witness who was present when the harness was lent to the accused. So in the recent case of *Commonwealth* v. *Smith*, tried before Judge PUTNAM, of the Superior Court of Massachusetts, where the respondent was charged with subornation of perjury, a new trial was granted upon affidavits and oral testimony that the principal witness for the Commonwealth confessed, after the trial, that he testified falsely, and did so because the prosecutor had agreed to provide for him and his family. The evidence of the perjury was so conclusive that the district attorney entered a *nol. pros.* in the case, against the respondent's protest and his demand for a trial.

The general rule, founded alike in reason and experience, which regulates the exercise of judicial discretion upon a motion for a new trial on account of newly discovered evidence, requires that the evidence shall be distinct in its character from the evidence introduced at the trial, and not cumulative, that it could not have been known to the party

by proper diligence, that it appears to the Court to be true, and is calculated, with the other evidence, to reverse the verdict. If either of these requirements is wanting in the evidence offered, a new trial will not be granted. It is not the business of courts to relieve parties from the consequences of their own negligence, or of the unskilfulness of their counsel; and it would be a mockery of justice to send back a case for a second trial, upon newly discovered testimony, which ought not to influence the action of a jury, or to ask a jury to pass upon evidence which the Court itself has not probable grounds for believing, and which is insufficient to change the result. Hence, in determining the question before the Court, it becomes necessary carefully to scrutinize, not only the new evidence offered, but also the evidence introduced at the trial.

At an adjourned term of this Court, held by Judge WALTON, at Auburn, in the county of Androscoggin, in July last, the prisoner, Luther J. Verrill, whose age is forty years, was found guilty of the murder of Mrs. Susannah Kinsley, on the night of the sixteenth day of last January. At the same term of the Court, one Clifton Harris, a negro, aged nineteen years, was convicted and sentenced for the same murder, upon his own confession. On the trial of the prisoner, Harris was a witness for the State, and testified that, on his return home from Lewiston, in the early part of the evening of the 16th of January, in a sleigh, he met the prisoner, who asked him "if he didn't want to go with him to the house to get some money." Harris asked the prisoner "where the house was," and the prisoner replied, — "the next house to Otis', — you know where it is, Mrs. Kinsley's." After some further conversation, Harris testified that he agreed to meet the prisoner at "Mrs. Kinsley's" between twelve and one o'clock; that he went home and went to bed, got up a little past twelve o'clock, met the prisoner at Mrs. Kinsley's; entered the house clandestinely; let the prisoner in; and that he and the prisoner together perpe-

trated one of the most diabolical murders known to the annals of criminal jurisprudence.

When confronted by Harris for the first time, immediately after he was suspected, and accused by Harris of being an accomplice, the prisoner was asked by the prosecuting officer,—"well, Verrill, what have you to say to this?" The prisoner replied—"*I have this to say; every word is false and I can prove where I was.*" Though a witness in his own behalf at the trial, and subjected to a long, searching and exhaustive cross-examination, the evidence, carefully reported by a stenographer, does not disclose, nor is it claimed, as I understand, that he has since made any declaration inconsistent with that assertion.

Eight other witnesses, whose attention was called to the subject soon after the murder, and who composed the family in which Verrill boarded, testified, at the trial, that he came to his boarding house that evening at an early hour, retired to his bed at the usual time, and did not, to their knowledge, leave the house again that night.

On the contrary, Harris has repeatedly, on several occasions and to several individuals, retracted the charge he made against the prisoner, and swore to at the trial, and confessed that he testified falsely, and that he perpetrated the murder unaided and alone.

In addition to his affidavit of July 29, 1867, in which he swore that he committed the murder alone, he subsequently made a more extended confession to the Rev. George W. Quinby, of Augusta, at the jail in that place, in the presence of Sheriff Parker, of Lewiston, who was taking him to the State Prison. Mr. Quinby testifies that, after some preliminary conversation, Harris said,—"I will tell you two gentlemen the truth now; Mr. Littlefield (the jailer in Auburn) told me, when I started from the jail, to tell Mr. Parker just the truth, and I will; and the truth is, gentlemen, Verrill was not there that night, and knew nothing about it at all. I did the whole myself,—everything,—this is true, so help me God. That, if he was on the gal-

lows or at the bar of God, he would say so." He further said, that "he went to Lewiston to see his girl, and that he had no chance to see her much, — that the first time he thought of going to Mrs. Kinsley's was when passing there; that he came back hoping to sleep with the women and get some money too; that, after entering the house, he went to Mrs. Kinsley's room; that she did not awake; that he put his hand upon her shoulder and asked her to turn over; and that she immediately rose up in bed. He told her to keep quiet and she would not do it, and he attempted to force her down, when a desperate struggle ensued, Mrs. Kinsley calling loudly for Polly. He then got off the bed and struck her on the head with a chair. Polly appearing, he dealt her a blow. He struck Mrs. K. several times till she was still. All this deprived him, he said, of the passion which had influenced him; still, he said, what he said of Verrill (at the trial in regard to the nameless crime committed by him) was true of himself. He then asked her where the money was, but not till he used his knife did she tell him; after searching in vain for the money he came away. In answer to the inquiry, how he came to implicate Verrill, he replied, he thought they would not be so hard with him, if there was another with him, and he had heard said, that a man could get clear by turning State's evidence.

