REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By WM. WIRT VIRGIN,
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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.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

JOHN WINCHESTER *versus* INHABITANTS OF CORINNA.

The defendant town, at a legal meeting held in August, 1864, voted, — "to raise $300, to each volunteer," and in addition "to pay such volunteer $16 per month," specifying the time of service essential to entitle the volunteer to such "bounty and pay, to be one year." In an action by one who volunteered upon the defendants' quota for one year and served until honorably discharged at the close of the rebellion; *Held*, —

1. That this vote was a promise to pay such volunteer the sums named;
2. That such volunteer was entitled to the full amount, although he served but nine months, he having been discharged by act of the government, before the year expired; and
3. That the vote was ratified and made valid by c. 298* of the Public Laws of 1865, notwithstanding that, when passed, it was expressly prohibited by c. 227* of the Public Laws of 1864.

The Legislature has power to confer the authority upon towns to offer or pay bounties, and to ratify votes offering bounties by subsequent enactment.

ON REPORT.

ASSUMPSIT to recover certain bounties.

It appeared that the defendant town, at a legal meeting held on August 24, 1864, under an article, — "To see what sum of money the town will raise to be expended in hiring men to fill the town's quota under the call of July, 1864," voted, "to raise three hundred dollars to each volunteer, to be paid when mustered into the United States service. In addition to this, the town pays each volunteer $16, per

* See opinion.

month, for each month in the service. The term of service specified to entitle the volunteer to the bounty and pay above mentioned, was one year."

The plaintiff proved that he, relying upon these votes, soon afterwards enlisted upon the town quota, under the call of July, 1864, and was duly accepted and mustered into the service of the United States, on September 17, 1864, and served in the 4th Maine Battery, to which he was duly assigned, during the final campaign around Richmond and Petersburg, in the fall of 1864, and winter and spring of 1865, and until the surrender of the rebel forces, and was duly and honorably discharged from the service of the United States, under a general order of the War Department, at Washington, on June 17, 1865, thus serving a period of nine months.

He also proved that, by his agent duly authorized, he demanded, on November 26, 1864, of the selectmen of the town, payment of the $300 bounty, named in the foregoing vote. That they offered to give, and did make out and sign a town order for $200, which was refused by plaintiff's agent; but said agent offered to take an order for the $300. At the annual town meeting held in March, 1865, the selectmen made the usual report of the outstanding debts of the town, which included, among other items, the monthly pay of the plaintiff and of other volunteers under the vote aforesaid, for the months served by each, down to that date. The report was duly accepted by the town. On June 26, 1865, the plaintiff having returned from the service, demanded in person, of the selectmen, the $300 bounty aforesaid and pay for nine months service, at $16 per month, being $144, making a total of $444. The selectmen offered to pay him $200 of the bounty and the $144 for the nine months service, making $344. The plaintiff refused to take that sum.

At the annual meeting in March, 1866, the selectmen made their usual report to the town of its outstanding debts,

including, among other items of indebtedness, $344, as due the plaintiff.

The defendants offered to prove that, before the above vote was passed, a written motion was made to raise $500 for each volunteer, including the State bounty, and that this motion was voted down; and that then the former vote as now appears of record was passed. The vote offered to be proved by the defendants did not appear of record. The case was then continued on report, with an agreement that, if the evidence offered by the defendants should be held admissible and material, the action to stand for trial; otherwise the full Court to dispose of it in accordance with the legal rights of the parties.

D. D. Stewart, for the plaintiff.

J. A. Peters, for the defendants.

1. No legal consideration for such a contract. The town has and had no power to tax its inhabitants for such purposes. It is beyond the powers of a town conferred by its incorporation.

2. It was an illegal contract. Towns were allowed to raise and pay nothing. It was expressly prohibited by c. 227, § 3, of laws of 1864. See also § 4.

3. The contract could not be ratified by the Legislature. It would not be a constitutional act. The Legislature can by an act cure informalities and technical defects in the slack performance of what a town could do. But cannot make valid what they were not only not authorized to do, but what was by law expressly prohibited. *Allen* v. *Archer*, 49 Maine, 346.

4. By an analysis of the whole proceedings, it is clearly evident that defendants voted no more than "the law will allow a town to raise for such purposes." In other words, they voted to pay $300 provided it was by law allowable. The vote "to raise all the money the law will allow a town to raise" must have some meaning in the text, and it means that no more than the law would allow could be raised.

The unrecorded motion voted down, to raise $500, including $300 of State, leaving $200 by town, showed that $300 was not intended merely to be an advance from the State. This they could advance. See § 6, c. 227, of 1864, before cited.

Plaintiff not entitled to the monthly pay, nor the $300, because not in the service one year. "The term of service," &c., &c., was one year. Plaintiff got the State bounty besides.

The town made no contract with the plaintiff. Passing a vote was one step; next was to make a contract. The vote could never become binding on the town until the town had ratified it, after the healing Act of the Legislature. They not being bound, could not become so without some action on their part to make it so.

KENT, J.—The claim of the plaintiff depends for its validity upon the construction of the votes of the town and the constitutional power of the Legislature to ratify and make binding those votes.

Although by the record it appears that there was a diversity of opinion and a somewhat remarkable fluctuation and contrariety in the votes passed and reconsidered, yet the final vote, which must be regarded as superseding all the former proceedings, is plain and explicit.

The article in the warrant called upon the town to determine what sum of money it would raise to be expended in hiring men to fill up the town's quota under the call of July, 1864. The town voted "to raise three hundred dollars to each volunteer, when mustered into the United States service, and in addition to this the town pays each volunteer sixteen dollars per month for each months service. The term of service specified to entitle the volunteer to the bounty and pay above mentioned was one year." This was an offer and a promise to pay to each such volunteer on the town's quota, the sums named. The case finds that the plaintiff, after the passing of these votes, and "relying upon the strength of

the same," did enlist upon the town's quota required under the call of July, 1864,—was accepted and mustered into the service on an enlistment for one year, and served until the end of the rebellion, when he was honorably discharged. He served nine months only. But we are satisfied that the term of service, referred to in the vote, was the term for which he enlisted, and not the time of actual service, if he was discharged by act of the government, before the year had expired. The essential thing which the town was desirous to secure, was an enlistment which would fill the requirements of the call and relieve the town or its inhabitants from liability to draft. This was done by the plaintiff.

He complied with the offer of the town and would seem to be entitled to the sums claimed by him, unless the proceedings of the town and its votes are inoperative and void for want of legal authority to pass them. The town seems to have regarded the plaintiff's claim as valid, except for one hundred dollars, which it claimed to retain, because the State paid one hundred dollars as bounty. But we think that the town is not estopped by its acts from setting up in defence, the want of legal authority to act in the premises. We must therefore consider this point.

At the time these votes were passed, there was no legal power in this municipal corporation to pass them. It has been settled by a series of decisions, in this State and other States, that towns in their corporate capacity are not bound to furnish soldiers or material of war. It is no part of the duties or rights imposed upon them, by the nature of their powers, or the original purposes of their creation. The general doctrine is, that towns must be confined to the exercise of the powers and performance of the duties conferred by legislative acts. They have no inherent powers beyond those granted by such statutes. The authorities to sustain these propositions are so familiar and so often cited that it is unnecessary to name them.

At the time, when these votes were passed, the town, so

far from having any such power, was expressly prohibited by the Act of 1864, c. 227, from raising or paying any bounty in addition to the bounty of three hundred dollars offered by the State, and was only authorized to raise not exceeding twenty-five dollars for each man enlisted, to pay recruiting expenses. It is clear, therefore, that the votes of the town, at the time they were passed, transcended its powers and were illegal and could not be held as binding. But, by the Act of 1865, c. 298, these proceedings were made valid. The Act provides that "the *past* acts and doings of cities, towns and plantations, in offering, paying, agreeing to pay, and in raising and providing the means to pay bounties to * * * volunteers, drafted men or substitutes of drafted or enrolled men, who have been or shall hereafter be actually mustered into the military or naval service of the United States, are hereby made valid."

The defendants present two objections to the validity of the act in question. One is, that the Legislature could not constitutionally make valid the *prior* acts and votes of the town by a subsequent statute. The other is, that the Legislature had no power to authorize towns to pass such votes and pay such bounties, even if the statute had been enacted before the action of the town.

In relation to the first objection, we are satisfied that, if the Legislature could authorize the action by prior legislation, it could, in a case like this, give validity to the doings by subsequent ratification.

It is unnecessary for us to consider the exact limit of this power to ratify and make valid the proceedings of corporations or individuals by subsequent legislation. We cannot doubt that where, as in this case, the action of the town was in relation entirely to public matters, of high national concern, and did not in any way touch or affect vested rights or private interests, as distinct from public exigencies, the Legislature might ratify and make valid whatever it might constitutionally authorize before action.

The votes in question were in their nature of a political

character, and not personal or affecting individual rights of property. The whole current of authorities on the subject of subsequent ratification confirm this view of the binding force of such legislation. *Allen* v. *Archer*, 49 Maine, 346; *Simmons* v. *Hanover*, 23 Pick.; *Walter* v. *Bacon*, 8 Mass., 468; *Patterson* v. *Philbrook*, 9 Mass., 151; *Locke* v. *Dame*, 9 Mass., 360; *Denny* v. *Maltoon*, 2 Allen, 361. In the case last cited, some of the prior cases in Massachusetts are said not to be very satisfactory. But there is nothing in the opinion, which would render doubtful the exercise of the power in a case like this before us. The great objection in most of the cases is, that rights of individuals, in distinction from their citizenship or their relations to the whole community, are injuriously affected. No such objection exists in the case before us. But the second question is whether the Legislature had any right or power to confer the authority upon towns to offer or pay bounties?

When these votes were passed, the country was in the midst of a gigantic struggle for existence, against armed foes, and "those of its own household." It had then, for more than two years, been engaged, as a government, with armies in the field, in the determined purpose to save itself and the country, from the equally determined purpose of rebels and traitors to destroy both. Can any one question the right and duty of our general government to call into exercise the whole physical power of the country, and all its moral, financial resources?

In such form as it might decide to be expedient, it had the right to call every man capable of bearing arms into the field, and to demand the last dollar, if necessary, from the individual citizen. In its hour of imminent peril, it might require equally of the willing and the unwilling, of the loyal man and the sympathizer with treason, whatever any or all could furnish for its necessities, to the last man and the last dollar.

Undoubtedly it must do this under proper laws and orders, emanating from the proper sources. But it could de-

signate the individuals or class of men required for any purpose; could fix the age and qualification of those who were called as soldiers into the field, and the extent and mode of taxation or excise duties, to obtain money and means. It could call directly on the individual, or through the action of the States, or of any municipality or organization, which would assume to perform what was asked or required. It could avail itself of local divisions, the boundaries of States, counties, parishes or towns. In fact, the States were appealed to and notified of the number of men that would be required from its limits. The State being thus notified and its aid invoked, had it the power to act? It clearly had, unless there was some distinct prohibition in its own constitution. We know of no such prohibition or limitation in this matter in our State constitution. It would be strange if there should be any such found in that instrument. For, in this exigency, the nation and the loyal States were in common peril, assailed by a common foe, and were "in the same boat," attempting to preserve a common existence. The people of the States and the people of the United States were identical. The State itself, as well as its people, whose sovereignty the Legislature represented, had a deep stake in the issue, and in the maintenance of the union of all the States, in its entirety and vigor.

If it be granted, that the call was not an imperative one on the State, as on a province or vassal, by an absolute command to send to the field a stipulated number of men; or even such a call as was made on the States during the revolution, when we were under the old confederation, yet no one can doubt that the State might assume, if it saw fit, to aid by voluntary action, by offering bounties or additional pay, or in other modes. If there is any limitation of the power of the State in this respect, it must be found in the constitution. The whole legislative power, which was originally in the people, has been conferred on the Legislature, with such qualifications and restrictions only as are found in the constitution. We find none touching this question.

If, then, the State could do it, as the single act of the State, why may it not authorize any municipality or public organization to do the same thing? It is to be remembered that it is not a question of compulsory but of voluntary action. Now although, as we have seen, towns were never bound, as an act of municipal duty, to furnish men, yet the general government, by its own military officers, had seen fit to adopt town lines and to apportion the quotas by such limits, and to require that a certain number of men should be furnished from the citizens residing within the limits of the town. If the town, in its corporate capacity had no liabilities, its citizens had a distinct liability and duty to perform, limited and measured by the town lines. It was not merely a patriotic duty, but a certain and fixed liability to furnish the quota of men required by the United States. There was no escape from this. The demand was for men, actual, living, efficient men, and these men must be furnished from the able bodied men within the specified ages. It was but just and equitable, that those who were exempt and those who remained at home, should contribute to make the compensation of those who periled their lives in the field, something more than mere monthly pay. The question is whether it was beyond the power of the Legislature to clothe the town with the power to do this if it saw fit. We find nothing in the constitution which prohibits the Legislature from conferring this power, which it might itself exercise, (and did exercise, in fact, most liberally and patriotically,) on towns.

The votes passed by Corinna were within the power given or ratified. There was no want of equity or justice in the offer made. The votes were passed in aid of the government, and were patriotic and loyal in their nature and scope. They violated no law, after ratification, and no provision of the constitution. They were simply a convenient and effectual mode by which the inhabitants could do their duty and "give encouragement," not to the enemies, but to the

friends of their country. We see no reason why the plaintiff is not entitled to recover.

We find our views are substantially the same, so far as the direct question of the power of the Legislature to authorize or render valid the doings of towns, as those of the courts in other States. *Fowler* v. *Danvers*, 8 Allen, 82; *Booth* v. *Town of Woodbury*, 32 Conn.; *Crowell* v. *Hopkinton*, 45 N. H., 9.

The evidence offered by the defendant to qualify or affect the record is inadmissible. The vote, as recorded, must govern, and this is a promise to pay $300, and says nothing about the State bounty.

Judgment for plaintiff for $444, *and interest from June* 26, 1865.

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

AARON L. SIMPSON, *Assignee in equity, versus* DANIEL WARREN *& ux.*

However defective the description or however inapplicable the terms of an assignment for the benefit of creditors, to property of any kind conveyed and transferred by the assignor, previous to the assignment, with the design to defeat, delay or defraud creditors; property thus situated will pass to the assignee, and he may maintain a bill in equity against the fraudulent grantor and grantee for the benefit of subsequent as well as prior creditors.

BILL IN EQUITY.

BARROWS, J.—ON DEMURRER. The bill sets forth a valid assignment by Daniel Warren, one of the defendants, to the complainant, of all said Warren's property for the benefit of his creditors, made in pursuance of the statute regulating such assignments, and perfected by the requisite oath and notice and seasonable proceedings in Probate Court, the

filing of a bond by the complainant as assignee, the entrance by him upon the duties of his trust, and the seasonable execution of the assignment by a large number of creditors who thus became parties to it, entitled to its benefits.

The bill charges that a certain conveyance, made Sept. 11, 1862, by said Daniel Warren, of the house and lot then and still occupied by him as his homestead, to Sarah Ann Warren, the other respondent, was entirely without consideration except that which arises from the relation subsisting between the grantor and the grantee as husband and wife, and that the said conveyance was made with the express and direct purpose and intent of preventing the property from being taken by attachment for the payment of the debts which the said Daniel then owed, or which he anticipated he might be owing at a future time, and that said Sarah Ann received and still holds the conveyance with the same purpose and intent, and that so the said conveyance is to be considered as made with the design to defeat, delay and defraud the said Daniel's creditors, and that the said Sarah Ann has refused, upon request made, to release to the complainant so as to make the property available to the creditors who became parties to the assignment, although some of them, it is alleged, were creditors at the time of the conveyance.

Defendants' counsel seeks to sustain the demurrer on the ground that nothing passed by the assignment except such property as the assignor actually held and possessed at the time of the assignment, and that his interest in property which he had conveyed in fraud of creditors would not pass either by the terms of the assignment or by operation of law.

However this may have been *previously*, the position cannot be maintained for an instant in face of the stringent provision in § 2, c. 112, Laws of 1859, that "all property of every kind, conveyed and transferred by the assignor previous to the assignment with the design to defeat, delay

or defraud creditors shall pass to the assignee by virtue of the assignment, and shall be held by him as property or assets for the benefit of creditors, and the assignee shall be clothed with all necessary powers to recover, receive and collect the same, and render the same available for the purposes of the trust created by the assignment."

With this provision before us, we have no occasion to look to the terms of the assignment. However defective the description or however inapplicable the terms of the assignment to property thus situated, it would still pass to the assignee, and he might maintain a bill against the fraudulent grantee for the benefit of all concerned.

It is asserted in argument by the defendant, that the demands of those who were creditors at the time of the conveyance have been adjusted. Even if this were admitted to be true and could be received in a hearing upon demurrer, it would still remain to be observed that the bill substantially charges a design to defraud *subsequent*, as well as existing, creditors, and alleges such a state of things as would create a secret trust in the grantee for the benefit of the grantor which might be made available to creditors whom the transaction was designed wrongfully to affect, even though their claims accrued at a date subsequent to that of the conveyance.

Demurrer overruled.—Defendants to answer.

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

A. W. Paine, for the complainant.

J. A. Peters, for the respondents.

JANE C. CHASE, *Libellant, versus* JOHN S. CHASE.

On a divorce *a vinculo*, for impotence, alimony cannot be decreed under the statutes of this State.

ON EXCEPTIONS.

LIBEL for DIVORCE for impotence and insanity.

KENT, J.—It appears by the exceptions, that, at the hearing of this libel for a divorce, at *Nisi Prius*, the Judge found that the charge of impotence was proved, but that the other charge was not proved. A divorce for the cause of impotence was granted to the wife. The Judge allowed alimony to the wife, as her legal right. To this allowance the libellee excepts on the ground that by law the Judge had no power to grant and order it. This raises a question, properly before us.

That question is whether on a divorce for "impotence," alimony can be allowed, under our statute.

By § 6, c. 60 of R. S. of 1857, it is, in the first sentence, provided that in case of a divorce for impotence the wife's real estate *shall* be restored to her, and the court in its discretion, may enter judgment for her for all or a portion of her personal estate, *received by the husband by the marriage*, or its value in money. The statute then, in the same section and next sentence, declares that, "when a divorce is decreed to the wife for the fault of the husband *for any other cause*, she shall have dower in his real estate, to be recovered and assigned to her, as if he was dead; and the same right to a restoration of her real and personal estate, as in case of divorce for impotence. The Court may also decree to her reasonable alimony out of his estate, having regard to his ability."

It is contended on the part of the libellant that this latter sentence applies to all cases, not excepting impotence. It is conceded that the next preceding sentence debars a wife divorced for impotence from dower. It would be difficult

to assign any good reason in the nature of things why such a wife should have alimony and not dower. The word "also," in the last sentence, indicates a reference to the provisos in the sentence above it, and an addition to the dower therein granted.

A reference to the earlier statutes on this subject shows conclusively, that, from the first, a distinction has been made between impotence and other causes, so far as dower and alimony are concerned. In the statute of 1821, c. 71, when the only causes for a divorce, *a vinculo*, were prohibited affinity or consanguinity, bigamy, impotence and adultery, it was provided, that when decreed for consanguinity or impotence the wife should have all her lands *restored* and a restoration of all or a part of her personal estate, which has come to her husband, or the value thereof. It is there provided, when the divorce shall be for the cause of adultery, in addition to her dower and her real estate, the Court shall have power to assign to her all or part of her personal estate, which the husband has received by the marriage. But if all this personal estate or money should be insufficient, *with her dower*, for the support of "the woman so divorced," the Court may allow her reasonable alimony, so long as she shall remain unmarried.

The same provisions, in c. 89 of R. S. of 1841, also clearly show (§§ 15,16,17,) that the Legislature intended to grant alimony only where the divorce was decreed for some other cause than impotence. The reference to dower, in § 17, shows that alimony was not to be given, except when a divorce is granted for other causes. The present statute c. 6, § 60, merely condenses these various sections into one, without changing their effect or meaning.

If we look at the reasons for this, at first apparently severe, if not unreasonable distinction, we find them in the nature and operation of a divorce, granted for impotence. This is in the nature of a decree annulling a marriage, resembling in its effects those cases where the marriage is declared void without any legal process, § 1, c. 60.

Impotence, to be a ground for divorce, must have existed at the time of the marriage. A judgment for this cause, declares the marriage void from the beginning, which it could not do, if the matter occurred subsequently to the nuptials. Bishop on Marriage and Divorce, § 332 (4th ed.) [235,] § 339. It is not therefore so much a dissolution of the bands, once uniting the parties, as a declaration that there never were any binding chains. It was voidable and not void, it is true, but when declared void, the sentence relates back to the beginning. Bishop, § 96.

The law then says:—as this is not a case of wrong or crime or cruelty after the marriage, and not strictly a fault, but rather a misfortune, the parties shall be restored as near as may be to their condition at the time of the nuptials. The wife shall have her lands and her personal property, which the husband has received by the marriage, or a reasonable part of it. But she shall not have dower in his estate, as a wife divorced for his fault after marriage may, nor alimony or other provision. She may take what she brought, but no more. She has not in fact, the rights of a wife, who has been forced to seek a dissolution of the tie, by the wrongs of a husband. But as the law finds her in the condition which impotence places her, it separates the parties, and restores the "*status ante bellum.*"

It is to be observed that the law gives this right of restoration to the wife, even when the divorce is decreed for *her own impotence.* The language is general, "when a divorce is decreed for impotence;" not as in the following sentence: when decreed "for the fault of the husband." This is but carrying out the idea of a voidable marriage, and that impotence was not a crime or wrong in itself, which gave either party special rights on account of the conduct of the other.

Alimony is strictly an allowance to a wife for her maintenance, whilst living apart from her husband.

It was therefore originally and particularly applied to cases of *divorce a mensa et thoro.* In such case, the relation of husband and wife continues legally; the effect of the

decree being to allow them to live separately, but not to dissolve the other relations between them. *Deane* v. *Richmond*, 5 Pick., 468. Alimony or maintenance was granted the wife, for her separate use during the absence from the bed and board of her continuing husband. But of course she could not have dower, although the Court by special provision of succeeding statutes might restore to her her own estates. In time, similar provisions as to alimony, in cases of divorce for adultery, and finally for all other causes except impotence, were incorporated into the law. But these grants were rather in the nature of allowances out of the estate than of alimony for the support of the wife, for she was wife no longer after the decree. But throughout all the legislation, special care was taken to exclude cases of impotency from any allowance coming out of the husband's own estate.

Perhaps the fact that impotence is a matter which ordinarily would be discovered immediately after marriage, and the party aggrieved would be able at once to annul the marriage, may have had some influence on the legislation on this subject. But however this may be, we are satisfied that alimony could not be legally decreed in this case.

The decree of divorce to stand, without alimony.

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

SAMUEL S. MORTON *versus* SAMUEL J. YOUNG.

A person, arrested on a special writ, subsequently and for the purpose of procuring his discharge, paying under protest a portion of the sum claimed in the writ, is not thereby estopped from showing, in the trial of an action for malicious prosecution, the want of probable cause in the original suit.

On Exceptions.

Case for malicious suit.

After introducing original writ, *Young* v. *Morton*, returnable before a trial justice in this county, *G. S. Bean*, called by the plaintiff, testified, substantially, that, as deputy sheriff, he arrested the plaintiff by virtue of the writ here introduced, Feb. 20, 1865, about one o'clock, P. M., and kept him under arrest until nearly evening, when the plaintiff paid $15, alleging at the same time that he owed the defendant nothing, but had previously adjusted all claims between them; that the plaintiff was about starting for the west, when arrested; that something was said about giving bond; that nothing was said about a compromise; that, upon receiving the $15, the witness had followed instructions of Young's attorney, and thereupon witness gave Morton a receipt and released him from arrest.

Plaintiff testified, — that, when arrested, he was about "going to the west," not knowing that he should return; that he paid the $15 to procure his release, and that he owed Young nothing at the time; that he paid the $15 rather than be bothered with the suit. Evidence concerning original indebtedness was introduced by both parties.

The defendant requested the presiding Judge to instruct the jury, —

1. That, if the plaintiff, on Feb. 20, 1865, after his arrest and while in custody of the officer, settled the suit of *Young* v. *Morton*, by paying $12 and the officer's cost, the officer being duly authorized to settle it, he is estopped to deny that there was probable cause to sue for the amount of $12, less the price of writ, oath and stamps, 79 cents;

2. That, if the plaintiff settled the suit, *Young* v. *Morton*, on Feb. 20, 1865, this action cannot be maintained; and

3. That, if the jury find that Morton settled the suit of *Young* v. *Morton*, by a payment of $12 and officer's cost, or $15 for the whole, because he thought it would cost him more than that sum to defend the suit, then he cannot maintain this action.

The presiding Judge declined to give the instructions as requested, but did instruct the jury that, if they were satisfied that, after arrest and while held in custody, the officer told Morton it could be settled for $15, and was authorized so to do; and, if the plaintiff, to compromise or settle the debt or to obtain a discharge from his obligation to pay the debt simply, paid voluntarily the sum demanded, either as for debt or debt and cost, whether to save cost or trouble, or other motive, he could not afterwards maintain a suit for malicious prosecution. But, if he paid it to obtain his liberty and a release from arrest and duress, and not merely to obtain a discharge from the debt claimed, and he paid under protest, denying all right on the part of the defendant or liability on his part, the fact of such payment would not prevent his afterwards maintaining this suit, if otherwise established. Verdict was for the plaintiff, and thereupon the defendant alleged exceptions.

Josiah Crosby, for the defendant.

This kind of action is but the continuance of a former suit, and at best, a necessary evil, and its bounds should not be extended. Courts have always looked upon it with jealous eye. A peculiar feature distinguishes this case from all others, — probable cause being really a question of fact, but in practice a question of law. Courts always require the plaintiff to show he was acquitted if tried on former action. If convicted in an inferior Court, but acquitted in the appellate Court, he cannot maintain this action. And even if acquitted, yet if the jury paused, the action is not maintainable. 2 Greenl. on Ev., § 457; *Payson* v. *Caswell*, 22 Maine, 212; *Witham* v. *Gower*, 14 Maine, 362. So, if the party acted *bona fide* under advice of counsel. *Reynolds* v. *Kennedy*, 1 Wilson, 232. Counsel also cited *Savage* v. *Brewer*, 16 Pick., 453; *Max* v. *Gray*, 42 Maine, 86.

N. Wilson, for the plaintiff, cited *Plummer* v. *Dennett*,

6 Maine, 421; *Merriam* v. *Mitchell*, 13 Maine, 439, and cases *infra*.

DICKERSON, J. — Case for malicious prosecution. The question reserved in this case is, whether the plaintiff, having submitted to the original suit, by paying part of the sum demanded, is thereby concluded from showing that it was brought without probable cause. The counsel for the defendant maintains the affirmative of this proposition, but the presiding Judge instructed the jury, that, while this would be true if the payment was made voluntarily, it would be otherwise if the plaintiff settled the claim to obtain his liberty from arrest and duress, denying all right of the defendant at the time of payment. The jury were instructed, in substance, that they might determine from the facts and circumstances attending the settlement of the action, whether the payment was made voluntarily and in submission to the defendant's claim, or compulsorily and in denial of it; if they should find the former, they should acquit the defendant, if the latter, they should return a verdict for the plaintiff, the other points in the case being irrelevant. The verdict of the jury establishes the fact of the payment under duress and protest, and the want of probable cause.

The burden is upon the plaintiff to show that the original suit was commenced without probable cause. If he settled the demand understandingly, and voluntarily, he is estopped from denying that the defendant had probable cause for bringing the suit. If he would contest the claim, he should have done so, before settlement; if, under duress, he should have protested against his liability. If a party is silent, where self interest commands him to speak, he will not be permitted to speak, when public policy commands him to keep silent.

The same legal consequences do not follow acts done under duress of arrest and protest, as when done freely and voluntarily, — under the abuse, as under the legitimate use of legal process. Suppose that, instead of set-

tling the defendant's demand the plaintiff had given him a deed or bond; how could he defend an action brought on such instrument, if the fact of his giving it is conclusive evidence that the defendant had a valid claim against him? Is the plaintiff the worse off for having paid his money, than he would have been if he had given a deed or bond to get his liberty? The rule of law is, that if a man, supposing he has a cause of action against another, cause him to be arrested and imprisoned, and the defendant voluntarily executes a deed for his deliverance, he cannot avoid such deed for duress of imprisonment, although the plaintiff, in fact had no cause of action; but when the imprisonment is unlawful, although by color of legal process a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided for duress of imprisonment. *Watkins* v. *Baird*, 6 Mass., 506.

There is nothing in principle, and we have not found anything in authority, which places a party upon less favorable footing who pays his money to procure his release from arrest on a groundless suit, than he who gives his bond or deed for the same purpose; if he may avoid the latter, he may recover back the former.

When the consequences of a man's acts are the subject of legal inquiry, the circumstances attending and the motives prompting them are proper matters for consideration. Especially does this become necessary where the question of volition is involved. To give the same legal effect to a party's acts, committed against his own interests, whether prompted from choice, or extorted by violent physical and moral compulsion, would be to confound those distinctions in law, which are uniformly recognized both in morals and divinity as the touchstone of human accountability.

The law does not make successful wrong a shield to protect its perpetrator from liability to afford redress to the injured party. If the wrongdoer has his hour of triumph, his hour of retribution is sure to come at last. The man

who falsely, maliciously, and without probable cause, sues out a process, arrests another, and compels him to pay money to procure his liberty, commits a wrong for which the law affords the sufferer redress in damages. The suing out of legal process is an abuse of the law to cover the fraud, the very wrong which the action for malicious prosecution was instituted to redress. It would be a reproach upon the law, if it should allow the payment of the money, thus wrongfully and illegally extorted from the plaintiff, to have any legal effect against him. In *Watkins* v. *Baird*, *ante*, the Court, PARSONS, C. J., held, not only that a deed given to procure the deliverance of a party from unlawful arrest and imprisonment on a groundless claim, was void, but that an action of malicious prosecution might properly be maintained. *Peirce* v. *Thompson*, 6 Pick., 192.

The opinion of TENNEY, C. J., in *Marks* v. *Gray*, 42 Maine, 86, is in harmony with this view of the law. In that case, the original defendants agreed to allow a certain sum on account of the alleged trespass, and the action was disposed of in accordance with that agreement; there was no coercion, and no payment under protest. The *quære* raised by Mr. Justice WILDE upon this subject, in *Savage* v. *Brewer*, 16 Pick., 453, was not germain to the issue upon which his opinion is based, and is at most, not a *dictum*, but a doubt. *Exceptions overruled.*

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

PHILANDER SOULE *versus* MOSES BUCK.

If an execution be returned satisfied by a levy upon the debtor's land, on which, unbeknown to the creditor, there was, and for a long time had been, an outstanding mortgage, duly recorded, for more than its value; the latter may, on *scire facias*, by virtue of R. S., c. 76, § 18, have the levy set aside and an alias execution issued for the amount of the original judgment.

R. S., c. 76, § 27, in nowise modifies or affects § 18; but the remedies provided in the two sections are independent and consistent.

ON REPORT.

Scire Facias brought under R. S., c. 76, § 18, requiring the defendant "to show cause why an alias execution should not be issued on" a judgment in favor of the plaintiff against the defendant, recovered before the S. J. Court for this county, at the January term, 1864. On Feb. 20, 1864, the first execution was levied upon a lot of land owned by the defendant and was returned by the officer as satisfied in full. The execution, together with the return thereon, was duly recorded within the time prescribed by the statute.

The plaintiff introduced a mortgage of the same premises levied on, from the defendant to one Shaw, dated Dec. 1, 1855, and recorded same month, together with evidence tending to show that the sum due on the mortgage was greater than the value of the land at the time of the levy, and that the plaintiff had no actual knowledge of the existence of the mortgage until a year after the levy. It also appeared that the mortgage was never foreclosed, but that possession under the same had been taken by the mortgagee, or one claiming under him.

The case was withdrawn from the jury and reported to the full Court, who were to render judgment according to the legal rights of the parties.

A. W. Paine, for the plaintiff.

J. H. Hilliard, for the defendant.

A creditor may waive his levy when the estate taken was

not the debtor's property or it could not be holden by the levy. R. S., c. 76, § 18. In the case at bar, the debtor owned the land, though under mortgage.

The mortgager is considered the owner against every body except the mortgagee until actual entry under the mortgage. *Goodwin* v. *Richardson*, 11 Mass., 473. "Actual entry" evidently means entry to foreclose. As between debtor and creditor, the land was the property of the former when levied upon; and, by R. S., c. 76, § 27, the creditor had the right to make his levy by appraisement whether the existence of the mortgage was known or unknown to the creditor at the time of the levy. *Brown* v. *Clifford*, 38 Maine, 212.

The creditor cannot be evicted, if he choose to protect it by redemption. The fact that he may have to pay the full value of the land to redeem does not change the law. He only pays for his negligence in not examining the record previous to his levy; but can recover the amount paid for redemption of the debtor, § 27. This levy is valid, § 27; and binds both creditor and debtor.

DANFORTH, J.—By the decision of this Court, in *Steward* v. *Allen*, 5 Greenl., 103, the plaintiff is entitled to the remedy he seeks. The facts in that case are the same as in this; and the statute then in force contained the same provisions as are found in c. 76, § 18, R. S. But it is said that § 27, of the same chapter, not then enacted, qualifies § 15 and prevents its operation in such a case as the one at bar. It is true that the section referred to provides another and a different remedy, but not necessarily an inconsistent one. The two sections are entirely independent of, and in no way connected with each other. The 27th does not in its terms purport to qualify, limit or restrain the other in any respect. The two are not in any sense antagonistic, but each can stand and have its full force and meaning, without, in the slightest degree, interfering with the other. The language in § 27, providing, in cases there referred to, that the levy

shall be valid, does not mean that the creditor shall be bound by it. He may waive it though valid, as he might do in certain cases under § 18. The meaning is, that notwithstanding his ignorance of the mortgage he *may* still avail himself of his levy, and recover of the debtor the amount paid to the mortgagee.

This section is a reënactment of § 32, c. 94, R. S. of 1841. By referring to that statute, we find the words, "still, the creditor shall hold the premises by virtue of his levy," &c., plainly indicating a choice given to the creditor, as to whether he would retain his levy or otherwise. There is no indication that the Legislature intended to change the meaning by a change of language, and a fair construction of the words will show that they have not done so. This provision was undoubtedly made for the benefit of the creditor. Previous to that, a levy made upon land under mortgage, could only be sustained, when the return shew that the creditor elected to disregard the incumbrance. When it was unknown, this could not be done; therefore, in such cases, the levy was void. *Steward* v. *Allen*, above cited; *Litchfield* v. *Cudworth*, 15 Pick., 23; *White* v. *Bond*, 16 Mass., 400; *Brown* v. *Clifford*, 38 Maine, 212. Hence, as the law formerly was, if the creditor overlooked a mortgage, on which the amount due was but small in proportion to the value of the land, still he would lose his levy and often his debt. To avoid this, the statute was passed to enable him, if he chose, to retain his levy and at the same time to recover of the debtor what he might be obliged to pay to relieve his land. But, if we give the statute the force contended for by defendant's counsel, it would often be a hardship rather than a benefit, for, in the case at bar, as in all similar cases, when the mortgage debt exceeds the value of the estate levied upon, the creditor must either lose his debt or increase it, perhaps largely, and take his chance of recovering it of a debtor of at least doubtful responsibility. This construction of the statute would be contrary to its general scope and policy, and is not required or

even sustained by its terms. It follows that a creditor may avail himself of either section, when his case comes within its provisions.

Judgment for Plaintiff. — Levy set aside, and an alias execution to issue for the amount due on the original judgment.

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

JAMES CUNNINGHAM *versus* ALBERT HOLTON.

A tenancy at will may be inferred from the payment and acceptance of rent.

The estate of a tenancy at will is not assignable.

The landlord may, on rent day, enter upon the premises held by a tenant at will, and demand payment of the rent; and, if not paid, he may hold them as forfeited for non-payment of the rent.

The defendant leased by parol his store, for three years, from April 1, 1865, rent payable quarterly. In September following, the lessee assigned his interest to the plaintiff, who, in the succeeding November, assigned to F., who, in February following, re-assigned to the plaintiff, who thereupon re-entered and continued in possession until the 10th of April following, when the defendant broke in and took possession. On the 18th of the last named month, the defendant sued the plaintiff in assumpsit for rent from October next preceding, and up to the time of the breaking, which the plaintiff soon after paid. In trespass *quare clausum* for the breaking and holding the plaintiff out; — *Held*, that instead of ordering a nonsuit, the presiding Judge should have submitted the question of tenancy to the jury.

ON EXCEPTIONS.

The case is stated in the opinion.

A. W. Paine, for the defendant.

1. Plaintiff was not defendant's lessee. He was sub-tenant without defendant's knowledge and assent, and was never recognized as his tenant by defendant. Plaintiff paid nothing until fourteen days after he was ejected. Defendant claimed the lessee as the only responsible tenant. The

suit, after eviction, cannot be construed into an assent. Taylor on Landlord and Tenant, § 497; *Doe* v. *Meux*, 2 Har. Dig., 3603.

2. Plaintiff had forfeited his term, if he had any right as tenant, by non-payment of rent April 1, 1866, and defendant entered and claimed forfeiture April 10.

Independent of the statute, a verbal lease is equally binding as a written one. Stat. of Frauds might prevent the operation of the contract to its full extent as an executory matter, where damages are sought for non-performance, which is not the case at bar.

The mere fact of the tenancy being under a verbal agreement does not necessarily lead to the conclusion that it is a tenancy at will. A tenancy at will may be by written lease, and a tenancy for years may be by parol. The verbal term for years, *may*, by the act of the parties, be converted into a tenancy at will. R. S., c. 73, § 10. If either party seeks to violate his verbal term of years, he can do so, and make it at will if the other acquiesces; but, if he does not so seek, the term for years will be continued and enjoyed, and the rights of the parties adjudged accordingly. It is the same with all agreements which are void by statute of frauds. A parol agreement to convey land on certain conditions is void. But, if the grantor actually make and deliver his deed, and the grantee accept it, the latter is not only bound to pay the price verbally agreed upon, but both parties are bound by the verbal agreement as to terms and times of payment.

R. S., c. 73, § 10, is akin to statute of frauds, and is liable to a similar construction. It avoids the attempt to create an estate in lands by parol greater than an estate at will. It does not create a tenancy at will when the parties did not so intend, but, if the estate undertaken to be created is "greater than an estate at will," it withholds its aid in protecting and maturing such an estate; instead of changing its nature, it merely ignores the estate altogether. After one party has taken advantage of the statute and avoided

the agreement, and the other has consented to the new state of things, their rights will be then judged according to the new status, resulting from the new and implied agreement.

The original agreement was for five years, at $120 per year, payable quarterly, and the law imposed the condition of not underletting. Either could abrogate. If not, they must strictly observe it. If lessee would enjoy the right of remaining, he must personally occupy, and pay as agreed in amount and time. Each must abide by his agreement in order to have the benefit of performance on the other side. The language of the statute means, that no estate in lands greater than an estate at will can be created by parol, — if the attempt is made the act is void, but estate is not reduced to one at will, — it is reduced to nothing and the party has no right further to remain in possession. *Cruch* v. *Crockett*, 5 Cush., 133; *Hollis* v. *Perl*, 3 Met., 350.

APPLETON, C. J. — This is an action of trespass *quare clausum*. It appeared in evidence that, in March, 1865, the defendant leased by parol the store in controversy for three years. The rent was to commence April 1, and was payable quarterly. In August or September following, Patten, the lessee assigned his interest to the plaintiff, who occupied to November, when he sold out to one Freeman. Freeman remained in possession until February, when he re-sold his right to the plaintiff who entered and continued in possession up to April 10th, when the defendant broke in and took possession, which is the trespass complained of. The rent for the two first quarters was paid by Patten. The rent due January 1st was paid by Freeman. A few days before the first of April, the defendant came into the store, which the plaintiff was then occupying, and asked him if he was going to pay the rent of the store. The plaintiff inquired if the rent was then due, and defendant replied it was not. The plaintiff then told the defendant that he expected to pay the rent when it became due. The defend-

ant then informed the plaintiff that he had leased the store for five years from April 1st and should expect him to quit the premises.

On 18th April, the defendant sued the plaintiff for the use and occupation of the store from Jan. 1, 1866, to April 10, which the defendant paid on the 24th. Upon these facts the presiding Justice ordered a nonsuit, and the question arises as to the correctness of such order.

It is conceded that Patten was a tenant at will of the defendant. A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue. The estate may arise by implication as well as by express words. The payment and acceptance of rent are facts from which the existence of such tenancy may be inferred. As Freeman paid rent at the quarter day it was due, the defendant, by receiving it from him, must be considered as regarding him as a tenant.

As a tenancy at will is determinable at any time, the tenant has no certain and indefeasible estate which he can assign or grant to any other person. *Austin* v. *Thompson*, 45 N. H., 117. "Therefore, if a tenant at will assigns over his estate to another, who enters upon the land, he is a disseizor, and the landlord may have an action of trespass against him." 1 Cruise's Dig., 244, title 19, c. 1, § 7; *Cooper* v. *Adams*, 6 Cush., 87. The plaintiff, consequently, by his purchase of Freeman, acquired no rights as against the defendant. If Freeman was a tenant at will, he determined his estate by his own act. The plaintiff being in as a disseizor the tenant might enter upon him as upon any other person, who, without right had taken possession of his lands. So, he might waive the tort and accept him as his tenant.

The defendant sued the plaintiff for rent up to the date of his entry, which the latter paid. The action for use and occupation cannot be maintained except upon an express or implied promise. It must appear that the defendant recognized the title of the landlord and occupied under it. *Rog-*

ers v. *Libby*, 35 Maine, 200; *Howe* v. *Russell*, 41 Maine, 446. Assumpsit for use and occupation will not lie when the relation of landlord and tenant does not exist. *Porter* v. *Hooper*, 11 Maine, 170. It is competent, however, for parties to waive the tort, and, if waived, the owner may maintain assumpsit for use and occupation. *Curtis* v. *Treat*, 11 Maine, 525. By bringing in assumpsit for use and occupation, in connection with the other evidence, the tenant would seem to have negatived the fact that the possession of the plaintiff was tortious, — and that he had a right to enter upon him as a disseizor.

The plaintiff cannot be regarded as a tenant at sufferance, for such tenancy is an interest arising when one comes into possession by a lawful title otherwise than by act of law, but retains such possession longer than he has any right. Besides, at common law, no action can be maintained against a tenant at sufferance for rent, "because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding suit." 1 Cruise's Dig., 250. *Flood* v. *Flood*, 1 Allen, 217. But by paying and receiving rent for the time the tenant holds over, the tenant at sufferance becomes a tenant at will. Ib. 1 Washburn on Real Estate, 393.

By bringing a suit for use and occupation, the defendant assumed that the plaintiff was his tenant, and as such, bound by express or implied promise to pay rent. The only tenancy under the facts as proved, was a tenancy at will.