Mr. Parker, sheriff of this county, corroborates the affidavit of Mr. Quinby, and relates the last conversation he had with Harris, as he was about to take his leave of him at the State Prison, as follows: — "After our arrival at the State Prison, and the shackles were taken off, and I was about to leave, I told Harris I should probably never see him again, and he would probably be hung. I asked him if he wished to correct the statement he made to us at Augusta. He said he did not, and lifting his right arm, he said, 'Mr. Parker, I did that thing alone before God.' These were his last words."

That the evidence of Harris' recantation and confessions is newly discovered; that it differs in character from any evi-

dence offered by the prisoner at the trial, and that no diligence whatever on his part could have obtained this evidence before the trial, does not seem to be questioned. Nor can its materiality, if true, be doubted, since it completely exculpates the prisoner from all connection whatever with this atrocious murder.

Are the confessions of Harris probably true, and are they calculated when considered with the other evidence, to change the verdict? As this question shall be answered, so must the prisoner's motion be decided. After allowing to the testimony introduced at the trial, relative to the hatchet, the knife, the unknown man and the hair, all the force due to it as corroborative evidence, it is quite clear that this alone, without Harris' testimony, is not sufficient to warrant the conviction of the prisoner. His was the original, substantive, and that the incidental and dependent testimony. Without the nutriment drawn from the trunk the branches lose their vitality. His testimony quickened and vitalized all the rest. Such must have been the view taken of it by the jury. Such *was* the opinion of the presiding Judge, who instructed the jury that "the facts alone, independent of the negro's testimony, and without it, were of a very weak and inconclusive character, scarcely sufficent to create a well founded suspicion."

Ordinarily confessions are among the least reliable species of testimony. Such are the imperfections of memory, and the infirmities of human nature, that it is exceedingly difficult for the narrator to convey to the hearer the exact idea of the speaker. But when this is done, confessions are the most satisfactory kind of evidence, owing to the improbability that a party would falsely criminate himself. Harris has been convicted of the very crime charged against the prisoner, upon his own confessions alone. If his confessions to the Rev. Mr. Quinby and Mr. Parker are true, he is also guilty of perjury. Were these confessions actually made, as they have been testified to? They come from sources at once intelligent and above suspicion. To deny

the correctness of the narrators would be to sap the foundations of human testimony. It is not for a moment to be questioned that Harris said what these witnesses testify to. There is no evidence that these confessions were elicited through the instrumentality or knowledge, or at the suggestion of the prisoner or his counsel. On the contrary, the high sources from which they come emphatically negative such hypothesis, and prove that they were made freely and voluntarily, and without fear, favor or hope of reward.

According to the well established rules of evidence, they thus become the most satisfactory kind of evidence. The changed condition and relations of Harris, from what they were when he gave his testimony, are worthy of consideration, when we come to consider the credibility of his confessions. Then, though a confessed murderer, he may have indulged the hope that a generous public, always prone to be lenient in its judgment of those who in early life and inexperience have been persuaded to act a subordinate part in the commission of crimes by more mature and controlling minds, would excuse his crime on this account, or that the executive clemency might be extended to him, if not in granting a pardon, at least, in commuting the awful sentence of death to imprisonment for life. Now that he has had time for reflection, such motive may have lost its force. Nor would it be incredible or strange that when, on the morning of the seventeenth of January, he woke to the terrible realities of his deeds of blood and infamy of the previous night, he should have been so crushed with the weight of his solitary guilt, as to be compelled to look about for another to share the damning weight of the burden with him. The history of criminal jurisprudence abounds in such instances. His acquaintance with the prisoner for a brief period, and by no means of a very marked character, could scarcely have inspired in him that degree of friendship which makes one's self forever infamous to screen a murderer from his crimes. The fellowship of bad deeds is not apt to beget such devotion. On the contrary, if the

guilt of the prisoner brought Harris to the threshold of the scaffold, the intensity of his indignation toward his seducer would naturally increase as the day of his execution approached. Every impulse of his nature bade him adhere to his first statement. It is hardly within the range of human credulity that Harris expected to derive any advantage from adding the crime of perjury to those of burglary, rape and murder.

On the contrary is it not highly probable that conscience, hitherto unheeded in its solemn protests against the monstrous wrong of accusing an innocent man of so atrocious a crime, at last obtained the mastery over selfishness, passion and perjury, and wrung from his reluctant and perjured heart that tribute of justice to the prisoner so long and cruelly withheld?

The evidence adduced at the trial, aside from Harris' testimony, is perfectly consistent with the theory that the murder was committed by one and the same hand. Moreover, the testimony of Harris bears intrinsic marks of improbability. The selection by Verrill of a bright, moonlight night, in which to commit a burglary, Harris' accidental meeting with Verrill, having a hatchet in his hand, beyond and going from Mrs. Kinsley's, as if hunting for an accomplice, and ready to select the first man he met, after he had armed himself for the deed; Harris' ready assent to join in the work, assigning as his only objection that "he had his team there;" the mysterious whereabouts of Verrill during the long, wearisome hours of a cold January night, spent between the time they first met and their final meeting at Mrs. Kinsley's; the throwing of Harris' clothes into the little window, after he had been unable to get in with them on, and was uncertain whether he could succeed with them off, instead of handing them to his accomplice; the neglect of both to take any matches, or to strike a light, when the object was to obtain money, and matches were subsequently found scattered over the floor; the instant seizure of Mrs. Kinsley by Verrill and striking her with a chair, when no

violence was contemplated, or called for, if but money was their motive; the feeble effort and failure to find money, though it might readily have been discovered, and there was ample opportunity for search, with none to molest them, and the pregnant fact that a crime was committed different from that contemplated and avowed by Verrill to Harris at their first meeting, but a crime for which *Harris is proved to have had an uncontrollable passion*, and which, in his confession he declares was the chief object of his adventure, and *was actually committed by him alone*,—all these circumstances together stamp the story of Harris at the trial as unsatisfactory, improbable, incredible and untrue.

If we turn to Harris' confession we find no such marks of improbability. He spent the first part of the evening in an unsuccessful attempt to gratify a sensual appetite, which had been cultivated from the early age of fifteen, and had repeatedly impelled him to enter the houses of his neighbors clandestinely, and conceal himself in the sleeping apartments of unsuspecting females. He had that evening failed in the attempt to gratify his lust. He first thought of going to Mrs. Kinsley's as he passed by her house that night, with this passion still upon him. He was familiar with the premises, and knew that none but females resided there. He returned for the avowed purpose of gratifying his insatiate lust. Having entered the house, he stealthily went to Mrs. Kinsley's apartment. She did not awake and "*he put his hand on her shoulder and asked her to turn over.*" She immediately rose up in bed. He told her to lie down and keep quiet; she refused to do so, and he attempted to force her down. A desperate struggle ensues; Mrs. Kinsley calling loudly for "Polly." Unable to master Mrs. Kinsley, he gets off the bed and strikes her with a chair. Polly appearing he deals her a blow, and fells her to the floor, and beats Mrs. K. till she is quiet.

He then accomplishes his fiendish purpose, in the commission of the same crime which he charged upon Verril, and the loathsome language he attributed to him was but

the expression of his own wanton feeling. He makes but a slight search in the dark for money, and goes home.

His reasons for accusing Verril are declared to be, that he thought that they would not be so hard with him if there was another with him, and he "had heard said" that a man could get clear by turning State's evidence!

This is a plain, straight forward and consistent story, and bears the impress of its own intrinsic verity. It may also be added, that his narrative harmonizes with the probable statements testified to by him on the trial, and conflicts with those which are improbable.

In addition to the confession of Harris, a new trial is claimed on the affidavit of Richmond Gowell. John A. Berry and Benjamin Hill testified at the trial, that they saw a man going in the direction where Harris says Verrill was going, at the time he would have been likely to meet Harris according to Harris' story. Gowell testified that he was on the road about that time near that place, and other witnesses corroborate his statement. Without detailing the evidence upon this point, it may suffice to say, that the balance of testimony shows that Gowell was the man testified to by Berry and Hill. Thus, what was regarded as a most important corroboration of Harris' story, is substantially disproved, and the confession of Harris further confirmed.

The confession of perjury, and the confession of mistake by a witness are placed on the same footing with respect to the granting of new trials. In neither case will a new trial be granted unless there is probable ground for the Court to believe that the perjury or mistake has been actually committed. It may require stronger evidence to satisfy the Court of the perjury than of the mistake, but when satisfied, its duty is as clear in the one case as in the other. Such satisfaction may be derived from the intrinsic improbability of the former testimony, the probability of the facts as confessed, the changed condition or relations of the witness, and the motives operating upon him on the two occasions, or other evidence corroborating the confession. There is

no necessity of the conviction of the witness, for perjury before the confession can be available, any more than there is of a trial for murder, before the accused can be convicted when he pleads guilty.