If there was such a tenancy and the rent was due quarterly, the landlord might have entered on the 1st April and demanded rent, and, if not paid, he might have held the premises as forfeited for non-payment of rent. *Jewell* v. *Berry*, 20 N. H., 37; *McMurphy* v. *Minot*, 4 N. H., 251. But the tenancy was not terminated by such entry. The landlord neither entered nor demanded rent on that day. He suffered the tenant to enter on a new quarter.

By R. S., 1863, c. 199, "all tenancies at will may be determined by either party by thirty days notice, in writing,

for that purpose, given to the other party, *and not otherwise*, except by mutual consent, and excepting cases where the tenant is liable to pay rent and no rent is due at the time the notice expires; and no further notice shall be required to entitle the landlord to the process of forcible entry and detainer." No notice whatever has been given under this statute.

The rent was payable quarterly and was due April 1. The entry was made April 10. In the absence of express stipulation it is a general rule of the common law, that, if a tenant hold from year to year, notice must be given ending with the year of the tenancy; if the hiring be a quarterly, a monthly, or a weekly hiring, the notice must be a notice to quit at the expiration of the current quarter, month or week; and, if it breaks in the middle of the quarter, month or week, it is not a good notice to quit. *Baker* v. *Adams*, 5 Cush., 99; *Sanford* v. *Harvey*, 11 Cush., 93; *Prescott* v. *Elms*, 7 Cush., 346.

The defendant never gave the written notice required by statute. He did not enter to demand rent when due, or to claim for a forfeiture if the same was not paid. He is not shown to have determined the tenancy, which his own writ indicates as existing. He elected to consider the plaintiff as his tenant. *Larrabee* v. *Lumbert*, 34 Maine, 79. He is therefore a trespasser. *Brock* v. *Berry*, 31 Maine, 293.

Further, the defendant is shown to have leased the premises prior to April 1st. In that case, he would have no right to enter. If the tenancy was terminated by such lease, the right to enter would belong to his tenant and not to him.

There was evidence tending to show that the plaintiff was tenant at will, which should have been submitted to the jury. *Nonsuit taken off. — Case to stand for trial.*

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

WALTON, J., concurred in the result.

JOHN PATTEN *versus* WILLIAM T. PEARSON.

In an action by the indorsee against the indorser of a negotiable promissory note, indorsed in blank, the latter may prove, by parol, that he indorsed the note for the accommodation of the former.

ON EXCEPTIONS.

ASSUMPSIT FOR MONEY HAD AND RECEIVED, to recover a balance due on a note for $2215, dated Oct. 15, 1858, signed by one Augustus W. Pratt, made payable to the order of the defendant and by him indorsed in blank.

The presiding Judge instructed the jury that the evidence introduced by the plaintiff was sufficient to establish a *prima facie* right in him to recover, demand and notice not being denied; and that there was nothing in the evidence of the defendant, assuming it to be true and admissible, which limits or controls the effect of the defendant's indorsement. That the indorsement being without any written qualification on the note, parol testimony cannot change, limit or control it.

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

The remaining facts sufficiently appear in the opinion.

Rowe, for the defendant, cited Byles on Bills, *63; *Easton* v. *Pratchett*, 1 Crompton, M. & R. 798; 1 Parsons on Bills, 176, 7, 8; 191–3; *Brock* v. *Thompson*, 1 Bar., 322; *Herrick* v. *Carman*, 10 Johns., 224; Chitty on Bills, *69, *70.

J. A. Peters, for the plaintiff, cited, *Hancock* v. *Fairfield*, 30 Maine, 299; *Goodwin* v. *Davenport*, 47 Maine, 112; *Thayer* v. *Mowry*, 36 Maine, 287. Counsel contended that *Smith* v. *Morrill*, 54 Maine, 48, is not an authority against the plaintiff, because the precise question therein decided is, that a prior indorser can maintain an action for contribution against a subsequent indorser, on proving an oral agreement between the indorsers at the time of indors-

ing, that, as between themselves, they were co-sureties. It is principally founded on *Weston* v. *Chamberlaine*, 7 Cush., 404, and *Clapp* v. *Rice*, 13 Gray, 403, the effect of which cases is that evidence such as is claimed to be admissible in case at bar is not so. The opinion in *Smith* v. *Morrill* accepts the decision in the Massachusets cases, but combats the grounds of them. If the grounds are wrong, the decisions must be wrong.

The conclusion in *Smith* v. *Morrill* is correct, and, upon the authorities, not adverse to the plaintiff here. The cases upon which it is based are not adverse but favorable to the plaintiff. Some of the reasoning of the Court in *Smith* v. *Morrill* is adverse to the plaintiff, and that reasoning is in direct conflict with *Shaw* v. *Shaw*, 50 Maine, 94; *Goodwin* v. *Davenport*, 47 Maine, 112, not alluded to in *Smith* v. *Morrill*. Counsel also cited *Lake* v. *Stetson*, 13 Gray, 310, and *Howe* v. *Morrill*, 5 Cush., 80, 82, as to varying legal effect of a legal instrument by parol.

CUTTING, J. — The only claim set forth in the writ is in assumpsit for money had and received, under which the plaintiff claims a balance due on a note payable to the order of the defendant and by him indorsed.

The defence, except as to the question of damages, is substantially disclosed in the defendant's testimony ruled in *de bene esse* and subsequently excluded. He swore as follows: —

"That in the fall of 1858, I owed Bragg & Patten $2092,19, for two bills of lumber sold me. I sold the same lumber to Upton & Co. of Boston, who subsequently failed, owing me about $12,000. I went to Boston and spent ten or twelve days endeavoring to get security of Upton & Co., for my claim against them. When I came home Bragg came to see me. I told him what I had done, that I had got this and some other securities, — that I considered this the best of them, — that parties there said it was good, — that I had no means of paying his firm unless they took some of these

securities. I told him I would turn out this note and mortgage for my indebtedness to them if they would take it in settlement. He then asked me to go to their office to see if they could arrange it. I went, carrying the mortgage and note with me, and then proposed to turn out to them the note and mortgage in payment of my debt if they would pay me difference. The plaintiff said the note and mortgage had a long time to run and that I ought to throw in the excess in the amount of the note over my debt. After further talk I consented that they should take the note and mortgage if they would give me a full release and discharge. And it was fully agreed that that should be in full and final settlement of my debt to them. I then handed them the note and mortgage, and the plaintiff receipted Bragg & Patten's bills against me and handed them to me. [Bills duly receipted were here put into the case.] Afterwards the plaintiff said the note is payable to your order, you want to indorse it to make it negotiable, and so that we can collect it in our own name. I thereupon indorsed it to accommodate them, not to be holden. I never intended to indorse to be holden."

On Cross examination.—"I did not indorse until after the papers were exchanged. It might have been a half an hour or less."

Now, the plaintiff substantially denies the defendant's statement, and swears that the agreement to indorse was a part of the negotiation and that the same was made before the papers were delivered.

Upon such conflicting evidence, if admissible, an issue was presented to the jury, or might have been, if it had not subsequently been, by the ruling, withdrawn from their consideration. Why should it have been so withdrawn?

This is the question now presented. If the plaintiff's testimony, upon this point, preponderated, he was entitled to a verdict for something; otherwise, if the most credit was given to the statement of the defendant. That statement was admissible unless its admission tended to vitiate

some well and long established rule of mercantile law. But no such rule is known to exist. On the contrary, it is well settled, by all the authorities upon this subject, that the indorsement was for the accommodation of the holder and plaintiff in the suit may be shown on trial. See *Smith* v. *Morrill*, 54 Maine, 48.

Exceptions sustained.—New trial granted.

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

MALVINA F. PATTERSON *versus* WILLIAM WILKINSON.

An *innuendo* does not extend or enlarge, but simply explains the meaning of something previously expressed.

When the words themselves are not actionable, but require reference to some extrinsic fact to make them so, such fact must be averred in a traversable form with a proper *colloquium*.

The words that "Malvina, (meaning the plaintiff,) has been to swear a young one," fairly convey the idea that the plaintiff has committed the offence of fornication.

Various actionable words, spoken at different times, constitute distinct causes of action.

When the general issue is well pleaded to one of five counts and the plaintiff demurs thereto and the demurrer is joined, the demurrer should be overruled and judgment rendered for the defendant.

ON EXCEPTIONS.

CASE FOR SLANDER.

The presiding Judge overruled the defendant's demurrer and sustained the demurrer of the plaintiff, and the defendant alleged exceptions. The remainder of the case is sufficiently stated in the opinion.

J. H. Hilliard, in support of the exceptions.

Piper, Mace & Laughton, for the plaintiff.

APPLETON, C. J.—This is an action for slander. The defendant, regarding the declaration as containing five counts,

pleaded the general issue to the last and specially demurred to each of the preceding ones. The plaintiff demurred to the defendant's plea of the general issue and joined the demurrers to the other counts.

Different pleas may be filed to different counts. To some the defendant may demur and plead the general issue to others. The general issue being pleaded, and being a good plea, the demurrer thereto should have been overruled, and judgment rendered for the defendant upon the last count.

The first count, after alleging the good character of the plaintiff, proceeds as follows; — "and whereas, one Sarah Patterson, a sister of the plaintiff, had sexual intercourse in the month of February, 1863, with a person not her husband, and was begotten with child, which, if born alive, would have been a bastard; the said Sarah, on the 16th day of October, 1863, being then pregnant and trying to conceal her shame, committed suicide by poisoning herself with arsenic. Nevertheless, the said defendant, though well knowing the premises, but contriving maliciously to injure and defame the plaintiff in her good name and reputation, repeated in substance the following in the months of October, 1863, to divers individuals: viz., that the plaintiff was going in the same way that her sister Sarah had gone, meaning to convey and conveying the idea that plaintiff had illicit intercourse with divers persons and that she was pregnant and would commit suicide by poisoning herself, to the damage of the plaintiff in the sum of one thousand dollars." And in the second count the words were "I make no doubt Malvina is in the same situation."

The words that "the plaintiff was going in the same way in which her sister Sarah had gone," or that "she was in the same situation," impute no offence and cannot be regarded as being libellous. Neither can their meaning be extended or enlarged by innuendo. An innuendo is only explanatory of some matter previously expressed.

The words spoken, not importing a crime, and not being upon their face slanderous, the rule as to declaring is thus

stated by Chitty, in his work on Pleading, vol. 1, p. 342, "When the 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 extrinsic matter, to show that they are actionable, it must not only be stated that such matter existed, but also that the words were *spoken of and concerning it.*" The count does not indicate that any conversation was had in reference to the misconduct of the plaintiff's sister. The fact of such misconduct is stated, but in what is technically termed the *colloquium*, it is not averred that the words were spoken in relation to such misconduct. If spoken generally, without any such reference, they were obviously not slanderous. "When the words spoken," observes Lord ELLENBOROUGH, in *Hawks* v. *Hawkey*, 8 East, 431, "do not in themselves naturally convey the meaning imputed by the *innuendo*, but also when they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated that such matter existed, but also that the words were spoken *of and concerning that matter.*" In *Sturtivant* v. *Root*, 7 Foster, 69, GILCHRIST, C. J., says, a "*colloquium* serves to show that the words were spoken in reference to the matter of the averment. An innuendo is explanatory *of the subject matter sufficiently expressed before, and it is explanatory of such matter only;* for it cannot extend or limit the sense of the words beyond their own meaning, unless something is put upon the record for it to explain." So, in *Carter* v. *Andrews*, 16 Pick., 1, SHAW, C. J., says,—"If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact must be averred in a traversable form, with a proper *colloquium*, to wit, an averment, that the words in question are spoken *of and concerning* such usage or report or fact, whatever it is, which gives to words, otherwise indifferent, the particu-

lar defamatory meaning imputed to them." For aught that appears in the declaration preceding the innuendo, the conversation might have had reference to the good and not to the bad conduct of the plaintiff's sister, and, if so, the words are entirely unobjectionable.

The third count sets forth no misconduct of the plaintiff's sister, but is for the utterance of these words, that Mrs. Patterson, the mother of said Malvina, "had not seen all of her trouble, that Malvina was in the same way that Sarah had been." But it is obvious that these words, without preceding averments to give them a special meaning, convey no slanderous imputation upon the character of the plaintiff.

The offence of fornication is punishable by the statutes of this State. An action of slander will lie for charging an unmarried woman with having committed this offence. *Miller* v. *Parish*, 8 Pick., 385; *Woodbury* v. *Thompson*, 2 N. H., 194. The words set forth in the fourth count, that "Malvina has been to swear a young one," fairly convey the idea that the plaintiff has committed the offence of fornication.

If the declaration, as the plaintiff now claims, contains but one count, that is bad on special demurrer for duplicity. Each count should contain but one cause of action, and no more. It is true, it was held in *Rathbun* v. *Emigh*, 6 Wendell, 407, that different sets of words, importing the same charge, laid as spoken at the *same* time, may be included in the same count. But such is not the case here. The different words set forth in the plaintiff's declaration were spoken at different times, and therefore constitute several and distinct causes of action, and should have been embodied in separate counts.

But the exceptions negative the proposition that there is but one count. They assume five several counts. The presiding Judge, in his ruling, acted upon the same assumption. We think there were five counts intended to be filed; though some were defective.

The result is, the three first counts are bad, and the fourth is good on general demurrer. The plea to the fifth is good. The plaintiff's demurrer thereto is overruled.

Exceptions sustained.

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

THOMAS MORTON *versus* INHABITANTS OF FRANKFORT.

Towns are not liable for injuries occasioned by such obstructions as are necessarily created in highways in order to repair them, provided reasonable measures are taken to notify travellers of their existence.

Such obstructions are not, in any proper sense, defects.

What are reasonable measures.

ON MOTION to set aside the verdict.

CASE for injury sustained by the plaintiff by reason of an alleged defect in a highway in the town of Frankfort, which highway it was admitted the defendants were bound to keep in repair.

John A. Rines, called by the plaintiff, testified:—I was driving a three horse team through Frankfort Marsh village, so called, April 30, 1857, and noticed some men, and oxen and cart, and a plank standing up in the road by the culvert. One of the men was Freeman C. Parker, surveyor of the district. The road was a gradual descent and smooth from where I was when I first saw team down to the culvert. Had 300 feet of green hard wood ship plank, weighing at least two tons, on my wagon. Horses trotted slowly. When some 75 feet from culvert, Parker gave notice by hailing. Told me to go to the left for there was a hole there. The hole was three to four feet wide, three to four feet deep, and extending from the west side to east of the center of the road. On the east side, about ten feet of the road had not caved in. The ox-team was standing on the

east side when I hove in sight. The ox-team started along towards me. I tried to rein up my horses, could not stop them. Swung leaders to. Sheered off pole horses that leaders might not get into hole, and that my team might not hit the cart. Rim of my near hind wheel hit hub of ox-cart. Collision broke draft of cart and my hind axle. The collision took place about thirty feet from the hole. I looked around and saw plaintiff lying on his back in the road behind my team. Plank swung down from my wagon and broke plaintiff's leg.

Cross-examination. — Discovered plank in the hole when 20 to 25 rods from it. Shoulders of the leaders about abreast of the hole when wheels collided. First saw plaintiff that day on the ground behind my wagon. My right hind wheel came off. Hind axle of my wagon thirty feet from fore.

Thomas Morton, testified: — About twenty rods from place of accident, I got upon hind end of the planks on Rines' wagon. Saw some men standing in the road ahead. Saw no plank sticking up in the road. Saw an ox-team. Rines' fore wheel passed the ox-team, but his hind wheel struck it, axle broke and plank came down upon my leg. Laid on my back forty-eight days. Leg did not heal entirely for four years. Did not hear Parker hail Rines. The road was descending, but good, smooth and hard. Rines tried to shear off from the ox-team, and then sheared to the other side to avoid the hole. Rines' team about fifty feet long. Don't know as Rines knew I was on his wagon. I got on to see the movement of his horses, as I had had talk with him about swapping. When I first noticed ox-team, it was moving towards us.

Seldon Morton, testified: — Am plaintiff's brother. Culvert 4 feet wide, twenty-six feet long, built of common stone covered with stringers and they covered with poles and dirt. Was under the culvert three weeks before accident. Wall on one side had partially fallen down, and the earth washed out from behind the wall, leaving a space of

the size of a hogshead. The cavity was directly under the place where the hole was on day of the accident. When I was under there, the crust of the earth was frozen.

Levi Curtis, testified:—Passed over the culvert April 30, 1857, in wagon. Horse stumbled and fell. Found he had broken through. No hole there just before. Hole, foot or foot and one-half across.

Franklin C. Parker, testified:—Was surveyor of district. Was notified of defect, April 30, 1857. Went immediately to fix it; found hole about size of water-bucket, north side of culvert, about one-third of the way from west side of the road. Broke down the earth with a bar, and found cavity north side of wall of culvert. Stuck up a plank in the hole, extending eight to ten feet above the surface and ten to twelve inches wide. Hopkins came along with his ox-team and stopped a few minutes. Saw Rines when he came in sight. Hopkins started along. Rines was coming pretty good speed. Hailed him. Swung my hands. He was about 15 rods from hole when I called to him. When he stopped his team, head of his leader nearly opposite the hole. I get to the hole within ten minutes after I was notified of its existence, about eight o'clock in the morning of the 30th of April. Hopkins' ox-team had got some rods from the hole when the teams collided. Road twenty-five feet wide where collision took place.

The evidence was voluminous, but the foregoing contains its substance.

The verdict was for the plaintiff, whereupon the defendants moved it be set aside.

N. H. Hubbard, for the plaintiff.

W. G. Crosby, for the defendants.

WALTON, J.—Towns are not liable for injuries occasioned by such obstructions as are necessarily created in highways in order to repair them, provided reasonable measures are taken to notify travellers of their existence. Such ob-

structions are not in any proper sense defects. They are the necessary means to a lawful end, — means necessary to the performance of a duty imposed by law, — and when reasonable notice of their existence is given, create no liabilities on the part of towns for injuries occasioned by them. To hold towns liable in such cases would be to impose a penalty, not on their negligence, but on the means necessary to the performance of a legal duty. The law, rightly administered, will lead to no such absurd results.

The only obstruction in the road, at the time of the plaintiff's injury, was an excavation made by the highway surveyor in order to repair a culvert. The water had got behind one of the walls of the culvert and washed out the earth, and the only way to reach this subterranean cavity and repair it, was to make an opening above it.

Did the driver of the team on which the plaintiff was riding have reasonable notice of this obstruction? We think he did. The driver says the surveyor hailed him and told him there was a hole there when he was about seventy-five feet distant from it. Other witnesses say that the distance was much greater than that. But this was not the only notice. The surveyor had stuck up a plank in the excavation eight or ten feet high, and ten or twelve inches wide, and the driver admits that he saw this plank, and the men standing around it, at the distance of twenty or twenty-five rods. It will be remembered that this was in broad daylight, — about eight o'clock in the morning, — that the teamster was acquainted with the road and must have known that there was a culvert there; that the excavation was westerly of the center of the road, and only six or eight feet long, leaving enough of the unbroken road on the easterly side for teams to pass upon with safety; that the teamster saw the ox-team coming and knew that he must meet and pass it before reaching the culvert. If, under these circumstances, the teamster was unable to keep out of the excavation, and at the same time avoid running against

the ox-cart, we think it must have been for some reason other than the fault of the town or the surveyor. We think the notice of the unsafe condition of the road was amply sufficient, — all that the most prudent man would have deemed necessary.

We of course recognize the soundness of the argument, that the mere enlargement of a hole by the lapse of time and the action of the elements will not affect the liability of the town. But there is no analogy between such a case and the one now under consideration. Here the hole was not enlarged by the lapse of time and the action of the elements, but an excavation was intentionally and necessarily made in order to effect repairs. The fact that there was a dangerous defect there before the surveyor commenced operations, instead of creating, frees the town from responsibility. It is the surveyor's justification for creating such an obstruction. Being necessary it was lawful. If it had not been necessary it would have been unlawful.

When a highway surveyor is about to commence repairs of such a character that while they are being made the road cannot be used with safety, he would undoubtedly be justified in closing it till the repairs should be completed. But when, as in this case, the repairs can be made in a short time, and enough of the road will remain unobstructed for travellers to pass upon with safety, he ought not to close it. To do so would subject the public to an unreasonable inconvenience. His duty in such cases is to adopt reasonable measures for notifying travellers of the condition of the road, — what portions must be avoided, and what portions can be used, — and then proceed to make the necessary repairs as soon as possible; and when he has done this he has done his whole duty. The town will be freed from responsibility, and travellers will use the road at their own risk. If he proceeds to make the repairs without giving such notice, the liability of the town for injuries will continue.

If in this case, the highway surveyor, when notified that a horse's foot had broken through the culvert, had com-

menced fencing up the road instead of setting himself to work to repair it, we cannot doubt that he would have been looked upon by the entire community as a fool or an insane man. The defect was one which could be repaired in a very short time, and, while the repairs were being made, enough of the smooth hard road would remain undisturbed for travellers to pass upon with safety. To have fenced up the road would, in our judgment, have subjected the public to an unreasonable inconvenience. The surveyor stuck up a plank in the hole eight or ten feet high and ten or twelve inches wide. It seems to us that such an object standing over a culvert, and in the travelled part of the road, would sufficiently indicate that that portion of the road was not in a usable condition. But this was not all. The surveyor himself remained by the excavation and actually hailed the driver of the team on which the plaintiff was riding at the time of the accident, and told him there was a hole there, when he was at least seventy-five feet from it. Other witnesses, as before stated, say that the distance was much greater than that, but the driver himself fixes the distance at not less than seventy-five feet.

Our conclusion is, that towns are not liable for injuries occasioned by obstructions in highways, necessarily created in order to repair them, provided reasonable notice of the condition of the road is given; that the only obstruction in the road at the time of the plaintiff's injury, was an excavation necessarily made in order to repair a defective culvert; that reasonable and suitable measures were taken to notify travellers of the condition of the road, and that the driver of the team on which the plaintiff was riding, in particular, had such notice; and if it can be said that the plaintiff was himself free from fault in getting on to the hind end of a heavily loaded lumber wagon without the knowledge or consent of the driver, and without right, and that the excavation in the road was the sole and proximate cause of his injury, (a proposition the truth of which may well be doubted, for it will be remembered that the collision with the ox-cart, and

the breaking of the plaintiff's leg, took place before the excavation was reached,) we think, that inasmuch as the excavation was necessarily made for a lawful purpose, and reasonable notice of it given, the plaintiff's loss, so far as the town is concerned, was "*damnum absque injuria*," and that he cannot maintain an action against the town to recover the damages he thereby sustained.

Perhaps we ought to notice the argument that, if this culvert had been repaired sooner, as it should have been, the plaintiff's injury would not have happened. It may be asserted with equal truth that if it had not been repaired so soon by a day, or even an hour, the accident would not have occurred. The teamster might have got one of his horse's legs into the hole that was there before the surveyor commenced operations and broken it, but there is no reason to suppose that such an accident would have ended in breaking the plaintiff's leg. The answer to this argument based on mere delay is that the excavation, being necessary, was therefore lawful, and as lawful on the morning of the accident as it would have been the day before, and to human foresight no more dangerous on the morning of the accident than it would have been the day before, — no more dangerous at the moment of the accident than it would have been the first moment the defect in the culvert was discovered. The unfortunate conjuncture of time and other circumstances which caused the plaintiff's injury were beyond the reach of human foresight. It could not be foreseen that the excavation necessary to repair the culvert would be more dangerous on the morning of the accident than at any other time. It was as lawful then as at any other time, and the liability of the town for injuries occasioned by it was therefore no greater then than at any other time.

The hole that was in the road before the surveyor commenced operations had no agency whatever in producing the plaintiff's injury, except upon the principle that all which goes before is necessary to produce what comes after, thus making the chain of causation endless. The teamster did

not drive into it; he had not reached the place where it was, even, when the accident happened. He never, in fact, had any knowledge of its existence till after the accident had occurred. It could not therefore have influenced his conduct. It was the excavation made by the surveyor, that he was endeavoring to avoid when the collision with the cart took place; and the proposition that the hole that existed in the road before the surveyor commenced operations, was the proximate cause of the plaintiff's injury, cannot for a moment be maintained. It was at most but one of the remote circumstances which combined to produce it. "*In jure, causa proxima, non remota, spectatur.*"

We think, upon the plaintiff's own showing, he is not entitled to recover, and that the presiding Judge would have been justified in ordering a nonsuit.

Motion sustained. — Verdict set aside. — New trial granted.

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

CYRUS PATTERSON *versus* JOSIAH CHANDLER.

An appraisers' return upon an execution, stating "we viewed a tract of land * * shown to us * * as the estate of * * the debtor, * * which said tract of land we have appraised at," a sum named, "and we have set out said tract of land by metes and bounds," &c., sufficiently states the "nature of the estate," as required by R. S., c. 76, § 3.

If the whole interest in the estate set out is appraised as belonging to the debtor, when, in fact, he owned only two-thirds, still the levy will be valid.

ON REPORT.

WRIT OF ENTRY.

The plaintiff claimed under a levy in his favor against the defendant, made Nov. 16, 1858, and recorded Jan. 6, 1859. The defendant was in possession at the time of the levy

and has continued in possession ever since. It was agreed that the defendant owned at the time of the levy only two-thirds undivided of the lot levied upon.

So much of the appraisers' return as is essential was as follows:—"We have this day entered upon, with the officer, Miles Staples, a deputy sheriff, and, so far as necessary to form a just value thereof, and viewed a *tract of land*, lying in Knox, in said county, shown to us by Cyrus Patterson, the creditor, *as the estate* of Josiah Chandler, the debtor, which said tract of land is bounded and described as follows, which said *tract of land* we have * * appraised at * * * and we have *set out the said tract of land* by metes and bounds to the creditor," &c.

Judgment was to be rendered according to the legal rights of the parties; and, if for the plaintiff, damages to be assessed by an arbitrator to be agreed upon by the parties, or to be appointed by the Court.

W. G. Crosby, for the plaintiff.

W. H. McLellan, for the defendant.

DANFORTH, J.—The only question raised in this case is as to the sufficiency of the appraisers' return, under the provisions of R. S., 1857, c. 76, § 3. The statute does not require the use of any particular form of words, but simply that the nature and interest of the debtor appraised should be distinctly described and set out. In the return under which the plaintiff claims, the appraisers say,—"we viewed a *tract of land* * * shown to us * * as *the estate* of Josiah Chandler, the debtor, * * which *said tract* we have appraised, * * and we have set out *said tract of land*," &c. This would seem to be fit and appropriate language to describe the highest interest in the land known to the law. It certainly covers all there is of it. It would be inappropriate if any less interest was appraised and set off. Language substantially like this was held sufficient in *Boynton* v. *Grant*, 52 Maine, 220. The principles laid down in

Stinson v. *Rouse*, 52 Maine, 261, are not in conflict with *Boynton* v. *Grant*, but rather confirmatory of it. The statute, however, does not require that the title of the debtor should be correctly stated, only that there should be no doubt as to the interest appraised. If a greater interest is appraised than the debtor had, still the levy will hold, if the creditor so elects, whatever estate the debtor had. R. S., 1857, c. 76, § 6. From the agreed statement of facts in this case, it appears that the debtor was the owner of two undivided third parts of the land levied upon, and for that portion only is the plaintiff entitled to judgment.

Judgment for plaintiff for two-thirds undivided of the land claimed, damages to be assessed by an assessor agreed upon by the parties or appointed by the Court.

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

INHABITANTS OF MONROE *versus* INHABITANTS OF JACKSON.

A person *non compos mentis* from infancy, and not emancipated, will follow the settlement of the father as well after he arrives of full age as before.

Such person cannot acquire an independent settlement by residence in a town for five successive years.

A transfer, by the father, of all his property to another, who, in consideration thereof, agreed to and did thereafter support the father and his family, does not constitute an emancipation of a member of the family who has been *non compos mentis* from birth.

ON REPORT.

ASSUMPSIT for supplies furnished a pauper who was *non compos mentis* from her birth. The only question was as to the settlement of the pauper.

The facts are sufficiently stated in the opinion.

N. H. Hubbard, for the plaintiffs, contended —

1. That a person *non compos mentis* may acquire a settlement in his own right, by residing in a town five successive years after he has arrived at the age of twenty-one years, without being emancipated; citing R. S., c. 24, § 1, clause 4; *Augusta* v. *Turner*, 24 Maine, 112; *New Vineyard* v. *Harpswell*, 33 Maine, 193; *Auburn* v. *Hebron*, 48 Maine, 322; R. S., c. 1, § 4, clause 8; *Corinth* v. *Bradley*, 51 Maine, 540.

2. That the father emancipated the pauper by transferring all his property to his son, who was to, and who did thereafterwards, support the whole family including the pauper.

W. G. Crosby, for the defendants.

BARROWS, J. — The only question is as to the settlement of Dorothy Jenness, a pauper, for whose support the plaintiffs have furnished supplies, for which they claim to recover in this action.

She was born July 8, 1817, is *non compos, a nativitate*, and the legitimate child of Francis Jenness, who, in March, 1847, with his family, then consisting of his wife, this daughter and a minor son, Charles, moved into Jackson and took up his abode with his son John, to whom he had previously conveyed what property he possessed, with the understanding that John was to support the family. The mother testifies that they all lived in the same house with John and his family, sometimes eating at the same table, and sometimes dividing their supplies and occupying different parts of the house; that John was "slim" for two or three years and did the business while her husband worked on the farm, doing as much as John for the common support, and continuing able thus to work until twenty days before his death, which occurred in October, 1850. After that Dorothy continued to have her home there, in Jackson, with her mother, until March, 1854, John dying in the fall of 1853.

Hereupon, inasmuch as the pauper lived and had her home in the defendant town for more than five years successively,

after arriving at the age of twenty-one years, the plaintiffs contend that, whether emancipated or not, she gained a settlement in her own right by that residence, and furthermore, that the arrangement made by her father with John, for the support of the family, was in effect an emancipation, if that is necessary in order to make her gain a settlement.

We cannot so view it.

The wants and weakness of helpless and dependent children give them a rightful claim for protection and support upon the parent, who, in requital, has an unquestioned right to the custody and control of them, and to such services as they are capable of rendering, so long as this condition of things lasts. The law of nature, in this respect, has been recognized in the enactments and legal decisions of all civilized nations.

In our provisions for the support of the poor, care was taken, as far as possible, to prevent the separation of those between whom this reciprocal duty and obligation subsisted. The settlement of legitimate children was made to depend upon that of their father, when he had one within the State. And minor children, not emancipated, have been uniformly held incapable of acquiring in any mode a different settlement from him. *Frankfort* v. *New Vineyard*, 48 Maine, 565.

This condition of dependence, in ordinary cases, is considered as ceasing upon the arrival of the child at the age when the law decrees that he may be presumed capable of contracting for himself and administering his own affairs with reasonable discretion, and so he is to be deemed emancipated upon coming to the age of twenty-one years, unless by reason of mental imbecility he is compelled still to remain dependent upon the parent for guidance and support.

When this state of things occurs, an uninterrupted series of decisions has recognized both the rights and the duties of the parents as still continuing, and has made the settlement of the child dependent upon that of the father and liable to change only with his. *Upton* v. *Northbridge*, 15

Mass., 237; *Orford* v. *Rumney*, 3 N. H., 331; *Wiscasset* v. *Waldoborough*, 3 Maine, 388; *Tremont* v. *Mt. Desert*, 36 Maine, 390; *Gardiner* v. *Farmingdale*, 45 Maine, 537.

The reason for these decisions and their propriety are alike obvious. And cases like *Augusta* v. *Turner*, 24 Maine, 112; *New Vineyard* v. *Harpswell*, 33 Maine, 193; *Auburn* v. *Hebron*, 48 Maine, 322; *Corinth* v. *Bradley*, 51 Maine, 540, in which it is held that persons *non compos mentis*, but emancipated by the death or desertion of the parent, may gain a settlement in their own right by five years continuous residence, are not at all in conflict with this rule. A minor, who, while living with his parents, can have only a derivative settlement, *if emancipated*, may acquire a settlement in his own right in any mode provided in the settlement Acts applicable to persons under 21 years of age. *Lubec* v. *Eastport*, 3 Maine, 220.

But, while the condition of filial subjection and dependence and parental control and support continues to subsist, whether it arises out of the weakness and necessities of immature years, or out of mental infirmity protracted into what are called years of discretion, there is no emancipation and no possibility of separate settlements.

To harmonize with our own previous decisions on these questions of settlement, we must hold that a person, *non compos mentis* from infancy, and not emancipated, though more than twenty-one years of age, will follow the settlement of the father with whom she resides, and cannot acquire an independent settlement by residence in a town for five successive years. Up to Oct. 31, 1850, the date of her father's death, the settlement of Dorothy, if not emancipated, was that of her father, and not in Jackson. She continued to live in Jackson only until March, 1854, less than five years after her father's death. Repeated decisions have settled it that five years continuous residence of a person capable of acquiring a settlement *suo jure*, is necessary to establish a settlement in that mode, and that it is not competent for that purpose to add the time during which

the person has resided in the town in a subordinate and dependent position, to that which elapses after that condition is changed, to make up the required five years. *Richmond* v. *Lisbon*, 15 Maine, 434; *Thomaston* v. *St. George*, 17 Maine, 117.

The only remaining ground upon which the plaintiffs claim to be entitled to recover is, that the facts show an emancipation of the pauper by her father, in his lifetime, in which case her continuous residence of seven years in Jackson, would, as we have seen from the authorities above cited, gain for her a settlement there in her own right.

But there is nothing in the case from which such emancipation can be legitimately inferred. So long as the wants and necessities of the child tend to make him dependent upon the father, emancipation, being contrary to nature, is never to be presumed but must always be proved. *Sumner* v. *Sebec*, 3 Maine, 225.

And this is equally the case whether those wants and necessities are owing to the feebleness of infancy or to mental imbecility extending into mature years.

It occurs either by the act of God in depriving the child of his natural protector by death, or by the voluntary act of the parent surrendering the rights and renouncing the duties of his position, or, in some way, conducting in relation thereto in a manner which is inconsistent with any further performance of them. Poverty, even culminating in absolute pauperism of the parent, and resulting in a binding out to service of the child by the selectmen, until he is 21 years of age, does not effect it. *Fayette* v. *Leeds*, 10 Maine, 409; *Sanford* v. *Lebanon*, 31 Maine, 124; *Oldtown* v. *Falmouth*, 40 Maine, 106.

Neither does desertion of his home nor vagrancy of the child, unless assented to by the parent. *Bangor* v. *Readfield*, 32 Maine, 60.

That emancipation may be inferred from the acts of the parties, was settled in *Dennysville* v. *Trescott*, 30 Maine, 470. But we find no case in which the character of the acts

relied upon as evidence of emancipation resembles that of those in the case at bar. On the contrary, in *Wiscasset* v. *Waldoborough*, *ubi sup.*, the main facts of which are not unlike these, (though the question of emancipation and its effect was not raised or considered,) the Court held that the *non compos* child, of full age, took a derivative settlement from one gained by the father, while resident with him in the family of a brother to whom the father had conveyed his property, conditioned for the support of himself and his wife, during life, and the support of the *non compos* for a term of years. This was in effect holding that these facts did not constitute an emancipation, for an emancipated child does not follow the after-acquired settlement of his parent.

But, without relying upon precedent, it is plain that the attempt of Francis Jenness to make some sort of provision for the future comfort and support of those dependent upon him, by conveying his property to his son John, transferred not a particle of parental authority or control over Dorothy to her brother. It still remained for Francis Jenness and, after him, for his wife, and ultimately for Dorothy herself, to say how far she should make use of the means of support thus provided. The transaction gave John no claim to her services, nor right to insist upon her living with him or according to his direction.

So far as appears, until disabled by sickness, twenty days before he died, Francis Jenness, never intermitting his paternal cares, but laboring for the benefit and comfort of the united families, preserved his right to control the movements of Dorothy as he might think best for her interest and his own. While parental control and filial subordination concur, there can be no pretence of emancipation.

Judgment for the defendants.

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

WILLIAM A. CLARK *& als., pet'rs, versus* JAMES WARDWELL *& als.*

The return, upon a warrant calling a town meeting, must show that an "attested" copy thereof was posted up in some public and conspicuous place "in" the town where the meeting was to be held.

If a town "has appointed by vote, in legal meeting, a different mode" of notifying its meetings, it is incumbent upon the party desiring to establish the legality of the meeting, to show it was called in accordance with the mode prescribed by the town.

In a petition for an injunction against town officers, under § 1, c. 239, of the Public Laws of 1864,* an allegation denying the prior legal authority of the town to authorize the issuing of town orders by the selectmen, and the subsequent legislative ratification thereof, puts directly in issue the legality of the town meeting.

Where such petition ran against the selectmen, collector and treasurer, *eo nomine*, and the names of the individuals holding such offices, when the bill was drawn, were inserted in the prayer of the bill as parties respondent, upon whom service was made: — *Held*, that the injunction would not be dissolved as to the particular respondents, although they had ceased to hold the respective offices named.

BILL IN EQUITY brought under the Public Laws of 1864, c. 239, § 1,* by the complainants, "ten taxable inhabitants" of the town of Frankfort, to enjoin the selectmen, collector and treasurer of said town from paying, or receiving in payment of taxes, certain town orders therein mentioned, drawn in pursuance of a vote of the town, to pay bounties to certain persons named.

* SECT. 1, c. 239, Public Laws of 1864. When any county, city, town or school district votes to pledge its credit, or to raise by taxation, or to pay from its treasury, any money, for any purpose other than those for which it has the legal right and power, or any agent or officer thereof attempts to pay out the money of such county, city, town or school district, without authority, the Supreme Judicial Court may, upon the suit or petition of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint, hear and determine the same in equity. Any justice of said court may, in term time or vacation, issue injunctions and make such orders and decrees as may be necessary or proper to restrain or prevent any violation or abuse of such legal right or power, until the final determination of the cause by said court.

The bill alleged that, at a meeting of the inhabitants of said town holden March 6, 1865, the warrant calling the meeting contained the following articles:

"Article 29. To see what action the town will take towards raising money to fill the quota of said town, under the call of Dec. 19, 1864, and towards paying" two persons named, who are drafted and accepted under the call of July, 1864.

"Article 30. To see what action the town will take in regard to compensating those who have furnished substitutes for the war," &c.

That the action of the inhabitants of the town upon said articles was as follows:

"Article 29. Voted that the selectmen be authorized and instructed to pay to any person who may volunteer or be drafted, or furnish a substitute and be mustered into the military or naval service of the United States, under the call of Dec. 19, 1864, the sum of $300, or a town note or order for that sum; and to" two persons named, "who were drafted and mustered into the service under the July call, $25 per month, so long as they shall remain in the service.

"Article 30. That the selectmen be instructed to draw a town order of $300 for each man who has put in a substitute since the commencement of the rebellion."

The bill further alleged that the selectmen issued under the vote upon Article 29, a town order of $300 to each of fifteen persons named, and to each of the two drafted persons named, two orders, one of $150 and one of $66.

That, under the vote upon Article 30, the selectmen issued an order of $300 to each of twenty persons named.

The bill further alleges that, at a meeting of said inhabitants, held March 5, 1866, the warrant contains the following articles:

"Article 11. To see how much money the town will vote to raise to pay its indebtedness."

That, upon said article, the town "voted to raise $10,000 by assessment, to pay the town's indebtedness;" that the

money so voted to be raised, was intended for the purpose of paying said orders; that said inhabitants "had no legal right, power or authority, * * * * by virtue of any article or articles in said first named warrant, to vote to authorize their selectmen to issue any one of such orders;" * * that the said inhabitants, at said last named meeting "had no legal right, power or authority to vote to raise any money for the purpose of paying said town orders; and that the action of said inhabitants in all of said premises has not been made valid by any subsequent Act of the inhabitants of this State, or of the Legislature."

The prayer of the bill was that these respondents, named and described as selectmen, collector and treasurer of the town, might be enjoined from taking up any of said orders and issuing others or other orders or notes directly or indirectly in the stead thereof; or from receiving directly or indirectly any or any part of said orders in part or full payment of taxes now due or to become due; and from paying directly or indirectly any money out of the treasury of the town in part or full payment of said orders or interest thereon.

The parties agreed that the articles and votes set out in the bill were correct, and that the respondents, since the commencement of the bill, had ceased to be officers of the town by expiration of their term of office.

The return upon the warrant for the meeting of March 6, 1865, was dated Feb. 25, 1865, wherein the person to whom the warrant was addressed certified that he has notified and warned the inhabitants of said Frankfort, &c., "by posting up two copies of the within in two public and conspicuous places; one at J. Wardwell's store, one at the post office at Frankfort Mills, seven days prior to the time appointed for said meeting." The return upon the warrant for the meeting of March 5, 1866, declared the service to have been made by "posting up two copies of said warrant, one in the post office at Frankfort mills, and one in James Wardwell's store, being public and conspicuous places in said town," &c.

The facts connected with the returns were put in subject to objection, and the respondents to have the benefit of all legal rights in relation to amendment of records and returns.

T. W. Vose, for the complainants.

W. G. Crosby, for respondents.

1. The prayer of the petition is, that these respondents, described therein as selectmen, treasurer and collector, may be enjoined from paying certain orders, &c. The agreed facts find that these individuals do not now hold those offices.

To enjoin them from doing an act which they have no official authority to do, would be a mere idle form; an injunction on them would have no operation on their successors in office. For aught that appears, their successors may have already paid the orders; or, if not, an injunction made perpetual on these respondents, now that they are out of office, will not enjoin those who now hold the office from acting in the premises.

To compel these respondents to incur the expense of answering to a suit to which they were made parties only by reason of their official capacity, after they have ceased to hold or exercise that capacity, would be inequitable. The injunction, as to them at least, should be dissolved; and they should be indemnified by the petitioners for the costs they have incurred since they ceased to hold office.

The course which petitioners should have adopted when that event occurred is so obvious that I need not indicate it.

2. The petitioners, in their petition, assign certain reasons why the respondents should be enjoined, &c.

Their counsel, in argument, assigns another reason, viz.: that the meetings, at which the votes were passed, were not legally called. This point is not open to them; they must confine themselves to the causes enumerated in their petition. It can be raised only by amending the petition, or complaint, or bill, whichever may be the appropriate style of the process, and the Court will not, at this stage of the

proceedings, permit the amendment. "After the cause is at issue the Court will not give the plaintiff leave to amend, unless he shows, not only the materiality of the proposed alteration, but also that he was not in a condition to have made it earlier." Story's Com. on Eq. Pl., (ed. of 1838,) pp. 268–9. "Application for leave to amend must be at the proper stage of the cause; the proper stage is before the cause is at issue; and the cause is properly at issue when the replication is in and the pleadings are closed." Ib. 679, 681.

But, admitting that petitioners can make the point, it is incumbent on them to show that the meetings were not legally called.