Harris is now under sentence of death, solely upon his own confession, that he committed the crime of which Verrill has been found guilty almost exclusively upon his testimony. If the law believes his confession of murder, may not the Court credit him, when he confesses that he committed perjury to divide the guilt, or escape the punishment due that crime? And if the Court believes his confession, shall the prisoner be denied the right of submitting that confession to a jury of his country in connection with the other evidence in the case, and be turned over to the clemency of the executive for redress?

Who would expect that the Governor would throw open the door of mercy to the prisoner after the Court had closed the temple of justice against him? It will be time enough to ask a pardon of the Executive when the prisoner has no longer a right to demand justice of the Court. God grant that until that point shall have been reached, no citizen of Maine may be compelled to beg for mercy of the Executive.

I have dwelt more at length upon the question before me than I otherwise should have done, but for its great importance to the prisoner and the State, and the frank avowal by the Attorney General, of his intention to enter a *nol. pros.* if a new trial is granted. Considering the knowledge which the Attorney General has of this case, the signal ability with which he has conducted the prosecution through all its various stages, and his known fidelity to the interests of the State, this announcement confirms and strengthens my convictions that he ought not to hold the verdict that has been rendered.

This timely suggestion of the Attorney General has admonished me to examine, compare, analyze and weigh, both the new evidence and that introduced at the trial, with the greater care, and in the light of both judge and jury, as the

double consequences attending a determination by both these tribunals, to the prisoner and the State, are to follow my decision. This consideration has, also, led me to state the grounds of my conclusion more at length, as such statement can have no effect for or against the prisoner, or the State, in any subsequent proceedings in the case.

In view of the evidence before me, the enlarged discretion which the law, in its humanity, reposes in the Court, and the responsibilities of the situation, I can come to no other conclusion than that the prisoner is clearly entitled to a new trial.

I am authorized to say that Judge WALTON, who tried the case, and who has been present at this hearing, fully concurs in the conclusion to which I have arrived; and we are both of the opinion that the circumstances of the case warrant the disposition which the Attorney General has proposed to make of it.

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 the 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 order, inconsistent with any existing law of Congress?

[The opinion of a majority of the Court, and dissenting opinion of DICKERSON, J., were published in Appendix to vol. 53 Maine Reports.]

DISSENTING OPINION.

In answer to the foregoing interrogatories, I have the honor to submit the following answers and suggestions. A majority of the Court having concurred in a single opinion, drawn by the Chief Justice, and being myself unable to concur in the views therein expressed, I have not deemed an earlier answer necessary.

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 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 such associations from either State, county or municipal taxes to the same extent, according to its value, as other real estate is taxed."

These provisions of the Act of Congress, referred to in the interrogatories propounded, are all that have an immediate bearing upon the question proposed.

1. 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?

The right of the State to tax such shares is not now questioned, and is indeed recognized by the Act referred to. Whether the tax could be legally imposed independent of the proviso found in the 41st section, need not now be discussed.

The first interrogatory relates to the *application* of the receipts of the tax.

It will be perceived that Congress does not *impose* a tax upon these shares, or declare that any shall be imposed by any other authority. So far as Congress is concerned, it is left entirely optional with the State to tax or not. When taxed, it is not a federal tax assessed by State regulations, but it is purely and exclusively a State tax.

To secure certain results which Congress regarded as desirable and necessary, and to prevent unjust discriminations, certain limitations and restrictions were imposed upon the taxing power, if it elected to tax these shares. Whether these limitations were legitimately imposed, is a question not now presented for discussion.

These limitations relate only to the *place* and *rate* of assessment.

No limitation or restriction is to be found in any part of the Act, upon the application of the proceeds of the tax when assessed and collected. Congress has been silent, and

very properly silent, upon this subject. Such an interference with the powers of the States to regulate their own internal and domestic affairs, cannot be established by vague inferences. If Congress had intended to exercise so questionable a power, it would have done it in plain, unmistakable terms, leaving nothing for inference.

If the power to tax rests upon the *proviso* referred to, when Congress thus *permitted* the exercise of the power to tax, it permitted also the exercise of all the powers necessarily incident to it, which were not specifically denied or limited by the Act. If it rest upon a right above, and independent of, the federal Act, it possesses also all those incidental powers, unaffected by any limitations. Among those incidental powers of taxation, is the power and right to indicate the uses to which the proceeds shall be applied, or the purposes for which the tax shall be levied.

2. The assessment and collection of taxes in this State has usually been conducted through the agency of municipal officers, whether the proceeds were designed for State, county or town purposes.

To insure an equal taxation and a just distribution of the proceeds, statutory rules have from time to time been adopted and modified, both as they related to the subject of taxation and the place of assessment.