The defects pointed out are in the returns of the warning officers; for aught that appears those meetings were notified in accordance with the vote of the town. R. S., c. 3, § 7. Petitioners do not show that they were not.

If there is any defect in the returns we shall ask for leave to amend them; this right is allowed us by the "agreed facts"; the Court will not, of course, refuse permission.

DICKERSON, J.—This is a process in equity, brought under c. 239, of the laws of 1864, to enjoin the respondents, town officers of Frankfort, from paying or receiving certain town orders, drawn in pursuance of a vote of the town, to pay bounties to the persons therein named.

In the absence of any statutory provision, the towns and cities in this State had no authority to raise money to pay bounties to soldiers; and it is worthy of remark, that the legislation upon this subject, instead of preceding, followed the action of the municipalities, ratifying rather than authorizing their doings in this respect.

The several enactments of the Legislature, legalizing the proceedings of the municipalities, in offering and paying bounties to secure the performance of military service, in the cases specified in those statutes, made them valid in as full and ample a manner as though they had been authoriz-

ed by law;—provided, the meetings at which these proceedings were had, were legally notified and held. *Sanborn* v. *Machiasport*, 53 Maine, 82.

Section 7 of chapter 3, R. S., requires that notice of town meetings shall be given "by posting up an *attested* copy of the warrant in some public and conspicuous place *in said town*, seven days before the meeting, unless the town has appointed, by vote, in legal meeting, a different mode." It has been repeatedly held that a failure to comply with this requirement, in any particular, renders the doings of the meeting void. *State* v. *Williams*, 31 Maine, 231; *Beard* v. *Fossett*, 34 Maine, 575; *Brown* v. *Witham*, 51 Maine, 21; *Sanborn* v. *Machiasport*, 53 Maine, 82.

The return upon the warrant calling the meeting of the 6th of March, 1865, when the bounties in question were voted, recites that service of the warrant was made by "posting up two copies of the warrant in two public and conspicuous places, one at J. Wardwell's store, one at the post office at Frankfort Mills, seven days prior to the time appointed for said meeting." The omission to certify that an *attested* copy of the warrant was posted up, is a fatal defect, if, indeed, this return shows that either of the notices was posted up *within* the town of Frankfort. The return upon the warrant calling the meeting of March 5, 1866, at which the town voted to raise money to pay the bounties in question, is liable to the same objection.

If the respondents would avoid the effect of these objections, it is incumbent upon them to show that these meetings were called in accordance with the mode prescribed by the town, at a legal meeting, or to have the return amended by the warning officer, if he actually posted up an *attested* copy of the warrant as the statute requires. They have not availed themselves of either of these alternatives, though notified that the return is amendable according to the facts.

The learned counsel for the respondents contends that this objection is not open to the petitioners, inasmuch as it is not specifically set forth in their bill. The bill alleges

that the town had no legal right to authorize the selectmen to issue the orders, as voted at the first meeting, and that the Legislature have not ratified its doings. In respect to the second meeting, it is alleged that the town had no legal right, power or authority to vote to raise money to pay these orders, and that its proceedings in this respect had not been ratified by the Legislature. The denial of prior legal authority, and of subsequent legislative ratification, puts directly in issue the legality of both these meetings, as the Legislature has only legalized the "*doings*" of such town meetings as were legally notified and held.

The counsel for the respondents further argues that the injunction should be dissolved as to the particular respondents named in the bill, as the case shows that they had ceased to be town officers, when the facts were agreed upon. The bill is brought against the selectmen, collector and treasurer of the town, whoever they may be. The names of the persons holding these offices, when the bill was drawn, were inserted in the prayer of the bill in order that service might be made upon some tangible persons holding these official relations to the town. The Act of 1864, § 1, gives a single Justice of this Court the right to enjoin the officers of a town, as such, under these circumstances, "until the final determination of the cause by the Court." The case is, in effect, the same as if the bill had been brought against the inhabitants of the town, as it more properly should have been, if the town had not voted to raise the money, nor issued its orders for the payment of the sums voted. Under this state of things, it becoming the business of the selectmen, treasurer and collector to pay, or receive the orders in extinguishment of taxes or other claims against the town, the bill is properly brought against the persons holding these official relations to the town for the time being, both as a warning to them, and a protection to the town. If the temporary injunction is not binding upon the successors of the official persons named in the petition, the latter might keep the case in court until a board should be elected who would

pay the orders; and thus the illegal purpose would be accomplished in spite of the statute specially designed to prevent it. This bill, and the proceedings under it, constitute a contingent limitation upon the powers of the selectmen, collector and treasurer of Frankfort, whoever they may be, until it is disposed of, and they are as much bound to know and respect this process, as they are other requirements of the statutes. The dismissal of parties from a bill in equity, brought against them to restrain them in their official capacity, from carrying into effect the alleged votes of a corporation, and the insertion therein of the names of their successors, at every change made in the election of officers, as ill comports with the dignity of equity proceedings as it does with the furtherance of justice. The principles of equity proceedings do not require courts or parties to keep watch of the election returns for any such purpose. If they did, such watchfulness would scarcely be available, as the new officers might be qualified and carry the illegal doings of the corporation into effect before service of the bill enjoining them could be made. The decision of suits in equity does not depend upon the result of any such trial of speed.

The injunction must be made perpetual, and a decree be framed by the Judge at *Nisi Prius*, in accordance with the principles of this decision.

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

OREN S. FRENCH *versus* INHABITANTS OF SANGERVILLE.

Section 1, c. 298 of the Public Laws of 1865, did not ratify the vote of a town whereby it voted to pay a bounty to drafted "non-combatants" who were credited upon such town's quota, but were discharged under § 17, c. 13 of Act of Congress approved Feb. 24, 1864.

ON REPORT.

CASE, to recover a bounty voted by the defendant town, at a legal meeting held Jan. 23, 1865.

It appeared that the plaintiff was an inhabitant of defendant town on Sept. 22, 1864, was there duly enrolled and was legally drafted for the period of one year, in accordance with the provisions of the Act of Congress for enrolling and calling out the national forces, approved March 3, 1863, and the Act amendatory thereof, approved Feb. 24, 1864, at the provost marshal's office for the 4th district of this State. That he was duly notified to report accordingly, on or before Sept. 27, 1864, at the place of rendezvous, in Bangor, or be deemed a deserter and be subject to the penalty prescribed therefor by the rules and articles of war. That he duly reported himself as required, and was examined and accepted. That the plaintiff was of that class denominated non-combatants, conscientiously opposed to the bearing of arms, and was duly qualified to be exempt therefrom, in accordance with § 17 of said Act, approved Feb. 24, 1864, and, on Oct. 18, 1864, after all due preliminaries, paid, in accordance with the provisions of this Act, three hundred dollars, whereupon he was duly discharged from liability under the draft. That he was credited in the quota of Sangerville, under the call. That he, in May, 1865, made a demand on the Selectmen of Sangerville for the order mentioned in the vote of the town.

Plaintiff put in the record of warrant and votes of the town under it, at a meeting held Jan. 25, 1865.

It also appeared that drafted men did not subscribe any oath or sign any roll, but they were simply examined, and

such as were accepted were sent to the seat of war and assigned to a regiment.

Charles C. Chandler, called by the defendants, testified:

"Was one of the commissioners at provost marshal's office at Bangor. Mustering in of drafted men is as follows:

"The regulations require that we shall know that the drafted man is sound and present; that we shall certify to same, together with his descriptive list. This certificate is signed by the commissioners and forwarded with the drafted man. The act of mustering is, usually, to call the drafted men into line; provost marshal is expected to see them in line; no papers signed by, no oath administered to drafted men. The officers cause his name to be put in the muster-roll that the man was mustered in such a day.

"Those exempted, or pay commutation, are never considered as being in military duty. If a drafted man does not report when notified he is considered a deserter."

The case was then continued "Law on report," the Court to render such judgment as the law of the case required.

J. Crosby, for the plaintiff.

The money paid by a "non-combatant" is not strictly commutation, but it is applied "to the benefit of the sick and wounded soldiers." Act of Congress, 1864, c. 13, § 17. Plaintiff was credited upon the town's quota, and the town voted to pay him for his service, months after he performed it, as an act of justice and to equalize the burden of its citizens. The town has not modified the vote passed specially to meet this case, and the municipal officers simply defend, in order to test their authority for assessing the tax to meet it.

The Legislature has ratified the doings of towns in raising bounties, with the exception of one class of cases, viz.: "to raise money to be paid by way of commutation, to relieve or discharge any person drafted," &c., by authority of any Act of Congress, when such person has neither been mustered into said service nor furnished a substitute." Public Laws of 1864, c. 226, § 12; 1866, c. 59, § 4. These

exceptions have no reference to the case of money paid by a con-combatant, whose money does not go "for the procuration of a substitute," as in the case of commutation properly so called, but is "applied to the benefit of sick and wounded soldiers."

"Commutation," in the Acts of Congress of 1863, Acts of the Legislature of Feb. 20, 1864, and opinion of the Judges in 52 Maine, 596, means the money paid "for procuration of a substitute," and not that of the man of "conscientious scruples" "applied to sick soldiers." Act of Cong., Feb. 24, 1864, amendatory of Act of 1863, provides that "in no instance shall the exemption of any person on account of his payment of commutation money for the procuration of substitute extend beyond one year." Same Act, § 17, provides for the first time for non-combatants, but neither there nor any where else applies "commutation" to them. The "commuter" avails himself of his privilege on selfish principles, and his money is used for belligerent purposes; while the "non-combatant" avails himself of his privilege from religious considerations, and his money is applied to the offices of mercy.

The vote of the defendants was ratified by Public Laws of 1865, c. 298, and 1866, c. 59. The former ratifies acts in favor of "volunteers, drafted men or substitutes of drafted men or enrolled men, who have been or shall be actually mustered into the military or naval service of the United States."

The excepting clause in Act of 1866, specifically applies to the ordinary "commuter," but it does not apply to the non-combatant. *Exceptio unius est exclusio alterius.* Non-combatants are Quakers or Shakers, and they are exempt from military duty under the constitution of Maine, art. VII. § 5. See also State Militia Laws of 1820, 1834, 1841, 1857 and 1865.

Not only the spirit of the Acts of 1865 and 1866 is intended for the benefit of the non-combatant, but he is clearly within the letter of them.

Act of 1865 speaks of "drafted men who have been or shall hereafter be actually mustered into the military or naval service." Act of 1866 ratifies the doings of towns for "drafted men mustered into the military or naval service." A "muster in" of a drafted man differs from that of an enlisted man or volunteer. Simple draft is sufficient to hold the former as a deserter. Plaintiff was drafted and accepted, which constitute his "muster in." Plaintiff tendered performance of his contract with government. Act of Cong. of 1864, c. 13, § 17. He was in service "in hospital" from date of acceptance till discharge, Oct. 18, 1864. He did all required of him, and is entitled to recover. *Frazier* v. *Cushman*, 12 Mass., 277; *Lord* v. *Tyler*, 14 Pick. 156; Chit. on Con., 633.

H. Hudson, for the defendants.

KENT, J.—The claim of the plaintiff is under this vote of the town:—"Voted, to give an order of three hundred dollars, payable in equal annual payments of one hundred dollars each, and interest, to every man that was drafted, who went into the service of the United States himself, and to every man who put in a substitute, or paid commutation under the 17th section of the conscription act, who served to fill the quota of this town, under the call of the President of the United States of July, 1864, for 500,000 men."

The plaintiff shows that he was drafted and paid commutation under the aforesaid 17th section, and that he was counted on the quota of the town. He thus apparently brings himself within the language and meaning of the above vote of the town.

The 17th section referred to, (c. 13, § 1, 1864,) provides "that members of religious denominations, who shall by oath or affirmation, declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, *when drafted* into the military service, be considered *non-combatants*, and shall be

assigned by the secretary of war to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the secretary of war shall designate to receive it, to be applied to the benefit of sick and wounded soldiers."

The case finds that the plaintiff was drafted and notified; that he appeared at the time named, was examined and accepted; that he was one of a class named in the 17th section; that he made the proof required and paid the three hundred dollars named in the statute and was duly discharged from liability on said draft. He was counted on the quota of the town; being an inhabitant at the time and liable to the draft.

It is conceded that the vote of the town was unauthorized and invalid, as transcending the legitimate powers of the corporation, and can only be made valid by an Act of ratification by the Legislature. It is said that such an Act has been passed. We have been referred to several Acts on this subject. The one in 1865, (c. 298, § 1,) which was the year next succeeding the vote in question, declares "that the past acts and doings of cities, towns and plantations, in offering, paying or agreeing to pay, and in raising and providing the means to pay bounties to, and all notes and town orders given by the municipal officers, in pursuance of a previous vote, for the benefit of volunteers, drafted or enrolled men, who have been or shall hereafter be *actually mustered* into the military or naval service of the United States, are hereby made valid." The votes of other years are substantially the same on this point.

It is apparent that the Legislature had not the same interest or views that this town had, when it specially designated for its bounty, men who were by the law named in the vote, *non-combatants*, provided they could count on their quota. The country, in its then needs, wanted men for the field,—not non-combatants for the hospital,—or a sum of money in lieu of personal services. The Legislature, therefore, understanding this condition of things, took especial

pains to limit its ratification of the votes and acts of towns in granting bounties, to those men who were actually mustered into the military or naval service of the United States.

It is clear that the plaintiff must bring his case within the rule given in the Act of ratification. Does it come within that rule? Can a man, who on being drafted, placed himself in the class, which the law had recognized as exempts from all military duty by payment of a sum of money, and was thereupon discharged, be said to have been mustered into the *military* service?

It is contended that a drafted man is actually mustered into the military service as soon as drafted and notified of the fact. In a certain sense he is, undoubtedly, under martial law, so far, that he may be treated as a deserter if he does not report himself to the provost marshal's office. But is he thereby actually mustered in, within the meaning of the statute? The 17th section of the statute of the United States, declares that this class of men "shall, *when drafted* into the military service, (not when mustered,) be considered *non-combatants*." They are so considered from the beginning, whenever they place themselves within the class. When a drafted man reports himself, he must first be examined by the surgeon, as to his physical fitness. If found sound and ablebodied, he is then mustered actually into the military service, unless he claims to be a non-combatant. If he makes that claim to exemption from military duty, on the ground of conscientious scruples against performing any strictly *military* acts, he may be assigned to duties in the hospital or in care of freedmen, or, if he prefers to retire at once, he may pay three hundred dollars.

Would it be seriously contended that a drafted man, who had simply reported and been found *unfit* for the service, and had thereupon been released from all claim on him under the draft, had been actually mustered into the military service, and was therefore entitled to be paid, under this provision of the Act of ratification?

In the case before us, the plaintiff paid the money and was

discharged. It does not appear that he was ever placed under military orders, or even "called into line," or ever entered on any muster roll of soldiers accepted or in service. He was examined by the surgeon, passed his examination, claimed to be a non-combatant, and "had his claim allowed," paid his money and returned home, with a clear conscience so far as any military act or bearing of arms was concerned. He now, however, sets up a claim to be paid a bounty, on the ground, which he must assume, that he was a soldier actually mustered into the military service. But we are dealing only with his legal rights.

The Legislature certainly intended something beyond a mere drafting into service, or they would have simply said "all drafted men," and omitted the qualification in the last clause as to mustering in.

When this statute was passed, it was well known that the conditional exemption of non-combatants existed and would be claimed. The Legislature did not intend to interfere with or qualify this right under the law of the United States. But it did not intend to give to towns the right and power to encourage men to seek for this exemption by voting bounties to them perhaps equal to or exceeding the sum required to be paid by them to the United States. They intended to ratify votes, giving bounties to the actual soldiers, who had entered the military service, and been mustered and enrolled and placed under military rules and discipline, as live and real men, composing the great army of the republic, in its struggle for existence. It was not intended to place the actual soldier, so far as the bounty was concerned, on the same footing as the *non-combatant*.

"Combatant" is defined by Worcester as "one who combats—a fighter." These were the men then needed for the field, and they were found, and the bounties promised to these men have been honorably paid with few, if any, exceptions.

It was certainly in the power of the Legislature to refuse its sanction to votes like the one before us. There

would seem to be no injustice or hardship in withholding a special bounty to an ablebodied drafted man, who declined to enter the service on conscientious scruples. It would seem to be enough to regard those scruples, and to permit the person to decline the military service, and either enter the hospitals, or to pay a moderate sum in lieu of such service, to be applied to hospital purposes.

The view we have taken, renders it unnecessary to consider the questions raised as to the legality of the town meetings, and other questions. Nor are we called upon to discuss the points made in the able and ingenious argument of the plaintiff's counsel on the construction of various sections of the statutes, forbidding towns to raise money to be paid by way of "*commutation.*" We are satisfied that the case before us is not within the clause of ratification, because the plaintiff has not shown that he was ever "actually mustered into the military service of the United States."

Plaintiff nonsuit.

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

WILLIAM D. WOOD *versus* DAVIS R. STOCKWELL.

By virtue of the constitution of the United States, Congress has the exclusive power to provide where the evidences of title of registered and enrolled vessels, in certain cases, shall be recorded.

The State Legislature has no authority, directly or indirectly, to add to or dispense with the requirements of section one of the Act of Congress of July 29, 1850, entitled an "Act to provide for recording the conveyances of vessels."

R. S., c. 91, § 1, providing for the registration of chattel mortgages, does not apply to property in vessels which are duly registered or enrolled according to the laws of the United States.

The plaintiff, as mortgagee of one-eighth of a vessel, demanded it of the assignee of the mortgager, who refused to comply, denying title in the plaintiff and claiming title in himself. The defendant, both before and

after the demand, received one-eighth of the net earnings and had paid one-eighth of the repairs. In trover, — *Held*,

1. That the foregoing facts constitute a conversion.
2. That the amount paid for repairs should not be deducted in mitigation of damages.

On Facts Agreed.

Trover for one-eighth of a schooner.

On April 5, 1865, one Ray, of Brewer, in the county of Penobscot and collection district of Bangor, being owner of the schooner "Mill Creek," then enrolled in Frenchman's Bay district, at Ellsworth, mortgaged one-eighth of said vessel to the plaintiff to secure the payment of the former's note of that date; and, on the same day, and on May 5, 1865, Ray conveyed by bills of sale duly executed and recorded, seven-eighths of said vessel to six other parties in different proportions. The mortgage to the plaintiff was duly sealed and stamped, and recorded in the custom house at Ellsworth, April 18, 1865; but was never recorded in the records of the town of Brewer, nor in the collection district of Bangor. On May 9, 1865, Ray conveyed one-eighth of said vessel to one Holmes, by bill of sale recorded at Bangor, May 10, 1865, on which day the enrollment was changed from Ellsworth to Bangor. On March 19, 1866, Holmes conveyed one-eighth of said vessel to Stevens & Farrar who, on April 7 following, conveyed the same to the defendant, both by bills of sale duly stamped and recorded at Bangor.

In the winter of 1865–6, the vessel was managed by William J. Currier, part owner and ship's husband. She was disabled at sea, taken into a southern port, repaired and brought to the north by order of Currier, who, on June 14, 1866, demanded and received from the defendant, as owner of one-eighth of the schooner, $288,89 for one-eighth of the repairs. Currier, at various times, during the year of 1866, paid to the defendant one-eighth of the vessel's net earnings. The defendant never had any actual possession or management of the vessel at any time after said mortgage

to the plaintiff, but Ray continued in the control and management of her as before. The plaintiff never took control or management of said one-eighth, or attempted to do so, until July 28, 1866, when, said vessel being at Bangor, the plaintiff's attorney demanded, at Bangor, one-eighth of her of the defendant, who refused to comply with said demand, denied plaintiff's title and claimed title in himself.

On Oct. 20, 1866, the plaintiff notified Currier in writing that he claimed the earnings of the one-eighth claimed by the defendant, and that he should hold said Currier responsible therefor.

The action was submitted to the full Court, who were to render judgment by nonsuit if they should decide that defendant was not liable for a conversion of the property sued for, or that the plaintiff could not maintain his mortgage against the defendant, for want of a proper record thereof in Brewer or Bangor; and by default, if they should determine otherwise. In the latter case, they were also to determine whether the amount paid by the defendant in June, 1866, for repairs, or any part thereof, should be allowed and deducted in estimating the damages. If the amount so paid by the defendant should not be so allowed and deducted, the damages should be the amount due on note secured by the mortgage to the plaintiff.

Rowe & Appleton, for the plaintiff.

W. C. Crosby, for the defendant.

Plaintiff's title rests in a "mortgage of personal property" given by a mortgager, residing in Brewer, and not recorded in Brewer. Such a mortgage is invalid against the defendant, he not being a "party thereto," and "possession of such property" not having been "delivered to and retained by the mortgagee." R. S., c. 91, § 1. That the property mortgaged is part of a vessel does not take the mortgage out of the operation of the statute.

U. S. Statute, c. 27, of July 29, 1850, is only intended

to regulate the use of vessels. *Vinal* v. *Burrill*, 16 Pick., 401; *United States* v. *Willings*, 4 Cranch, 55.

The property passes by sale by parol, but to entitle the purchaser to a new register, the Act of Congress must be complied with. *United States* v. *Willings*, 4 Cranch, 55; *Mitchell* v. *Taylor*, 32 Maine, 434; *Bixby* v. *Franklin Ins. Co.*, 8 Pick., 86; *Lamb* v. *Durant*, 12 Mass., 53; *Taggard* v. *Loring*, 16 Mass., 336; *Wait* v. *Gibbs*, 4 Pick., 300; *Badger* v. *Bank of Cumberland*, 26 Maine, 428; *Richardson* v. *Kimball*, 28 Maine; 463; *Metcalf* v. *Taylor*, 36 Maine, 28; *Chadbourn* v. *Duncan*, 36 Maine, 89; *Rice* v. *McLarren*, 42 Maine, 157. In *Foster* v. *Perkins*, 42 Maine, 168, this Court has given partial construction to this statute, limiting its application to vessels registered at the time the mortgage was made. "The Act of Congress of July 29, 1850, for the recording in a collector's office of mortgages of vessels, does not supersede a State law requiring the record of such mortgage with a State officer as a condition of its validity against third persons." *Ætna Ins. Co.* v. *Aldrich*, 26 N. Y., 92. See also *Bryant* v. *Steamboat John Jay*, 17 Howard, 399.

Defendant is not liable in trover. No tortious taking is alleged. Taking earnings after paying for repairs is not a conversion.

Demand and refusal are not conversion, but only evidence from which, unexplained, it may be inferred. It is no evidence of conversion until the defendant was proved in possession when demand was made. 8 Vermont, 30; 6 Foster, 280; *Boobier* v. *Boobier*, 39 Maine, 406; 4 Wend., 613; 4 N. H., 310; 8 Vermont, 110.

Defendant could not have complied with demand without taking vessel out of Currier's possession and control, which he had no right to do as part owner. He could only make a symbolical delivery, or give a written non-claim. Trover will not lie for refusing such. Gravamen of tort, upon which trover rests, is such an intermeddling with the property as deprives the owner of its possession, and then a conversion

to the use of the tort-feazor. Mere assertion of ownership, without intermeddling, is not sufficient. 8 Vermont, 30.

In all the cases in this State, trover has never been maintained without possession in defendant. *Dickey* v. *Franklin Bank*, 32 Maine, 572; *Moody* v. *Whitney*, 34 Maine, 563; *Fuller* v. *Taylor*, 39 Maine, 519; *Scott* v. *Perkins*, 28 Maine, 22; *Head* v. *Goodwin*, 37 Maine, 181. In *Fernald* v. *Chase*, 37 Maine, 289, Judge SHEPLEY has fully discussed this point.

To claim ownership is equivalent to denying title of all others; but, "without proof that he has taken possession of it, or has exercised any dominion over it, cannot amount to a conversion." *Fernald* v. *Chase, ubi sup.* Case finds defendant never had possession. Receiving earnings of ship's husband is only exercising dominion over money, and not over the property producing it. If he has received $80 wrongfully, he can be compelled to refund it, but not to pay the value of a vessel he may never have seen.

Defendant, as assignee of mortgager, could legally take whole earnings until possession taken by mortgagee. *Cheennery* v. *Blackborn*, Abbott on Shipping, 19, note.

Advances for repairs, less earnings received, should be deducted from damages.

DICKERSON, J.—Trover for one-eighth of a schooner. This case comes before us upon an agreed statement of facts, and raises the question whether, as between the mortgagee and the subsequent purchaser of an enrolled vessel without notice, the mortgage must be recorded in the records of the town where the mortgager resides, in addition to the recording at the custom house where the vessel is enrolled. The plaintiff's mortgage was recorded at the custom house in the district where the vessel was enrolled, and not elsewhere. The defendant's bill of sale of a subsequent date, and record, from the same grantor, was duly recorded in the custom house. If the plaintiff's mortgage is valid, he is entitled to prevail upon this branch of the case; otherwise he has no cause of action.

The Act of Congress, approved July 29, 1850, entitled "An Act to provide for the recording the conveyances of vessels and for other purposes," provides "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."

Section 1, chapter 91 of the R. S. of this State, provides that "no mortgage of personal property made to secure more than thirty dollars, shall be valid against any other person than the parties thereto, unless possession of such property is delivered to, and retained by the mortgagee; or the mortgage is recorded by the clerk of the town in which the mortgager resides."

Does the State law conflict with the Act of Congress? If so, which is entitled to control?

The discussion of this subject involves an inquiry into the object, meaning and intent of the Act of Congress. Does the Act simply provide a custom house regulation, by which the officers of government may be the better able to detect violations of its revenue system, and enforce its rules in regard to the national commerce? Or does it embrace these objects, and the further purpose of regulating the ownership, transfer and evidence of title of registered and enrolled vessels in certain cases?

The title of the Act recites that it *has* "other purposes" in view than "the recording conveyances of vessels." But the intent of a statute is to be sought primarily from its language. The office of interpretation is to deduce the meaning from the statute, and not to introduce a meaning into it, derived from extrinsic circumstances.

The general import of the statute undoubtedly is, that bills of sale, &c., of registered and enrolled vessels, in a

certain class of cases, when thus enrolled, shall be valid. If the sole object of the Act was to establish the relation between the government and the owners of registered and enrolled vessels, and not the relation between persons claiming to be owners, in certain cases, why was an exception made in the case of "the grantor, mortgager," &c., that between them and their grantee or mortgagee an unrecorded bill of sale should be valid, while it is invalid between the grantee or mortgagee and a subsequent purchaser from the grantor or mortgager without notice, holding under a recorded title? If it had been the purpose of Congress to give the Act this restricted signification, it would have been easy to express such intent by providing that, as between the owners of such vessels and the government, no bill of sale, &c., should be valid unless recorded in the custom house. The Act contains no such restrictive clause, and we are unable to give it this limited interpretation without doing violence to its language. We think the obvious meaning of the Act of Congress is to declare who shall be regarded as owners of registered and enrolled vessels, in certain cases, for the purposes of government, and also, to regulate the ownership, transfer and evidence of title of this kind of property, in the cases mentioned, as between the persons themselves who claim to be owners under a written contract.

The power granted to Congress, under the constitution, "to regulate commerce with foreign nations, and among the several States," extends, not only to the subjects of traffic, but also to the instruments or vehicles by which an exchange of commodities is effected. Shipbuilding and the navigation of ships are the vital agencies of commerce. The power of Congress to regulate commerce would, to a great extent, become a dead letter, if it has no right to legislate upon these subjects. Congress has this power as effectually as it would have had if these terms had been specifically enumerated in the constitution in connection with the word "commerce." *Gibbons* v. *Ogden*, 9 Wheat., 1.

By the sovereign power "to regulate commerce" is meant

the power to prescribe rules and regulations upon that subject, and to enforce compliance therewith. Under this grant of power, Congress has plenary authority over the whole subject matter, and may exercise it to the utmost extent within the limitations prescribed in the constitution. This power can be exercised by one sovereignty alone, since, to concede to another government the power to alter, suspend, supersede or abrogate the prescribed regulations, is to deny sovereignty to the power that establishes them. The grant of this power to Congress is therefore exclusive, covering the whole subject matter and leaving no power in the States to impair or prevent its exercise. It is not a concurrent power like the power of taxation. In exercising the concurrent power of taxation, neither Congress nor the States exercise the power granted to the other. Both governments derive this right from distinct and independent sources, and exercise it over a subject in which they have the common right of participation. From its very nature, too, both governments may exercise the prerogative without interfering with the concurrent right of the other. Not so with the power "*to regulate* commerce." The exercise of this power by one sovereignty is incompatible with its exercise by another; the power "to regulate" ceases to be a sovereign power, when the results of its exercise are liable to be changed by another power.

The power of Congress to regulate commerce is analogous to its power to borrow money on the credit of the United States. That is a sovereign and exclusive power, and cannot be indirectly impaired by State taxation of the securities given by the United States, because such taxation is inconsistent with the supremacy of the national government, tends to embarrass its operations, and might be carried so far as completely to arrest them. *Weston* v. *City of Charleston*, 2 Pet., 449.

But, under the grant of power "to regulate commerce," has Congress the power to prescribe the mode by which the title to enrolled and registered vessels shall be determined

in certain cases? Is the power to do this inherent in, incident to, implied from, or "necessary and proper" to carry into effect such granted power, or is it a substantive power, distinct and independent in its nature? If the Act of Congress comes within the former class of powers, it is constitutional; if within the latter, its constitutionality cannot be maintained. *McCulloch* v. *Maryland*, 4 Wheat., 316.

The Act does not assume to prescribe the mode of making contracts in respect to this kind of property, but to declare what evidence of contracts shall control in certain cases. The power of Congress over the objects and instruments of commerce, as we have seen, is sovereign and exclusive; it may do what the States separately might have done, in this respect, before the adoption of the constitution, or what they may now do in regard to the subjects within their exclusive jurisdiction. This power has long been exercised by the States under statutes, identical in language with that of the Act of Congress, in respect both to real estate and personal property under their jurisdiction, and we are not aware that their right to do so has been seriously questioned by any court of competent authority. The power of Congress is no less ample over this subject. It has power to establish a revenue system, and, as incident thereto, it may prescribe rules for determining what persons and what property shall be liable for a violation of its revenue laws. The facility and frequency with which the title to vessels is transferred, the liability of such property to change in value and locality, the opportunities for fraud, and the necessity for a uniform rule by which to determine the rights of conflicting claimants, in certain cases, renders the exercise of such authority by Congress, not only necessary for the government in the execution of its revenue laws, but also for the convenience and safety of parties in their negotiations concerning this species of property. It would be an anomaly in legislation as well as a vexation to ship owners, to prescribe one rule of ownership as between the government and owners of vessels, and another and a different

one, as between the persons themselves claiming to be owners. The Act of Congress in question is not liable to this imputation.

As Congress has the exclusive power of legislation for the regulation of commerce, including shipbuilding and navigation, and has exercised that power in the case under consideration, the State Legislature has no authority, directly or indirectly, to add to or dispense with the requirements of the Act of Congress. If it may do so in one particular it may in another; if one State may impose conditions or requirements inconsistent with the Act of Congress, another may; and there may be as many conflicting rules and regulations upon this subject as there are States. The confusion that would thus follow demonstrates the wisdom of the framers of the constitution, in not allowing their government, in this respect, to depend upon the pleasure of the States.

We are aware that our conclusion does not harmonize with the opinion of the Court in the *Ætna Insurance Co.* v. *Aldrich*, 26 N. Y., 92. After a careful examination of that opinion, we are unable to recognize the soundness of the reasoning upon which it rests. It seems to us that, in its effort to reconcile State with national legislation, that learned Court has failed to attach sufficient importance to the supremacy of the national government over the matter under consideration, and given the Act of Congress a construction which its language scarcely warrants. While we acknowledge the high authority of that Court upon ordinary questions at common law, we do not feel bound by its decisions upon grave questions of constitutional law, unless they are supported by reasons which convince our judgment.

If the provisions of § 1, c. 91, of R. S., apply to property in registered and enrolled vessels, it conflicts with the "Act (of Congress) to provide for the recording of conveyances of vessels, and for other purposes," by requiring more than that Act declares to be sufficient, and is therefore unconstitutional and inoperative. But that Act is to be construed with reference to its subject matter and the jurisdic-

tion of the Legislature which passed it. By the constitution of the United States, Congress has the exclusive power to legislate upon this subject, and, unless the contrary appears, the legislation of the State will be presumed to conform to the supremacy of the national government. The Legislature is presumed to understand, and not to exceed the constitutional limits of its authority. The language of § 1, c. 91, R. S., does not overcome this presumption; and we do not feel bound to hold that the Legislature trespassed upon the domain of Congress by exercising powers which the constitution confides exclusively to that body; on the contrary our construction of that section is, that it does not apply to mortgages of property in vessels, which are duly registered or enrolled according to the laws of the United States.

The mortgage held by the plaintiff, being duly recorded "in the office of the collector of the customs, where the vessel was enrolled," according to the Act of Congress, "concerning the recording of conveyances of vessels," gave him a valid title as mortgagee, without being recorded in the town where the mortgager resided.

Though the defendant had never been in the actual possession of the one-eighth of the vessel purchased by him of Ray, he paid for repairs made on her, and received his share of her earnings after his purchase. He also denied the plaintiff's title, claimed title in himself, and refused to comply with the plaintiff's demand for delivery of the vessel to him. The plaintiff never took possession nor received any part of the vessel's earnings prior to the demand.

As assignee of the mortgager of one-eighth of the vessel, the defendant had no right to the exclusive possession of the vessel. By contemplation of law, in this capacity, he was in possession through the master, who was his agent. His voluntary participation in the earnings of the vessel, before and after the demand, was an assertion of his title, and an acknowledgment of the authority of the master to manage the vessel as his agent. His bill of sale, his possession through the master, his receiving the earnings, as-

sertion of title, and refusal to surrender the vessel when demanded, make out a case of conversion, and entitle the plaintiff to maintain this action.

The plaintiff was mortgagee of the vessel, and out of possession. The defendant was assignee of the mortgager and in possession through his assignee. It is a familiar principle that the mortgagee of a vessel out of possession, is not liable for repairs, unless made by his authority. If the mortgager in possession, or his assignee, would indemnify himself for repairs made, or paid for by him, he must either obtain authority from the mortgagee or reimburse himself out of the vessel's earnings. If the defendant has not done either, it may be his misfortune, but it furnishes no ground of claim against the plaintiff. *Winslow* v. *Tarbox*, 18 Maine, 132.

According to the agreement of the parties, the defendant must be defaulted, and judgment rendered for the plaintiff for the amount of his note secured by the mortgage.

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

JAMES H. CHAMBERLAIN *& al.*, *versus* GEORGE N. BLACK.

The respondent contracted in writing to convey to the complainant certain land, provided the latter should pay to the former a certain note, (dated Dec. 20, 1864, and payable in one year with interest,) "according to its tenor and date." On the 20th December, 1865, the complainant tendered the amount of the note to and demanded a deed of the respondent, who, without making any objection to the tender, replied he would never deliver a deed according to the terms of the contract, but would give one with a certain reservation, if the complainant would receive it in fulfilment of the contract. In a bill in equity to compel specific performance; *Held*, — that the tender was waived; and whether the parties, by the language in their contract, intended the money should be payable at the end of the year or three days later, *quere*.

DANFORTH, J. — This is a bill in equity in which the specific performance of a contract is prayed for, also damages for a breach of the same contract. As it comes up on a demurrer the only question is whether the allegations in the bill are sufficient to entitle the plaintiffs to any decree in their behalf. By the contract, as set out, the plaintiffs are entitled to the conveyance of certain land described, on condition that they pay two notes described "according to their respective tenor and date." One of them was paid on demand and no question is raised as to that one. The other was payable in one year from date; and, at the end of the year, the amount was tendered to the defendant. The objection is now raised that the tender was premature and should not have been made till the last of the three days of grace. It is true that the note was not payable until three days later, and perhaps a tender of the amount due before the last day of grace might not discharge it. But in this case we are to look at the contract itself to ascertain the time when the money is due, and upon such a contract no days of grace are allowed. It is true that the notes are to be paid before the defendant is under any obligation to convey, but it is also true that they are to be paid according to their "tenor and date." Legally, the tenor of an instrument means its exact language. Now by the language of the note it became payable at the end of the year, and the days of grace are added, not by the words or terms of the note, but by the law. But whether the parties, by the language used in the contract, intended that the money should be payable at the end of the year, or three days later, may perhaps be doubtful, and we deem it immaterial. Time is not of the essence of the contract. *Jones* v. *Robbins*, 29 Maine, 351.

There is no suggestion that the plaintiffs were in fault in making the tender when they did. It was not neglect on their part and there is no indication that they intended to, or could by so doing, obtain any improper advantage. Nor does it appear that the defendant has suffered any damage

in consequence of the plaintiffs not availing themselves of the days of grace. No objection appears to have been made at the time of the tender. On the other hand, it is distinctly alleged in the bill, that the defendant stated, he "never would deliver a deed according to the terms of the written contract," but would give one with a certain reservation, "if the plaintiff would receive it in fulfilment of the obligation," thereby waiving all objections to the tender, if any existed, or, by his unqualified refusal to comply with the terms of the contract, rendering it unnecessary to make any. The other questions raised by the defendant's counsel can be more properly considered upon answer and proof. As the bill now is, assuming all the allegations to be true, as we must do under the demurrer, there will be no difficulty in doing exact justice between the parties. In such cases the plaintiffs are entitled to relief. White & Tudor's Cases in Equity, vol. 3, p. 74, note; Story's Equity Juris., (Redfield's ed.,) §§ 776, 796.

Demurrer overruled.—Defendant to answer.

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

Rowe & Appleton, for the complainants.

J. A. Peters, for the respondent.

RUFUS B. BICKFORD *versus* INHABITANTS of BROOKSVILLE.

The defendants, at a legal meeting, voted to pay a fixed sum "for each man drafted to fill their quota" under call of July, 1864. The plaintiff, a resident of defendant town, then at work in U. S. navy yard, was drafted, accepted, and furloughed to continue his work in the navy yard. After the draft, the defendants requested an extension of time for filling their quota, and soon after filled it with volunteers, whereupon the plaintiff was discharged from U. S. service:—*Held*, that the plaintiff did not come within the spirit of the vote, and could not recover against the town.

On Report.

Case to recover a bounty claimed to be voted by the defendants to such men as should be drafted to fill the town's quota, under call of July, 1864.

The article in the warrant calling the meeting of Nov. 4, 1864, introduced by the plaintiff, was, — "To see what measures the town will take towards raising money for the benefit of the drafted men, or to fill the town's quota," &c. The vote was: — "Voted to raise $350 for each drafted man to fill the quota," &c. It was admitted that the plaintiff, with others from the defendant town, was drafted Oct. 21, 1864; that he reported at the provost marshal's office for the 5th district, at Belfast, Oct. 25, 1864. Plaintiff put in certificate of provost marshal of 5th district, dated June 16, 1865, that plaintiff had been duly drafted, accepted, held to service and furloughed in accordance with circular from provost marshal general; that he was regularly discharged from navy yard, at Kittery, on May 22, 1865; and that he had been credited on quota of defendant town. Plaintiff put in descriptive list from Adj't General's office, containing his own description with others. He also put in certificate dated July 1, 1865, from provost marshal of 5th district, of his being drafted, accepted, furloughed, discharged from navy yard, of his subsequent reporting to provost marshal's office and discharge from United States' service.

Plaintiff put in letter from provost marshal of 5th district, dated Nov. 25, 1864, to commanding officer at Kittery navy yard, informing him that the plaintiff, with others, shipcarpenters, &c., employed at Kittery navy yard, had been drafted and accepted, and furloughed in accordance with circular No. 28, from P. M. General, to labor in the navy yard, requesting notice when they should be discharged, "in order that they might be held to service in the field."

It was admitted that plaintiff was at work in the navy yard when drafted.

Plaintiff testified: — Left Kittery finally fore part of May, 1865, went to Belfast and reported to provost marshal. Pro-

vost marshal sent me home. On July 16, 1865, sent me the certificate of that date. Was never in military service. Was under same rules and regulations in navy yard after I was drafted as before. Never left the State or put on uniform after the draft.

A certificate, dated Jan. 11, 1865, from provost marshal of 5th district, addressed to the selectmen of the defendant town, declaring that the "quota of the town having been filled by volunteers, the drafted men were discharged from all liability under the draft." This was in answer to written request for extension of time to fill quota with volunteers.

Rowe, and with him, *Wiswell*, for the plaintiff.

C. J. Abbott and *E. Hale*, for the defendants.

APPLETON, C. J.—The plaintiff, while at work at the navy yard, at Kittery, on the 21st Oct., 1864, was drafted under the call of the President of the United States, of July 18, 1864. On 25th Oct., 1864, he reported to the provost marshal's office for the fifth district, at Belfast, and was examined and accepted. On 29th Oct., he was furloughed and went back to the navy yard where he remained at work in the yard, never leaving the State nor putting on uniform after the draft.

The town filled its quota without the plaintiff, and, on 11th January, he was discharged.

The defendants, at a regular meeting holden on 4th Nov., 1864, "voted to raise three hundred and fifty dollars *for each drafted man to fill our quota*, and to each man having furnished a substitute under the last call for five hundred thousand men."

The plaintiff is not within the vote. The town quota was filled without him. The vote was "for each drafted man to fill the quota," not for those drafted men who did *not* fill the quota. If the plaintiff was to recover, those who *did not* and those who *did* fill the quota would be alike entitled to the benefits of the vote. The vote fairly construed requires that the person entitled to the bounty, should not merely be

drafted, but that he should aid in filling the quota. This the plaintiff did not.

By the case, as reported, the evidence of the facts establishing, as well as of those defeating the plaintiff's claim, are before us for consideration, and are equally entitled to consideration. *Plaintiff nonsuit.*

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

THEODORE BRAGDON *versus* WILLIAM SOMERBY.

By the Public Laws of 1867, c. 130, § 1, a person convicted of selling intoxicating liquors, in violation of § 7, c. 33, of the Public Laws of 1858, shall not only be punished by fine, "but, in addition thereto, shall be imprisoned," &c.

Where, upon the trial of a complaint under § 1, c. 130, the plaintiff was only sentenced to pay the statute fine, he cannot, after payment thereof, recover the same from the magistrate who sentenced him, and to whom he paid it.

ASSUMPSIT ON FACTS AGREED.

George S. Peters, for the plaintiff.

E. & F. Hale, for the defendant.

KENT, J.—This is a very singular case. The plaintiff, against whom a complaint was regularly made and warrant duly issued, was brought before the defendant, a trial justice, charged with having illegally made sale of intoxicating liquors, contrary to the provisions of the statute. He pleaded not guilty; on trial was found guilty, and by the magistrate sentenced and adjudged to pay a fine of ten dollars and costs to and for the use of the State, which he paid to the justice, and thereupon was discharged. He now brings this action to recover from the magistrate the money thus paid, on the ground that, by the Act of 1867,

c. 130, § 1, he should have been sentenced, in addition to the fine and costs, to imprisonment in the county jail for thirty days, and that, because he has not suffered the whole penalty, which by law he was *entitled* to, he can recover back from the magistrate, in his individual capacity, the fine and costs, paid to him for the use of the State. The complaint is one that, to say the least, is unusual in our Courts; convicted criminals seldom complaining that they have escaped the extreme penalty prescribed for their offences. It would certainly be a case of new impression, if such criminal should commence an action against a magistrate on the ground that by the lenity or mistake of the Court he had lost the disciplinary benefits of imprisonment, or because he had been deprived of the alleviations to his conscious sense of guilt by having suffered punishment and thereby in a degree expiated his offence. If such an action could be sustained, the damages would probably be enhanced, by proof (not given in this case) that, upon demand or request of the convicted offender, the magistrate had refused to send him to jail.

But the plaintiff's counsel does not assume any such grounds, but bases his argument on the proposition that the judgment and sentence, not being authorized by law, at the time it was given, it was not within the power of the magistrate to award such sentence, and that the plaintiff can recover of the magistrate the sum so paid for the use of the State.

Now, granting the facts, and that the magistrate could not legally impose a fine without the imprisonment, and that the judgment might be reversed on error, it does not follow that this action can be sustained. The judgment complained of was clearly a judicial and not a ministerial Act. The trial justice had jurisdiction of the case and of the subject matter, and he gave a judicial decision and judgment. If he gave an erroneous judgment and sentence, it may be reversed on error. But it has been determined by an uninterrupted series of decisions in this country and in England, that no

magistrate, high or low, can be held personally responsible, where he has jurisdiction of the subject and the parties, and where he is authorized to pronounce a judgment, and he does so, without going beyond his authority. It would be a dangerous doctrine to hold otherwise. He may be held in cases where he plainly exceeds his jurisdiction, or does mere ministerial acts wrongfully, or acts forbidden by law.

A cloud of authorities might be cited to sustain these propositions, but it is not necessary. We merely refer to a case in our own Court. *Tyler* v. *Alford*, 38 Maine, 530.

Plaintiff nonsuit.

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

INHABITANTS OF ELLSWORTH *versus* INHABITANTS OF GOULDSBORO'.

To establish a settlement by the sixth mode, it must be shown that the pauper had his home five successive years on the actual territory within the legal limits of the town.

The provision in R. S., c. 24, § 22, that "persons living in places not incorporated and needing relief, are under the care of the overseers of the adjoining town," does not give to such persons a legal settlement in such adjoining town, so that when they remove to a distant town and there fall into distress, they become chargeable to the adjoining town.

ON REPORT.

ASSUMPSIT for supplies furnished to certain paupers whose settlement was alleged to be in the defendant town.

The only question was that of settlement.

The pauper, called by the plaintiffs, testified:—"I was born in Plantation No. 7, in Hancock county, in 1819, where my father was born and lived until about 14 years ago. Resided in No. 7 until eight years ago. Removed to Ellsworth in 1862, where I and family have resided ever since. Up

to year 1844, father and I had been taxed and we paid taxes and voted in Gouldsborough. It was supposed that father and I lived within the limits of Gouldsborough until 1844, when No. 7 was organized for election purposes, when the line was run fixing our house in No. 7, since which time we have neither paid taxes nor voted in Gouldsborough."

After testimony was all in, the case was continued on report, with the agreement that, if the action could not be maintained, plaintiffs were to become nonsuit; otherwise case to stand for trial.

A. Wiswell, for the plaintiffs.

E. & F. Hale, for the defendants.

KENT, J.—The pauper in question, and family, fell into distress in Ellsworth, and their wants were supplied as required by law. This suit is brought to recover the amount from Gouldsboro', on the ground that, by statute provisions, that town is liable therefor. The first question is whether the father ever acquired a legal settlement in Gouldsboro', by five years residence in that town. One of the modes of acquiring a settlement is by a residence of five years "*in* any town in this State." It is clear that neither this pauper nor his father ever did in fact live or have their homes in the defendant town, although, for a series of years before 1844, they were taxed and voted in that town, under the erroneous belief, or assumption, that the houses in which they dwelt were in fact within the limits of Gouldsboro'.

But the residence must be *in* the town, not *outside* of it. The belief of the assessors, or other town officers, that the line of the town included a certain lot, could not change the real line, and make the residents on it inhabitants, dwelling and having their home *in*, i. e. *on*, the territory within the true boundaries. The lines enclosing the town are fixed by the act of incorporation, and cannot be altered, except by the same authority. A five years residence to fix a settlement, must be shown to have been on the actual territory, within the legal limits of the town.

Another ground for recovery is suggested by the plaintiffs' counsel, viz.:—that, as by § 22, c. 24, R. S., "persons living in places not incorporated and needing relief, are under the care of the overseers of the adjacent town, where they are liable to be taxed;" whenever persons, who have resided formerly in such place, not incorporated, fall into distress in some third town, and are there relieved, that such third town may recover of the adjacent incorporated town for such supplies.

We have seen that such claim cannot be sustained on the ground that such persons had a legal settlement by residence in that town. The provision, that persons in distress are under the care of the overseers of an adjacent town, does not make such persons the legal paupers of such town. On the contrary, the same section gives the right to recover, for supplies furnished such persons, from the town in which they have their legal settlement, if any such town can be found. If not, then the adjacent town must bear the expense, as it must in all other cases where the pauper falls into distress, in their town, having no legal settlement therein, and none in any other town in the State. It seems to have been the intention of the Legislature to put the unfortunate residents on a plantation, where no provision exists for their relief, under the care of the overseers of an adjoining town, in the same manner and to the same extent as is required in cases of persons falling into distress but having no legal settlement in their town; and to make it the duty of the overseers to provide for all cases of distress, within their town or in such adjacent plantation as is named in the statute, whether they have a settlement in any town or not. But such care and oversight as the law requires of them, does not give to the persons receiving it a legal settlement in their town, so that when they remove from the plantation to a distant town, and there fall into distress, they become chargeable to the adjacent town. They have no legal settlement in such town, and there is no statute provision making that town liable for any relief furnished such

persons after they have removed from the plantation. The last proposition is all that the case requires us to determine on this point. We are aware that the law, as it now stands on the statute book, (in § 22,) is not free from difficulties in construing and applying it, and may call for further Legislative action to make it just and practicable in its operation. The object undoubtedly is to secure relief and needed supplies to persons in distress, in places not incorporated as towns, where there are no overseers of the poor and no corporation bound by law to furnish such aid. Without some provision there might, and doubtless would be many cases of extreme suffering. On the other hand, it seems unequal and unjust to compel an adjacent town to be at the whole expense of such supplies, where the pauper has no legal settlement in the State. There would seem to be no satisfactory reason for imposing this burden on one town rather than another. The number of such cases is not large, and perhaps the most equitable provision would be, for the State to assume the charge.

It is perhaps not unreasonable to believe that the overseers of adjacent towns will be somewhat unwilling to assume the burden where there is no prospect of remuneration from any source, and, in some cases at least, refuse aid, when needed, to prevent immediate and severe suffering, under the construction which they may adopt, that the statute, putting the paupers under their "care," does not, *in terms*, impose any obligation to furnish supplies, except in cases where remuneration is secured, or as they in their discretion may determine. Under the present statute, it may be difficult to point out any mode by which overseers may be compelled to act in favor of non-resident paupers.

Questions may also arise as to *which* of the adjacent towns is intended. The liability to taxation may be questionable, or indefinite, or not clearly fixed, and the towns may be disputing as to their respective duties and obligations, whilst the poor paupers are perishing for lack of food. Perhaps a more definite and satisfactory designation would be that

of the *oldest* adjacent town, or the town nearest the place of the pauper's residence when he fell into distress, or the town first applied to for relief.* But the case before us is free from these doubts. *Plaintiffs nonsuit.*

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

DAVID T. BONZEY *versus* GILMAN B. HODGKINS *& als.*

The mere fact that a vessel is taken on shares does not discharge the owners from liability for the loss of freight.

But where she is sailed on shares, and the master has control of her, he is *pro hac vice*, owner, and is alone responsible for loss of freight.

ON FACTS AGREED.

ASSUMPSIT against the owners of the schooner "Barnard" for the value of certain merchandize, alleged to have been shipped on board the "Barnard" and lost on a voyage from Boston to Ellsworth.

The question was whether the owners or master were liable.

G. S. Peters, for the plaintiff.

E. & F. Hale, for the defendants.

APPLETON, C. J. — It is admitted that the vessel was sailed by John Linscott on shares; that he victualled and manned her; having control of her; taking such freight as he chose; paying to the owners one-half of the gross earnings for the use of her as is customary in this State.

The mere fact that the vessel was taken on shares does not discharge the owners. Their control must cease. It does, when it is transferred to the master. From the agreed statement of facts, it must be understood that the

* See statue 1868, chapter 219.

master had the control of the vessel; that it was his for the time being, and when the goods in question were shipped. In such case the master is liable, and the owners are not. *Sproat* v. *Donnell*, 26 Maine, 185; *Cutler* v. *Winsor*, 6 Pick., 335. The master in such case is to be deemed the owner *pro hac vice*. *Winsor* v. *Cutts*, 7 Greenl., 261.

In the case of *Emery* v. *Hooper*, 4 Greenl., 407, and in *Sims* v. *Howard*, 40 Maine, 276, it did not appear that the master had the control of the vessel. In the present case, it is admitted that he had. *Plaintiff nonsuit.*

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

JAMES THOMPSON *versus* CHARLES H. DYER.

Where an administrator of the estate of a defendant, who died during the pendency of the suit, after having represented the estate as insolvent, has appeared in the suit as the representative of the deceased party, it is his duty to have the proceedings in insolvency made to appear upon the record in this Court, in order that the proper judgment may be entered up.

But, if no suggestion of the insolvency or prayer for the stay of execution be made, and a judgment be awarded against the estate of the intestate in the hands of the administrator, and execution be issued in due course, the receipter for the property attached in the original suit, cannot impeach the correctness of such judgment in an action against him upon the receipt.

ON REPORT.

ASSUMPSIT upon a receipt for goods attached on mesne process.

The facts appear in the opinion.

Madigan, for the plaintiff.

Bradbury & French, for the defendant, cited *Martin* v. *Abbott*, 1 Maine, 333; R. S., c. 66, § § 15, 16 & 17.

BARROWS, J. — On the 24th of August, 1859, the defendant, with one Richard Dunn, a resident of Nova Scotia, gave a receipt to the plaintiff, a deputy sheriff in this county, for

personal property of the value of $200, attached on a writ in favor of Henry M. Hunter against said Dunn, while commorant at Eastport, in which receipt they agreed to keep safely and redeliver to the officer on demand, or within thirty days after judgment in the action of *Hunter* v. *Dunn*, without demand, at said Eastport, all the property thus attached, free of expense to the officer or creditor. The receipt contained, in addition to the foregoing stipulations, the following:—"And we further agree that this receipt shall be conclusive evidence against us, as to our receipt of said property, its value before mentioned, and our liability under all circumstances to said officer, for the full sum above mentioned."

The action of *Hunter* v. *Dunn*, was duly entered in Court, answered to by Winslow Bates, Esq., a counsellor residing in Eastport,—an offer of default for a specific sum was made and not accepted,—and, at the January term, 1861, the death of Dunn was suggested. His attorney, Mr. Bates, who was also public administrator for the county, having taken out letters of administration, January 15, 1861, appeared at the April term following, and was defaulted, and judgment was duly awarded against the estate of the intestate in the hands of Bates, as administrator, and execution was regularly issued, and placed in the hands of the plaintiff, who made demand upon the defendant within thirty days after judgment, and was met with a refusal, and was informed by the defendant that Mr. Bates, the attorney and administrator of Dunn, the defendant in the original suit, told him not to give up the property. Hence this suit, which the receipter claims to defend by showing that, on the 2d of April, 1861, before he had appeared as administrator in this Court, Mr. Bates made a representation of the insolvency of the estate in the Probate Court, and procured the appointment of commissioners, who subsequently reported that no claims were presented, whereupon the administrator closed the estate, by paying his own bill for defending the original suit and the administration charges.

The defendant contends that, by these proceedings, the attachment was dissolved, the officer freed from liability either to creditor or debtor for the property attached, and, in consequence, that he himself is no longer liable on his contract to the officer.

If it be true that the officer is relieved from liability to any person for the property attached, the contract being substantially one of indemnity, it may perhaps follow that he is not entitled to maintain this action, notwithstanding the stipulation that the receipt should be conclusive, against the signers, of their "liability, *under all circumstances*," for the value of the property.

The question that presents itself here, is whether an attachment in a suit pending against a debtor at the time of his death, is vacated by a representation of insolvency and the appointment of commissioners in the Probate Court, *when these proceedings are not made judicially to appear in the suit in which the attachment is made?*

The defendant relies upon § § 15 and 17 of c. 66, R. S., providing that judgment may be rendered in actions pending on claims not preferred against persons whose estates shall be represented insolvent, with a particular effect, and to be satisfied in a certain manner, viz.: no execution shall issue except for costs to the prevailing party, and the sum found due to the claimant is to be entered by the Judge of Probate on the list of contingent debts entitled to dividends.

The defendant relies further upon cases where it has been adjudged in the original suit, either upon disclosure of a trustee summoned, or upon motion of the administrator defending, for stay of execution, that where the insolvency of the estate was made to appear by the issuing of a commission in the Probate Court, the attachment was thereby dissolved, and judgment could only be rendered with the effect an satisfided in the manner above stated. Doubtless this is so. The difficulty is, that this was not the kind of judgment that was entered up in the suit of *Hunter* v. *Bates, Adm'r.* The case finds that judgment was awarded against the estate

of the intestate Dunn, in the hands of the administrator, and execution issued in due course, no suggestion of the insolvency, or prayer for the stay of execution, having been made.

We are clear that the defendant in this suit cannot be permitted here, and now, to impeach the correctness of that judgment and the proceedings thereon, in this collateral manner. It was the duty of the administrator, on appearing, (if he had represented the estate insolvent,) instead of submitting to a general default, to have the proceedings in insolvency in Probate Court made to appear upon the record here, so that the right judgment might be entered up. In the face of a judgment standing as this does, neither he nor any other party can be permitted to dispute the propriety of it in any collateral proceeding.

It was long ago settled that, although an estate had been represented insolvent and actually proved to be so, yet, if the creditor had been permitted, notwithstanding this, to proceed to judgment in a pending suit, in the usual form, a levy upon the execution would bind the estate, even though the attorney of the creditor knew of the representation of insolvency. *Ramsdell* v. *Creasy*, 10 Mass., 170.

And again, in case an execution, regularly issued upon a judgment obtained under like circumstances as to insolvency, is returned *nulla bona*, the administrator cannot escape a judgment and execution *de bonis propriis* by setting up the proceedings in insolvency in defence of the *scire facias* against himself. *Sturgis* v. *Reed*, *Adm'r*, 2 Maine, 109.

Now, the original suit of *Hunter* v. *Dunn*, in which the property, for which the receipt was given, was attached, proceeded regularly to judgment and execution, and the execution was duly placed in the plaintiff's hands to be satisfied out of the property which he had attached. His liability to the creditor was thereby fixed, and the receipter, in *his* turn, must make good the contract of indemnity. Or if, by reason of the assent of the creditor's attorney to the taking of a receipt and his approval thereof, the officer was re-

lieved from personal responsibility, the creditor, standing in his place, may pursue the receipter in his name, unimpeded by any suggestions which can be made available only by attacking the judgment in the original suit.

The plaintiff's objections to the reception of the evidence, as to the proceedings in the Probate Court, should have been sustained. *Defendant defaulted.*

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

STILMAN LOOK *versus* ACKLEY NORTON.

Possession alone, although for a less term than twenty years, is sufficient to maintain an action of trespass *quare clausum* against every body who has not the legal title or who has not the permission of the legal owner.

ON REPORT.

TRESPASS *quare clausum*, for entering and cutting wood and timber.

Plaintiff testified he had been in possession of the *locus in quo* since 1827. Moved upon the lot October 25, 1828, and continued to live there until July, 1849, and have occupied the lot ever since. Enclosed eight or ten acres where house and barn were. Claimed the lot by adverse possession. Built a house and two good barns and good fences which are now standing. Wood not cut within the inclosure by defendant. "Mr. Asa Tucker moved into our house on the lot twenty-six years ago. Told him when he got ready I would assist him about building a house, and let him have a piece of land when I got a title. Expected to get a title by purchase of the owner. Did not consider I then had a title, because I had not been there twenty years. Tucker lived in my house about two years. I never gave Tucker any deed."

Defendant put in a deed of quitclaim, dated September 13, 1841, from Asa Tucker to Jotham Lippincott, of all Tucker's "right, title and interest to a part of the lot now occupied by Stilman Look, and the labor done upon the same."

Jotham Lippincott, called by defendant, testified: — "Met Tucker and Look together, when Tucker proposed to give me this deed and stop the action. My impression is Look agreed to disclaim any title to the part Tucker was to convey to me. Look told me Tucker was to have the southern part of the lot, where Tucker's house stood. Tucker had a field, some potatoes and some grain. I did not authorize Norton to cut on the part of the lot I claim. I told him if he got clear of Look he must settle with me for cutting on my part of the lot. I put in specifications of defence."

Plaintiff denied the conversation testified to by Lippincott.

The action was continued on report, the Court to draw such inferences as a jury might, and enter such judgment as the law and evidence warranted. In case of judgment for the plaintiff, damages to be assessed by Shadrack L. Wass.

J. A. Milliken, for the plaintiff.

J. Lippincott, for the defendant.

DANFORTH, J. — As early as 1827 the plaintiff took possession of the land upon which the alleged trespass was committed, and moved upon it in October, 1828. From his own testimony, we learn that, when he took possession, he expected to get a title from the owner by purchase; that, after having been sometime in possession, he did not consider that he then had a title, because he had not been in possession twenty years. What effect this testimony may have upon his title, it is not necessary for us to determine. There can be no doubt, from the testimony in the case, that, at the expiration of the twenty years, and previous to the trespass complained of, he was in possession of the *locus in quo*, claiming it as his own. This possession and claim continued up to the commencement of the action. This,

though at the time of the trespass had continued less than twenty years, gave him a title against every one who could not show a better claim; and was sufficient to enable him to maintain his action against a mere wrongdoer. *Kilbourne* v. *Revere*, 8 Gray, 415; *Moore* v. *Moore*, 21 Maine, 350; *Hunt* v. *Rich*, 38 Maine, 195.

The defendant attempts to justify under Mr. Lippincott, who is claimed to be the true owner. The testimony, however, fails to show any title in him. He has only a quitclaim deed from Asa Tucker, under which he never took possession; while Tucker's possession, so far as he had any, was in subordination to that of the plaintiff. But, if Lippincott had the title, the defendant shows no permission to himself; he therefore cannot avail himself of that title. *Merrill* v. *Burbank*, 23 Maine, 538.

As to the question of damages, they must be commensurate with the injury. The plaintiff had the same possession and claim of title to the trees and wood carried away, which he had to the soil. He is therefore entitled to recover for their value, as well as for the injury to the land. *Cutts* v. *Spring*, 15 Mass., 137.

Judgment for plaintiff, and, according to the agreement of the parties, damages are to be assessed by Shadrack L. Wass of Addison.

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

HORATIO N. PLUMMER *& als.*, *versus* JAMES L. BUCKNAM.

A verbal contract for the sale of land is void.

At the time of making such a contract, the purchaser paid fifty dollars in part performance and afterwards terminated the contract, notified the seller of that fact and demanded the repayment of the fifty dollars: — *Held*, that the money could not be recovered back.

On Report.

Assumpsit to recover back money paid on a verbal contract for the purchase and sale of a lot of land.

After the evidence was all in, the case was continued on report, the full Court to draw such inferences as a jury might, and to enter judgment by nonsuit or default as the law should require.

J. A. Milliken, for the plaintiffs, cited

Richardson v. *Allen*, 17 Maine, 296; *Gammon* v. *Butler*, 48 Maine, 344; *Coughlin* v. *Knowles*, 7 Met., 57; *Parker* v. *Parker*, 1 Gray, 409.

G. Walker, for the defendant.

Appleton, C. J.—The plaintiffs contracted with the defendant to purchase of him a lot of land. The bargain was by parol and within the statute of frauds. The plaintiffs paid fifty dollars in part performance, when the bargain was made. Afterwards the plaintiffs terminated the contract, notified the defendant of that fact and demanded the fifty dollars paid, which the defendant refused.

A verbal contract for the sale of lands is void. If a parol contract is made, and fulfilled on the part of the purchaser, and the seller is ready and willing to perform his agreement, no action can be maintained to recover back payments. But, if the seller refuses to perform the contract, the other party not being in fault can recover the payments he has made. *Kneeland* v. *Fuller*, 51 Maine, 518. Here the plaintiffs voluntarily ended the contract,—since which time there has been no new agreement. "It would be an alarming doctrine," remarks Spencer, J., in *Ketchum* v. *Evertson*, 13 Johns., 359, a similar case to the one under consideration, "to hold that the plaintiffs might violate their contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have." When the non-perform-

ance is on the part of the plaintiff, he cannot recover payments already made, the defendant not being in fault. *Rounds* v. *Baxter*, 4 Greenl., 454; *Smith* v. *Haynes*, 9 Greenl., 128. *Plaintiff nonsuit.*

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

ALEXANDER KENNEDY *versus* THOMAS M. BRADBURY.

A colt is exempt from attachment when the debtor owns neither oxen nor horses, of the statutory value.

ON EXCEPTIONS.

TRESPASS for taking and converting a colt two years old in the spring before the same was taken.

The defendant justified as a deputy sheriff holding an execution against the plaintiff.

The plaintiff proved that, at the time of the taking, he owned neither oxen nor horses.

The presiding Judge ruled that the colt was exempt from attachment, and the defendant alleged exceptions.

J. Granger, for the plaintiff.

W. C. Copeland, for the defendant.

APPLETON, C. J.—By R. S., 1857, c. 81, § 36, "one pair of working cattle or, instead thereof, one or two horses, not exceeding in value two hundred dollars," are exempted from attachment or seizure on execution.

The exemption is for the benefit of the debtor. If not able to own a pair of oxen or a horse or horses of the statutory value, it would be a strange doctrine to deny his right to own a colt, which, in process of time, will soon become a horse. When a cow is by law exempt from attachment, it has been held that a heifer, if the owner has no cow, is exempt from attachment. *Dow* v. *Smith*, 7 Vermont, 465; *Freeman* v. *Carpenter*, 10 Vermont, 433. The same prin-

ciple applies in the case at bar, as the value of the colt does not exceed the amount allowed by statute. The exemption is alike within the spirit and intention of the Act and the decisions under it. *Bonsey* v. *Newbegin*, 48 Maine, 410.

Exceptions overruled.

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

JOSEPH MYSROLL *versus* ROSAMOND VIOLETTE.

The levy of an execution upon real estate in the name of him for whose benefit the judgment is alleged in the execution to have been recovered is invalid.

ON EXCEPTIONS.

WRIT OF ENTRY. One Isaac Violette owned the demanded premises in 1846, when a writ was sued out of the clerk's office of the Eastern District Court, in the name of James S. Sigee and John O. Bustin, "for the benefit of F. W. Hathaway." On this writ, a judgment was recovered in September, 1846, and, in January, 1847, an execution issued declaring that, "whereas James S. Sigee and John O. Bustin, of, &c., for the benefit of F. W. Hathaway, of, &c., by the consideration of our Justices," &c.

The return of the appraisers indorsed upon the execution commenced,—"we the subscribers, being duly chosen to appraise such real estate as the within named F. W. Hathaway, the creditor, should show unto us," &c., and ended,—"which said lands and tenement the said F. W. Hathaway is to hold to him and his heirs forever."

The receipt of seizin and possession was signed,—"F. W. Hathaway, by J. C. Madigan, his attorney."

The officer's return declared that he delivered seizin, &c., "to J. C. Madigan, attorney of the within named F. W. Hathaway."

The plaintiff claimed title under a deed from Hathaway, and the defendant, under a subsequent deed from Violette.

The presiding Judge ruled, *pro forma*, that the levy was invalid to pass any title to Hathaway, and the plaintiff alleged exceptions.

Trafton & Herrin, for the plaintiff.

Copeland, for the defendant.

DANFORTH, J.—The only question in this case is as to the validity of the levy under which the demandant claims. It was made by virtue of an execution issued upon a judgment recovered in the name of James S. Sigee and John O. Bustin, for the benefit of F. W. Hathaway. The levy appears to have been made in the name of Hathaway, and the return of the officer, if in this respect it is sufficient under the statute, which is somewhat doubtful, shows that the premises were set off to him, and that he was treated as the creditor in all the proceedings. For this we find no authority in the statute, as Sigee and Bustin were in fact the judgment creditors, and the proceedings should have been in their names. As a levy is authorized only by statute, the directions there found must be strictly followed.

The levy, therefore, cannot be valid. If the officer had followed the directions of his precept and of the statute, Hathaway would, undoubtedly, have had an equitable interest in the premises which the law would have protected, as in the cases of *Warren* v. *Ireland*, 29 Maine, 62, and *Cushman* v. *Carpenter*, 8 Cush., 388, and might have acquired a legal title to them under the statute. R. S., c. 76, § 14. But, until such a conveyance, he would have no such legal interest in the premises as would enable him to maintain an action for the possession, in his own name, and his grantee would be in no better position.

Exceptions overruled.

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

ROSAMOND SANFASON *versus* JOSEPH MARTIN.

A collector can sell property distrained for the payment of taxes only by virtue of a legal warrant issued by the proper authorities.

A collector's warrant signed by only two assessors, without any evidence that a third was chosen and qualified, will not justify such sale.

ON REPORT.

REPLEVIN for a riding wagon.

Plea, general issue, with brief statement alleging property and right of possession in the defendant and not in the plaintiff.

Plaintiff testified: — That he resided in Van Buren Plantation and was the owner of the wagon in controversy; that Francis H. Violette took the wagon from plaintiff's possession, Oct., 23, 1865, and sold it at auction 25th same Oct.

On cross-examination, he testified: — That Violette acted as collector of taxes in the plantation; that A. S. Richards and E. Parde acted as assessors of taxes in the plantation that year. Violette demanded payment of my taxes before selling the wagon. Violette returned to me the surplus for which the wagon sold above my taxes and costs.

The warrant and tax list signed by Richards and Parde, as assessors, was put in and their signatures proved.

The collector Violette testified to all the facts in detail of demanding taxes, taking of the wagon, posting notices of sale, sale, and of returning to plaintiff an account of sale with the surplus proceeds of the sale.

The case was submitted to the full Court with jury powers, who were to render such judgment as the law and facts might warrant.

Granger & Madigan, for the plaintiff.

C. M. Herrin, for the defendant.

Proof that a person acted as a public officer is *prima facie* evidence of his official character. 1 Greenl. on Ev., 111, 121; *Hutchings* v. *Van Bokkelen*, 34 Maine, 126.

Plaintiff, a resident of V. B. Plantation was to be taxed there. If tax was illegally assessed, his remedy was against the plantation. *A. & W. Cotton Man. Co.* v. *Amesbury*, 17 Mass., 460; 8 Maine, 278. Or trespass against the assessors. The collector, and *a fortiori*, an innocent purchaser would not be responsible for any irregularities on the part of others. *Holden* v. *Eaton*, 8 Pick., 436.

Collector made statute account of sales and paid surplus to plaintiff who received it.

A sale of personal property by a public officer, at public auction, he being authorized by law and having an official jurisdiction over the procedings, transfers the debtor's title to a *bona fide* purchaser, although the officer may not have conformed to the requirements of the statute in making the sale. *Tuttle* v. *Gates*, 24 Maine, 395; *May* v. *Thomas*, 48 Maine, 397; *Ludden* v. *Kincaid*, 45 Maine, 411.

It is for the interest of the debtor that his property should bring the highest price and not be sacrificed. If a sale could be avoided by some irregularity, his property would only bring a nominal price. There would be no bidders.

This plaintiff has already sued collectors for the wagon. If he succeeds in present suit,

1. He will receive benefit of payment of his tax, $16,93;
2. Surplus paid to him by collector, $35,87, making $52,80;
3. Would keep wagon from an innocent purchaser; and
4. Recover value of wagon of collector.

DANFORTH, J. — "A sale of such goods as are in controversy, made by an officer at public auction, on judicial process, he being authorized by law and having an official jurisdiction over the proceedings, will transfer the debtor's title to a *bona fide* purchaser, notwithstanding the directions of the law may not have been complied with." This seems to be the conclusion of the Court from a review of all the authorities upon this subject, somewhat conflicting, as ex-

pressed by CUTTING, J., in *May* v. *Thomas*, 48 Maine, 400. From this it would seem that, whatever may be the effect, or want of effect, of any irregularities in the proceedings of the officer; in order to convey a title to the goods sold, he must be an officer *de facto*, at least, and acting under a *legal precept*. If this be so, in the execution of judicial process, there is at least equal reason for applying the same principle to a sale of personal property distrained for the payment of taxes. In the case at bar, the collector, who perhaps might have been an officer *de facto*, seized and sold the property in controversy, by virtue of a warrant signed by two persons claiming to act as assessors of Van Buren plantation. There is nothing in the testimony reported, tending to show that any third person was chosen assessor, or at that time assumed to act as such. So far as appears, there were but two assessors, at most, "one less than the law required." It is doubtful, to say the least, whether these two were qualified to act, but it is certain they had no authority to assess a tax or issue a warrant, if they only were qualified. *Inhabitants of Williamsburg* v. *Lord*, 51 Maine, 601.

It is admitted that the title to the property was originally in the plaintiff. It is therefore incumbent upon the defendant to show a better title in himself, and he can only do this by showing a sale by virtue of a legal precept, issued by the proper authorities. This he has failed to do, and, according to the agreement of parties, there must be

Judgment for plaintiff.

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

JOHN ALLEN *versus* DAVID B. DELANO.

Where a mare, being with foal, is sold on condition that she is to "remain the property of the vendor until paid for," the vendor continues to own the colt subsequently foaled, until performance of the condition.

ON EXCEPTIONS.

REPLEVIN for a colt. Writ dated October 2, 1865. Plea, general issue, with a brief statement denying title of the plaintiff and claiming property in the defendant.

The plaintiff introduced a writing signed by the defendant and duly stamped, of which the following is a copy:—

"Maysville, Sept. 19, 1864.

"For value received, I promise to pay John Allen or order, one hundred and sixty dollars and interest, one-third in one year, one-third in two years, and one-third in three years. The above note is given for a mare called the Smith mare, red color with white star in forehead, six years old last spring; and it is agreed that said mare shall remain the property of said Allen till paid for."

(Signed,) "David B. Delano."

It was admitted that, at the date of the writing, the mare was with foal; that she foaled in April following; that that offspring is the colt replevied in this suit; and that the note is not paid.

Upon the foregoing testimony and admissions, the presiding Judge ruled that, under the writing, the plaintiff retained and had no property in the colt, and thereupon ordered a nonsuit. And the plaintiff alleged exceptions.

Herrin, for the plaintiff.

Copeland, for the defendant.

APPLETON, C. J. — The nonsuit must be set aside and the case stand for trial.

The plaintiff's title to the mare is not questioned. By

the terms of the contract no title vested in the conditional vendee.

The plaintiff, owning the mare, owned likewise the colt. "Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that '*partus sequitur ventrem*,' in the brute creation, though, for the most part, in the human species it disallows that maxim." 2 Black. Com., 390. And so are all the authorities. Putting a mare to pasture in consideration of her services, does not entitle the bailee to her increase. *Allen* v. *Allen*, 2 Penn., 166. In case of a pledge, not only the thing pledged passes but also, as accessory, its natural increase, as, for instance, the young of a flock of sheep. Story on Bailments, § 292. Where live stock is mortgaged, its natural increase and produce becomes subject to the mortgage. *Forman* v. *Proctor*, 9 B. Mon., 124. The increase of domestic animals, gratuitously loaned, belongs to the lender. *Orser* v. *Storms*, 9 Cow., 687. Where a mare was sold on condition, the vendor continued to be the owner of her colts until performance of the condition. *Buckmaster* v. *Smith*, 22 Vermont, 203. The defendant, having no title to the mare, can have none to her increase.

Exceptions sustained.

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

JOSEPH W. HINES *versus* JOHN ALLEN.

No defendant in replevin, or any person deriving title from him after the service of the writ, can, during the pendency of the suit, maintain a subsequent action of replevin for the same property, against the former plaintiff in possession.

ON EXCEPTIONS.

REPLEVIN for a colt. Writ dated Oct. 4, 1865. Plea,

general issue with brief statement, claiming title in the defendant and denying title in the plaintiff.

It appeared that, on Oct. 2, 1865, the defendant replevied the same colt from one Delano and received possession of the colt from the officer, whereupon Delano, owing the plaintiff $42, sold the colt to the plaintiff for a fair value, and thereupon the plaintiff instituted this suit.

The presiding Judge ruled that this action could not be maintained, and ordered a nonsuit, to which ruling the plaintiff alleged exceptions.

E. Madigan & Copeland, for the plaintiff.

Herrin, for the defendant.

KENT, J. — It is well settled that when property has been taken from a person by a replevin suit against him and delivered to the plaintiff, the defendant in that suit cannot replevy the property back again, pending the suit. *Ilsley* v. *Stubbs*, 5 Mass., 280; *Morris* v. *De Witt*, 5 Wend., 71; *Sanborn* v. *Leavitt*, 43 N. H., 475. The reasons for this rule are obvious. Such a course would lead to confusion, multiplicity of suits, and unnecessary complications. It cannot be necessary to vindicate the rights of either party. Those rights can be fully determined in the first suit. It is clear therefore in this case, that Delano could not maintain a replevin suit against the plaintiff for the colt.

Can a person who derives his title or claim from a sale or transfer by Delano, *made after the colt had been replevied from him*, maintain this action of replevin?

The cases before cited, and others of like character, unquestionably establish as a general principle, that the owner of a chattel may take it by replevin from any person, whose possession is unlawful, unless it has been taken from him by replevin by the party in possession.

The chattel is not considered in the custody of the law, so as to be for that reason irrepleviable by any person, pending the suit, after it has been delivered by the officer to the plaintiff in replevin.

But, is it not a clear evasion, if not a nullifying of the doctrine first stated, if a party, who cannot replevy himself, can, by a new sale or conveyance, colorable or real, enable a third party to do it? Ordinarily, the rights and liabilities of parties in suits, depend upon the facts existing at the time of the commencement of the action. In this case, at *that* time, the present plaintiff had no right or title, or interest in this colt. His after acquired title depends entirely upon the right and title of Delano. This right can be perfectly vindicated in the first suit against Delano. If the plaintiff in that suit, (the present defendant,) fails to establish his title or right to possession, there must be a judgment for a return, and then this plaintiff can assert his right against Delano by replevin.

If this action can be sustained, we should have two actions of replevin, to be tried upon exactly the same facts and the same title. In both, the question must be the right set up by the present defendant and the right set up by Delano. The present plaintiff's rights are exactly the same, no less and no more, than Delano's.

We think it could not be intended by the principle, before stated, that a new right could be acquired by a subsequent sale to a third party, to institute a replevin, which did not exist in the vendors. The reasoning which would prohibit a suit by the defendant in replevin applies with equal force to a subsequent purchaser.

Exceptions overruled.

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

INHABITANTS OF MONSON *versus* INHABITANTS OF FAIRFIELD.

The former settlement of a pauper is defeated by his gaining a new one.

And, where a pauper gained a new settlement by dwelling and having his home in an unincorporated place, at the time when it was incorporated into a town, the repeal of such act of incorporation does not revive his former settlement.

ON FACTS AGREED.

ASSUMPSIT for supplies furnished a pauper whose settlement was alleged to be in the defendant town.

The only question was that of settlement.

The facts appear in the opinion.

H. Hudson, for the plaintiffs.

1st. Isaac Bodfish, the pauper, had a legal settlement in Fairfield, and therefore defendants are chargeable, unless they can show he has a legal settlement elsewhere, and at the time of plaintiffs' furnishing the supplies.

2d. It was the duty of the overseers of the poor of Monson to furnish the supplies to said pauper, and they were bound so to do, whether he strayed into their town or there lived in his father's family. R. S., c. 24, § § 22, 23 & 24.

3d. Defendants attempt to avoid their obligation by showing that said Isaac Bodfish had gained a settlement in Elliottsville. Such attempt is not sufficient to defeat this suit, and is not admissible for that purpose, because, by the repeal of the act of incorporation, it left all persons in just the same condition that they were before the plantation was incorporated into the town of Elliottsville.

4th. Plaintiffs funished the supplies from August, 1865, to April, 1866. And was there any other town liable but Fairfield? There was no such town as Elliottsville. And, as a citizen of Maine, as this pauper was, he must have a legal settlement in some town. That town was Fairfield.

5th. The facts proved show that Isaac Bodfish had a legal settlement in defendant town, and, before they can relieve themselves, they must show that there is another town lia-

ble to pay for the supplies and that the plaintiffs could and ought to recover of said town. Have they shown it? Is there any such town?

6th. What becomes of residents of a town when the act of incorporation is taken away from them, if the defendants are to prevail? There is no provision made for them, even by a forced construction of the law. You make aliens of citizens of Maine, so far as relief as paupers is concerned. There is no town or individual then can extend to them relief, when needed, and get repaid.

7th. This pauper was a citizen of Maine, born in Fairfield, and his father before him. And, at the time of the plaintiffs' furnishing relief, was a resident of a plantation. Therefore some town should and ought to be responsible for the supplies. It was not the plaintiff town, for he never resided there.

8th. In order for defendants to avail themselves of the last part of section 2d of c. 24 of R. S., they must show that the pauper gained and retains a legal settlement in some other than the defendant town. When they attempt to show that the pauper gained a settlement in Elliottsville, they at the same time show that that settlement is null and void, by the repeal of said charter. And the supplies being furnished after the repeal, plaintiffs must recover.

D. D. Stewart, for the defendants.

APPLETON, C. J. — This is an action of assumpsit for supplies furnished one Isaac Bodfish.

Samuel G. Bodfish, the father of the pauper, was born in Fairfield and resided there, with the exception of three years, until 1827, when he removed with his family to township No. 8, Range 9, north of the Waldo Patent, where he continued to remain with them until within the last two years.

Township No. 8, Range 9, north of the Waldo Patent, was incorporated into the town of Elliottsville, in February, 1835. In 1858, the Act, by force of which it was incorporated, was repealed.

The pauper was born in Fairfield, in 1811, and has lived in his father's family until within the last two years.

It is conceded that, prior to 1827, Samuel G. Bodfish, the father of the pauper, had his legal settlement in the defendant town.

The fifth mode of gaining a legal settlement under the Act of March 21, 1821, c. 122, § 2, then in force, is as follows:—"All persons dwelling and having their homes in any unincorporated place, at the time when the same shall be incorporated into a town, shall thereby gain a legal settlement therein." By the Act incorporating Elliottsville, Samuel G. Bodfish and his family, of which the pauper was a member, acquired a settlement therein.

By the same section, "every legal settlement, when gained, shall continue till lost or defeated by gaining a new one; and, upon gaining such new settlement, all former settlements shall be defeated and lost." The moment a settlement was gained in Elliottsville, the settlement in Fairfield was "defeated and lost." The pauper could then only acquire a new settlement there as he could in any other town. No provision is made for the revival of a lost settlement. The obligations of towns to support paupers are wholly the result of statutory provisions. The original settlement of the pauper in the defendant town, having been "defeated and lost," he has not regained it in any of the modes provided by the statute, and it could not be regained in any other way.

The provision to which we have above referred is found in the last revision. R. S., 1857, c. 24, § 2:—"Settlements acquired under existing laws, remain until new ones are acquired. Former settlements are defeated by the acquisition of new ones."

It is for the Legislature to make provision for a case like the present. It is not for the Court to legislate.

Plaintiff nonsuit.

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

ANNA K. GILMAN *& als., Ex'rs, versus* WILLIAM H. HEALY.

At common law, the discharge of a debt by one of several executors, is valid and binds the others.

When two joint executors have, under § 1, c. 250 of the Public Laws of 1864, obtained a decree of the Probate Court to compromise claims between the estate of the testate and its debtor in a certain manner, an adjustment by either of the executors, in compliance with the decree, will bind the other.

ON REPORT.

ASSUMPSIT by the executors of the last will and testament of the late Nathaniel Gilman, upon a written memorandum of the following tenor:— "Waterville, Aug. 17, 1855. "Received of Nathaniel Gilman, nine hundred dollars, payable on demand with interest."

(Signed,) "W. H. Healy."

On the memorandum were the following indorsements:— "Jan. 18, 1862, received $100; May 12, received $300; Aug. 22, received $426."

Defendant read in evidence a paper of the following tenor:

"Received of Wm. H. Healy twelve hundred and seventy-five dollars and fifty-six cents, in full discharge, award and satisfaction of two notes of hand now in suit against him, in the name of Charles B. Gilman and Anna K. Gilman, ex'rs on the estate of Nathaniel Gilman, late of Waterville, deceased, one note dated Nov. 1, 1855, for $1,945,38, given by said Healy to N. Gilman & Son, the other dated Aug. 17, 1855, for $900, given by said Healy to said N. Gilman, each note having been in part paid by said Healy, said sum being the amount due on said notes after allowing said Healy certain sums claimed by him as payments on said notes, by way of settlement and compromise, in accordance with a decree of the Probate Court for Kennebec county, authorizing such settlement and compromise of said notes and claims.

"Chas. B. Gilman, *Ex'r on the estate of Nathaniel Gilman, deceased.*

"*Witness*, Rob't B. Woodward."

2 cent Rev. Stamp.

Defendant also read from the probate records of the county of Kennebec as follows: —

"To H. K. Baker, *Judge of Probate for Kennebec county*:

"We have a suit against Wm. H. Healy, on a note given by him to N. Gilman & Son, for $1,945,38, dated Nov. 1, 1855, and also a note given by said Healy to N. Gilman, deceased, for $900, dated August 17, 1855, and said Healy defends said suit and claims to have a defence to said notes, but, for the purpose of a settlement and by way of compromise, said Healy offers to pay the balance on said notes, deducting from the note in favor of N. Gilman & Son, as of its date, the sum of $500, claimed as paid by him, and from the note to N. Gilman, $318, claimed as a payment by him, computing the interest on the balance annually, and said Healy to pay one-third of the costs of suit. And we ask the authority of the Court to compromise said suit as above. "Joseph Baker, *Att'y for Ex'rs of N. Gilman's estate.*

"*Augusta*, ——— 13, 1867."

"Kennebec county. — *In Probate Court, held at Augusta, on the second Monday of May*, 1867.

"On the foregoing petition,

"*Ordered*, — That the said executors have authority to compromise the claims of said estate against Wm. H. Healy, as requested therein. "H. K. Baker, *Judge*."