The *general* rule in this State is, that all personal property shall be assessed to the owner in the town where he is an inhabitant on the first day of April in each year. R. S., c. 6, § 10.

To this rule, however, there are numerous exceptions to be found in the statutes, and no inconsiderable portion of the personal property in the State is taxed in places other than that of the owners' residence. The authority thus to tax a portion of the personal estate of the citizen in one place, and a portion in another, has never been questioned, and is, I think, subject to no legal objection. The proceeds of taxes thus assessed and collected, have *usually* been applied to the payment of the State and county taxes, and such other

necessary municipal expenses as have been legally incurred and provided for by the town or city making the assessment.

From this it is quite apparent, that some portions of the personal estate of the citizen is taxed for the liquidation of the expenses incurred by the city or town in which he resides, and some portions of it for expenses incurred by cities and towns where the property is situated, regardless of the owner's residence.

By the provisions of § 38, c. 47, of the R. S., every State bank was required, "within ten days after the first Mondays of April and October, in each year, to pay to the Treasurer of State, for the use of the State, a tax of one-half of one per cent. on the amount of its capital stock actually paid in," and this sum, by virtue of the provisions of c. 11, § 73, was annually appropriated to the support of common schools, and distributed among the several towns "according to the number of children therein, between four and twenty-one years of age."

This distribution was made without any regard to the residence of the shareholder, or the location of the bank.

Towns in which a shareholder did not reside, and in which the bank was not located, received portions of this tax.

Thus we perceive, the application of the proceeds of taxes assessed under the laws of this State, does not in all instances follow the residence of the owner, neither does it in all instances follow the location of the property, or the place of its levy and collection, but is subject to the will of the power imposing it in the matter of declaring the uses to which it shall be applied. The rule not being inflexible in this matter, no argument arises that Congress intended the one or the other.

If the State may thus tax a portion in one place, and a portion in another place, and apply the amounts received therefor, to the discharge of the municipal obligations of the several towns and cities where the same is assessed, regardless of the residence of the owner, or the location of

the property, I see no reason why they might not assess it *all* in the place where the owner resides, or assess it *all* in the place where the property is in fact located, and make the same application of the proceeds, as is now made by law. It must be remembered that it is the people who do this, and that under our form of government all political power is inherent in the people, and they are subject only to the restrictions of the constitution, and constitutional federal laws.

I can therefore perceive no reason why the Legislature may not assess the tax upon all the shares of National Banks in the city or town where the bank is located, and apply the amount received to the use and benefit of the towns and cities where the shareholder resides. The Act of Congress alluded to is in nowise inconsistent with it, and the power of the State so to do, is in my judgment, clear and unquestionable.

I answer the first interrogatory in the negative.

3. "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, now pending before the Legislature, a copy of which bill accompanies this order, inconsistent with any existing law of Congress?"

The sections here referred to are as follows:—

"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 banking 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 associ-

ation is located, a certificate under their hand of the taxes so assessed, upon which shall be stated the residence of the person 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.

"SEC. 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."

These sections relate to the *mode* of assessing and collecting the tax upon shares in National Banks. The second section had already provided the *rate* and *place* of assessment. The right to levy a tax, includes the right to collect it, and indeed, levying a tax, may be said to consist of assessing and collecting the same. There can be no question that the State has the right to prescribe the mode, and provide the means of collecting a tax, in the absence of any paramount law controlling it. Upon the subject of *collecting* the tax, Congress has also been silent. Having left it optional with the State to tax or not, it has not undertaken to prescribe the mode and manner of collecting a purely State tax. I find no inconsistency in the *mode* here provided, with the provisions of the federal Act referred to.

The fourth section of the State law also provides for the

abatement of certain portions of the tax in certain defined instances, so as to make the levying of this tax conform to the principles of equal taxation adopted in this State.

The federal Act provides *no rate* at which these shares shall be taxed. In this particular it only provides that it "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," and shall not be "at a greater rate than is there assessed upon other moneyed capital in the hands of individual citizens of such State." This rate may be less than that imposed upon the shares of State banks and other moneyed capital, and the State may even elect not to tax at all; but to guard against unjust discriminations in the matter, the federal Act provided it should not *exceed* such rate. The effect of the provisions of the fourth section, in relation to abatement, can in no event increase the rate *allowed* by the federal Act, but, in every instance where it is operative, must reduce it below the *maximum* rate mentioned in it. This provision of the State law is not only not in contravention of the *terms* of the federal Act, but is in harmony with its spirit, and I do not regard it, in any particular, "inconsistent with the existing law of Congress," and I find no difficulty in harmonizing the state and national legislation upon this subject.

I therefore answer the second interrogatory in the negative. RUFUS P. TAPLEY.

HON. J. L. CHAMBERLAIN,
Governor of Maine.

STATE OF MAINE.