J. Baker, Att'y for the plaintiffs, testified: — This petition is in the handwriting of Mr. Libbey, signed by me, as it appears, as attorney for the executors of Nathaniel Gilman, deceased. My present impression is, I had no communication with Charles B. Gilman in relation to this compromise, but of that I am not certain. I took the statement from Mr. Libbey; he and I had an understanding that such was the arrangement. I had no authority from Anna K. Gilman to act in relation to the compromise in any way, and, when it came to her knowledge, she repudiated the whole thing. She did not assent, but objected to it. I mean to say I had no authority from her to originate this proceeding

in the Probate Court. The first communication I had with her was after I understood that the matter had been settled, and she then refused to give her assent to the settlement.

A. Libbey, Att'y for the defendant, testified:—I never had any communication with Charles B. Gilman in regard to the settlement of this estate. Gen. Moor, who acted as counsel for the executors in the settlement of their matters, communicated to me the fact that an agreement had been made by the executors for the settlement of this action. My client also communicated the same information. The latter part of April or the first of May, Anna K. Gilman sent a note to me, requesting me to meet her at the Augusta House, for consultation on some business. I went there and met her. We consulted first in regard to an equity suit by her mother against her and Charles, as executors. After we got through with that, I said to her that I understood an agreement had been entered into for a settlement with Mr. Healy. She said there had been negotiations between Mr. Healy, Gen. Moor and Charles, and that one time she assented to it, but on reflection she did not feel quite satisfied to have it settled by the allowance of $318 on the $900 note, which Mr. Healy alleged was in the hands of her father, coming from her grandmother's estate to him, and which her father, Nathaniel Gilman, had agreed, as Healy alleged, to allow on the $900 note. She said there were several grandchildren who would claim the same sum if they allowed that to Healy on that ground, and that was the objection she had to the settlement. I said to her, if that was her objection, I thought it could be obviated by allowing it to Mr. Healy as a payment on the $900 note, without its appearing from what source it came. Then she said her counsel in New York had said to her that there might be another objection; it was doubtful whether they, as executors, had authority to compromise a suit by allowing sums in payment which were not really payments, and it might interfere with the settlement of the estate in New York. I told her we had a statute authorizing Probate Courts

to pass decrees authorizing a compromise and settlement of controverted claims, and that a petition might be made to the Court, and the decree of the Court would be full authority for the executors to settle. She stated, if that could be done and done so that it would not appear that the $318 came from her grandmother's estate, she would assent to it, and that the petition might be made to the Probate Court for that purpose. She stated that Mr. Baker was her attorney, and that he could sign it. That was all, in substance, that passed between us in regard to the settlement of the action. I mentioned to Mr. Baker the fact, and, at his suggestion, I drew up the petition and he signed it, relying, I suppose, upon the statement I made to him. When I next saw Miss Gilman, which I think was in July, she informed me she had changed her mind and would not assent to that settlement.

By agreement of parties, the case was withdrawn from the jury and submitted to the full Court, upon so much of the foregoing evidence as is competent and admissible, the Court to render such judgment as the legal rights of the parties may require.

J. Baker, for the plaintiffs.

1. One of two joint executors, who have given one joint bond and are therefore each liable *per my et per tout*, cannot compromise for less than the face a debt due the estate, and allow disputed offsets and give a valid discharge, without the consent and against the protestations of the other.

2. Probate Court granted a power to the two plaintiffs jointly, *pendente lite*, to compromise the suit. It was a *trust* conferred upon two, relying upon their united judgment. One cannot execute the joint trust when the other refuses.

3. The discharge is not under seal, and it was not given for any new consideration. *Lunt* v. *Stevens*, 24 Maine, 532.

4. The discharge is not admissible under the general issue, but is matter in defence, arising "*puis darrein continuance.*"

Rowell v. *Hayden*, 40 Maine, 582; *Fiske* v. *Holmes*, 41 Maine, 441–5; *McKeen* v. *Parker*, 51 Maine, 389.

A. Libbey, for the defendant.

APPLETON, C. J.—The plaintiffs sue as executors of the last will and testament of Nathaniel Gilman. After this suit was commenced, they were authorized by the Judge of Probate for this county to compromise the claims of the defendant against the estate of said Gilman.

The Judge of Probate, in authorizing the executors to compromise, acted under the provisions of the Act approved March 22, 1864, c. 250, § 1, which is in these words:—"Probate Courts may authorize executors, guardians and trustees to adjust by arbitration or compromise, any claims for money or property, in favor of or against the estates by them represented."

After authority thus given, one of the executors compromised the claims in controversy and gave the defendant a discharge in full without the assent of his co-executrix.

The question presented is whether one co-executor can give a discharge without such assent. The case is submitted upon the evidence, so far as the same is admissible and competent.

By the common law, "co-executors, however numerous, are regarded in law as an individual person, and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all; for they have all a joint and entire authority over the whole property. Hence a release of a debt by one of several executors is valid, and shall bind the rest." 2 Williams on Executors, 620. An act by one is deemed the act of all, hence one of several executors may release the liability of a witness. *Shaw* v. *Berry*, 35 Maine, 279.

It is obvious, therefore, that either executor might have given a valid discharge of the claims in suit. The statute, c. 350, § 1, only authorizes that to be done under the sanction of the Court, which could have been done before its

passage, without such sanction. It protects the executors when acting under the authority of the Judge of Probate. It in no way limits or restricts the powers of the executors or either of them. As either might give a discharge without applying to the Probate Court, so either can do it after such application and leave granted.

The object of the Act referred to was to enable executors and administrators, by obtaining previous authority from the Judge, to compromise with debtors with perfect safety and without being subjected to expense in sustaining their acts. *Wyman's Appeal*, 13 N. H., 18.

It is well settled that, when several plaintiffs must join in a personal action, a release of one joint plaintiff is a bar to the suit. *Hall* v. *Gray*, 54 Maine, 231.

The point is taken that a proper plea has not been filed. But of that we cannot judge, as the pleadings have not been furnished us. The case is before us "to render such judgment as the legal rights of the parties may require." The defence is an equitable one. It is not alleged that there was unfairness in the compromise. If there were any formal error in the pleadings, which is not shown to be the case, the Court would have authority to allow an amendment, if necessary for the purposes of justice, or even to allow a new plea to be filed. *Rowell* v. *Hayden*, 41 Maine, 582. *Judgment for defendant.*

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

JONATHAN BASSETT *versus* MOSES BASSETT *& al.*

A deed of warranty duly executed and delivered, but unrecorded, of one undivided half of certain lands therein described, may, by consent of the parties thereto, be altered by erasing the words "one undivided half of;" and a re-delivery of such altered deed will render it effectual to convey the whole of the premises without a re-acknowledgment.

On Report.

Writ of Entry. Writ dated July 18, 1865. Plea, general issue, with brief statement averring the title to the demanded premises to be in the defendant Reuben Weeks, and that the defendant Bassett was in possession under him.

The deed from Moses Bassett to Reuben Weeks, covering the premises, was duly executed, delivered, acknowledged and recorded, June 21, 1865. The remaining facts sufficiently appear in the opinion.

Libbey & Snow, for the plaintiff.

J. Baker, for the defendants.

Walton, J. — This is a real action, and is referred to the law court on a report of the evidence.

The suit is between father and son. In 1844, the father deeded to his son an undivided half of his farm. In 1850, he deeded the other half. The son then held the title to the whole. In 1852, the son re-deeded to the father an undivided half of the farm. In 1864, he agreed to re-deed the other half. To effect this, he took the deed of 1852, which had not then been recorded, and, with the consent of the father, erased the words "one undivided half of." The deed then in terms purported to convey the whole of the farm. The deed was then delivered anew, and put on record. If the alteration and re-delivery of the deed was effectual to convey the whole of the farm, the plaintiff admits that this action cannot be maintained. We have no doubt such was the effect. Our reasons for this conclusion are stated in the opinion in another suit between these parties, in which the son claims to recover of the father the value of one-half of the premises thus conveyed. See p. 130.

Judgment for defendants.

Appleton, C. J., Cutting, Dickerson, Barrows and Tapley, JJ., concurred.

JONATHAN BASSETT *versus* MOSES BASSETT.

Although a deed acknowledges the receipt of a consideration, the grantor may show that none was in fact received, when his purpose is to recover the consideration and not to defeat the operation of the deed.

Where, as the consideration of a conveyance of land by the plaintiff to the defendant, the former relies upon the parol promise of the latter to convey certain other land to him, and the defendant refuses to execute such promise, the plaintiff may recover the value of his conveyance from the defendant upon an implied assumpsit.

And, in such case, the plaintiff may prove the special agreement, not as a basis of recovery, but as a declaration bearing upon the question of value.

And, if the plaintiff can show that the defendant agreed to give another piece of land for it, worth $2000, such agreement is a practical admission that the land conveyed by the plaintiff was worth that sum.

If a deed of one undivided half of certain premises therein described, once completed and delivered, is, years afterwards, surrendered for the purpose of striking out the words "one undivided half of," so that its terms will embrace the whole of the premises, and it be again delivered and accepted with intent that it shall take effect and become operative as an instrument of conveyance, the law will give it such effect, although not acknowledged.

If the plaintiff convey land to the defendant, in consideration of the latter's parol promise to convey certain other land to the former, and the defendant refuses to execute such promise, the plaintiff need not demand a deed from the defendant before commencing his suit for the value of the land thus conveyed, if the defendant had put it out of his power to comply with such demand, by conveying to another the land thus promised to be conveyed to the plaintiff.

ON EXCEPTIONS, and MOTION to set aside the verdict as being against evidence, and because of the alleged excessive amount of damages.

ASSUMPSIT to recover the value of certain real estate alleged to have been conveyed by the plaintiff to his father, the defendant. The writ was dated July 14, 1865.

It appeared on the part of the plaintiff that, on June 7, 1852, he duly executed, acknowledged and delivered to the defendant a deed of warranty of one undivided half of a certain farm therein described; that, about the middle of February, 1864, the parties to the deed met, when, as the plaintiff testified, the defendant verbally agreed to convey

to him all that part of a certain lot of land which lay on the east side of a certain road, provided the plaintiff would convey to the defendant the remaining half of the farm mentioned in the deed of June 7, 1852; that, thereupon said deed, not having been recorded, was produced, when the words "one undivided half of" were erased and the deed re-delivered by the plaintiff to the defendant, without being re-acknowledged. This deed, thus altered, was recorded April 4, 1865. The defendant objected to all testimony as to the consideration, upon the ground of the receipt in the deed and statute of frauds; but it was admitted.

The plaintiff also testified that he demanded of the defendant a deed of that part of said lot lying on the east side of the road, and that the defendant refused, declaring he would not "deed a foot of his land as long as he lived." It also appeared that the defendant conveyed the premises to Reuben Weeks, June 21, 1865. Several witnesses testified that the whole of the farm was worth $4000, and that all of the lot mentioned, lying on the east side of the road, was worth $2000.

The defendant's testimony tended to deny that of the plaintiff. Several witnesses for the defendant set the value of the lot No. 7, on east side of the road, lower than those of the plaintiff.

The defendant contended that the deed from plaintiff to defendant, altered as stated by plaintiff, did not convey the whole farm, but only the undivided half as originally made; but the Court instructed the jury, for purposes of this trial at least, it did convey the whole. The defendant also contended that plaintiff must prove that he made a demand for a deed of the piece of land east of the road belonging to No. 7, before he could maintain this action, and that there was no sufficient evidence of such a demand. The Court on this point instructed the jury that they would consider the evidence bearing directly on this point, and decide for themselves whether demand had been proved, and also instructed them that, if they found that defendant had put it out of

his power to comply with such demand by conveying the land to another, a demand was not necessary, otherwise it would be. The defendant also requested the following instructions, which the Court declined to give. That, in estimating damages, they should not take in consideration the value of that part of No. 7 lying on the east side of the road. But did instruct them that the measure of damages was the value of the undivided half conveyed in the deed at the time it was conveyed, and that, if there was any testimony in the case which satisfied them that the defendant considered that part of lot No. 7, east of the road, as of equal value with the one undivided half conveyed, and agreed to give it as equivelant therefor, they might consider it an admission on his part of the value of the half conveyed, and give it such weight as in their judgment it was entitled to, taken in connection with the other evidence in the case upon that point.

The Court also instructed the jury that, if they find, on the principle stated by him, that the plaintiff was entitled to recover, they would add interest on the sum they fixed as the damages, from the time of demand and refusal to deed.

The verdict was for the plaintiff for $2125, and the defendant alleged exceptions.

J. Baker, in support of the exceptions.

I. Plaintiff conveyed no title to defendant, as the altered deed was not effectual for that purpose.

II. But, if he did convey a title, it is not competent for him to prove the consideration therefor within the scope of his writ. Such evidence is inadmissible:

1. Because the receipt of the consideration is acknowledged in the deed itself, a solemn instrument under seal, and this imports a pecuniary consideration actually paid; and now the plaintiff proposes to contradict this receipt and show not only that the pecuniary consideration was not paid, but that there was no agreement to pay it, but to pay in land.

2. Because the contract set out in the writ is void as being

within the statute of frauds, as a parol agreement to convey real estate. As set out in the writ, and as the evidence tends to prove, this was not a sale of land for money, but an exchange of land — land for land. The only consideration for the plaintiff's conveyance to defendant, was defendant's *parol* agreement to convey other land to plaintiff. Evidence of this kind is not admissible, and was seasonably objected to. 2 Washb. on Real Property, 619, § 17; *Griswold* v. *Messenger*, 6 Pick., 517.

Counsel also elaborately argued his motion.

Libbey & Snow, for the plaintiff.

WALTON, J. — This is an action of assumpsit in which the plaintiff claims to recover the value of certain real estate which he says he conveyed to the defendant. The jury returned a verdict for the plaintiff. The defendant excepts to certain rulings of the presiding Judge. He has also filed a motion to have the verdict set aside as against evidence, and because, as he says, the damages are excessive. We do not think the damages are so excessive, or the verdict in other respects so clearly against the weight of evidence, as to warrant us in setting it aside. Nor are we able to discover anything erroneous in the rulings of the presiding Judge.

1. The law is now well settled that, notwithstanding a deed acknowledges the receipt of a consideration, the grantor may show that none was in fact received, when his purpose is to recover the consideration and not to defeat the operation of the deed. *Goodspeed* v. *Fuller*, 46 Maine, 141.

2. While it is true that an action cannot be maintained for the breach of a parol promise to convey land, (such a promise being within the statute of frauds,) it is also true that when such a promise has been relied upon as the consideration of a conveyance, and the party promising neglects or refuses to keep his promise, the other party may recover the value of his property upon an implied assumpsit, and prove the special agreement, not as a basis of recovery, but as a declaration of the defendant bearing upon the question

of value, just as any other declaration of a party may be proved. If the plaintiff can show that the defendant was willing, and in fact agreed, to give another piece of property for it, that was worth $2000, it is a practical admission that the property conveyed was worth that sum. *King* v. *Brown*, 2 Hill, 485; Brown on Stat. of Frauds, § 118.

3. There is no rule of law prohibiting the alteration of a deed by the parties to it. An alteration by one party without the consent of the other will avoid it. But if an alteration is made by consent of all the parties to it, and the grantor assents that the grantee shall retain it in its altered form, such assent, says Mr. Greenleaf, amounts to a redelivery, and warrants the jury in finding accordingly. A deed takes effect when it is delivered, and there is no rule of law prescribing to the grantor the order in which the several acts necessary to complete it shall be performed. He may sign and seal a blank and fill it up afterwards, or he may fill the blank first, and then sign and seal it; and, if a deed, once completed and delivered, is surrendered for the purpose, he may as well alter it over for the purpose of making a new deed, as to use a new blank; and if, when a new deed is thus made by altering an old one, it is again delivered with intent that it shall take effect and become operative as an instrument of conveyance, the law will give it such effect. 1 Greenl. Ev., (11th ed.,) § 568, a., and notes, and authorities there cited.

4. It was not necessary for the plaintiff to demand a deed of the defendant before commencing his suit, if the defendant had put it out of his power to comply with such a demand by conveying the land to another. "A demand wholly useless and nugatory need not be made."

The rulings and instructions of the presiding Judge were in harmony with the foregoing principles of law. We fail to discover any error in them.

Motion and exceptions overruled. — Judgment on the verdict.

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

EBEN M. KNIGHT, *Adm'r*, *versus* SANDERS MACOMBER.

R. S., c. 81, § 112, does not make the expiration of twenty years a bar to a suit upon a judgment; such a lapse simply creates a presumption of payment, which may be rebutted.

Evidence that three executions upon the judgment in suit were returned in no part satisfied, — that the debtor, upon demand of payment, replied he had no property and could not make payment; that, at about the time of the rendition of the judgment, he put his property, real and personal, out of his hands, and claimed not to be the owner of any property since, and his continued reputation of insolvency, is sufficient to repel the presumption of payment, arising from a lapse of more than twenty years.

ON REPORT.

DEBT on a judgment of the late District Court, Middle District, recovered in favor of Julia Macomber, the plaintiff's intestate, at the August term, 1844, against the defendant for one year's alimony of $44. Writ dated Feb. 19, 1866. Plea general issue.

It appeared that three executions were issued upon the judgment in suit, dated Oct. 16, 1844, March 6, 1847, and May 30, 1850, respectively, which were severally returned by Moses Whittier, a deputy sheriff, "in no part satisfied."

Moses Whittier, called by the plaintiff, testified: — While deputy sheriff, had for collection an execution in favor of Julia Macomber against the defendant; called on defendant for payment of same, and he replied that he had no property and could not make payment. He made no payment to me. The execution was on a decree of divorce and alimony.

Asa Gile, called by plaintiff, testified: — I am and have been for the last thirty years well acquainted with Sanders Macomber of Readfield; on the 28th day of March, 1853, he was at my office for the purpose of making disclosure of his affairs under the poor debtor laws of this State. At this time and a few days before, when his citation was issued, had some talk with him as to his property and the amount of his indebtedness; he told me what he was owing and to whom he was indebted, and, in the course of these conver-

sations, he spoke of his liability to his former wife under the decree of the Court granting her divorce and allowing alimony. He then stated that he never should pay anything on that claim, and made inquiry about the executions which had been issued against him in that case, and wished me not to aid or assist in having it enforced against him. About the time the proceedings for divorce were commenced, said Macomber put his property, personal and real, out of his hands, and claimed not to be the owner of any property. At the time of these conversations he had for several years had the reputation of being insolvent, and continued to have such reputation until after the decease of his wife, claiming that property in his possession was not owned by him.

On the foregoing statement of facts the Court were to draw such inference as a jury would be authorized to draw, and to render such judgment as the law and facts require.

E. O. Bean, for the plaintiff.

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

The judgment in suit is presumed to have been paid. R. S., c. 81, § 112.

The plaintiff's evidence is not sufficient to repel the presumption. It does not show a distinct recognition of the debt, as in *Brewer* v. *Thomes*, 28 Maine, 81, or a partial payment, as in *Denny* v. *Eddy*, 22 Pick., 533.

Whittier's testimony does not show his demand and defendant's reply to have been within twenty years. His first execution was dated 1847, and the reply was to this. The return, "in no part satisfied," is no evidence of demand or effort to collect, but simply a non-receipt of payment.

Gile's testimony fails because he says that, in course of these conversations, Macomber spoke of his liability to his former wife "under the decree of the Court granting her divorce and alimony." This is a judgment of the District Court, and was not alluded to by defendant to Gile. Defendant spoke of not paying the decree and not of the judg-

ment. Nothing but direct and unequivocal testimony should be allowed to overcome the presumption.

APPLETON, C. J. — At the October term of the Supreme Judicial Court, A. D. 1842, Julia Macomber, the plaintiff's intestate, obtained a divorce from the defendant with an allowance of $44 a year as alimony.

At a term of the late District Court, the alimony for a year remaining unpaid, she recovered judgment for the same and costs. Three several executions were issued, upon each of which the return of "in no part satisfied" was made by the officer having the same for collection. The last execution bore the date of May 30, 1850.

The defendant relies on R. S., 1857, c. 81, § 112. "Every judgment and decree of any court of record of the United States, or any State, or of a justice of the peace, shall be presumed to be paid and satisfied at the expiration of twenty years after any duty or obligations accrued by virtue of such judgment or decree."

But the presumption thus created may be rebutted. It constitutes no peremptory bar to the maintenance of an action upon such judgment. *Brewer* v. *Thomes*, 28 Maine, 81; *Denny* v. *Eddy*, 22 Pick., 533.

In the present case this presumption is abundantly rebutted. Three several executions were returned unsatisfied, the debtor, when called upon for payment, replying that he had no property and could not make payment. Referring to this claim, the defendant told Asa Gile that he should never pay anything upon it. According to the testimony of this witness he put his property out of his hands prior to the divorce to avoid paying what might be decreed to his wife, and, from that time, has ever had the reputation of being insolvent. From all the evidence introduced, we are fully satisfied the judgment in suit has never been paid.

Judgment for the plaintiff.

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

VASSAL D. PINKHAM *versus* JOHN V. DOROTHY.

The right to impress property to be used for the taking care of persons infected with sickness dangerous to the public health, can only be exercised when expressly granted.

Chapter 14 of R. S. does not authorize the impressment of a stagecoach for the removal of a person thus infected.

ON EXCEPTIONS.

TRESPASS for taking and using plaintiff's stagecoach to transport persons infected with small pox to a hospital provided by the municipal officers of Skowhegan in Somerset county.

The defendant undertook to justify under Martin M. Ward, a deputy sheriff of Somerset county, who acted under the following warrant:—

"To Eusebeus Weston and James Bell, Esq'rs, Justices of the Peace in and for the county of Somerset:—

"The undersigned, selectmen of Skowhegan, represent that Mehitable Nicholas, Sarah J. Hayden, Elbridge G. and William H. Hayden, Mary J. and Frederick York, Martha Colway and her two children, names unknown, Elizabeth and Sally Belougee and three small boys of Louis Belougee, names unknown, all of said Skowhegan, in said Skowhegan, are infected with contagious sickness, and they therefore request you to issue to a proper officer a warrant requiring him to remove said infected persons, and to impress and take up convenient houses, lodgings, nurses and attendants, and other necessaries for the accommodation, safety and relief of said persons.

"Dated at Skowhegan this 31st day of March, A. D. 1864. "James B. Dascomb, } *Selectmen of*
"Daniel Snow, } *Skowhegan.*"

[L. S.] "State of Maine.—Somerset, ss.—To the sheriff of said county or either of his deputies:—

"Pursuant to the above application and by virtue of authority vested in us by law, you are hereby required, in

the name of said State, to proceed under the direction of the municipal officers of the town of Skowhegan, in said county, and remove Mehitable Nicholas, Sarah J., Elbridge G. and William H. Hayden, Mary J. and Frederick York, Martha Colway and her two children, names unknown, Elizabeth and Sally Belougee and three small boys of Louis Belougee, names unknown, all of said Skowhegan, and infected with contagious sickness, and also to impress and take up convenient houses, lodgings nurses and attendants, and other necessaries for the accommodation, safety and relief of the said infected persons while sick.

"Given under our hands and seals at said Skowhegan, this first day of April, A. D. 1864.

"Eusebeus Weston, } *Justices of*
"James Bell, } *the Peace.*"

"Somerset, ss.—April 3, 1864.—By virtue of the foregoing precept, I have proceeded under the direction of the municipal officers, and removed the persons named in said precept to the building on the agricultural grounds, which I impressed for that purpose; that, in order to do so, it was necessary to have a suitable carriage for that purpose, and I found a coach in said building when I took possession of it, and I directed John V. Dorothy to take the same, and it was taken and used for the purpose aforesaid, and the persons named in said precept were removed to said building, and I furnished them with convenient lodgings, nurses, attendants and other necessaries for their accommodation, safety and relief while sick.

"M. D. Ward, *Deputy Sheriff.*"

Martin D. Ward, called by the defendant testified:—I engaged the horses of defendant myself. They were under my control after that. I ordered defendant to proceed to Fair Ground and get a carriage that I supposed was there; he got it and brought it and left it in street near Neil's store, and had nothing else to do with it. I put another man into possession and control of it. I took it there. Frank Gray was the driver after that. The coach was used to run

to the Fair Grounds two or three times Sunday, and no other day. It was carried on to the island and cleansed and then taken to barn one-half mile out of town, and remained there. This from three to six days after it was used. I paid most of the bills and town paid me. No injury or damage to the coach, only wear on easy road.

The defendant contended that the warrant and proceedings under it were his sufficient justification; but the presiding Judge ruled otherwise *pro forma*. And the defendant alleged exceptions.

J. Baker, for the defendant, elaborately contended that the ruling was erroneous, arguing, among other things, that the power to remove carries with it all the necessary means to that end.

A. Libbey, for the plaintiff, contended that the statute, being in derogation of the natural rights of the citizen, should be construed strictly, and cited *Mitchell* v. *Rockland*, 45 Maine, 496.

APPLETON, C. J.—By R. S., 1857, c. 14, § 1, the municipal officers of a town are authorized to provide for the safety of its inhabitants, "by removing" any person infected with any disease or sickness dangerous to the public health, to a separate house, &c.

By § 26, they are authorized to provide hospitals for the reception of persons having the small pox or other disease dangerous to the public health.

By § 29, hospitals are to be provided on the breaking out of any infectious disease "and they shall cause such sick and infected to be removed thereto, unless their condition will not admit of it without imminent danger; in that case, the house or place where the sick is shall be deemed a hospital for every purpose aforesaid."

By § 7, provision is made for the removal of infected articles and for the *impressing* of "convenient houses or stores for the safe keeping of such infected articles."

In none of these cases is the power given to impress the means of removal, whether the removal be of the sick or of infected articles. The officer is to provide the means of removal; not to impress them. The removal is commanded. The officer is to discharge this as he does other duties. He provides alike for the removal of the sick; of infected articles; and of debtors and convicts, in such mode and manner as he judges most expedient.

By § 5, "any two justices of the peace may issue a warrant directed to a proper officer, requiring him to remove any person infected with contagious sickness, under the direction of the municipal officers where he is; *or* to impress and take up convenient houses, lodgings, nurses, attendants and other necessaries for the accommodation of the sick."

This section is in the alternative. In case the condition of the sick will admit, they are to be removed under § 29 to the hospital. If not in condition to be safely removed, authority is given to *impress* "the house or place where the sick is."

The first clause of the section authorizes the issuing a warrant "directed to a proper officer, requiring him to remove any person infected with contagious sickness, under the direction of the municipal officers where he is." This gives the power to remove. It gives no authority to *impress* for the purposes of removal. The authority for removal is given, but the proper officer is to discharge the duty as he does other duties, by means of his own procurement. The right to impress is not to be inferred. It is only to be exercised when expressly granted. The whole power of removal is given in this clause, and it contains nothing from which a right to impress can possibly be inferred.

But it may not be expedient to remove. The situation of the infected may be such that removal would be dangerous. Accordingly, provision is made when removal for any cause becomes inexpedient, by the latter clause of § 5, in these words, —"*or* to impress and take up convenient houses and lodgings, nurses and attendants, and other neces-

saries for the accommodation, safety and relief of the sick." This provision is for the relief of the sick in the houses, &c., impressed. The subject of removal is provided for in what precedes. The removal is to the hospital. The impressment is authorized as to specific things, and the authority to impress is not to be enlarged by construction, upon any recognized principles of interpretation. "Other measures for the accommodation, safety and relief of the sick," are for the sick in the houses or lodgings impressed. They do not include horses or carriages. The context negatives this. The right to impress is given after the authority to remove. The last clause neither expressly nor impliedly has any relation to the subject of removal. It refers to the sick who cannot be removed, and, not being removable, the house, or lodgings in which they are, is impressed, together with "other necessaries" for their accommodation.

Exceptions overruled.

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

WALTON and TAPLEY, JJ., did not concur.

JUSTIN E. SMITH *versus* SAMUEL H. SAWYER.

Where a person, other than a regular party to a note voluntarily pays it for the honor or credit of any indorser without request, he does not thereby acquire a right to repayment from any of the prior parties thereto.

ON REPORT.

ASSUMPSIT upon a negotiable promissory note against the second indorser.

The facts sufficiently appear in the opinion.

J. Baker, for the plaintiff.

A. G. Stinchfield, for the defendant.

CUTTING, J. — This action is brought against the defendant as second indorser of a note of the tenor following, viz.:

"Portland, July 9th, 1859. — Four months after date, I promise to pay to the order of Files & Emery, five hundred dollars, payable at either bank in Portland. Value received. (Signed) "Robert Files."

Indorsements — "Files & Emery, S. H. Sawyer, B. D. Peck."

Assuming that the plaintiff, upon the production of the note duly protested, and legal notice to the parties, has established, *prima facie*, the right of recovery, we are brought to the consideration of the defence.

Peck swears that the note was given to him by Files & Emery to raise money upon for their benefit and that it was discounted by the Norumbega Bank of Bangor, at his request, for the benefit of Files & Emery, to whom he paid over the proceeds, and that the defendant and himself were only accommodation indorsers. That subsequently Files & Emery conveyed to him their stock of goods, of the value of between eleven and twelve thousand dollars, for the purpose of securing him for liabilities assumed for them. That, at the time the note matured, he had funds in the Norumbega Bank, partly accruing from the proceeds of the sale of that stock of goods, and, according to the best of his recollection, he paid the note by giving his check to the cashier of the bank, or by giving him current funds to meet it.

To rebut this testimony, *George R. Smith* was introduced by the plaintiff, who testified that he was cashier of the bank at the time the note was discounted, and that neither Peck or any party to the note ever paid it to the bank. — That the bank failed in Dec., 1859. After that the note remained in his custody until he passed it to the plaintiff, without the knowledge of the officers of the bank; that he owed the plaintiff, and, if he collects the note, his liabilities will be diminished to that amount.

On cross-examination, the witness stated that the facts dis-

closed in his letter to Peck were substantially true, which is as follows; viz.:—

"Bangor, July 5, 1865.—Friend Peck.—I received a few days ago from my brother's attorney, a list of interrogatories to be put to you in the case of my brother against S. H. Sawyer, on Files' note indorsed by him.

"I thought I would write you about it, for you may have forgotten about the note. The note was discounted for you, together with sundry other notes, July 23, 1859, by the Norumbega Bank, and when it became due was sent to Portland for payment, and was protested for non-payment. This, I think, was in November, 1859, and, at that time, you will recollect it was very important to have your credit stand good at the Norumbega Bank, and therefore I took up the note with my own funds. The note has never been paid to this day, or any part of it. My brother soon afterwards loaned me some money and I gave him the note in part payment. I write this so that you may know the history of the note. I don't know as it is necessary to state any of the above facts in your answers."

"Respectfully yours,

"Geo. R. Smith."

Now, upon the foregoing facts, substantially stated, the parties have agreed that this Court should render such judgment as they and the law require.

Upon the facts we are inclined to the opinion that Peck never paid the note to the bank, although their mutual relations, perhaps, never have, and never will be fully disclosed. At the same time we may well assume that Geo. R. Smith, from his own funds, paid the note to the bank in order to have Peck's credit stand good at that institution. In other words, he paid the note *supra* protest without the request of any parties to the note. Under such circumstances, it is well settled as to *notes*, the person so paying has no cause of action against any party to the note, as was settled in *Willis* v. *Hobson*, 37 Maine, 405, where SHEPLEY, C. J., remarking upon the authority of Story on Notes, § 453, uses

the following language: — "When a person, not being a regular party to a note, pays it for the honor or credit of the maker, or any indorsers, without request, he does not thereby acquire a right to repayment from any of the prior parties, for whose honor he may have paid it. He can no more make another his debtor by the payment of a note without request, express or implied, than he could by the payment of any ordinary account."

If George R. Smith's letter to Peck "is substantially true," this case is within the foregoing decision. If it be untrue, then it would appear that Smith, the cashier, without authority and in violation of his legal duties, selected from the fossil remains of an insolvent bank, for his private use, the note in suit, and transferred it to the present plaintiff. A charitable construction of his testimony inclines us to give force to the disclosures in his letter. Besides, the lapse of time, during which the note was suffered to remain in the bank after protest, without any action, has a strong tendency to prove that the note had been paid, either by Peck or Smith. *Plaintiff nonsuit.*

APPLETON, C. J., WALTON, DICKERSON, BARROWS and TAPLEY, JJ., concurred.

THOMAS HOVEY, *Adm'r*, *versus* HORATIO PAGE.

An action for an alleged breach of promise of marriage, when no special damage is alleged in the writ, does not survive in behalf of the promisee.

An allegation of special damage, which would cause the action to survive, must be of damage to the property and not to the person merely, and such as would be sufficient of itself to sustain a suit.

An allegation that, after such alleged promise of marriage, the deceased promisee had a child born to her out of wedlock, now living, and that the promisor is the father of such child, if proved, would only increase the damages on the ground of injury to the character and not to the estate.

Nor does such action come within the provisions of R. S., c. 87, § 8.

On Report.

Assumpsit, to recover damages for an alleged breach of promise to marry. The action was commenced by the plaintiff's intestate, in her lifetime; but, she having deceased, it is now being prosecuted by her administrator. The defendant contended that the action did not survive.

The plaintiff offered to prove that, in 1851, the defendant (then residing in the west) was in the habit of visiting the deceased and corresponding with her for many years, together with other facts tending to show the promise and its breach by the defendant.

The plaintiff also offered to prove that, after such alleged promise, the deceased had a child born to her out of wedlock, now living; that the child was begotten in Hallowell, and that the defendant was the father of the child; that the defendant is possessed of a large amount of property in the city of St. Louis, where he now lives and has lived for many years past, and since said child was begotten.

The defendant contended that evidence of the facts contained in the latter offer was inadmissible. And thereupon the action was "continued on report," with the agreement that, if upon so much of the foregoing evidence as may be admissible, the full Court should be of the opinion that the action survived, the case was to stand for trial; otherwise, a nonsuit was to be ordered.

A. G. Stinchfield, for the plaintiff, cited 2 Greenl. on Ev., 268 to 273; 4 Pet., 172–182; R. S., c. 97, §§ 8 and 9; *Paine* v. *Ulmer*, 7 Mass., 317, n. 3; *Leland* v. *Stone*, 10 Mass., 462; *Baxter* v. *Bradbury*, 20 Maine, 262.

L. Clay, for the defendant, in addition to the cases referred to by the Court, cited Chitty on Cont., 159–60; *Chamberlain, Adm'r*, v. *Williamson*, 2 M. & S., 408; Addison on Cont., 677; *Lattimore* v. *Simmons*, 13 S. & R., 183; Pars. on Cont., 552–3.

DANFORTH, J. — This action was commenced by the plaintiff's intestate in her lifetime, and is for an alleged breach of promise of marriage. That such an action does not survive at common law, without an allegation of special damage, is well settled. *Stebbins* v. *Palmer*, 1 Pick., 70; *Smith* v. *Sherman*, 4 Cush., 408. Nor does it come within the provisions of R. S., c. 87, § 8. In this case, no special damage is alleged, but there is an offer to prove, for which the same effect is claimed, "that, after such alleged promise, the deceased had a child born to her out of wedlock, now living, and that the defendant is the father of the child." It is not necessary now to decide whether such testimony, with or without an amendment of the declaration, would be admissible; for we are of the opinion that, if the facts stated in the offer were proved, there would not be such special damage as to authorize the prosecution of the suit. In order to do so, it must be such as to affect the property and not such as is purely personal. The distinction between actions which do not survive, and those which do, is, that the former are to recover damages to the person only and the latter damages to the property. If any others survive it is by virtue of statutory provisions. Hence, the allegation of special damage which would cause the action to survive, must be of damage to the property, and such as would be sufficient of itself to sustain a suit.

That such was the understanding of the Court in *Stebbins* v. *Palmer*, is evident from the last sentence in the opinion, by which it is left in doubt whether, in case the action survives, the plaintiff would recover any more than the damage to the property. In *Smith* v. *Sherman*, it is held, "that it must be some damage of such a character, that it might be given in evidence, to aggravate the damage in one action, or be itself the substantive cause of action, as in trespass *quare clausum*, and conveying away the plaintiff's goods." As a matter of principle, it is evident that the effect of proof offered for the purpose of aggravating the damage, or to sustain special damage, could not be greater than if offered

in a separate action, for that which is merely incidental to the principal thing must fall when the principal falls,—and that which would not of itself sustain an action would not cause one to survive which would otherwise abate. Now the testimony offered and relied upon in this case, if admissible, would increase the damages only on the ground of injury to the character and not to the estate; nor would it of itself sustain an action, for, if seduction is relied upon, the plaintiff's intestate, if living, would have no legal cause of complaint. *Paul* v. *Frazier*, 3 Mass., 71. If the expense of supporting the child is relied upon, the only remedy is that provided by statute. 2 Kent's Com., 215.

Plaintiff nonsuit.

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

JAMES DUDLEY *versus* GEORGE A. WELLS & *Trustee.*

To authorize the Court to declare an unstamped promissory note "invalid and of no effect," it must appear that the omission to affix the stamp, provided for in the Act of Congress of March 3, 1865, was the result of an "intent to evade" the statute.

ON EXCEPTIONS.

The trustee disclosed that, on the 15th of Dec., 1865, he purchased a horse of the principal defendant, for which the former agreed to pay the latter $45, in five months from the day of sale, and gave him his negotiable promissory note on five months; that, on Jan. 1, 1866, the promisor paid to the promisee's wife, $10, to be indorsed on said note; that, on April 17, 1866, he was served with the writ in this action; that, about two weeks thereafterward, one Daniel Moore notified the trustee that he had purchased said note of the principal defendant; that he paid said note at ma-

turity to said Moore; and that, at the time of the service of the writ upon him, he owed the principal defendant nothing, except as disclosed.

In answer to specific interrogatories, the trustee declared that there was no U. S. revenue stamp upon the note when given, nor when he was served with the writ.

The presiding Judge discharged the alleged trustee upon the disclosure and the plaintiff alleged exceptions.

Libbey & Snow, for the plaintiff.

Gazlin, for the trustee.

APPLETON, C. J.—By the Act of Congress of March 3, 1865, a draft or note is declared "invalid and of no effect" when there is an "intent to evade the provisions of this Act." To authorize the Court to declare an unstamped instrument void, there must be an intent to evade the law. Whether there was such an intent or not is not made to appear. The inquiry is not made of the trustee, nor is there any proof on the subject. The note is not shown to be absolutely "invalid and of no effect." *Hitchcock* v. *Sawyer*, 39 Vermont, 413; *Tobey* v. *Chipman*, 13 Allen, 123; *Govern* v. *Littlefield*, 13 Allen, 127; *Willey* v. *Robinson*, 13 Allen, 128; *McGovern* v. *Hoesback*, 53 Penn. State Rep., 177. *Exceptions overruled.*

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

JULIA KIMBALL, *Exec'x*, *versus* HARRISON A. BILLINGS.

A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts as the agent or servant of one claiming to be the owner, and is ignorant of his principal's want of title.

And it is no defence to an action of trover that the property sold was government bonds payable to bearer, provided the principal was not the *bona fide* purchaser.

ON REPORT.

TROVER for the conversion of four hundred dollars of U. S. 7-30 treasury notes, Nos. 54,969, 73,089, and 73,090, each of the denomination of $100, with interest coupons attached, and Nos. 44,434 and 44,435, of the denomination of $50, with interest coupons attached. Writ dated May 12, 1864. Plea general issue.

William H. Kimball, called by the plaintiff, testified:— Lived with the plaintiff, my mother, in Gardiner, in 1862, 3 and 4. Capt. N. Kimball was my father. Knew all about the bonds. There were $3400 in bonds in a private safe in the house, in Feb., 1863. Was in the habit of cutting off the coupons and collecting them for mother. Kept a schedule of the numbers of the bonds. Collected interest Feb., 1863, when all the bonds were in the safe, of which mother kept the key. Went to the safe in August, 1863, to get coupons, when there were only $3000 in bonds. Made copies of my schedule and notified different banks. Found the three lost $100 bonds at Cobbosseecontee National Bank, J. Adams, cashier. The numbers corresponded with those in my schedule. Never found the $50s.

Joseph Adams, called by the plaintiff, testified:—Was cashier of Cobbosseecontee Bank in 1863 and 4. Purchased of defendant three $100 7-30 bonds in 1863 or 4, the numbers of which corresponded with Kimball's schedule. Think I had the two $50s. Had them of two ladies and a gentleman, neither of whom was Mrs. Witham.

Nath'l K. Theobald, called by the plaintiff, testified:—Reside in Gardiner, and was 14 years old last February. Knew Mrs. James Witham; one house between her and plaintiff's, my grandmother, where I lived in 1863 and 4. Knew her boy Winfield S. Witham. He called himself 18. He kept a shop in Gardiner. I was frequently at his mother's. I took from grandfather Kimball's safe $400 in bonds, day before the loss was discovered, and handed the money to W. S. Witham. Three $100 and two $50s. Before that, Mrs. W. said I might as well have the money as to have my uncles squander it. I gave one $100 bond to Mrs. W. She called me a good boy. She told me not to tell, if I did it would put me in State prison. Nothing could be done with her as she did not take the bonds.

Martin Burns, called by the plaintiff, testified:—Was with W. S. Witham when Nathaniel got the bonds,—three $100, and two $50s. Mrs. W. said,—"for God's sake don't tell, it will take me to State prison."

Harrison Billings, defendant, testified:—Kept grocery in Gardiner in 1864; knew Mrs. James Witham; she traded with me some; supplied her with goods; received some bonds from her, should say about three years ago, could not say the number; more than one; my impression is, three bonds. Think they were $100 pieces; could not say any $50s. Had them exchanged for her at her request, at the Cobbosseecontee Bank, Joseph Adams, cashier. Can't give the numbers; they were a little larger than greenbacks; some coupons attached; got money in exchange; sold no bonds to any one but Mr. Adams that I know of. She was about to settle with me for goods or had settled; can't say which. Can't tell the amount I received from Adams. She was, or had been, owing me about $30 for goods; can't say I took my pay out of the money. I was to send the money I got for the bonds to her, and suppose I did. I supplied her family, after that, about ten dollars. Soon after I took Mr. Wood as partner, and we continued to supply her; she paid me frequently for goods after that; I saw $300 in her

hands after that; can't say same money and same amount I sent her. Was told Witham was in the army; saw the $300 some months after I had the bonds; she put it into my hands; it has not gone back to her or her husband. A criminal prosecution was pending when she handed it to me. I did not negotiate any other bonds than those with Adams.