EXECUTIVE DEPARTMENT,
AUGUSTA, Dec. 6, 1867.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court.

I respectfully ask the opinion of the Court upon the following question:—

In counting votes for county officers, are the Governor and Council authorized to reject ballots illegally received by the presiding officers of elections by reason of such ballots having upon them distinguishing marks, when such fact is duly set forth in the record of town meeting in which such ballots were cast.

Very respectfully,
J. L. CHAMBERLAIN.

Bangor, Dec. 10, 1867.

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the interrogatory proposed.

In 1845, the opinion of this Court was requested upon the question whether it was competent for the Governor and Council, in counting votes for county officers, under the provisions of the then existing law, to receive from the town clerk and selectmen evidence to show that the return made by them did not correspond with the records.

The Court in their opinion say, that the Governor and Council were no otherwise judges of these elections than "to open and count the votes returned," and that they were not authorized to receive any other evidence in relation to the votes, than what the certificates, prepared in accordance with the law, transmitted and received, may contain. "They

are to compare the votes, and, in so doing, to ascertain who, if any one, is elected, and if any one is thereupon found to be elected, it will become the duty of the Secretary of State to issue notice to him of his election; and if no one shall be ascertained to be elected, the Governor, with the advice of the Council, must make an appointment to fill the vacancy."

"The powers conferred upon the Governor and Council are specific and precise, and it is believed it would be irregular to go beyond them, or in any manner to deviate from them. If they could receive evidence that the certificates were erroneous in one particular, they might with equal propriety do so in another; and so exercise the powers of judges of those elections generally, and without restriction." 25 Maine, 568. The same views were reaffirmed in *Bacon* v. *York County Commissioners*, 26 Maine, 494.

The Legislature, the opinion of this Court as to the power of the Governor and Council in cases like the present having been ascertained, saw fit to enlarge those powers only to a limited extent. By R. S., 1857, c. 78, § 5, the Governor and Council, on or before the first day of December in each year, "shall open and compare the votes so returned, and may receive testimony on oath to prove that the return from any town does not agree with the record of the vote of such town *in the number of votes or the names of the persons voted for*, and to prove which of them is correct; and the return when found to be erroneous may be corrected by the record."

The power of the Governor and Council in relation to the matter under consideration was increased in two respects only, the number of votes and the names of the persons voted for. In no other respect was their authority enlarged. The correction of errors is limited by the section above cited. The language of the statute is clear and precise. Its meaning is obvious. Had the Legislature intended to have conferred more extensive authority on the Governor and Council they would have indicated such intention.

Votes with distinguishing marks.

By R. S., 1857, c. 4, § 22, —"No ballot shall be received at any election of State or town officers, unless in writing or printing upon clean white paper, without any distinguishing marks or figures thereon besides the name of the person voted for, and the office to be filled, but no vote shall be rejected on this account, after it is received in the ballot box."

We do not understand from the question proposed that the fact that certain votes had "distinguishing marks or figures thereon" appeared on the return made to the Governor and Council, but the reverse. By the previous decisions of this Court it has been held they were not authorized to correct any errors in the returns before them by resorting to extrinsic evidence. The Legislature have, by § 5, indicated the precise extent to which errors may be corrected, affirming practically the opinion of the Court in every other respect. The fact that certain votes had distinguishing marks or figures was not one as to which the Governor and Council were by statute empowered to correct the returns in the Secretary's Office, by having recourse to the records of towns. They are to "open and compare them," and, upon comparison subject to certain specified and defined corrections, to determine who are to be declared elected. And that is the limit of authority conferred on them.

We therefore answer the question proposed in the negative.

JOHN APPLETON, EDW. KENT,
C. W. WALTON, J. G. DICKERSON,
WILLIAM G. BARROWS, CHAS. DANFORTH,
RUFUS P. TAPLEY.

HON. J. L. CHAMBERLAIN,
Governor of Maine,
Augusta.

OPINION OF CUTTING, J.

THE answer to the question propounded by the Governor depends upon the construction of section 22 of chapter 4, of the R. S. of 1857, which is in these words: —

"No ballot shall be received at any election of State or town officers, unless in writing or printed upon clean white paper, without any distinguishing mark or figures thereon, besides the name of the person voted for, and the office to be filled, but no vote shall be rejected on this account, after it is received into the ballot box."

The constitution, art. 2, § 1, provides that "every male citizen of twenty-one years and upwards, excepting," &c., "having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives in the town or plantation where his residence is so established," &c.

But the mode and manner in which this elective franchise, so sacred to every citizen, is to be exercised, must necessarily be provided for by legislative enactments, of which the section cited is such, and must be construed in case of doubt, so as not to encroach upon so sacred a privilege. With this view, the section before cited was enacted, making the presiding officers of the town the judges of what constituted a ballot with distinguishing marks, under a severe penalty in case of an intentional and erroneous decision. The section authorized them to decide what constituted a distinguishing mark. There may have been many marks upon the ballot which may or may not have been distinguishing; the voter may have presented it in good faith, and, as such, it may have been received by the town officers, which on subsequent inspection may be determined otherwise, and so certified. But the same was received without objection; whereas, had objection been made before the vote was cast, another vote could easily have been substituted, and most assuredly would have been, if the voter had been apprised

of its illegality by the presiding officers. But, if such a vote be cast without objection by the officers having jurisdiction over the subject matter, no power is conferred by the statute on the Governor and Council to say that such vote shall be rejected. Consequently I answer the question in the negative. JONAS CUTTING.

HON. JOSHUA L. CHAMBERLAIN.

ADDITIONAL RULES OF COURT.

1. But one counsel on each side will be permitted to examine a witness, unless by leave of Court.

2. A witness cannot be re-examined by the party calling him after his cross-examination, unless by leave of the Court, except so far as may be necessary to explain his answers on his cross-examination, and except as to new matter elicited by the cross-examination, touching which he has not been examined in chief.

3. In all trials of causes, whether by Jury or by the Court, the closing arguments of the counsel of the respective parties shall be limited to one hour on each side; unless, before the commencement of the arguments, for good cause, the Court shall allow further time, which shall in all cases be fixed and definite.

4. All copies of cases to be orally argued at the Law Terms in the several Districts shall be printed on letter paper, for the use of the Court.

5. The copy of the case required under Rule 29, "in cases submitted upon written arguments or briefs not read in Court," shall be furnished to the Court, during the Term at which the action is entered, and before the same is set down for argument; unless the Court shall allow further time for furnishing the same upon good cause shown: otherwise the case may be dismissed from the Law Docket.

INDEX.

BILLS AND NOTES.

1. A blank indorsement of a negotiable promissory note is, as between the immediate parties thereto, only *prima facie* evidence of the contract implied by law; and it is competent to prove by parol evidence, the agreement which was in fact made at the time of the indorsement.
Smith v. *Morrill*, 48.

2. As to third persons, without notice of any other contract, the one implied by law is conclusive. *Ib.*

3. In an action by one indorser who had paid the note, against another for contribution, it is competent for the plaintiff to prove, that it was "verbally agreed by all the indorsers, previous to indorsing, that their indorsements should be joint and not several; and that, in the event of liability thereon, and the payment thereof by either, of the whole amount of the note, each should pay to the one thus paying, his equal proportion of the amount thus paid, as joint and not as several indorsers." *Ib.*

4. Proof of such agreement would make the indorsers, as between themselves, co-sureties, and payment of the whole debt by one, would authorize the maintenance of suits by the one so paying, against each of the others for their proportional parts, upon counts for money paid for their use.
Ib.

5. A waiver of demand and notice may be proved by parol, or may be inferred from acts and circumstances, in an action against the indorser of a negotiable promissory note. *Keyes* v. *Winter*, 399.

6. Defendant, applying to the plaintiff for a loan of money, was informed by the latter that, if he would get, and indorse in blank, defendant's brother's note, and give his word upon honor that, if his brother did not pay it he would, he would loan him the money. Defendant replied that he was willing to give his word, and that he expected to be holden, if he got the money; adding, that he desired the plaintiff to wait as long as he could for his pay, and, if his brother did not pay, he (defendant) would. In an action upon such a note, given the next day; — *Held*, that there was a waiver of demand and notice. *Ib.*

7. A note payable to an insurance company or order for a sum certain, "and such additional premium as may become due on" a policy named, and at a time therein specified, is not negotiable.
Marrett v. *Equitable Ins. Co.*, 537.

See EVIDENCE, 5, 6. PRINCIPAL AND SURETY.

BOND.

See PARTNERSHIP.

BOUNTIES TO VOLUNTEERS.

1. Where a town voted a bounty "to every person who may volunteer and be mustered into the service of the U. S., on the quota of the town under" a specified "call for troops," and the plaintiff, on his own motion and without the knowledge or consent of any agent of the town, volunteered and

See EVIDENCE, 1, 2, 3, 4.

DEMURRER.

See EQUITY, 12, 15. INDICTMENT, 7, 8, 9, 10. MANDAMUS, 4, 5.

DEVISE AND LEGACY.

DIVORCE.

DONATIO CAUSA MORTIS ET INTER VIVOS.

EASEMENT.

ELECTIONS.

EQUITY.

ERROR.

EVIDENCE.

EXCEPTIONS.

EXECUTION.

HUSBAND AND WIFE.

INDICTMENT.

INJUNCTION.

See EQUITY, 12.

INSURANCE.

LEASE.

See LANDLORD AND TENANT.