Had been dealing with Mrs. Witham sometime before,—some months, perhaps a year. Was told she had a son in the army, that he was a lieutenant, and had been in the army some time. When she traded with me, she told me her husband and son sent her money to pay. I knew the capacity in which her son was serving. I had no suspicion, at the time the bonds were handed me, she was not the owner. I was not acquainted with that kind of securities. She showed me one of the bonds; offered it in payment. I remarked to her that there was a premium on certain kinds of bonds, and thought there was on this kind; she said if there was a premium, she would like to sell some she had at home. I told her I could exchange them at the bank, and could learn what the premium was; she said she would bring them or send them down for me to exchange them; soon after Winfield came in, handed me a roll, said that was the money. I took it and went to the bank, had a part or the whole changed, gave the money I received for them to the same boy; I think all of it. Did not hear of any bonds being lost by Mrs. Kimball till sometime after, perhaps six months. I believed the bonds were her property at the time. She did not give me any account of how she came by them. Don't know there was any demand made on me before the suit, for the bonds or money received for them. The $300 she put into my hands at the time the criminal prosecution was commenced against her; she wished me to show it to Clay or Kimball, to convince them it was not stolen: I don't recollect she had requested me to be her surety at that time. I am now reminded there was something said about Mr. Sawyer and myself being sureties. I was not her surety. I was trusteed before I

paid back the money, — not more than a day or two after I received it. I have no claim on the money, unless it is my claim against her for ten dollars and the trustee process.

Cross-examined. — Had been acquainted with Mrs. Witham for considerable time. I supposed the Witham family worth considerable property. I supposed she owned the house where they lived; supposed Witham worth property; did not know. I think she showed me the bond the day I took them and sold them; she wanted me to see what they were worth; perhaps she asked me what they were worth; she did not appear to know their value. I supposed they were greenbacks, and supposed she thought so also. I had never heard of 7–30s then. I think she showed or handed me one as money. I did not pretend to know the value; she was a smart active woman; she did not assign any reason for wishing me to carry them to the bank. Had never had any business with her, other than small grocery bill. Don't recollect that we had any acquaintance other than at my store; sent the money to her by the boy; could not say I ever did anything of the kind for her before or since; perhaps had traded with her to the amount of $100 before that time. I think she told me she was going to get money to pay, from her husband and son in the army. She died about a year ago. Don't know her husband's business before he went into the army. He traded with me some before he left.

The case was taken from the jury and continued on report to the full Court, to draw such inferences as a jury might, and render judgment according to the law.

A. Libbey and *L. Clay*, for the plaintiff, cited *Gilmore* v. *Newton*, 9 Allen, 171; *Titcomb* v. *Wood*, 38 Maine, 561; *Stanley* v. *Gaylord*, 1 Cush., 536–550; *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532, 540, 550 and 559; 2 Hill. on Torts, 554, 557, 558; *Galvin* v. *Bacon*, 11 Maine, 28; *Atl. Bank* v. *Skinner*, 4 Allen, 290; *Mason* v. *Waitt*, 17 Mass., 560; *Riley* v. *Boston W. P. Co.*, 11 Cush., 11; *McPartland* v. *Read*, 11 Allen, 231.

J. Baker and *N. M. Whitmore*, for the defendant,

1. Bonds being payable to bearer, the property in them vested by delivery, same as bank bills. 1 Hill. on Torts, 50, 51, 52, c. 1, §§ 45, 46, 48; *Atl. Bank* v. *Merch. Bank*, 10 Gray, 532, 550; Williams on Pers. Prop., 422, §§ 311, 312; *Wheeler* v. *Guild*, 20 Pick., 545; *Miller* v. *Race*, 1 Burr., 452; 1 Smith's Leading Cas., 250; *Grant* v. *Vaughan*, 3 Burr., 1516; *Peacock* v. *Rhodes*, 2 Doug., 333; *Collins* v. *Martin*, 1 B. & P., 648.

2. Bonds were taken by defendant in good faith without fault on his part. He has committed no tort.

3. Defendant did not convert to his own use. He did what he did innocently. Was not *particeps criminis*. Made no profit. Is not culpable. *Burdett* v. *Hunt*, 25 Maine, 419. No *mala fides*. *Clark* v. *Shee*, 1 Cowp., 197; *Foster* v. *Pearson*, 1 C. M. & R., 849; *Goodman* v. *Harvey*, 4 Ad. & El., 870; *Mauran* v. *Lamb*, 7 Cowp., 174; *Pearce* v. *Austin*, 4 Wheat., 489; *Barburin* v. *Daniels*, 7 La., 481; *Woodhul* v. *Holmes*, 10 Johns., 231; *Saltus* v. *Everett*, 20 Wend., 267.

WALTON, J.—It is no defence to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title. Story on Agency, §§ 311 and 312, and authorities there cited; *Coles* v. *Clark*, 3 Cush., 399.

If, therefore, it be true, as the defendant says, that, in selling the bonds sued for in this case, he acted as the agent or servant of Mrs. Witham, and had no knowledge or suspicion that she was not the true owner of them, these facts constitute no defence to the suit. Mrs. Witham could not secure to him immunity for an act which she could not lawfully do herself.

Nor is it any defence that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond payable to bearer, might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases; nor to the agent of one not a *bona fide* holder. The evidence in this case satisfies us that Mrs. Witham was not a *bona fide* holder; that she received the bonds well knowing that they had been stolen, if she did not in fact procure the theft to be committed. The defendant took the bonds into his possession, and, as her agent or servant, sold them.

The sale was a conversion of them, which made not only Mrs. Witham, but the defendant, liable for their value to the true owner. — The rule of law protecting *bona fide* purchasers of lost or stolen notes and bonds, payable to bearer, has never been extended to persons not *bona fide* purchasers, nor to their agents.

In *Burdett* v. *Hunt*, 25 Maine, 419, cited by defendant, the servant was held not liable, because he did not participate in the illegal sale; he was a mere carrier of the goods from the person lawfully in possession of them to the person to whom they were sold; and the Court held that such a removal was not under the circumstances an act of conversion. But the doctrine is there recognized that a sale by the agent would have made him liable.

Bonds to the amount of $400 were stolen from the plaintiff, but the evidence fails to satisfy us that more than three hundred dollars worth of them came into the hands of the defendant and were sold by him. The exact date of the sale is not shown, but we are satisfied it was as early as the *first* of November, 1863.

Judgment for plaintiff for $300,
and interest from Nov. 1, 1863.

Appleton, C. J., Cutting, Dickerson and Tapley, JJ. concurred.

NATHANIEL BRYANT, JR., *Adm'r, in Eq., versus* CHRISTOPHER ERSKINE *& als.*

The condition in a mortgage of real estate provided — " that, if the said" mortgager, " his heirs, executors or administrators, shall pay to the said" mortgagees, * * " the sum of $2500, *or* shall well and truly support the said" mortgagees, " and the survivor of them during their natural lives" in the manner specified, " then the mortgage shall be void, otherwise shall remain in full force." On demurrer to a bill in equity, brought by the assignee of the mortgager against the assignees of the mortgagees, — *Held,*

1. That the condition was in the alternative and that the mortgager had his election; —

2. That the election once made could not be revoked; —

3. That, having elected the latter alternative, the mortgager was entitled to possession in order that he might comply therewith; —

4. That the services to be performed were owed by the mortgager personally and to the mortgagees alone; —

5. That the mortgager could not assign his interest to a stranger, and enable him to discharge the former's obligation, without the mortgagees' consent; and that the mortgagees could not assign their interest until after a breach;

6. That the bill, having alleged an assignment by the mortgager to the complainant's intestate, but failed to allege that the mortgagees, or either of them, assented to such assignment, and that the complainant's intestate might discharge the obligations assumed by the mortgager, is therefore defective; —

7. That such mortgages may be redeemed after breach.

Who should be made parties in such a bill.

BILL IN EQUITY, heard on demurrer.

APPLETON, C. J. — This is a bill in equity for the redemption of certain mortgaged premises. Three of the respondents demur and the third, Jane Linscott, has filed an answer. The questions now presented for adjudication arise upon the bill and the demurrer thereto. The demurrer admits the facts duly set forth in the bill.

On April 22, 1861, Ephraim Linscott conveyed the premises in controversy to Charles H. Linscott, by deed of warranty, who, on the same day, mortgaged them to Ephraim

Linscott and Jane Linscott, his wife. The condition of the mortgage was in these words:—

"Provided nevertheless, that, if the said Charles H. Linscott, his heirs, executors or administrators, shall pay to the said Ephraim and Jane, their heirs, executors, administrators or assigns, the sum of twenty-five hundred dollars, *or* shall well and truly support the said Ephraim and Jane and the survivor of them, during their natural lives, in as good and comfortable a manner as they have been accustomed to live, to furnish them and each of them with all necessary food, clothing, medical attendance, nursing, pocket money, with the use of a horse and wagon when necessary, all necessary fuel, and allow them to occupy the south part of the house, and pay all the taxes on said farm, and decently bury the said Ephraim and Jane, and erect suitable grave stones, then this deed shall be void, otherwise shall remain in full force."

Charles H. Linscott entered into possession of the premises conveyed to him and supported Ephraim Linscott and wife to their satisfaction, while he so remained in possession.

On the 14th Aug., 1861, Charles H. Linscott mortgaged these premises to the plaintiff's intestate, to secure the sum of three hundred dollars. On the 9th Oct., 1862, he quitclaimed and released the same to the plaintiff's intestate, who thereby acquired all the remaining interest of said Charles, subject to the prior rights of the first mortgagees. *Hoyt* v. *Bradley*, 27 Maine, 242.

On the 29th Sept., 1862, Ephraim Linscott assigned the mortgage in question to Harriett N. Harris. On the 13th Nov., 1862, said Linscott and wife joined in another assignment of the mortgage to Harriett N. Harris, from whom the respondents demurring derive their title.

Whether the plaintiff can maintain this bill depends upon the force and effect of the condition in the mortgage given by Charles H. Linscott to Ephraim Linscott and wife, dated April 22, 1861, and upon the rights respectively acquired

by the parties to this bill, by virtue of their several assignments.

The condition of the mortgage is to pay "the sum of twenty-five hundred dollars, or well and truly support the said Ephraim and Jane or the survivor of them, during their natural lives," &c.

The plaintiff does not, in his bill, offer to pay the twenty-five hundred dollars, but does offer to perform the other alternative condition and pay whatever may be due.

If the sum of twenty-five hundred dollars is to be regarded as in the nature of a penalty and as security for the performance of the latter clause in the condition, then all that the mortgager would be required to do, would be to support the mortgagees according to the terms of the condition, or pay damages sustained by reason of its non-performance.

If the condition is to be regarded as in the disjunctive, the election is in the obligor,—and, in this case, in the mortgager. "It is laid down as a general rule that, in case an election is given of two several things, he who is the first agent, and ought to do the first act, shall have the decision. As if a man grants a rent of 20s. or a robe to one and of his heirs, the grantor shall have the election, for he is the first agent, by payment of one or the delivery of the other." 3 Bac. Abr., Election, B, p. 309. "If," remarks GILCHRIST, J., in *Smith* v. *Durell*, 16 N. H., 345, "we consider this as a disjunctive condition, it is subject to the rule which gives the obligor, for whose benefit the condition is inserted, an election between the two things to be done. Comyn's Dig., Condition, K., 1." To the same effect is the case of *McNitt* v. *Clark*, 7 Johns., 465.

The bill alleges an election of the latter alternative by the mortgager, and that, in pursuance of such election, he commenced supporting the mortgagees in accordance with the terms of the mortgage, and continued so to support them to their satisfaction, while he remained in the State. "An election once made, is conclusive and irrevocable." 3 Bac. Abr., Election, D., 314. The mortgagee cannot have

part performance of one of the alternatives and then claim the entire performance of the other.

As between the mortgager and mortgagees, the mortgage by its very terms implies that the mortgager should remain in possession, so that thus he might be enabled to comply with the condition he has chosen to perform. The mortgagees would have no right to keep him out or prevent his performance of what he has undertaken. Without breach on his part they could maintain no action for possession. *Dearborn* v. *Dearborn*, 9 N. H., 117; *Flanders* v. *Landphear*, 9 N. H., 201; *Clinton* v. *Flye*, 1 Fairf., 292; *Brown* v. *Leach*, 35 Maine, 41.

The services to be performed were personal. The support was to be rendered by Charles H. Linscott and by no one else. The mortgagees relied upon him, and they have a right to require his services. He could not assign his interest to a stranger and enable him to discharge his obligations without their consent and approbation. *Eastman* v. *Batchelder*, 36 N. H., 141. If, however, the mortgagees should assent to an assignment of the equity of redemption, and that the assignee should perform the contract of the assignor, then such assignee would be entitled to the possession of the mortgaged premises equally as if he had been the original mortgager, and would have the same right to redeem in case of a breach and an attempted foreclosure. The bill alleges a transfer by Charles H. Linscott of his right to the plaintiff's intestate, but it does not allege that the mortgagees, or either of them, assented to such transfer and that the plaintiff's intestate might discharge the obligations assumed by the mortgager. The bill is therefore defective for this cause.

The respondents demurring are assignees of the mortgage. The bill does not disclose when, or for what cause, they entered into possession. While the support contemplated by the condition in the mortgage is to be rendered *by* the mortgager, unless the mortgagees assent that it be rendered by some one else, so the support is to be furnished

to the mortgagees and to them alone. They have a right to support on the mortgaged premises according to the conditions of the mortgage. They alone have a right to insist on their performance. Until a breach of the condition, they have no interest which they can transfer. In *Daniels* v. *Eisenlord*, 10 Michigan, 454, a mortgage was given, conditioned for the support of the mortgagee, by the mortgager. Held, that it was solely for the benefit of the mortgagee, and could not be foreclosed at the suit of any person who had furnished board and lodging to the mortgagee, although at the request of the mortgagee. The interest of the mortgagee is not assignable before breach of the condition, and no action at law can be maintained by an assignee unless where there has been an actual breach, and, perhaps, an entry for condition broken, before the assignment. *Bethlehem* v. *Annis*, 40 N. H., 34.

There can be no question that mortgages of this description may be redeemed after breach. "It is also said," remarks SHEPLEY, J., in *Hoyt* v. *Bradley*, 27 Maine, 242, "that there can be no conditional judgment for non-performance of duties of a personal character. But damages may be recovered for non-performance of personal services, as well as for services to be performed by others." In *Henry* v. *Tupper*, 29 Vermont, 359, it was held that a court of equity might grant relief from the forfeiture of an estate conditioned for the maintenance and support of the grantee, when the forfeiture was accidental or unintentional and not attended with irreparable injury. "Not to afford relief in such a case," remarks REDFIELD, C. J., "would be a discredit to the enlightened jurisprudence of the English nation and those American States who have attempted to follow the same model." That relief might be granted in case of a failure to perform the conditions of a mortgage like the one under consideration, was fully affirmed in *Bethlehem* v. *Annis*, 40 N. H., 43.

It is claimed that Charles H. Linscott and Harriett N. Harris should be made parties to this bill.

Charles H. Linscott has no remaining interest in the estate. The plaintiffs have no interest in obtaining a decree against him.

If the mortgager seeks in his bill an account for rents and profits or other sums received by Harriett N. Harris, before the assignment to the defendants demurring, she should be made a party. But, in a bill brought to redeem, it is not in general necessary to make any person but the last assignee a party to the bill, however many mesne assignments have been made. Story's Eq. Plead., §§ 189, 190.

By R. S., 1857, c. 90, § 8,—"When the condition is for doing *some other act than the payment of money*, the Court may vary the conditional judgment as the circumstances require; and the writ of possession shall issue, if the terms of the conditional judgment are not complied with within two months." The mortgager or his grantee, if the original mortgagee assents to the transfer of the equity, will be alike entitled to redeem, upon such terms as will mete out equal justice between the contending parties.

It is not necessary to consider the answer of Jane Linscott, as she interposes not merely no objection to the maintenance of the bill, but, on the contrary, seems desirous that it may be maintained and that the plaintiff should support her according to the conditions of the mortgage.

Demurrer sustained, —with leave for the complainant to amend his bill upon terms to be fixed at *Nisi Prius*.

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

J. Ruggles, for the complainant.

A. P. Gould, in support of the demurrer.

LUCY H. SHELDEN *versus* MOSES CALL.

A defendant cannot be defaulted on the ground that his specifications of defence are defective, if the plaintiff's declaration is also defective.

In such cases the Court will treat a motion by the plaintiff to have the defendant defaulted, as an informal demurrer, and decide against the party who committed the first error.

ON EXCEPTIONS.

DOWER UNDE NIHIL HABET, the declaration being same as in *Freeman* v. *Freeman*, 39 Maine, 426.

The remaining facts are sufficiently stated in the opinion.

J. Ruggles, in support of the exceptions.

A. P. Gould, for the plaintiff.

WALTON, J. — The exceptions state that, on the plaintiff's motion, the defendant was defaulted, because in the opinion of the presiding Judge his specifications of defence were insufficient. We think such a disposition of the case clearly wrong. It is familiar law that when a case is to be decided upon the sufficiency of the pleadings, the Court will examine the whole record, and decide against the party who has committed the first error. In this case the plaintiff committed the first error. His declaration is fatally defective. If he had demurred to the defendant's specifications, as he had a legal right to do, judgment must have inevitably been rendered against him. *Calais* v. *Bradford*, 51 Maine, 414; R. S., c. 82, § 18. And we think the plaintiff ought not to be allowed to escape this result by attacking the defendant's specifications in the form of a motion instead of a demurrer. A party who seeks to drive his adversary out of Court for defective pleading, should take care at his peril that his own pleading is correct. It is a maxim in pleading, that a defective plea is a good enough answer for a defective declaration. No reason can be given for requiring greater accuracy of the defendant than the plaintiff, and there is no more reason for

defaulting a defendant, who has filed defective specifications, than there is for nonsuiting a plaintiff who comes into Court with a defective declaration.

It is said that it was matter of discretion with the presiding Judge, whether to take off the default or not, and that to the exercise of such a discretion exceptions do not lie. This is undoubtedly true. But, in this case, the Judge ordered the default, and it is this order, and not his refusal to take the default off, that constitutes the gist of the defendant's complaint. *Frothingham* v. *Dutton*, 2 Greenl., 255.

Exceptions sustained.

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

ISAAC P. FASSETT *& als.*, *versus* JOHN GEYER *& als.*

An action of debt for the penalty provided for in the *Special laws of 1826, c. 417, and *Special laws of 1844, c. 105, cannot be maintained unless it appear that the persons prosecuting as the fish committee were duly sworn as is provided in the former Act.

ON EXCEPTIONS.

The facts sufficiently appear in the opinion.

A. P. Gould, for the plaintiffs.

R. R. Sewall, for the defendants.

TAPLEY, J. — This is an action of debt to recover a penalty. The plaintiffs claim to recover under the provisions of a special Act passed in 1826, entitled, "An Act to regulate the Alewive Fishery in Bristol," and an Act additional to said Act approved March 19, 1844.

At the trial, the defendants admitted all the allegations of fact in the plaintiffs' writ, and then introduced certain other evidence, all of which is reported.

* See opinion.

Upon the case as thus presented, the presiding Judge ruled, *pro forma*, "that the defence was not sustained, and that the plaintiffs were entitled to a verdict," whereupon the defendants submitted to a default, which is to be taken off if the ruling is erroneous.

The proceeding is to recover a penalty, and is prosecuted by the plaintiffs as a "fish committee," under the provisions of the Acts referred to.

The Act of 1826 provides for the choice of such a committee, and specifically enumerates their duties, one of which is, "that it shall be the duty of said fish committee to prosecute for all offences against the provisions of this Act, in any court of competent jurisdiction; and all penalties or forfeitures recovered shall enure one half to the use of said town of Bristol, and the other half to said committee." § 6. It is also provided, by the Act that, "the committee aforesaid shall be sworn to the faithful discharge of the duties required of them by law."

The Act of 1844, c. 105, is an Act additional to the Act of 1826, and provides that "no person shall be allowed to set or place any net, weir, seine, or other machine, in the Pemaquid river, or in or across any stream, creek, inlet or cove in said river, from the first day of May, to the first day of July, within one mile from the junction of the fresh stream with the river aforesaid, under the penalty of ten dollars for each and every offence," and that "all penalties or forfeitures under this Act shall be sued for and recovered, as is provided for in § 6 of the Act to which this is additional."

These Acts impose a penalty, provide a party prosecutor, and appropriate the penalty. No persons, except a committee thus chosen and qualified, can prosecute for the penalty.

Two qualifications are essential and indispensable to the performance of this duty; one, is the due election by the town, and the other, is the taking of the oath required by the Act. One may as well be dispensed with as the other.

Upon an examination of the case, it will be found that it is neither alleged, or proved, that the plaintiffs were ever sworn as required by the Act. No oath of any kind appears ever to have been taken by them. They were therefore not authorized to enter upon the duties of that office, and receive the benefits and emoluments to be derived from it. Whenever they do, it must be under the securities and obligations of the oath required by law. This view obviates the necessity of considering any other objection which may exist to the right of the plaintiffs to recover in this action. The plaintiffs were not entitled to a verdict as the case was presented, and the

Exceptions are sustained, and the default must be taken off, and the case stand for trial.

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

JAMES M. SPROUL *versus* SAMUEL FOYE.

When a call in a deed bounds one side of the land therein conveyed "by the new county road leading from" a place named "to" another place named, and the road as located by the commissioners, and that as actually wrought and travelled, are not identical, the latter alone will answer the call.

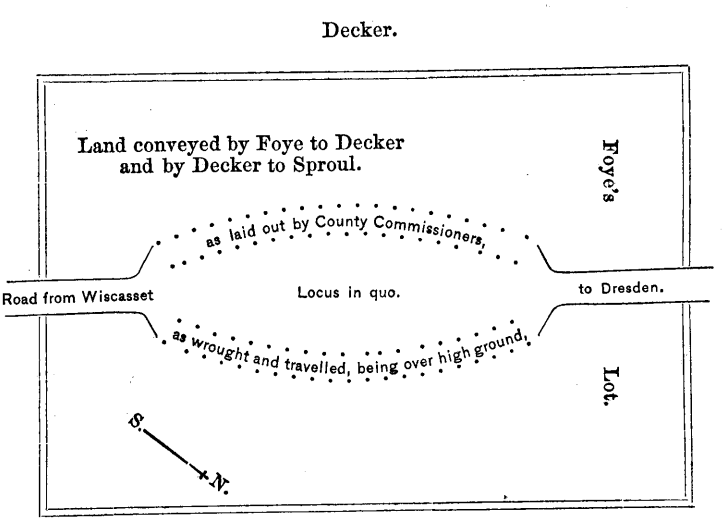
ON EXCEPTIONS.

WRIT OF ENTRY. The land demanded in the writ, was described as "beginning on the southerly line of the *existing road* leading from Wiscasset to Dresden, at," &c., thence in a certain direction named, to a "birch tree marked;" thence in a certain other direction named, to a monument named; thence in a certain other direction, "to the road aforesaid; thence south-easterly, by the road *as it existed and has been travelled since March* 14, A. D. 1853, to the first mentioned bound," &c.

The defendant seasonably filed a disclaimer to "all of said described premises, except that part between the road as laid out by the county commissioners and the road as the same was built," and, as to the strip thus excepted, he pleaded *nul disseizin*. The plaintiff accepted the disclaimer and joined issue.

The deeds from the defendant to one Decker, dated March 14, 1853, and from the latter to the plaintiff, dated March 19, 1853, described the land as "beginning on the southerly side of the new county road leading from Wiscasset to Dresden," at, &c.; thence in a certain direction named, "to a birch tree marked;" thence in a certain other direction named, to a monument named; thence in a certain other direction named, to the aforesaid county road; "thence by said county road, to the bound began at," &c.

It was admitted that the defendant owned the premises in controversy, prior to his deed to Decker.



Several witnesses testified upon each side in regard to numerous facts connected with the land in controversy. The defendants contended and requested the presiding Judge to rule that there was no latent ambiguity in the deeds;

that it was the duty of the Court to construe them; that the evidence did not warrant the Court in submitting the question of construction to the jury; and that, upon the legal construction of them, the line of the new county road, as it was actually located and marked upon the face of the earth, was the one, and the only one, that answered the call in the deeds. But the presiding Judge declined to so rule and submitted the question to the jury.

The verdict was for the demandant, and the defendant alleged exceptions, and also filed a motion to set aside the verdict as being against law and the manifest weight of evidence.

A. P. Gould, for the defendant.

W. Hubbard, for the plaintiff.

WALTON, J.—This is a writ of entry. The question is one of boundary. The defendant conveyed a parcel of land, bounding it on one side by "the new county road leading from Wiscasset to Dresden." Some forty or fifty rods of this road was built outside of the original location of the county commissioners, and the question is whether the line of location or the road as actually built is to be regarded as the true boundary of the land conveyed.

The deed bounds the land "by the new county road leading from Wiscasset to Dresden." At this time the road had been open and used for public travel about three years. Did the parties refer to the road as located, or to the road as built? To a mere line of location not wrought, not in use for public travel, or to the road that was wrought and in actual use as a public highway?

When a road is referred to in a deed as one of the boundaries of the land conveyed, we should ordinarily suppose that something more than a mere location was meant. A road is a way actually used in passing from one place to another. A mere survey or location of a route for a road is not a road. A mere location for a road falls short of a

road as much as a house lot falls short of a house. "Bounded by the new county road leading from Wiscasset to Dresden." Can the proposition be maintained that an invisible and unwrought location answers such a call better than a visible wrought road over which the public travel is passing daily? We think not. We think such a call in a deed requires something more than a mere location to answer it.

Our conclusion is that the Judge who presided at the trial committed no error in declining to instruct the jury that the original location would alone answer the call in the deed; that, if he erred at all, it was in not ruling as matter of law that the road, as actually built, was the only boundary that would answer the call. This error, however, if it was one, operated favorably for the defendant, and against the plaintiff, and was one therefore of which the defendant cannot justly complain. It gave him a chance of winning from the jury if he could a point which should have been ruled against him as matter of law.

The verdict of the jury establishes the road as built and not the road as located, as the boundary of the land conveyed. We think the verdict is right.

Motion and Exceptions overruled.

Judgment on the verdict.

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

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* JOHN H. WEBSTER *versus* ASAEL W. CALDEN *& al.*

A bill of exceptions will not be sustained, unless it state enough to show that the ruling was erroneous and prejudicial to the party excepting.

In a real action, exceptions will not lie to the admission of a deed offered by the defendant, and objected to by the plaintiff, with which, when offered, the former proposed, but subsequently failed, to connect his own title.

* This action was entered and argued in the Eastern District by virtue of the statute.

Nor to comments made in argument, addressed to the presiding Judge, in favor of the admissibility of certain evidence, if such evidence was rejected.

Nor to the rejection of irrelevant or immaterial testimony.

When the answer to a certain interrogatory in a deposition, given by a deponent to be used in a former suit between the parties, is read by the defendant to contradict such deponent's statement, made in a deposition in the present suit, the plaintiff may read all of such answers in the former deposition as pertain to the same subject, but none other.

In a real action, evidence that the plaintiff used all the means in his power to produce an original deed, forming a part of the defendant's chain of title and alleged to be forged, is inadmissible.

When the plaintiff claims title under the heirs of W. M., and the defendant under a deed from W. M., dated July 28, 1853, evidence that A. M. had paid a mortgage on the premises in controversy, from A. M. to W. M., dated Dec. 13, 1850, is immaterial.

The report of evidence, though signed by the presiding Judge, is not admissible to prove what a witness testified on a former trial, for the purpose of contradicting him.

By virtue of the Public Laws of 1862, c. 112, office copies of certain deeds may be read in evidence in all actions touching the realty, without proof of their execution, "where neither the party offering such office copy, nor the party opposing, is a party to the deed, or claims as heir, or justifies as servant of the grantee or his heir."

Such deed, appearing to have been duly and properly recorded, is presumed to have been duly executed and delivered; and, to entitle the party holding adversely to such deed to recover, he must overcome such presumption by sufficient proof.

The Court will not, on motion of the plaintiff, order the defendant to produce a deposition taken by the latter and used in a former trial of the same case, unless upon evidence that the deposition has been filed by the clerk.

ON EXCEPTIONS and MOTION to set aside the verdict as being against the weight of evidence.

REAL ACTION.

The parties derive their title from one William M. Mann, the plaintiff claiming under a deed given by the guardian of the children of said Mann, and the defendants under a deed from said Mann to Obadiah Mann, dated July 28, 1853, and various mesne conveyances.

The defendants introduced and read in evidence the deed of John G. Neil to Joseph Cushing, of a portion of the premises in controversy. Three days before the close of

the trial, the presiding Judge permitted the defendants, against the plaintiff's objection, to withdraw the deed.

The delivery of the deed of July 28, 1853, from William M. Mann to Obadiah Mann, was denied by the plaintiff, although the same was recorded. The presiding Judge instructed the jury that, by law, the defendant was authorized to use an office copy of this deed; that, having introduced such a copy from the records, where it appeared to have been duly and properly recorded, the presumption was, that it was duly executed and delivered; and that, to entitle the plaintiff to their verdict upon this branch of the case, he must introduce sufficient evidence to overcome that presumption.

The defendants' counsel had in his possession the deposition of one John Kerswell, dated May 10, 1865, and read in testimony by the defendant in a former trial between these parties. The plaintiff called upon said counsel for the deposition, declaring his wish to use it in evidence in this trial. The defendants' counsel denied that it had ever been filed by the clerk, and refused to produce it, whereupon the plaintiff moved the Court for an order directing the defendants to produce the deposition. There being no evidence upon the deposition that it had been filed, and no evidence being offered to prove such fact, the presiding Judge declined to interfere.

The verdict was for the defendants, with several special findings not necessary to be reported here, and the plaintiff alleged exceptions. The remaining facts will be found in the opinion.

John H. Webster, pro se.

The statements of Bachelder should have been admitted, Calder holding his title. 1 Greenl. on Ev., §§ 189, 191; *Treat* v. *Strickland*, 23 Maine, 234; *Smith* v. *Powers*, 15 N. H., 546; *Jackson* v. *McCall*, 10 Johnson, 377; *Prop'rs of the Ch.* v. *Bullard*, 2 Met., 363; *Cilley* v. *Bartlett*, 19 N. H., 323; *Jackson* v. *Bard*, 4 Johns., 230; *Jackson* v.

Myers, 11 Wend., 533; *Padgett* v. *Lawrence*, 10 Page, 180; *Pitts* v. *Wilder*, 1 N. Y., 1 Coms., 526; *Merrill* v. *Foster*, 33 N. H., 379; *Fellows* v. *Fellows*, 37 N. H., 75; *Bradly* v. *Spofford*, 23 N. H., 446; *Walcott* v. *Keith*, 22 N. H., 196; *Davis* v. *Spinner*, 3 Pick., 284; *Morgan* v. *Leonard*. 10 Met., 54; *Caver* v. *Jackson*, 4 Peters, 1. Not inconsistent with the above are *Jackson* v. *Cole*, 4 Cow., 587; *Van Rensaleer* v. *Clark*, 17 Wend., 25.

The Neil deed should not have been withdrawn. *Wheeler* v. *Hill*, 16 Maine, 329; *Vibbard* v. *Staats*, 3 Hill, 144.

Cushing's deeds to Neil and Wyman should not have been admitted, defendant's title not being connected. *Green* v. *Watkins*, 7 Wheat., 27; *Walcott* v. *Knight*, 6 Mass., 418; *Jackson* v. *Harder*, 4 Johns., 202; *Shapleigh* v. *Pillsbury*, 1 Maine, 271; *Mechanics' Bank* v. *Williams*, 7 Pick., 438; *Putnam Free School* v. *Fisher*, 38 Maine, 324.

The averments of counsel to the Court, upon the admissibility of original proofs, were made in the presence of the jury and for their benefit. *Webster* v. *Calden*, 53 Maine, 203, had decided their inadmissibility. The comments prejudiced the minds of the jury as they were intended to do. The jury could not rid their minds of this indirect evidence.

The balance of Gerry's deposition should not have been excluded. *Hammett* v. *Emerson*, 27 Maine, 308; *Raymond* v. *Howland*, 17 Wend., 389.

The efforts made by plaintiff to obtain original deed from W. M. Mann to Obadiah Mann should have gone to the jury. It is a significant circumstance that the original has been kept out of sight, when it was known that was alleged to be forged.

The report of Amos A. Mann's testimony in former case should have been admitted. *Hammett* v. *Emerson*, 27 Maine, 308, 337; *Benedict* v. *Nichols*, 1 Root, 434.

The ruling in regard to the effect of the office copy of the deed of July 28, 1853, was inaccurate. Statute of 1862 was never intended to change the burden of proof, but only to relieve a party who was not supposed to have the pos-

session of a deed from producing the original and introducing the formal proof of its execution. The Legislature did not intend to give more weight to the copy than to the original. When sufficient evidence has been adduced to let in the deed, then both parties introduce their evidence as to its execution. The burden is not changed. If plaintiff's testimony just equals defendant's, the deed is not proved. Plaintiff need not *overcome* the defendant's evidence on this point.

There is nothing in the nature of the proof prescribed or allowed by the statute, which entitles it to any more weight than proof of the handwriting of a deceased witness. The Act of 1865, c. 308, so far as it appertains to this class of cases, is in the language of the Rules of Court. If the Legislature intended more, they would have used different language. The Act did not change the rule of evidence in this class of cases. See construction of the rule in *Sellar* v. *Carpenter*, 27 Maine, 496. As to the *quantum* of proof, see *Central B. Corp.* v. *Butler*, 2 Gray, 130. If the ruling be correct, it will open a wide door to fraud.

D. D. Stewart, for the defendants.

APPLETON, C. J.—This is a writ of entry. The parties derive their title from William M. Mann. The demandant derives his title from a deed given by the guardian of the children of said Mann. The tenant claims under a deed from said Mann to Obadiah Mann, dated July 28, 1853, and various mesne conveyances. The delivery of the deed of July 28, 1853, was denied, but the jury by their verdict affirmed the fact of such delivery.

Numerous exceptions are taken to the ruling of the presiding Judge, which will be considered in their order.

1. The plaintiff proposed to prove statements made by James R. Bachelder, before and at the time of the conveyance by Obadiah Mann to him, the defendant not being present, in relation to the interest of said Obadiah and Amos Mann in the premises.

What the statements were, whether material or immaterial, whether favorable to the demandant or the tenant, does not appear. Now a bill of exceptions will not be sustained, unless it states enough to show that the Judge ruled erroneously and to the prejudice of the party excepting. *Fuller* v. *Ruby*, 10 Gray, 285; *Burghart* v. *Van Deusen*, 4 Allen, 374.

2. The withdrawal of the deed, Neil to Cushing, of the Wyman lot, is not shown to have affected the rights of the demandant injuriously.

3. The tenant read certain deeds with which he proposed to connect his own title, but failed in his attempt. Parties, in deducing their title, ordinarily suit their own convenience in the order and arrangement of proof. The deeds offered were immaterial, if the tenant failed to show that he derived rights under them. After they were offered, the demandant did not ask their rejection,—nor request any rulings upon their effect. Before they were received, the Judge could not know but the tenant would connect his title therewith.

4. It is objected that the counsel for the tenant commented on certain proofs offered and rejected at the instance of the demandant. The objectionable commenting was in the argument of the counsel to the Court, in which he endeavored to procure their admission. It would be a novel procedure because counsel, in and by their argument, failed to obtain a desired ruling, to set aside a verdict at the instance of the party winning the point in debate.

5. The tenants offered the answer of Joshua Gerry to the tenth interrogatory to a deposition taken in an equity suit, *Webster* v. *Mann & al.*, to contradict his statement made in a deposition in the present suit. The demandant then offered the balance of said deposition, which was excluded, except such parts as related to the subject matter referred to in the answer to said tenth interrogatory, or such portions as might qualify that answer. This was undoubtedly correct. *Lynde* v. *McGregor*, 13 Allen, 172.

The parties have referred us to this deposition. Upon a

careful examination, and assuming, what is not denied, that all statements having any bearing upon the tenth interrogatory were received, we find nothing remaining in the deposition, the admission of which would have been of service to the demandant or the rejection of which could have been to his disservice. The rejection of irrelevant or immaterial testimony affords no good ground of complaint.

6. The plaintiff offered to prove that he used all the means in his power, to obtain the original deed of July 28, 1853, in dispute, but without success. This evidence was excluded. This was not to excuse the non-production of a deed which he was bound to offer, — for the deed was not, and never had been, in his hands, and it was adverse to his title. It was not to authorize the reception of secondary evidence, for the copy of the deed was in the case. It was simply an offer to prove that he did all in his power to bring about a favorable result, which, from his able argument before us, cannot be doubted. Of this the jury needed no proof.

7. It is not perceived that the demandant was injured by admitting evidence that Amos A. Mann paid the mortgage, A. A. Mann to Wm. M. Mann, dated Dec. 13, 1850. As the jury have found a delivery of the deed of July 28, 1853, the admission of the evidence was immaterial.

8. The report of testimony on a former trial, though signed by the presiding Judge, is not admissible to show what a witness testified on such trial, for the purpose of contradicting him.

9. The office copy of the deed, Wm. M. Mann to Obadiah Mann, dated July 28, 1853, was properly received under the provision of the statute of 1862, c. 112. This was held *prima facie* to establish the tenants' title. *Blethen* v. *Dwinel*, 34 Maine, 133. An office copy being *prima facie* evidence, there is no necessity of calling the attesting witness. *Eaton* v. *Campbell*, 7 Pick., 12. It raises a presumption that the grantor had sufficient seizin to enable him to convey, and operates to vest the legal seizin in the grantee.

Ward v. *Fuller*, 15 Pick., 185. When the original is not in the custody of, or power of the party having occasion to use it, the certified copy is *prima facie* evidence of the original and its execution, subject to be controlled by rebutting evidence. *Cone* v. *Emery*, 2 Gray, 80.

10. There being no evidence that the deposition of Kerswell had ever been filed, the Court declined to order its production. If so, it was never in the custody of the Court. The presiding Judge could not properly have ordered the counsel for the tenants to produce it. Rule 25, 37 Maine, 576.

No sufficient reason is shown for setting aside the verdict as against evidence. *Motion and exceptions overruled.*

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

INHABITANTS OF NEW PORTLAND *versus* INHABITANTS OF KINGFIELD.

In assumpsit by one town against another for supplies furnished an alleged pauper, parol evidence that certain persons (named) were acting overseers of the poor of the plaintiff town, when the supplies were furnished, is admissible.

So is the testimony that the pauper, at the time it is stated he fell into distress, called at the residence of one of the overseers, and, inquiring for him, sat down and cried while waiting for the overseer's return from his field.

So is the testimony of a physician, descriptive of a disease upon the pauper, unfitting him for labor.

Where, upon the issue of the alleged pauper's "need of relief," the testimony of several witnesses, called by the plaintiffs, tended to establish the affirmative, while that of C. T., introduced by the defendants, tended to prove the contrary, it is competent for the plaintiffs, without first interrogating C. T. as to the subject matter, to prove that C. T. had, when speaking of the action, declared "she would do all she could to help the defendants, she'd be damned if she would'nt."

The defendants had introduced testimony tending to prove that the supplies furnished by the plaintiffs, May 1, 1861, were collusively furnished; — *Held*, that the presiding Judge properly instructed the jury — that, as the plaintiffs' testimony showed that the alleged paupers had had their home in the

plaintiff town, since May, 1856, the burden of proof was on the plaintiffs to show that, before the lapse of five years from that time, they had become destitute and in need of relief, and had received necessary supplies as paupers; otherwise their settlement would be in the plaintiff town; that if the plaintiffs had satisfied the jury of these facts, and that such supplies were furnished and received, the presumption was, in the absence of evidence to the contrary, that the transaction was in good faith; and that, if the defendants claimed that there was bad faith on the part of the overseers of the plaintiffs, and that the supplies were furnished collusively and by the contrivance of the overseers to prevent their gaining a settlement in the plaintiff town, the burden of proof was upon the defendants to show it.

On Exceptions.

Assumpsit for supplies furnished John Stevens and wife, (alleged paupers,) from Dec. 8, 1864, to Feb. 14, 1866, date of the writ. Specifications of defence denied each allegation in the writ in detail.

The facts are sufficiently stated in the opinion.

D. D. Stewart, for the plaintiffs.

J. H. Webster, for the defendants.

1. Plaintiffs should have been required to prove the election and qualification of their overseers by the record, which was in their possession. *State* v. *Williams*, 25 Maine, 561; *Christ Church* v. *Woodward*, 26 Maine, 172; *Allen* v. *Archer*, 49 Maine, 346; *Fossett* v. *Bearce*, 29 Maine, 523; *Bearce* v. *Fossett*, 34 Maine, 575; 2 Greenl. on Ev., §§ 63 and 64.

2. Huldah Lane's testimony is inadmissible, as it did not tend to contradict Catherine Tufts. Nor was Catherine interrogated about the statement testified to by Mrs. Lane. 1 Greenl. on Ev., § 462 and note; *Ware* v. *Ware*, 8 Greenl., 42; *Cooley* v. *Norton*, 4 Cush., 93; 1 Greenl. on Ev., § 450.

3. The instruction was erroneous. Good faith is one of the elements necessary for plaintiffs to show affirmatively. They have the affirmative. 1 Greenl. on Ev., § 7; *Phelps* v. *Cutler*, 4 Gray, 139; *Powers* v. *Russell*, 13 Pick., 69, 70; *Crowningshield* v. *Crowningshield*, 2 Gray, 524–9;

Central Bridge v. *Butler*, 2 Gray, 132; *Spaulding* v. *Hood*, 8 Cush., 605-6.

TAPLEY, J.—This was an action to recover for supplies furnished to John Stevens and wife as paupers.

At the trial various objections were raised to the admissibility of evidence and exceptions were also taken to certain rulings of the presiding Judge.

I. The plaintiffs proved by parol that Alvah Thompson, John P. Hodsdon and Sullivan Williamson, were acting overseers of the poor, in May, 1861, at the time the supplies were furnished. The defendants objected to this evidence as incompetent, and required the record proof of their election. The Court overruled the objection and admitted the evidence.

It is now contended this was error on the part of the presiding Judge.

Mr. Greenleaf, in his first volume of Evidence, § 83, says, "proof that an individual has acted notoriously as a public officer, is *prima facie* evidence of his official character, without producing his commission or appointment."

Again, in the same volume, § 92, he says, "from the strong presumption arising from the undisturbed exercise of a public office, that the appointment is valid, it is not, in general, necessary to prove the written appointment of public officers. All who are proved to have acted as such are presumed to have been duly appointed to the office until the contrary appears; and it is not material how the question arises, whether on a civil or criminal case, nor whether the officer is or is not a party to the record; unless, being plaintiff, he unnecessarily avers his title to the office or the mode of his appointment.

These propositions are sustained by him by reference to numerous decided cases in the several State Courts, under the United States Court, and is the rule of practice observed in this Court for many years.

The presiding Judge committed no error in admitting the testimony complained of.

II. "Rosanna Thompson, wife of Alvah Thompson, one of the acting overseers of New Portland, called by the plaintiff testified that Stevens came to our house in the after part of the day, about the first of May, 1861. He inquired for my husband. I told him he was in the field. He wanted to see him and waited for him. Went out into the door-yard and sat on a log. He sat with his head down wiping his eyes with his handkerchief. He remained until Mr. Thompson came up, 10 or 15 minutes." "This testimony was seasonably objected to but admitted by the Court."

Dr. Stevens testified to the physical condition of the pauper a number of years before, describing a disease which he regarded as incurable and preventing him from performing any amount of hard labor, and testified to the existence of the same difficulty at a period subsequent to the commencement of the action.

Hiram Williams testified to the destitute condition of the pauper in the spring of 1861. The testimony of these witnesses was also objected to, but admitted.

It is now argued that this testimony was irrelevant and calculated to mislead the jury by exciting their sympathy.

One ground of defence assumed by the defendants, was, "that the said John and Sarah Stevens had not fallen into distress in manner and form as alleged, and they denied that the several articles and sums of mony specified in the account annexed to plaintiffs' writ were necessary to the immediate relief of said persons, and required proof that they were necessary."

This was an important issue in the case, and, unless the plaintiffs sustained it their case must fail. To aid in establishing the contested point, the plaintiffs had a right to resort to such circumstances as tended to prove the issue, and we think the testimony of each of these witnesses have some tendency to establish the contested point. The testimony of Mrs. Thompson tends to show an application for relief. That of Dr. Stevens, an incapacity to labor, strengthening the testimony of others concerning his actual condi-

tion; showing one of the causes which had brought him to the unfortunate condition of asking aid of the town. That of Williamson tended to show his actual condition immediately before the supplies were furnished. The relation of the condition of this aged couple, being about eighty years of age, may have excited the sympathy of the jury for *them*, but how it could operate to prejudice the cause between these parties litigant has not been made to appear. We think this evidence was properly admitted.

III. The defendants called one Catherine Tufts, who testified "that the persons alleged by the plaintiffs to be paupers, first of May, 1861, were then in comfortable condition; that she was at their house about the middle of May, 1861, and saw pork, and flour, and potatoes, and other supplies there; that she was at Stevens' quite often in the spring of 1861, and eat at their table, and gave other testimony of a similar character."

The plaintiffs called Huldah Lane, who testified, "that she knew Catherine Tufts and had heard her speak of this matter, and, being asked what she said, the defendants' counsel objected, but the objection was overruled, and she testified" "that said Catherine came to her brother's about two years ago and said she would do all she could to help Kingfield, she'd be damned if she would not."

Two objections are now presented to this ruling. First, that it did not tend in any way to contradict Catherine Tufts, and second, Catharine was not herself asked when upon the stand anything about such statement.

Testimony might have been introduced and admitted for the purpose of showing the bias under which the witness was testifying, and thus affect the credit to be attached to her statements, especially when found to be in conflict with the testimony of other witnesses.

In some States it has been the practice of the courts to require interrogation of the witness sought to be impeached, upon the questionable matter, before introducing the impeaching evidence.

The practice in this State, however, has been otherwise for a long series of years. In 1831, in the case of *Ware* v. *Ware*, 8 Greenl., 42, it was declared to be the practice of this and the Massachusetts Courts not to require the previous interrogation.

The admission of this testimony was in accordance with the long established practice of the Courts in this State and Massachusetts, based upon principles then deemed to be sound and just, and we perceive no reason now why the practice should be changed.

IV. Evidence had been adduced in the case, by the defendants, for the purpose of showing that the supplies furnished by the plaintiffs, the first of May, 1861, were collusively furnished.

The Court instructed the jury "that, as the plaintiffs' own testimony showed that the alleged paupers had had their home in New Portland since May 18, 1856, the burden of proof was on the plaintiffs to show that, before the lapse of five years from that time, they had become destitute and in need of relief, and had received necessary supplies as paupers, otherwise their settlement would be in New Portland; that, if the plaintiffs had satisfied the jury of these facts and that such supplies were furnished and received, the presumption was, in the absence of evidence to the contrary, that the transaction was in good faith, and that, if the defendants claimed that there was bad faith on the part of the overseers of New Portland, and that the supplies were furnished collusively, and by the contrivance of the overseers, to prevent their gaining a settlement in New Portland, the burden of proof was upon them (the defendants) to show it."

The defendants contend that this instruction was erroneous, and say "that good faith is one of the elements necessary for the plaintiffs to show on their part."

We do not understand the instruction given to be in conflict with this proposition of the defendants.

The instruction required the plaintiffs to prove, as matter

of fact, that, before the lapse of five years from May 18, 1861, the alleged paupers had become destitute and in need of relief, and had received necessary supplies as paupers.

The legal proposition there stated was, that these facts being proved, the presumptions of law attending them were such, that it afforded sufficient evidence of good faith, in the absence of evidence to the contrary.

The fact that good faith must appear, was not denied, but the Court asserted what would afford sufficient proof of it until the contrary appeared.

In this we think the presiding Judge was clearly right.

Fraud, wrong and covin are never presumed. All men are presumed to be innocent of such practices until the contrary appears.

The law presumes that official persons, in the performance of their duties conduct legally, until there is proof to the contrary. *Treat* v. *Orono*, 26 Maine, 217.

Exceptions overruled.

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

JOHN TUFTS *versus* SAMUEL BUNKER *& al.*

When the question at issue is whether a sale was made to defraud creditors, evidence that the alleged fraudulent vendor previously offered to sell the property to other persons, is not admissible to disprove the fraud.

ON EXCEPTIONS

TRESPASS for taking a pair of oxen, cart, yoke, bows, ring and staple. Writ dated Aug. 11, 1865.

The plaintiff introduced a bill of sale of the property sued for, with other property, from one Albert Williams to himself dated Aug. 2d and 3d, 1865.

The defence was that the sale from Williams to the plain-

tiff was fraudulent as to creditors and subsequent *bona fide* purchasers, the defendants claiming to be in a condition to raise that question.

The remaining facts are sufficiently stated in the opinion.

J. H. Webster, for the defendants.

D. D. Stewart, for the plaintiff.

WALTON, J. — When the question to be tried is whether a sale was made to defraud creditors, evidence that the alleged fraudulent vendor previously offered to sell the property to other parties, is not admissible to disprove the fraud.

The exceptions state that the plaintiff called one Joseph E. Gray, and among other things asked him whether he knew of offers by Williams to sell the property in controversy before he sold it to the plaintiff. The defendants objected to the inquiry, but the presiding Judge ruled that the witness might answer; and he thereupon testified that he had such knowledge; that Williams offered to sell the property to Moses M. Thompson; that he was present when the offer was made. In *Fisher* v. *True*, 38 Maine, 534, such evidence, offered for the same purpose apparently, namely, to rebut the inference that the sale in question was made with the intent to defraud creditors, was held inadmissible. No reason is perceived for overruling that decision. *Exceptions sustained. — New trial granted.*

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

SAMUEL BUNKER *& al. versus* JOHN TUFTS.

Two or more persons severally signing a promissory note as sureties do not thereby incur a joint liability.

Such sureties cannot maintain a joint action on the case against a person who subsequently "aids or assists" their principal "in a fraudulent transfer or concealment of his property, to secure it from creditors," although, after such conveyance, they became joint creditors by the joint payment of said note.

When several sureties pay the debt of their principal, and there is no evidence of a partnership or joint interest, or of payment from a joint fund, the presumption of law is that each paid his proportion of the debt.

ON REPORT.

CASE, under R. S., c. 113, § 47, for aiding in the fraudulent concealment of the property of Albert Williams.

The testimony is sufficiently stated in the opinion.

The defendant's counsel contended that this action cannot be maintained by the plaintiffs jointly; and that the plaintiffs were not creditors within the meaning of § 47. Thereupon the case was continued on report, with the agreement that if, in the opinion of the full Court, the action can be maintained, it is to stand for trial; otherwise the plaintiffs to be nonsuit.

J. H. Webster & Coburn, for the plaintiffs.

1. Plaintiffs were creditors of Williams within the purview of § 47. *Howe* v. *Ward*, 4 Maine, 195; *Thompson* v. *Thompson*, 19 Maine, 244; *Sargent* v. *Salmond*, 27 Maine, 539; *Thatcher* v. *Jones*, 31 Maine, 528.

2. Statute is remedial and to be construed liberally. *Quimby* v. *Carter*, 20 Maine, 218. A surety paying the debt of the principal is subrogated to the rights of the creditor. *Norton* v. *Soule*, 2 Maine, 341; *Closson* v. *Morris*, 10 Johns., 524.

3. The interest of the sureties in the property fraudulently conveyed is a joint interest. Every dollar fraudulently conveyed increased the risk of each equally. The property of the principal debtor constitutes a joint fund out

of which they are jointly to be relieved. *Elwood* v. *Deifendorf*, 5 Barb., 398.

4. Plaintiffs should join. 1 Chit. Pl., 63, 64, 65 and 66; *Medbury* v. *Watson*, 6 Met., 246; *N. Y. & S. L. C. Co.* v. *Fulton Bank*, 7 Wend., 412; *Jackson* v. *Sidney*, 12 Johns., 185; *Pickering* v. *Pickering*, 11 N. H., 141; *Gilman* v. *Wilbur*, 12 Pick., 120.

D. D. Stewart, for the defendant, cited *Pullen* v. *Hutchinson*, 25 Maine, 249; *Craig* v. *Webber*, 36 Maine, 507; *Bove* v. *Wilson*, 1 Jones, (N. C.,) 182; *Quimby* v. *Carter*, 20 Maine, 218; *Ingalls* v. *Dennett*, 6 Greenl., 79; *Woodward* v. *Herbert*, 24 Maine, 358; *Ellis* v. *Ham*, 28 Maine, 387; *Huzzey* v. *Collins*, 30 Maine, 190; *Dole* v. *Warren*, 32 Maine, 94; *Reed* v. *Pierce*, 36 Maine, 461; *Hoyt* v. *Wilkinson*, 10 Pick., 30; *Wood* v. *Leland*, 1 Met., 387.

APPLETON, C. J.—This is an action on the case, under the provisions of R. S., c. 113, § 47, against the defendant for aiding in the fraudulent concealment or transfer of the property of Albert Williams.

The plaintiffs offered in evidence a note, dated Oct. 24, 1864, payable to the president, directors and company of the Second National Bank of Skowhegan, or order, in four months, signed by said Williams, as principal, and by them severally, as sureties.

There was evidence tending to show that, on the 2d or 3d of August, 1865, Williams made a conveyance of certain property to the defendant, fraudulently, and "to secure it from his creditors, and to prevent its attachment or seizure on execution."

On the 18th of August, 1865, the plaintiffs gave their note for the amount for which they had signed as sureties, and took up the note of said Williams.

Prior to the 3d of August, 1865, the plaintiffs had made no payment on the note which the bank held against Williams and on which they were sureties. They had signed severally. They had by so signing incurred no joint liabil-

ity. They were not joint creditors or entitled as such to maintain this suit.

After the date of the conveyance alleged to be fraudulent, they gave their joint note. If it were to be conceded that thereby they became joint creditors, still they would not have been joint creditors when the conveyance was made, and therefore could not be permitted to impeach it as such creditors.

The law seems well settled in this State, that where several sureties pay the debt of their principal, and there is no evidence of a partnership or joint interest, or of payment from a joint fund, the presumption of law is that each paid his proportion of the same. *Lombard* v. *Cobb*, 14 Maine, 222; *Goodall* v. *Wentworth*, 20 Maine, 224. In *Lombard* v. *Cobb*, the sureties paid the note by giving their joint note, as in the present case. This rule of law has been adopted in New York. *Gould* v. *Gould*, 8 Cow., 168; *Doremus* v. *Selden*, 19 Johns., 213. *Plaintiff nonsuit.**

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

* The following cases were argued at the same term.

SAMUEL BUNKER *& al. versus* ALBERT WILLIAMS.

ON REPORT.

ASSUMPSIT by plaintiffs as sureties for the defendant, on a promissory note to the Second National Bank of Skowhegan, for $1000, dated Oct. 24, 1864. Writ dated Nov. 3, 1865.

Plaintiffs introduced the note above described, also a joint note given by them, August 18, 1865, for $1050,76, payable to the First National Bank of Skowhegan in four months, and proved, by one Rowell, president of the bank, that the latter note was given to take up the former. Rowell also testified that neither of the plaintiffs had ever paid any money on said joint note. Plaintiffs also offered a judgment recovered by said bank on said joint note, against the plaintiffs jointly, at Dec. term, 1866, to the introduction of which the defendant objected, — (1,) because not alleged in the writ, — (2,) because it did not exist at date of writ, in this action — (3,) because the note had not been put in suit when the action was brought.

The case was withdrawn from the jury, and continued on report, with the agreement that if it could be maintained it was to stand for trial; otherwise a nonsuit to be entered.

J. H. Webster & Coburn, for the plaintiffs.

1. Where two or more sureties pay the debt, for which they are sureties, out of their joint fund, or raise the money on their joint credit, they can maintain a joint action against the principal. *Appleton* v. *Bascom*, 3 Met., 169; *Chandler* v. *Brainard*, 14 Pick., 285; *Osborne* v. *Harper*, 5 East, 225; *Parsons* v. *Parker*, 3 N. H., 366; *Jewett* v. *Cornforth*, 3 Maine, 107; *Day* v. *Swan*, 13 Maine, 165; *Lombard* v. *Cobb*, 14 Maine, 222; *Clapp* v. *Rice*, 13 Gray, 403; 2 Saund., 116, n. 2.

2. Taking up first note, by giving a new note by the sureties and the acceptance by the bank, is payment. *Chandler* v. *Brainard*, *ubi sup.*; *Greenleaf* v. *Hill*, 31 Maine, 562; *Fowler* v. *Ludwig*, 34 Maine, 455; *Milliken* v. *Whitehouse*, 49 Maine, 527.

D. D. Stewart, for the defendant.

Per Curiam. — The questions raised in this case are settled in the decision made in *Bunker & al.* v. *Tufts*.

Dennis Moore *& al. versus* John Tufts.

On Report.

Case, under R. S., c. 113, § 47, for aiding in the fraudulent concealment of the property of Albert Williams. Action commenced same time as the others.

The plaintiffs introduced a promissory note for $1000, payable to Second National Bank, Skowhegan, dated Oct. 26, 1864, signed by Albert Williams, as principal, and Samuel Bunker, one of the plaintiffs, as surety, and Dennis Moore, (the other plaintiff,) on the back of the note, and proved that said Moore put his name on the note before it was negotiated to the bank.

Plaintiffs proved that said note was paid by a note of the plaintiffs, dated August 18, 1865, and that, since giving the latter note, said Moore had paid thereon $475. There was no evidence that Bunker had paid anything.

There was evidence tending to show the same facts as to the alleged fraudulent conveyance, as in *Bunker & al.* v. *Tufts*. The same questions were raised by defendant, and the case was continued on report with the same agreement.

J. H. Webster & Coburn, for the plaintiffs, cited *Union Bank* v. *Willis*, 8 Met., 504; *Clapp* v. *Rice*, 13 Gray, 403; *Wright* v. *Morse*, 9 Gray, 337; *Essex Co.* v. *Edmunds*, 12 Gray, 273; *Leonard* v. *Wildes*, 36 Maine, 265; *Moulton* v. *Southard*, 36 Maine, 147; *Childs* v. *Wyman*, 44 Maine, 433.

D. D. Stewart, for the defendant. Plaintiffs are subsequent creditors. Moore's name, on back of the note, after being signed by the principal and surety, made Moore surety for Bunker as well as for Williams. Moore and Bunker could therefore have no joint interest. Bunker would be liable to Moore for whatever he might pay. Moore has paid $475; Bunker nothing; thus showing their interests to be several.

Per Curiam. — The questions raised in this case must be governed by the decision recently made in *Bunker & al.* v. *Tufts*.

Adaline O. Hanson *versus* Thomas F. Millett.

By the laws of this State, a husband acquires no right to control the personal property of his wife, by virtue of the marriage relation.

Whether such property consist of household furniture kept in her husband's house, or of stock kept on his farm, the wife is deemed to be in possession of it, in the same manner that the husband is of his property kept in the same manner.

The natural increase of a mare, while thus owned and possessed by a married woman, belongs to the wife.

Delivery is an essential element to be proved in establishing a title by gift.

The naked declarations of the husband, as to the ownership of personal property claimed by the wife, are inadmissible.

On Exceptions.

Replevin for a colt. Plea, the general issue, with a brief statement denying the property to be in the plaintiff, and alleging it to be in one George S. Hanson.

Tried by the Court, with leave for either party to except.

The Court found the facts to be, that the plaintiff was married to Jesse Hanson, the father of George S. Hanson, in Dec., 1856, that before, and, at that time, she owned the mare, the mother of the colt in dispute; that, at the time of the marriage, she carried this mare, with other personal property, to her husband's house; that this property was turned in with his property and used in common; that this mare was used upon the farm and controlled by plaintiff's husband; her husband died in August, 1866; that, from the time of her marriage until the death of her husband, she lived with him upon his farm and was maintained by him; that she owned a farm distant about three miles from her husband's farm; that her husband carried on her farm; that the hay and produce of her farm was taken by him, carried home and used upon his farm, the hay put into the barn with the hay from his farm, and the hay from both farms fed to all the stock without distinction; that her husband sold a portion of the cattle carried there by her, and their increase, and used the proceeds, and that there was no distinction

made between her property and the property of her husband; that, at the time of her marriage, she had a son, James Farnham, and that her husband had a son, George S. Hanson, of about the same age; that both boys lived with her and her husband and formed a part of the family from the time of her marriage to the death of her husband; that the mare before mentioned had two colts during the time she lived with her husband; the first one was called in the family James' colt; the plaintiff told George S. Hanson, before the second colt was foaled, that it should be his. After the colt was foaled, without any delivery other than the following facts show on the part of the plaintiff, it was always called by the plaintiff and the family generally George's colt, up to the time of his father's death. George called the colt his. The colt was kept upon the father's farm all the time, fed from the produce of the plaintiff's and her husband's farms the same as the other stock, but that George usually took care of this colt, that he got it shod, and drove it usually as he wished. The colt was foaled in the spring of 1862.

Since the death of her husband, the plaintiff has sold the colt called James' and taken the pay for it. At the time the second colt was foaled, George was about fifteen years old. George took the colt in the month of September, 1866, and delivered it to the defendant, who refused to deliver it to the plaintiff on demand.

After the material part of the foregoing testimony was out, the defendant offered to prove the declaration of Jesse Hanson, the plaintiff's husband, in relation to the ownership of the colt; the plaintiff objected, and the Court excluded the evidence.

Upon these facts the Court ruled that the mare, the mother of this colt, continued the property of the plaintiff during the time she was the wife of Jesse Hanson; that the increase of the mare, including this colt, became her property, and that there was not sufficient evidence of a delivery of the colt to George S. Hanson, to authorize the Court to infer a gift of said colt by the plaintiff to said George.

To the foregoing rulings in matters of law, and to the exclusion of the evidence offered by the defendant, the defendant alleged exceptions.

Hackett, for the defendant.

According to the laws of this State, "a woman having property is not deprived of any part of it by her marriage." R. S., c. 61, § 2; Laws 1844, c. 117, §§ 2, 3; *Swift* v. *Luce*, 27 Maine, 285; *Southard* v. *Plumer & al.*, 36 Maine, 64. Nor of that which she acquires after marriage. *Southard* v. *Piper*, 36 Maine, 84; Laws 1847, c. 27. She may acquire property after marriage by "descent, gift or purchase." Laws 1844, c. 117, § 1; R. S., c. 61, § 1. Or by her personal labor performed for other than her own family. Laws 1857, c. 59. The law, (unless by implication,) does not confer upon her the right of acquiring property by accession. *Swift* v. *Luce*, 27 Maine, 285; *Howe & al.* v. *Wildes & ux.*, 34 Maine, 566; *Southard* v. *Piper*, 36 Maine, 84; Bouv. Law Dict., "Purchase"; Laws Mississippi, 1839, c. 46; *Grand Gulf Bank* v. *Barnes*, 2 S. & M., 165; *Beatty* v. *Smith*, 2 S. & M., 567; *Boynton* v. *Finnal*, 4 S. & M., 193; *Bullard & ux.* v. *Russell*, 33 Maine, 196; Laws of Maine, 1848, c. 73. She may release the control of her property to her husband. Laws 1844, c. 117, § 3; R. S., c. 61, § 2; *Kneeland* v. *Fuller*, 51 Maine, 518.

If he has the right of control and occupancy generally, at the time the accession takes place, such accession becomes his, although the property may remain hers, and she have the right to terminate his control at any time. 2 Blackstone's Com., c. 26, "Accession"; *Wood* v. *Ash*, Owen's Rep., 139; *Putnam* v. *Wyley*, 8 Johns., 432.

The law does not declare that a woman's rights in her property, or her right of acquiring property, shall not be affected by her marriage. They are affected by the common law disabilities, which have not been removed. Laws 1848, c. 73; *Swift* v. *Luce*, 27 Maine, 285; Laws 1857, c. 59; *Bradbury* v. *Andrews & trustee*, 37 Maine, 199;

Merrill v. *Smith*, 37 Maine, 394; Laws 1866, c. 52; *Davis* v. *Millett & ux.*, 34 Maine, 429; *Howe & al.* v. *Wildes & ux.*, 34 Maine, 566; *Fuller* v. *Bartlett*, 41 Maine, 241; *Brookings* v. *White*, 49 Maine, 479.

She loses the right of fixing her own residence. She is bound to follow that of her husband. *Chretien* v. *her husband*, 17 Martin, 60. It becomes her duty to labor for her family, and the products of such labor become her husband's. *Keith & al.* v. *Wombell*, 8 Pick., 211. She is affected by the common law presumptions. *Furlong* v. *Hysom*, 35 Maine, 332. All the property in her possession is presumed to be her husband's. *Allen* v. *Hooper*, 50 Maine, 371; *Commonwealth* v. *Williams*, 7 Gray, 337.

There is no different presumption arises from the joint occupation of husband and wife than from his sole occupation. Cases cited above.

If they live together, and he maintains her, and she allows her property to come into his possession, and allows him the control of it, whether the presumption is, that he has control under § 3, Act 1844, or in some other manner, (50 Maine, 371,) he occupies and controls it, not as her servant, but with the same rights as though he rented or hired it of a third person. And it is the same, whether the property is real or personal. Laws Illinois, p. 143; *Eliju* v. *Taylor*, 37 Illinois, 247; *Gage* v. *Dauchy*, 28 Barb., 622; *Freeman* v. *Orser*, 5 Duer, 476; *Sherman* v. *Elder*, 1 Hilt., 476. His rights are not restricted in such case by last clause, § 3, Act 1844. *Eliju* v. *Taylor*, *supra; Bird* v. *Plagrum*, 76 Eng. Com. Law, 638, (C. B., 639,) 3 Cowen, 590,—5 Johns. Ch., 464.

A married woman may give away her property. Laws 1852, c. 227; *Allen* v. *Hooper*, *supra*. There can be no gift without delivery. 2 Kent's Com., § 38, "gift." *What* constitutes a delivery, is a question of law. *Chase* v. *Breed*, 5 Gray, 440.

What constitutes a delivery? *Blake* v. *Jones*, 1 Bailey, 141. It may consist of words without acts, or acts without

words, or both. *Verplank* v. *Sterry*, 12 Johns., 536; 11 Maryland, 424. Words importing an intention to give possession by the donee with the assent of the donor, is sufficient evidence of a delivery to authorize the inference of a gift. *McCluney* v. *Lockhart*, 1 Baily, 467; 2 Baily, 117. It is not necessary that the possession immediately follow the words. *Gillespie's Adm'r.* v. *Burleson*, 28 Alabama, 551. The words may be spoken of a thing not in existence at the time. *Cook* v. *Husted*, 12 Johns., 188; *Linnendal* v. *Doe & Terhune*, 14 Johns., 222.

It is not necessary that the possession should be exclusive of the donor. *Smith* v. *Smith*, 2 Strange, 955; (10 Petersdorff's Ab., 241;) *Penfield* v. *Public Administrator*, 2 E. D. Smith, 305; *Holmes* v. *Sawtelle*, 53 Maine, 179; *Merrick* v. *Linfield*, 21 Pick., 325.

It is the same where the donee is in possession before the words are spoken. *Winter* v. *Winter*, 1 Ellis, B. S., 997. It is not necessary that the donee should receive the thing given, or be in actual possession of it; it may be received and held by some other person for him, and the assent of such person to the gift is sufficient. *Sprigg* v. *Negro Presley*, 3 H. & J., 493; *Negro Hannah* v. *Sparkes*, 4 H. & J., 310; 1 H. & J., 252. And the donor may be that person. *Grangiac* v. *Arden*, 10 Johns., 292; *Hillebrunt* v. *Brewer*, 6 Texas, 45.

D. D. Stewart, for the plaintiff.

Dickerson, J.—Replevin for a colt. Trial by the presiding Judge, and exceptions to his findings in matters of law, and to his exclusion of evidence.

The brief statement denied property in the plaintiff, and alleged it to be in one George S. Hanson.

The presiding Judge found, as matter of fact, that, when the plaintiff married Jesse Hanson, father of said George S., she owned the mother of the colt, and that the colt was foaled after said intermarriage. He also held, as matter of law, that the colt in dispute, being the increase of the plain-

tiff's property, belongs to her. While the findings of the presiding Judge are conclusive in respect to the facts, they are subject to revision by the law court in matters of law.

It appears from the findings of the Court on the facts, that, after the plaintiff's marriage, she lived with her husband upon his farm, and that she also owned a farm near by which was carried on by him, and that the mother of the colt, with other stock, owned respectively by herself and her husband, and the colt itself, were kept indiscriminately upon the joint products of both farms.

By the laws of this State, a woman having personal property loses no part of it by marriage; nor does her husband acquire any right to control it by virtue of the marriage relation. The right of the wife to possess, enjoy and dispose of such property remains as full and complete after, as it was before the marriage; and she has the same power to employ her husband or other person, to manage it, that any other owner of property has, who is not under the disabilities of coverture. Whether such property consist of household furniture, kept in her husband's house, or of stock kept on his farm, the wife is deemed to be in possession of it, in the same manner that the husband is in possession of his property kept in the same way. *Knapp* v. *Smith*, 27 N. Y., 227; *Allen* v. *Cowen*, 23 N. Y., 505.

The husband of the plaintiff, therefore, acquired no property in the mother of the colt in dispute, by virtue of the marriage; and the plaintiff, having both the ownership and the possession of her, is entitled to the *increase*, upon principles of law too familiar to render the citation of authorities necessary.

The defendant undertakes to show title to the colt in George S. Hanson, by gift from the plaintiff, and the burden is upon him to prove this, the presumption of ownership, when once established, continuing until alienation is shown. A delivery is indispensable to the validity of a gift of this sort.

According to the finding of the presiding Judge, the colt

was kept upon the same farm and in the same manner as its mother; and, although it was called George's colt by the plaintiff and in the family, and he usually took care of it, and drove it, yet there is no such distinct act of parting with the possession as authorizes the Court to infer a delivery to him in the capacity of owner.

The declarations of Jesse Hanson in relation to the ownership of the colt are no part of the *res gestae*. He was not the owner of the mare or the colt. His declarations could not bind the true owner, and were properly excluded.

Exceptions overruled.

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

ELIZA J. SWETT *versus* PELEG SPRAGUE.

Where a public law has, in accordance with its provisions, been legally adopted by a city council, such an adoption of a subsequent Act amendatory of the former, is not essential, unless its provisions expressly require it.

The provisions of c. 177 of the Public Laws of 1860, abating nuisances, as amended by c. 187 of the Public Laws of 1863, requiring the notice therein provided to be published "three weeks successively" in a certain newspaper, is complied with, when such notice was published in the weekly issue of such paper, dated the 15th, 22d and 29th, respectively, of the same month, although the hearing under such notice was to take place on the 30th.

The order of notice provided by this statute, passed at a legal meeting of the mayor and aldermen, is legal when the record shows that the mayor was present and participated in the proceedings; no separate action of the mayor being necessary.

This statute requires no complaint to be made, but it is competent for the mayor and aldermen to act upon their own previous observation and knowledge of the unsafe condition of the building.

And, if the notice ordered at the time of adjudication fails of service, a new notice may be ordered and served, without commencing proceedings anew.

Chapter 177 of the Public Laws of 1860, and c. 187 of the Public Laws of 1863, are constitutional.

ON REPORT.

TRESPASS QUARE CLAUSUM, for breaking and entering plaintiff's close and tearing down a brick building situated in the city of Bath, and owned by the plaintiff in common with ten others, some of whom resided without this State.

The defendant justified under an order from the mayor and aldermen of the city of Bath, and put in the records of the city, together with the proof of the dilapidated condition of the building. The facts are sufficiently stated in the opinion.

Tallman & Larrabee, for the plaintiff.

Gilbert, for the defendant.

WALTON, J.—An Act of the Legislature passed in 1860, (chap. 177,) provides that whenever the mayor and aldermen of any city, or the selectmen of any town, after due notice to the owner of any burnt, dilapidated, or dangerous building, shall adjudge the same to be a nuisance to the neighborhood, or dangerous, they may cause it to be removed. This case involves the validity of proceedings under this Act.

May 6, 1863, the mayor and aldermen of the city of Bath, ordered notice to the owners of a dilapidated building to appear before them on the 30th of May, 1863, and show cause, if any they had, why the same should not be adjudged a nuisance and dealt with accordingly. No one appearing to object, the building was adjudged a nuisance, and notice was ordered to the owners to remove it. The service of this notice was defective, and on the 15th of July, 1863, new notice was ordered requiring the owners to remove the building on or before the 15th of August. This notice was duly served, but the owners neglected to make the removal. Aug. 21, 1863, the defendant, (then street commissioner,) was directed to remove it. He commenced August 24, 1863, and completed the removal in three or four days. The plaintiff claims that these proceedings were

irregular and illegal, and do not justify the defendant. Several objections are interposed to the sufficiency of the notice.

1. One objection is, that the Act of 1863, (chap. 187,) which provides that notice may be given by publication in a newspaper, was never adopted by the city of Bath. The Act of 1860 contained a provision that it should not be in force in any town or city unless adopted by the inhabitants of the town or the city council of the city; but the Act of amendment, passed in 1863, contains no such provision. Being a public Act, it would take effect by its own force, and no vote of acceptance was necessary. The original Act was accepted by the city of Bath.

2. Another objection is that the notice was not published "three weeks successively," as the statute requires, because the last of the three publications was only one day before the time appointed for the hearing. The notice was published on the 15th, 22d and 29th of May, and the time appointed for the hearing was the 30th. Certainly the notice was published "three weeks successively," and all three of the publications being before the day appointed for the hearing, we think the statute was complied with, that it was not necessary that a full week should intervene between the last publication and the time of hearing.

3. Another objection is that the notice "eminated only from the board of aldermen without any action of the mayor." The order of notice was passed at a regular meeting of the mayor and aldermen. The record shows that the mayor was present and took part in the proceedings. No separate action of the mayor was necessary. The objection is not sustained.

4. Another objection to the regularity of the proceedings is that it was not competent for the mayor and aldermen to act without a complaint. The case does not show whether any complaint was made to them or not. Nor is it material. The statute requires no complaint, and we think it was competent for them to act upon their own pre-

vious observation and knowledge of the unsafe condition of the building.

5. Another objection is that the failure to give notice, as ordered at the time of the adjudication, that the building was a nuisance, put an end to the power of the mayor and aldermen to act further in the matter, and that the order for new notice, made some fifteen days after, was illegal and void. No reason is perceived why a new order of notice could not be made as well as the first. To require proceedings to be commenced anew in such a case would create unnecessary expense and delay, and be of no advantage to any one. This objection cannot prevail.

6. Another objection to the validity of the proceedings is that the Acts of the Legislature authorizing them is unconstitutional. We see nothing unconstitutional in the Acts. The point taken, that they deprive the owners of the building of a trial by jury, is not true in fact.

The statutes contain ample provisions for such a trial.

Our conclusion is that the statutes under which the proceedings were had are valid; that the proceedings themselves were regular and in conformity with the statute requirements; and that the defendant's justification is established. *Plaintiff nonsuit.*

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

SILAS HAMILTON *versus* INHABITANTS OF PHIPSBURG.

To render the votes of a town meeting legal, it must appear, from the return upon the warrant, that the places where the attested copies thereof were posted were public and conspicuous places.

The vote of a town, at a legal meeting, adopting or ratifying the proceedings of a prior illegal meeting, can be regarded as adopting or ratifying such proceedings only to the precise extent indicated by such vote.

On Report.

Assumpsit on a promissory note for $160,20, dated March 11, 1865, payable in one year and interest; and for bounty to the plaintiff and aid to his family, in consideration of his enlisting and serving as a volunteer in the U. S. army from said town, from July 29, 1861, until June 28, 1865.

The plaintiff introduced the record of art. 2, of a warrant calling a meeting of defendant town, to be held May 11, 1861, which article is as follows: — "To determine what appropriation the town will make for the families of those persons who may enlist as volunteers under the provisions of the Acts of the Legislature, passed at its late extra session."

The return upon the warrant did not describe the places, where the "attested copies of the warrant" were posted, to be "public and conspicuous places."

Record of the vote under article 2, which appropriated certain specific sums to the families of volunteers, "and, after being mustered into the service and marched beyond the limits of this State, the town to pay each non-commissioned officer and private, $5 per month in addition to the pay from the State, and while they remain in the service of the United States."

Plaintiff also put in record of art. 8, of a warrant for a town meeting to be held March 3, 1862, — "To see what action the town will take in relation to supplies to families of volunteers, * * * and to raise money for the same, if deemed expedient." Also, the return on same, which was same as the former. Also, the vote of the town under this article, which fixed supplies at the same sums named in the former vote.

Also, of art. 12, of a warrant for town meeting to be held March 2, 1863, — "To see if the town will raise by loan or otherwise a sum of money sufficient to pay all the discharged soldiers $5 per month, as voted in 1861, for the time they were absent from the State, in the U. S. service, according to said vote of 1861." Also, of the return upon

said warrant, which was legal. Also, of the vote under article 12,—"Voted, that the selectmen be authorized to raise $1500, by loan, to pay all soldiers whatever may be due them with regard to $5 per month, voted in 1861."

Also, of art. 18, of a warrant for town meeting to be held March 7, 1864,—"To see what action the town will take in relation to the $5 per month now paid to volunteers." Also, of the return, which was legal.

Also, of the vote under art. 18,—"Voted to pay the $5 per month bounty to all who enlisted in the U. S. service prior to Jan. 1, 1862; the time of such monthly pay to be from the date of enlistment to the date of discharge, but no such time for said monthly pay shall extend beyond July 1, 1864."

Plaintiff testified that the vote of 1861 was the inducement to his enlistment; that he enlisted, and was mustered in July 29, 1861, and was discharged Dec. 13, 1863; that he re-enlisted, and was discharged June 28, 1865; that he had never received the monthly pay of $5, and had demanded it. The view taken by the Court renders it unnecessary to report evidence put in by the defence in regard to payment of the aid appropriated to volunteers' families.

The case was continued on report, the Court to draw such inferences as a jury might, and to render such judgment as law and evidence required.

Libbey & Snow, for the plaintiff.

Gilbert, for the defendants.

Appleton, C. J.—By R. S., c. 3, § 7, town meetings are to be notified by "posting up an attested copy thereof (of the warrant) in some public and conspicuous place in said town, seven days before the meeting." It does not appear by the return of the constable to whom the warrant was directed, nor in any other mode, that the places where the attested copies thereof were posted were either public or conspicuous places. Nor does it appear that the town

had appointed a different mode of notice. No motion to amend the return has been made. The various town meetings, except that holden March 7, 1864, were illegal. *Fossett* v. *Bearce*, 29 Maine, 523; *Bearce* v. *Fossett*, 34 Maine, 575.

The vote of the town, at the meeting holden on the 7th March, 1864, does not touch the aid to be furnished the family of the soldier. It is "to pay the five dollars per month bounty to all who enlisted in the service of the United States prior to Jan., 1862, the time for such monthly pay to be from the date of the enlistment to the date of discharge." The plaintiff was discharged on his first enlistment on 13th Dec., 1863, and is entitled to his town bounty up to that time and no longer. The vote at the last town meeting, which was the only legal one, can be regarded as an adoption or ratification of the preceding illegal doings of the town to the precise extent indicated by the vote and not beyond it. That is, the defendants had, at a town meeting held previous to the plaintiff's enlistment, promised to pay the sum of five dollars per month, as town bounty, to all who should thereafter enlist, and to make certain provision for the families of those so enlisting. The meeting at which these votes were passed was illegal for the reason already given. At a subsequent legal meeting, the town partially adopted and sanctioned their former doings, and thus far are to be held liable. Stat. 1866, c. 59.

Judgment for the plaintiff for the note in suit, and for five dollars per month, from the date of the first enlistment to that of the first discharge.

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

ALEXANDER SNOWMAN, *in Eq.*, *versus* JACKSON HARFORD.

A court of equity discriminates between those terms which are formal and those which are of the substance and essence of a written contract for the conveyance of land.

Where, from conversations between the parties thereto, had a short time before the final payment was to be made, it is apparent that neither of them expected or required a strict performance as to time, a court of equity will decree a conveyance, provided the party seeking it has always been ready to pay according to the terms of the agreement, and the time was suffered to pass, by his being led to believe, by the conduct of the other party, that no advantage would be taken of such non-payment.

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

The prayer of the bill was for a decree of conveyance in fee, free from all incumbrances, for process to enforce the same, and for injunction against other conveyance and incumbrance during the pendency of the bill.

The facts sufficiently appear in the opinion.

Gilbert, for the complainant.

Tallman & Larrabee, for the respondent.

APPLETON, C. J.— On 14th March, 1866, the plaintiff entered into a written contract with the defendant for the purchase of the premises described in the plaintiff's bill, for the price of two hundred dollars, of which sum one hundred dollars was paid at the time. The plaintiff, at the same time, gave his note for the balance, payable in a year and interest. The defendant agreed to prepare the deed on or before the 14th March, 1867. In the agreement, which was signed by both parties, were the following words:— "It is hereby declared and agreed, by and between the parties hereto, that no deed or conveyance is to be required of or executed by the said Jackson Harford until the said Alexander Snowman fully and completely complies with all and singular his covenants and promises touching and concerning the payment of the said several sums of money."

The plaintiff immediately entered into possession of the

land thus agreed to be conveyed, cut wood therefrom and paid the taxes assessed thereon.

About the first of February, 1867, the parties met and had a conversation in regard to the note then about maturing. The plaintiff told the defendant he should meet the note when it became due. The defendant said he was going east in the month of March. The plaintiff inquired how it would be about fixing up for the land, to which the defenddant replied, that it would make no difference, he should come back and settle up his business before he moved down for good. From the conversation it is apparent that neither party expected or required a strict performance of the contract.

On the 15th March following, the plaintiff sent word to the defendant, by his son, that he had the money ready for him and requested him "to come and fix up about that land," &c. The parties, it seems, were near neighbors.

The defendant admits the meeting of the parties in Februrary, and does not deny the statements of the plaintiff. He says he then suggested that he might indorse the note, to which the plaintiff made no objections.

The defendant further testifies that he met the plaintiff about the 10th March, "when he asked me respecting doing up the business concerning the land. I asked him where he chose to have the business done. He said at Todd's. I told him that I would meet him at Todd's at a certain evening. I went to Todd's on that evening. Todd told me Snowman had been there. Finding him gone, I made an appointment to meet him at another time, and requested Todd to notify him."

The parties met at Todd's on 28th March. The plaintiff was ready to pay the note. The defendant refused to receive pay or to give a deed, on the ground that the plaintiff had forfeited his obligation. On the next day, the plaintiff made a more formal tender of the money due and demanded his deed, which being refused, he forthwith commenced this bill.

At law, the plaintiff must show that all those things which are on his part to be performed, have been performed within the time specified in the contract. At law, time is of the essence of the contract. But in equity it is different. A court of equity discriminates between those terms of a contract which are formal and those which are of the substance and essence of the agreement. It holds time to be *prima facie* non-essential, and grants specific performance of contracts after the time for their performance has been suffered to pass, by the party asking for the intervention of the Court.

The evidence shows clearly that the parties did not require a strict performance of the contract. If time were of the essence, the defendant has waived a strict compliance.

The plaintiff has at all times been ready and willing to perform on his part. If the money was not paid at the day of the maturity of the note, it was because the plaintiff was led to believe, by the conduct of the defendant, that no advantage would be taken of such non-payment.

A compensation in damages, for the breach of an agreement to convey real estate, is not regarded as adequate relief, but a court of equity will decree a specific performance. *Foss* v. *Haynes*, 31 Maine, 81; *Jones* v. *Robbins*, 29 Maine, 351. Nor does the Court regard time as of the essence of the contract. *Hull* v. *Noble*, 40 Maine, 459; *Rogers* v. *Saunders*, 16 Maine, 92. Where a day for payment was inserted in the contract, it was held not to be thereby rendered essential. *Hearne* v. *Tenant*, 13 Ves., 287. Where a day was specified for the delivery of the abstract, it was equally non-essential, although the purchaser, upon its expiration, refused to proceed. *Roberts* v. *Berry*, 16 Beavan, 31.

The plaintiff is entitled to a conveyance according to the prayer of his bill.

The plaintiff entitled to decree according to the prayer of his bill—with costs.

CUTTING and DANFORTH, JJ., concurred.

WALTON, J. — I concur in the result, and will add, that it seems to me that where, as in this case, a *negotiable note* is given for the price of the land, which may not be in the hands of the payee when the time of payment arrives, the note should be presented for payment before a forfeiture is claimed.

DICKERSON and TAPLEY, JJ., concurred.

STATE *versus* DAVID BARTLETT *& als.*

In an indictment for larceny of gold and silver coin, railroad bonds, legal tender notes, and compound interest notes, it is a sufficient allegation of ownership to describe them as "of the goods and chattels" of the owner.

In an indictment for larceny of a large number of different articles, it is not necessary to use the word "and" to connect the descriptions of the several articles.

Upon an indictment charging the felonious breaking and entering of a building, and a larceny therein, after a general verdict of guilty, judgment will not be arrested, if the larceny of a single article is properly alleged; although it may contain insufficient allegations of the larceny of other articles.

Exceptions to allowing the officer for the State to inquire, on cross-examination of a prisoner's witnesses, what his business had been, will not be sustained, when it does not appear what the answer was.

When the identity of the prisoner is a material question, and a witness for the government has testified to an acquaintance with him, the witness may be asked where it was, and what was his own business.

The Act of 1864, ch. 280, allowing a person charged with crime to be called as a witness at the trial, "at his own request but not otherwise," is constitutional.

The fact that he does not testify is a proper one for the consideration of the jury in determining the guilt or innocence of the accused.

On the trial of an indictment, the presiding Judge may, in his discretion, appoint a counsellor of the Court to assist the attorney for the State; and the fact that such person may expect compensation for services thus rendered will not deprive the Court of the power to appoint him.

State *v.* Bartlett.

On Exceptions.