LEVY ON REAL ESTATE.

See EXECUTION. REAL ACTIONS, 3, 4.

LIBEL.

LIEN.

See RECEIPTER.

LIQUORS, SPIRITOUS AND INTOXICATING.

LIMITATIONS.

See PRACTICE, 5.

MANDAMUS.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MILLS AND MILL DAMS.

MISNOMER.

STATUTES CITED.

PUBLIC LAWS OF MAINE.

STATUTE OF FRAUDS.

1. A parol agreement by a railroad company to take all the wood the plaintiff would put on that season, at the same price paid him for that purchased before, and more, if the wood was better, is within the statute of frauds. *Edwards* v. *Grand Trunk Railway*, 105.

2. To constitute an acceptance of goods, something more than mere words are necessary; there must be some act of the parties amounting to a transfer of the possession, and an actual receipt by the purchaser, so that the seller no longer retains a lien for the price. *Ib.*

3. An oral agreement to execute and deliver a writing obligatory to convey real estate, upon the terms and conditions therein mentioned, is within the fourth clause of the statute of frauds. *Lawrence* v. *Chase*, 196.

4. If the defendant would take advantage of that statute, in an action for the breach of such an agreement, he must do so by some proper plea. *Ib.*

See MORTGAGE, 4.

TAXATION OF NATIONAL BANK STOCK.

1. The statutes of this State, as they existed in 1865 and 1866, taken in connection with the Act of Congress of June 3, 1864, c. 106, §§ 40 and 41, did not authorize the assessors of a city or town, in which a National Bank was located, to assess taxes for State, county and municipal purposes, upon the stocks of such bank owned by parties resident in other towns or cities in this State. *Abbott* v. *Bangor*, 540.

2. Where the general tax laws of the State permitted the assessment of shares in National Banks, with due conformity to the restrictions imposed

TENANCY IN COMMON.

TOWNS.

TRESPASS.

TROVER.

See EXECUTORS AND ADMINISTRATORS, 2. TENANCY IN COMMON, 9.

TRUSTEE PROCESS.

TRUSTS.

USURY.

VERDICT.

In an action of trespass *quare clausum*, the jury found that the *locus in quo* was "necessary for and attached to" the defendant's gristmill, — the use of the *locus*, as a passage-way by plaintiff, being inconsistent, with the ordinary use of the gristmill; a motion to set aside the verdict as against evidence was overruled and judgment rendered; in a subsequent suit between the defendant's grantees and the plaintiffs, the jury, upon the same evidence, and upon the same instructions, found that another parcel of the same premises, which the respective parties claimed under the same title, was "necessary for and attached to" the gristmill,—

Held, that a motion to set aside the verdict in the latter case as being against evidence, must be overruled, it appearing that the use by the other party of the premises in dispute in the second case, was a greater incumbrance on the use of the gristmill than his use of the premises in dispute in the first case. *Page* v. *Esty*, 319.

WAYS.

1. A grant of a "perpetual right of way into and through a passage-way twelve feet in width, lying in the rear of houses numbered 81 and 83, into Congress street," conveys, in the absence of other controlling evidence, a right of way twelve feet wide, one line of which is identical with the rear line of lots 81 and 83, extended to Congress street. *Gore* v. *Fitch*, 41.

2. And no part of such line can be subsequently changed by the grantor alone. *Ib.*

3. P. recovered judgment against the plaintiffs for damages occasioned by a defect in one of their highways. The defect complained of was an excavation caused by the defendants, who were duly notified of the pendency of the former suit. In an action by the plaintiffs against the defendants to recover the amount of such judgment; — *Held*,

1. That the verdict and judgment were conclusive evidence of the existence of the defect, the injury to P. while in the exercise of due care, and the amount of the injury; and

2. That it was incompetent for the defendants to prove that, in making the excavation, they were guilty of no negligence, and that they properly guarded and covered the same, at the time of leaving off work, on the night of the alleged injury. *Portland* v. *Richardson*, 46.

4. If a private citizen be guilty of a nuisance in making an excavation in a public highway, he will be responsible for injuries arising therefrom during its continuance. *Ib.*

5. R. S., c. 18, § 62, assumes the existence of a way or bridge in actual use for travel. *Gilpatrick* v. *Biddeford*, 93.

6. It was not the intention of this section to authorize street commissioners, on their own motion, to bind their town or city, by constructing a way in whole or in part where none previously existed. *Ib.*

7. The plaintiff, owning a lot of land in Portland in 1820, purchased the necessary materials, including granite curbstones, and, with the consent of the city authorities, constructed, at his own expense, a sidewalk in front of his premises. In 1865, the city constructed a drain culvert under the outer edge of the sidewalk, and, for that purpose, took up the said curbstones,

See DEVISE AND LEGACY.