Indictment, the material portions of which are as follows:—

"Sagadahoc, ss.—At the Supreme Judicial Court, begun and holden at Bath, within and for the county of Sagadahoc, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and sixty-seven—

"The jurors for said State upon their oath present, that David Bartlett alias Fitz Erald alias J. Dunbar, Orrin Syms alias Orrin Burns alias Rory Syms alias Rory Burns, and Edward Maguire, late of the city, county and State of New York, now cormorant at Augusta, in the county of Kennebec and State of Maine, laborers, on the twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-six, with force and arms at Bowdoinham, in said county of Sagadahoc, in the night time, feloniously did break and enter the bank of the 'National Village Bank of Bowdoinham,' a banking association duly and legally established and organized at said Bowdoinham, there situate, and a certain amount of gold coin of the value of sixty-five dollars, a certain amount of silver coin of the value of seven dollars and seventy-five cents; six Portland and Kennebec Railroad bonds of the following numbers, to wit:—numbers one, seven, fifty-six, fifty-eight, fifty-nine and one hundred and seven, each for one thousand dollars, and of the value of one thousand dollars each; four Portland and Kennebec Railroad bonds numbered as follows, to wit;—sixty-five, sixty-six, eighty-six and eighty-seven, each of five hundred dollars, and each of the value of five hundred dollars; one Consolidated Interest Railroad bond, number thirty-two, of the value of one thousand dollars; certain bank bills current as money in this State, to a large amount, to wit:—to the amount of three thousand four hundred and eighty-one dollars, of the value of three thousand four hundred and eighty-one dollars; certain Legal Tender Notes to a large amount, to wit:—to the amount of three thousand seven hundred and fifteen dollars, and of the value of three

thousand seven hundred and fifteen dollars; certain Compound Interest Notes to a large amount, to wit:—to the amount of fourteen hundred and thirty dollars, and of the value of fourteen hundred and thirty dollars, of the goods and chattels of the said 'National Village Bank of Bowdoinham;' five United States bonds, numbered 49,816, 49,817, 49,818, 49,819, 49,820, of the bonds of the United States issued under the Act of July 7th, 1861, and of the supplementary Act of August 5th, 1861, each of one thousand dollars, and each of the value of one thousand dollars; three United States Treasury Notes dated August 15th, 1864, numbered 100,923, 100,924 and 100,925, of one thousand dollars each, and each of the value of one thousand dollars, of the goods and chattels of William Purrinton of said Bowdoinham, being then and there deposited and found in the bank aforesaid;" [here follows a description of other property in similar language;] "three United States treasury notes of one hundred dollars each, and each of the value of one hundred dollars, of the goods and chattels of Thomas Spear of Bowdoinham, being then and there deposited and found in the bank aforesaid; feloniously did steal, take and carry away, against the peace of said State, and contrary to the statute in such cases made and provided.

"And the jurors aforesaid upon their oaths aforesaid do further present, that David Bartlett alias Fitz Erald alias J. Dunbar, Orrin Syms alias Orrin Burns alias Rory Syms alias Rory Burns and Edward Maguire, late of the city, county and State of New York, now cormorant at Augusta, in the county of Kennebec and State of Maine, laborers, on the twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-six, at Bowdoinham, in said county of Sagadahoc, with force and arms a certain building there situate, then and there occupied as and for a banking house by the 'National Village Bank of Bowdoinham,' a banking association duly and legally established and organized at said Bowdoinham, in which building were then and there kept valuable things and articles of value, to wit:

specie, bank notes current in this State, promissory notes and bills of exchange, which were articles of value, and other articles of value belonging to said bank, feloniously did break and enter in the night time and certain gold coin to a large amount, to wit:—to the amount of sixty-five dollars, of the value of sixty-five dollars; certain silver coin to a large amount, to wit:—to the amount of seven dollars and seventy-five cents," &c., as in the first count.

Before empanneling the jury, the County Attorney moved that George F. Shepley, Esq., be appointed by the Court to assist in the prosecution.

Counsel for the prisoners objected unless it should appear that he was not employed for compensation by other parties, and desired to propound inquiries to him, to ascertain whether he was so employed, and whether he was to act for pecuniary compensation.

The Court ruled that when it appears to the Court that such facts and circumstances exist that the public interests require that the State's Attorney have the aid of some counsellor of the Court in the trial of the cause, the Court will appoint such person as may seem to them best fitted under the circumstances to aid in the promotion of justice; and the fact that such person may expect compensation, for services thus rendered, will not deprive the Court of its power to appoint him, but the Court may, in the exercise of its discretion, appoint or refuse to appoint under such circumstance. General Shepley may, in this case and at his pleasure, answer the inquiry of the prisoners' counsel concerning his expectation of compensation.

Gen. Shepley said, I propose to answer. I am employed at the request of the prosecuting officer. I was applied to by the officers of the bank, and asked the compensation. I stated to them that it was a matter that I would not decide till the case was ended. I now say to my learned friend, and I now say to the prosecuting officer who employed me, I say to the officers of the bank, that when this case is ended that they may or not pay my actual pecuniary expen-

ses. I make no conditions in regard to that, and that if they will put into the hands of Mrs. Sampson, who has been a friend to the soldiers, a sum equal to that received by the learned counsel who raised the objection, I will neither ask nor receive one farthing of pecuniary compensation for my personal services.

The counsel for the prisoners then said:—The objection is not waived. It is claimed that, according to the statement of Gen. Shepley, he does receive and is to receive pecuniary reward.

Mr. Shepley replied:—I make it purely voluntary whether they give anything or not. I waive any claims. I would not have made this offer if the Court had not, previously to my making it, granted the request of the county attorney. The Court having so decided, I waive any other claims, leaving the question entirely to their generosity what they shall give to the orphan asylum in Bath, trusting they will make it equal to the fee of my learned brethren.

The Court appointed Gen. George F. Shepley to assist the State's attorney, the duly elected county attorney being absent, and Francis Adams having been duly appointed for the term.

Evidence was offered on the part of the government, that certain United States bonds and other securities, described in the indictment, were stolen from said Bank. This evidence was seasonably objected to on the ground that said bonds and securities were not alleged in the indictment to belong to any person, but to be "of the goods and chattels" of persons named; and because it was not alleged in the indictment that said bonds and securities were stolen. This objection was overruled, and the evidence was received.

William Murphy was examined by the defence, to prove that Edward Maguire was in New York on the 22nd of June, 1866; and the transactions of that day were fully inquired into by counsel on both sides. Counsel for the government then inquired of the witness what was the business of Edward Maguire? This question was objected to

but allowed; and subsequently the same cross-interrogatory was addressed to Maguire's witnesses by the government against the objection of respondent's counsel.

Moses Sargent, a witness for government, was inquired of, how long he had been acquainted with Bartlett? He answered that he was acquainted with him about fourteen years ago for a few years, and from ten years till recently was not acquainted with him. Where was Bartlett when you saw him? Objected to, and objection sustained. Where were you, what was your business? Objected to but allowed. Witness answered that he was an officer in a certain State's Prison. There was no other evidence tending to prove that Bartlett had been a State's Prison convict.

The respondents excepted to the foregoing rulings, to the overruling of their motion in arrest of judgment, and to certain instructions of the presiding Judge which are fully stated in the opinion.

Tallman & Larrabee, for the respondents.

At the trial of the cause the presiding Judge erred in the following particulars,—viz.:

1. In allowing Gen. Shepley to appear in and argue the case to the jury.

a. He was employed by, and was acting in the case, for and as the attorney of said bank.

b. Such course is in violation of the policy of the laws, as well as in contravention of the requirements of the statutes of this State.

"In cases of felony it is the duty of the counsel for the prosecution to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party." *Regina* v. *Thursfield*, 34 Eng. C. L. R., 385.

In opening the case, Corbet, for the prosecution, said he "apprehended his duty as counsel for the prosecution was not to consider himself as counsel for any particular side or party."

GURNEY, B., said:—"The learned counsel for the prose-

cution has most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice," &c. Ibid.

c. The Court will not allow an attorney, who is employed by, or expects any compensation from an interested party, to assist the prosecuting officer in the trial of a criminal cause for felony, — much less to argue the cause to the jury. *Com.* v. *Knapp*, 10 Pick., 476; same v. *Williams*, 2 Cush., 582; same v. *King*, 8 Gray, 501.

2. Such employment is forbidden by the statutes of this State.

a. The prosecuting officer is an officer of the law, acting under an oath which prohibits his receiving any "fee or reward, for or in behalf of any prosecutor for official services. R. S., c. 67, § 35; same 79, § 19.

b. The attorney employed in this case was also bound by his oath to "conduct with all good fidelity" to his clients. R. S., c. 79, § 22.

Suffering additional counsel to appear for the prosecution, is within the legal discretion of the Judge, but the Judge is not justified in violating the policy of the law, much less the requirements of the statute.

In this case, therefore, we conclude the appearance of Gen. Shepley was improper and illegal.

3. In allowing the counsel for the government to inquire of defendant Maguire's witness "what was the business of Edward Maguire."

a. The question was either irrelevant or designed to prove that his character was bad.

b. In either case it was improper and illegal. *State* v. *Upham*, 38 Maine, 261.

"Even in a prosecution for stealing a particular horse, it cannot be given in evidence against the defendant that he associated with horse thieves." Bishop on Crim. Proceed., § 488.

"Actions, looks, words, steps, form the alphabet by which you may spell character." Worcester's Dict.

4. So, also, in allowing Sargent to testify where he was and what was his business, when he was acquainted with Bartlett.

5. So, also, in instructing the jury that this bank was within the purview of the statute.

a. This was not such a bank as was intended to be embraced by it. It referred only to state and not to national banks.

b. Neither is the building mentioned in the second count such a one as is intended by the phrase "other building in which valuable things are kept."

6. In instructing the jury that the "indictment also *properly* charges the larceny of gold and silver coin, and other bonds specified and particularly described therein, and is not limited, as the prisoners' counsel contends, to the treasury notes of Thomas Spear."

a. What might have been intended to have been charged in the indictment, we know not; but we apprehend its correct reading shows only a charge of larceny of notes of Thomas Spear.

b. This clearly appears from inspection of the indictment.

c. There is no allegation in either count of the indictment, that the supposed property of said bank, was in the bank, or other building, at the time of its alleged breaking, or any larceny of it committed "therein."

d. Neither is any of the property or its ownership "properly" charged or described as "goods and chattels." R. S., c. 120, § 1; Bishop's Crim. Law § 357; *Regina* v. *Powell*, 6 British Crown Cases, 401; *U. S.* v. *Davis*, 5 Mason, 356; *Rex* v. *Hill*, 1 British Crown Cases, 189; *Rex* v. *Mead*, 19 Eng. Com. Law. Rep., 514; *Rex* v. *Vise*, &c. 2 Br. Cr. Cases, 218; *Rex* v. *Henry Clark*, 1 Br. Cr. Cases, 181.

7. The Judge also erred in instructing the jury that "the fact that they might be witnesses or not, as they chose, and did not offer themselves as witnesses, is a fact in the case, and proper for your consideration. The necessary infer-

ence, if any, arising from it, is for you to determine." Constitution of Maine, art. 1, § 6; Statute of Maine, 1864, c. 280; Stat. of 1865, c. 312.

a. This instruction is not only unwarranted by law, but calculated to mislead the jury.

8. The Judge also erred in stating to the jury—"and here let me remark, gentlemen, that the law does not require you to believe as jurors what you cannot believe as men. There is no such distinction known to it."

a. This instruction abolishes all distinction of the quantity of proof required, between civil and criminal cases.

"Where the instruction was, that it is not necessary the jury should be satisfied of the defendant's guilt to the exclusion of a reasonable doubt; but if, from the evidence, they should believe him guilty "they should so find,"—this was held to be wrong, as was also the instruction "that the jury should weigh and consider all the facts and circumstances proven to their satisfaction, in connection and combination, and should hold them and pass judgment on them in that condition; and that, if the conclusion from the facts and circumstances so proven to their satisfaction be, that there is that degree of certainty in the case, that they would act on it in their own grave and important concerns, that that is the degree of certainty which the law requires, and which will warrant and justify them in returning a verdict of guilty." 1 Bishop on Crim. Proceed., 819.

b. In civil cases, a preponderance of testimony is sufficient, but in criminal, the defendant has the presumption of innocence in his favor, and the crime must be established beyond a reasonable doubt.

c. This instruction deprives the defendant of the benefit of the legal presumption of innocence, and excuses the government from proving the case beyond a reasonable doubt.

"In a criminal case, the establishment of a *prima facie* case does not, as in a civil case, take away from the defendant the presumption of innocence, or change the burden of

proof," the State is required to prove beyond all reasonable doubt, the facts which constitute the offence. The establishment, therefore, of a *prima facie* case merely, does not take away the presumption of innocence from the defendant, but leaves that presumption to operate in connection with, or in aid of, any proofs offered by him to rebut or impair the *prima facie* case thus made out by the State." 1 Bishop's Crim. Proceed., § 503.

d. "In civil cases, their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt." 3 Greenleaf on Evidence, § 29; *Com.* v. *Webster*, 5 Cush., 320.

Frye, Attorney General, for the State.

TAPLEY, J. — This is an indictment for breaking and entering the National Village Bank of Bowdoinham and stealing therefrom a large amount of coin, bills, bonds and U. S. treasury notes. The prisoners being convicted, now raise certain questions pertaining to the sufficiency of the indictment, and to the regularity of the proceedings on trial.

1. It is alleged by the prisoners' counsel that there is no sufficient allegation of property or ownership in articles alleged to be stolen.

The several articles of property alleged to be stolen, after being particularly and specifically described, are alleged to be "of the goods and chattels of" several persons therein named. No objection is made to the form of this allegation, but it is urged that coin, bills, bonds and treasury notes are not goods and chattels, and therefore there is no allegation of ownership.

Every indictment for larceny must allege an ownership of the property stolen, and would be defective without such allegation, but there are no particular words or phrases which the law requires should be used. This allegation, it should

be noticed, is one of ownership purely, and in no manner or part descriptive of the things stolen. The descriptive allegations are full and complete, and the only question arising under this objection is, whether this sufficiently alleges the property in the individuals named.

To constitute an allegation of ownership, such words must be used, and in such succession and connection that they convey clearly to the ordinary mind the idea, that a certain person or persons named, are the owners of the stolen property. This may be done by a variety of words and phrases, any of which will be sufficient, if they clearly convey the idea that such persons are the owners.

Viewed in this light, can there be any question as to the signification of these words as they are here used? Is or not the idea, or the fact, that certain persons were the owners of the property stolen, clearly conveyed? Will any doubt, in *any* mind of ordinary capacity arise, concerning it? If not, it is because such words are used as convey one and the same idea upon this point to all persons. If they do convey clearly to the ordinary mind the fact, that certain persons were the owners, that is all that is required. A few citations showing the sense in which these words have been used and understood may not be inappropriate.

"An allegation in an indictment, that the bank bills were the goods and chattels of A, is a sufficient averment that they were his property; the word chattels denoting property and ownership." *People* v. *Frost*, 1 Doug., 42, (7 U. S. Dig., 340.)

"Coin is included under the general terms 'goods and chattels,' as used in the 26th section of the crimes Act of 1831." *Hall* v. *the State*, 3d Ohio, (N. S.,) 575, (15 U. S. Dig., 377.)

"Chattels personal are generally such as are moveable, and may be carried about the person of the owner wherever he pleases to go; such as *money*, jewels, garments, animals, household furniture, and almost every description of property of a moveable nature." Holthouse's Law Dict., 'Chattels.'

"Chattels personal are property, and, strictly speaking, things moveable; which may be annexed to or attendant on the person of the owner and carried about with him from one part of the world to another; such are animals, household stuff, *money*, jewels, *coin*, garments and everything else that can properly be put in motion and transferred from place to place." 2 Black. Com., 387.

"The terms, 'goods and chattels,' includes choses in action as well as those in possession." 12 Co., 1; 1 Atk., 182.

"Chattels is a more extensive term than goods or effects." "The terms 'goods and chattels,' includes not only personal property in possession, but also choses in action." "The word '*goods*,' simply, and without qualification, will pass the whole personal estate, when used in a will, including even stocks in the funds." Bouv. Law Dict., "Chattels."

"Any moveable property or goods, as furniture, plate, *money*, horses," &c. Worcester's Dict., "Chattel."

"Chattel is a very comprehensive term in our law and includes every species of property which is not real estate or a freehold." Burrill.

In *Commonwealth* v. *Richards*, 1 Mass., 338, SEDGWICK, J., says:—"The indictment alleges that the defendant stole a bank note of the value of ten dollars, of the goods and chattels, &c. This is a sufficient allegation of property and value, and, in my opinion, as particular in description as the law requires."

In the *People* v. *Holbrook*, 13 Johns., 90, four promissory notes, commonly called bank notes, were alleged to be the goods and chattels of P. C., and it was held sufficient without saying they were the property of P. C. "Chattels" denoting property and ownership.

Such use of these terms, continued for so long a time, taken in connection with the very apparent fact that they do, as used in this case, clearly convey the idea of ownership, and nothing else, leads us to the conclusion that this indictment has a sufficient allegation of ownership.

It has been held that, in an indictment of this kind, the words "of the goods and chattels," may be rejected as surplusage and the remaining words will be sufficient. *Com.* v. *Eastman*, 4 Gray, 416, and cases there cited.

If they are so immaterial that they may be rejected as surplusage, and then sufficient remains, it is quite clear a sufficient allegation is found, whether rejected or not. If they qualify the remaining words, they cannot be rejected and thus enlarge or diminish the remaining words; and, if they do not, a rejection is not necessary to make the allegation sufficient.

We have no doubt the allegation is sufficient as it stands.

2. It is contended there is no allegation of a larceny, except as to the treasury notes of Thomas Spear; and that this arises from the omission of the connecting word "and," between the different articles of property described. We think the word "and" was not necessary to connect the property described with the allegation of feloniously stealing, taking and carrying away. This form of declaring is not unusual. It had been practiced in Massachusetts before we became a State, and has been, there, and here ever since. See Davis' Precedents and Train & Heard's Precedents.

3. It is also urged that there is no sufficient allegation of a larceny *in the bank* of the articles alleged to be the property of the bank. That while the indictment charges all the rest of the property as "being then and there deposited and found in the bank aforesaid," there is no such allegation as to the property alleged to belong to the bank.

The property belonging to other persons was, in fact, *deposited* in the bank *for safe keeping*, hence the allegation in relation to those articles.

The allegation in relation to the bank property is substantially that the prisoners broke and entered the National Village Bank of Bowdoinham, and certain described property "feloniously did steal, take and *carry away*."

This, it is contended by the government officer, is a suf-

ficient allegation of stealing, taking and carrying away *from the bank.*

The objection here raised, if of any importance at all, is now open to the prisoners only upon their motion in arrest of judgment.

Their objections to the introduction of evidence were specific, and confined to two alleged causes; one was, "that said bonds and securities were not alleged in the indictment to *belong* to any person," but to be "of the goods and chattels of persons named," and the other cause assigned was, "because it was not alleged in the indictment" that "said bonds and securities were stolen." These objections we have considered and find them unsound in theory and practice. The question now presented arises legitimately upon the motion in arrest, and we think it cannot avail the prisoners, even upon the construction of the indictment they contend for.

The offence which they are indicted for, consists of the breaking and entering the bank and committing a larceny therein. The amount stolen from the bank is immaterial. The offence is as complete by the larceny of one dollar as of eighty thousand.

If the prisoners broke and entered the bank and stole the treasury notes of Thomas Spear therefrom, the offence charged has been committed.

It is not claimed by the prisoners' counsel that the objection here raised applies to any of the articles other than those belonging to the bank. All the rest of the property being free from this objection, even though the point was well taken as to the property of the bank, judgment will not be arrested. While the indictment is well drawn as to the larceny of a single article, judgment will not be arrested upon a general verdict of guilty.

In *Commonwealth* v. *Williams*, 2 Cush., 588, it is said, "But, in reference to the offence upon which this indictment is found, and for which the defendant is to be punished, the amount of property stolen does not enter into the offence,

or affect the statute punishment. It is the breaking and entering in the night time a public building, and stealing therein, that is the subject of punishment under the statute."

"It is well settled that, upon an indictment charging a *larceny* of various distinct articles of property, some of which are technically described, and others not so, and a general verdict of guilty is found by the jury, the insufficiency of the description as to certain articles has no other effect than to strike them out of the indictment, and the verdict is to be applied to the whole property, which is properly and sufficiently charged to have been stolen, and, for the larceny of such property, the punishmnnt is to be awarded." We have not found it necessary, therefore, to consider or decide upon the question of the sufficiency of the charge of larceny of bank bills. Independent of that charge, there is a larceny technically and properly set forth in this indictment.

For the same reason we do not find it necessary to consider or decide upon the sufficiency of the allegation concerning the articles described as belonging to the bank, because, independently of that charge, there is a larceny from the bank of many other articles, technically and properley set forth in this indictment.

4. The counsel for the government was allowed to inquire of Maguire's witnesses, "What was the business of Edward Maguire?" This inquiry was put upon cross-examination. It does not appear what the answer was, hence it does not appear that he was aggrieved by the allowance of the question. We can conceive of many reasons why such a course of inquiry might well be allowed, but, as the answer does not appear, or even that an answer was made at all, it becomes unnecessary to examine it.

5. "Moses Sargent, a witness for the government, was inquired of, how long he had been acquainted with Bartlett? He answered that he was acquainted with him about fourteen years ago, for a few years, and from ten years till recently was not acquainted with him." He was then asked

"where was Bartlett when you saw him?" The prisoners' counsel objecting, the objection was sustained. Subsequently the witness was asked, "where were you and what was your business?" The prisoners' counsel objected, but the Court allowed the witness to answer, and he answered that he was an officer in a state's prison.

No request was made to have the answer stricken out or other objection made.

The inquiry and answer objected to proves nothing. The answer could not have been anticipated by the presiding Judge. The identity of the prisoner being an important inquiry, it was competent to show the acquaintance and familiarity of the witness with the prisoner.

If the counsel feared an incorrect and unfavorable inference would arise from it, he could have pursued the inquiry upon cross-examination and elicited any other facts within the knowledge of the witness which would remove the unfavorable impression he may have feared, or he could have introduced the prisoner, Bartlett, to make any explanation. It is urged that the inference to be drawn from this inquiry and answer is that Bartlett was a convict in some State's prison. Why the counsel thus concludes he does not state; certain it is there is no such necessary inference arising. The answer does not state that either the prisoner or witness was in a State's prison when he saw him. If there was danger that any improper inference would be drawn, how easy for the prisoners' counsel to have inquired where they in fact were, or to have introduced the prisoner to state the fact concerning the matter. If he sees fit to lay by and trust to any inference which he thinks may arise from such an answer, taking no means to avoid it, he cannot now urge it as a cause for new trial. As before remarked, the inquiry and answer prove nothing for or against the prisoner, and the fears of counsel must have some other foundation than anything appearing in the question and answer.

6. The Court instructed the jury "that the laws of this State permit these defendants to testify in their own behalf

if they desire. Whether they will or not is at their option. The government cannot make them witnesses. They cannot compel them to go upon the stand. If they choose to, the government cannot exclude them. The fact that these prisoners have not testified is apparent to you. The reason why, is not, except from the statement of their counsel. The law presumes nothing concerning it. It is a matter of fact, and no legal inferences or presumptions arise from it. The fact that they might be witnesses or not, as they chose, and did not offer themselves, is a fact in the case and proper for your consideration. The necessary inference, if any, arising from it, is for you to determine. If the government has failed to prove their guilt there was no necessity for them thus to testify. If the evidence they have produced raises a reasonable doubt of their guilt, then there is no occasion for them thus to testify, for that entitles them to a verdict."

To this instruction the prisoners' counsel takes exception, because the jury were allowed to take into consideration the facts that the defendants did not offer themselves as witnesses.

The argument of the learned counsel for the prisoners, in support of his objections, proceeds principally upon the assumption that the Act, admitting defendants in criminal cases to be witnesses in their own behalf, is in contravention of that provision of the bill of rights which provides that the accused "shall not be compelled to furnish evidence against himself." Const. Maine, art. 1, sec. 6.

The Act provides that, "in all indictments, complaints and other proceedings against persons charged with the commission of crimes and offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness," &c. Acts of 1864, c. 280.

We do not perceive any conflict between this Act and the provision recited from the bill of rights. The Act carefully guards the rights of the accused, and leaves it entirely at his option to testify or remain silent. He cannot now be com-

pelled to furnish evidence against himself any more than before the passage of the Act. He may now be as reticent as before, if he chooses. The only difference is that, before the Act, he *must* be silent, and now he *may*.

The difficulty which is suggested, however, in its practical operation, is that, if he does not avail himself of the opportunity offered, an unfavorable influence arises, and, if he does and tells the truth, he must convict himself, and therefore he is between two straits. If this be so, it by no means follows that the Act is in conflict with the rule referred to in the bill of rights.

We are not aware that such a construction has ever been given this provision in the bill of rights; on the contrary, the construction now contended for is in conflict with certain well known rules of evidence of long and frequent practice in our courts.

If a person accused remains silent when he may speak, he does so from choice, and the choice he makes upon such occasions has always been regarded competent evidence. It is the *act* of the party. From time immemorial the reply or the silence of the accused person, when charged, has been regarded as legitimate evidence on his trial for the consideration of the jury. Any act of his, when charged, tending to sustain the charge, may be proved. Fleeing from arrest, giving contradictory, untrue or improbable accounts of the matters in issue, and refusals to account for the possession of stolen property, are evidences of guilt admitted upon the trial of the persons accused. These are proofs derived from the prisoner's acts, sayings and silence. He never has been, and is not now compelled to furnish the Court the evidence of the existence of these facts. If it be said, these are the voluntary acts of the prisoner, the manifest answer is, they are not more so than the refusal or neglect to testify.

When found in the possession of stolen property and inquired of concerning it, he *must* speak or be silent.

When found with the implements used in a recent burg-

lary and interrogated in reference to them, he *must* answer or be silent.

When found with the bloody instruments of a foul murder, and he is called upon to explain his possession, he *must* answer or be silent. There is no escape from this. He is in the strait betwixt the two. He must choose the one or the other. He must speak or be silent. Yet, in all these cases, it has been the uniform practice of the Court to admit in evidence the conduct of prisoners upon such occasions, and it never has been held an infringement of the rule referred to.

A distinguished writer upon criminal law says, —" Where a man at full liberty to speak and not in the course of a judicial inquiry is charged with a crime, and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury." Wharton's Criminal Law, 320.

The Act in question imposes no obligation upon the prisoner to testify; it only affords him an opportunity so to do, if he choose. It changes his condition only in adding one more opportunity to speak or be silent, and the same rule applies to the result which has been applied to such cases for a long time.

We are not aware that any Court has ever extended the rule so far as now contended for by the counsel for the prisoners. To do so would work manifest injustice to all except the *guilty*, and overrule the law-making power.

The proposition is substantially this, a law which gives an *innocent* person, who is accused of an offence, an opportunity to relieve himself from suspicion and punishment, and opens his mouth that he may declare and prove his innocence, must be declared unconstitutional because the *guilty* man who is accused, may, if he takes the stand to testify, get caught in the meshes of his own falsehoods, and, if he does not testify, is liable to an inference unfavorable to his escape from the punishment he deserves.

From this it would result, that the innocent man must be

deprived of this great privilege and allowed to suffer, that the guilty may the more readily escape.

Such a proposition, involving such results, added to the overruling of the law-making power, can be adopted only upon some positive, unyielding principle of law requiring it. Such requirement we do not find, and we have no doubt the Act is constitutional in its spirit, letter and design; and our observation of its practical operation does not lead us to the same conclusion of the impolicy of its enactment, which has been expressed by the counsel for the prisoners.

It is insisted further, that, if the law is not in conflict with this provision in the bill of rights, still the jury should not be allowed to consider the fact that the prisoner prefers to be silent on his trial.

The reason suggested is, there is danger the jury will attach too much importance to the fact.

If this were so, it might by some be regarded as strong an argument against the jury system as against the admissibility of the evidence. It is a fact, and one not resting upon dubitable evidence for proof, but apparent to the jury themselves. That an inference does arise is admitted, and is undeniable. It is evidence. The force of it may depend upon circumstances. Now, that a fact which is evidence, must be excluded because the jury may misconceive its force and value, is certainly a novel proposition. As we have said before, evidence of this kind has always been entrusted with the jury, and no serious consequences resulted from it.

The danger apprehended has two antidotes; one lies in the intelligence of the jury, where the security of a proper consideration of every other fact lies, and the other remedy lies with the prisoner himself. If in silence there lies insecurity, the law in its beneficence allows him to break silence and avoid the danger arising from it. If he has so conducted himself that he thus encounters greater difficulties, the fault is his own and not that of the law. The instructions

upon this point were quite as favorable to the prisoners as they were entitled to.

The jury were instructed, "that the law presumed nothing concerning it; that the omission upon their part to testify must not be regarded as a confession of guilt; that it did not change or diminish the proof required to authorize a verdict; that, if the government had failed to prove their guilt, there was no necessity for them to testify; that, if the evidence they had adduced in defence, raised a reasonable doubt of their guilt, then there is no occasion for them to testify, for that would entitle them to a verdict."

From this it is apparent the government were required to establish the guilt of the prisoners *independent* of any inferences which might arise from their silence.

This we think was erroneous, and a more favorable instruction than they were entitled to.

We regard it a fact in the case, proper for the consideration of the jury, upon the question of guilt or innocence, and if, when a cause is submitted to the jury, the facts proved in the case, combined with this fact, satisfies them beyond a reasonable doubt of the guilt of the prisoners, their verdict should be guilty.

The particular weight to be attached to this circumstance must depend upon the circumstances of each case, and be entrusted to the good sense and intelligence of the jury, under the advice of the Court.

If the defence is an *alibi*, and numerous witnesses have testified to all the facts which, from the nature of the defence the prisoner could, his testimony could add only the force of one more witness, (and that an interested one,) to the same facts, and, in such case, the inferences arising from silence would possess much less force, than if the defence involved facts peculiarly within his own knowledge, and only slight and indirect proof of it had been exhibited by him. No fixed and definite rule can be laid down with reference to it. The same tribunal is entrusted with this fact that is entrusted with all the others in the case, and the same

intelligence and integrity must be the security of the prisoner and the public, that it will be properly weighed and considered.

The presiding Judge in this case, to guard the prisoners against any unwarranted inferences, deprived the government of the whole force of the fact, by requiring it to prove all that was necessary for a conviction without it.

Another cause has been assigned as a reason for granting a new trial which may be entitled to a brief notice.

The state's attorney for the county being absent, the Court appointed Francis Adams prosecuting officer for the term. Before proceeding with the case to the jury, for reasons assigned by him, he moved that George F. Shepley, Esq., a counsellor of this Court, be allowed to assist him in the trial of the case to the jury, and he was allowed so to do by the Court, the prisoners' counsel objecting, because it appeared, as they claimed, "that he does and is to receive pecuniary reward" from some parties for such services.

Before the appointment, the presiding Judge stated the rule in such cases to be, "that when it appears to the Court that such facts and circumstances exist that the public interest requires that the state's attorney have the aid of some counsellor of the Court in the trial of the cause, the Court will appoint such person as may seem to them best fitted under the circumstances to aid in the promotion of justice; and the fact that such person may expect compensation for services thus rendered will not deprive the Court of its power to appoint him, but the Court may in the exercise of its discretion, appoint or refuse to appoint under such circumstances."

The power to appoint a counsellor of the Court to assist a prosecuting officer in the trial of a case, is an incidental power of the Court, and one not unfrequently exercised in cases of more than ordinary importance or difficulty. Without this power the public interests might suffer in many cases, and generally this evil would arise in cases where the greatest and most important interests were involved.

The selection and appointment of such persons lies in the discretion of the presiding Judge. It cannot, upon any occasion, be demanded or refused as a matter of right. The Judge called upon to preside must determine the propriety of the request at the time and under the circumstances of the case exhibited to him. The exercise of this power is not the subject of exception unless it infringes some *rule of law*. The needs and emergencies of the case are for his consideration and cannot be reviewed upon exceptions. If a person *legally* disqualified be appointed, it may and will be remedied upon exceptions.

There are two kinds of appointments to which the attention of the courts upon several occasions have been directed. One is the appointment of a *prosecuting officer* to fill a vacancy existing in the office, and the other, the appointment of some person at the request of the *prosecuting officer* to aid him in the trial of the case.

The first is the appointment of an *officer;* a person who has the management and control of the prosecution; the other is simply that of a person to aid and assist *the officer*, and has no control over the case.

The difference between these two appointments, and the difference between the powers and duties of the one and that of the other, seem to have been entirely overlooked by the counsel in his argument upon this question.

One is made by virtue of statutory provisions and the other is not. One is under certain statutory restrictions and the other is not.

Section 35 of chapter 77, R. S., in relation to Attorney General, provides, —"He shall not receive any fee or reward, from or in behalf of any prosecutor, for official services, or during the pendency of a prosecution; be engaged as counsel or attorney for either party in a civil action depending essentially on the same facts."

The same restrictions are imposed on county attorneys. R. S., c. 79, § 19.

These statutory restrictions apply to incumbents of these

several *offices* and do not extend beyond. Waiving, for the present, the effect of compensation expected, there is no statutory provision restricting the Court in the appointment of such a person. Therefore there is no cause of exception for the infringement of any statute right in the matter.

Neither is there the same, if indeed any, reason at all existing why such restrictions should, in such cases, be imposed. The *officer* is appointed for the term of a court, or elected for a term of years, and has the management and control of the case from its inception to its close, and may dispose of it at his will, but the person appointed to aid him has no control of the case to be influenced by pecuniary or other considerations, and is subject to removal by the presiding Judge at any moment.

The statute prohibits the attorney general and county attorney from receiving any fee or reward from, or engagement as counsel or attorney for either party in a civil action depending essentially on the same facts.

They cannot be counsel for the accused in such civil suits lest they, having the control of the case, may be influenced to dispose of it against the public interests. They cannot accept fee or reward, or be counsel against them, lest they may be influenced to prosecute when justice and the public interests would forbid it.

None of these reasons apply to the person appointed to aid the prosecuting officer. The case is at all times under the control and management of one who is under these restrictions and acting under an oath of office.

Our attention has been called to several cases in Massachusetts touching this matter, neither of which are in conflict with the rule stated in this case.

The first case is that of *Commonwealth* v. *Knapp*, 10 Pick., 478, in which Daniel Webster had been engaged to assist in the trial. It was a capital case, exciting great interest, and requiring in its investigations great legal knowledge and experience. A similar objection to that now presented was raised by the prisoner's counsel, based upon the statutory

provisions of that State, making it the duty of certain officers "*exclusively* to conduct the prosecution on the part of the Commonwealth."

The Court say,—"We have examined that statute (st. of 1807) and we are of opinion that it was not intended to prohibit the appointment of the counsellors of this Court *in aid of* the *law officers*, whenever the circumstances of the case should require the Court in the exercise of a sound discretion to make such appointment. It is one of the incidental powers of the Court, and has heretofore been exercised in cases within our own recollection."

In the next case, *Com.* v. *Williams*, 2 Cush., 582, the Court say, as a *general* rule "the conducting of the case before the Court and jury is to be confined to the *public prosecutor*. But exceptions may occur to this rule, arising from peculiar circumstances applicable to particular cases, which would justify the Court in associating with the public prosecutor, at his request, additional counsel to aid him in the conducting of the case. When this takes place, it must be at the request of the district attorney and under some stringent reasons arising in the particular case; and the control and direction of the case must be with the public prosecutor. We are to presume, this being a motion addressed in some degree to the presiding Judge, that proper reasons existed for granting the request of the district attorney."

The next case, in order of time, is *Com.* v. *Gibbs*, 4 Gray, 146. This case presents the matter of the appointment of a *public prosecutor*, rather than a person to aid one.

The office of district attorney was vacant, and the appointment of a person to fill the vacancy for the time being devolved upon the Court. A counsellor of the Court was appointed who "had previously been employed to commence several suits against two of the defendants and to defend an action of slander brought by one of the defendants, all of which, depending upon the same facts involved in the prisoners' case, then stood for trial."

This, it will be perceived, was *not* an appointment in *aid*

of a public prosecutor, but was the appointment of the *prosecuting officer* who should have the control and management of the case. The Court say,—"Such *substituted* officer must, for the time being, have the same powers with the regularly appointed officer, and have full management and control of the prosecution. He ought, then, to have the same general qualifications, to render him a suitable person for that duty, within the meaning of the statute" defining the duties of such an officer, which statute, they say, "after enumerating in previous sections the prosecuting officers, and providing for the appointment of a substitute for the time being, it enacts that 'none of the said officers shall receive any fee from or in behalf of any prosecutor, *or be concerned as counsel or attorney for either party, in any civil action depending on the same state of facts.*'" Therefore the counsellor appointed in that case, being appointed the *prosecuting officer*, was irregularly appointed, because the statute in terms forbade it, he then being "concerned as counsel or attorney in a civil action depending on the same state of facts."

Whether, if the regularly elected prosecuting officer had been present and desired the appointment of the same counsel to assist him, because of his acquaintance with the facts in the case, the Court would have regarded the appointment in aid of the district attorney as irregular, does not appear, but, in a subsequent case, where there was a *pro tempore* appointment of district attorney, a counsellor was appointed who had been engaged as counsel against the prisoner in the same case, when it was "before the examining magistrate, and had also acted as clerk in certain proceedings relative to these fires, (the matters in controversy,) before a fire inquest, organized under their statute."

His appointment, under these circumstances, was not only regarded as unobjectionable, but the appointee, by reason of them, was considered better fitted to furnish aid to the government officer. The Court in their opinion say,—"The

reasons given in the argument for Mr. Burt's not being a suitable person, seem to us to indicate his peculiar fitness," from which arises a strong inference that, had the appointment in the former case been an aid to the district attorney, it would not have been objectionable, but regarded as fitting, because of his familiarity with the facts.

The purpose of the statute in such cases is to secure, in the controlling counsel, impartiality and freedom from influence by reason of pecuniary interest in the result.

It does not exclude the government from obtaining *aid* from any source, the control and management of the case being in hands free from influences dangerous to the cause of justice. The great end to be attained is a just conclusion and a true verdict in the case. Whether or not this can best and most surely be attained by the aid of others in conjunction with the prosecuting officer, must, when such aid is requested by such officer, be determined by the presiding Judge. Who is best adapted to accomplish those ends, must also be decided by him, and those decisions are not subject to revision here unless the person appointed be *disqualified* by some rule of *law*. There is no rule of law disqualifying the person appointed in this case.

The case was one of great interest, involving the examination of many witnesses, and the proof of many circumstances. The acting county attorney came to the examination of the case a stranger to all its details. Gen. Shepley, as a man of ability, integrity and honorable practice, was well known to the Court. There could have been no apprehension on the part of the prisoners' counsel that he would seek to deprive the prisoners of any privilege accorded them by the law of the land. The only real objection which could exist in the minds of the prisoners, was his ability so to present the facts and circumstances in the case, that the truth would be made to appear, and justice overtake them; a serious objection in their estimation, to be sure, but one not recognizable by this Court as invalidating

a verdict. We have no doubt of the legality and fitness of the appointment. *Exceptions overruled.*

Judgment on the verdict.

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

SAMUEL H. SAWYER, *in Eq.*, *versus* ARTHUR NOBLE *& al.*

A bill, alleging that the complainant and one of the respondents were co-partners, and praying for a settlement of the partnership concerns; and alleging a fraudulent sale of all the property of the firm by one of the respondents to the other, and praying that such sale may be declared void, is bad for multifariousness.

BILL IN EQUITY, heard on demurrer.

The bill substantially alleges that the complainant and the defendant Noble, on March 20, 1863, by parol agreement, entered into a co-partnership in the clothing business, each contributing same amount of capital; that, in the prosecution of their business, the complainant, from time to time, advanced of his private funds for the purposes of the firm various sums, amounting in all to $5000, which have never been repaid, but remain due; that on Oct. 30, 1866, the firm owned $10,000 worth of goods, and had $3,000 due them from divers persons; that the firm were indebted to various persons, but that the complainant is unable to state the amounts or names of creditors, because ever since July 4, 1866, the whole business has been conducted by said Noble, without consultation with the complainant, from whom said Noble had concealed and withheld all knowledge of the firm's affairs.

The bill further alleges that, about Oct. 30, 1866, without the complainant's knowledge or consent, and for the purpose of defrauding the complainant and of excluding

him from the good-will of the firm, and to obtain and hold the same to the said Noble, he, the said Noble, colluding with the said Randall, (the other respondent,) in said fraudulent purpose, and the said Randall consenting and agreeing thereto, and well knowing that the complainant had no knowledge, and did not, and would not, if he had had knowledge, consent thereto, made a pretended sale of the whole stock of said co-partnership and the good-will of its business to said Randall, who has since claimed and still claims to own the same, but that said sale was collusive and fraudulent, &c.

And the bill further alleges that, in pursuance of the fraudulent intention of said Noble, he advertised a dissolution of said firm on said 30th October; that since said pretended sale, the possession, care, custody and control of the business has remained solely with said Noble; that Noble has retained all the assets and books, and has not paid the debts due from said firm nor the amount due the complainant, but refuses to settle with the complainant, &c.

The prayer is for a settlement and that the sale may be declared void, &c.

The respondents demurred.

S. C. Strout & Gage for the complainant.

Davis & Drummond, for the respondents,

Upon the point that the bill is multifarious, cited *Ward* v. *Northumberland*, 2 Anst., 469, 477; *Boyd* v. *Hoyt*, 5 Paige, 65; *Swift* v. *Eckford*, 6 Paige, 22; Story's Eq. Pl., § 271; 1 Dan. Ch. Pr., (Perkins' Ed.,) 342 and note; *McLellan* v. *Osborne*, 51 Maine, 118; *West* v. *Randall*, 2 Mason, 181, 200, 201; *White* v. *Curtis*, 2 Gray, 467; *Metcalf* v. *Cady*, 8 Allen, 587.

APPLETON, C. J. — The bill alleges that the complainant and Noble were partners, and prays for the settlement of the partnership concerns, and to set aside an alleged fraud-

ulent sale of all the effects of the firm by said Noble to the defendant Randall.

It is obvious that Randall is in no way interested in the adjustment of the affairs of Sawyer & Co.

"If a joint claim, against two or more defendants, is improperly joined in the same bill, with a separate claim against one of these defendants only, in which the other defendants have no interest, and which is wholly unconnected with the claim against them, all or either of the defendants may demur to the whole bill for multifariousness." *Swift* v. *Eckford*, 6 Paige, 22; *Boyd* v. *Hoyt*, 5 Paige, 65. "By multifariousness in a bill is meant the improperly joining in one bill, distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story's Eq. Plead., § 271; 1 Daniel's Ch. Prac., 383; *Whittier* v. *Whittier*, 36 N. H., 326.

The settlement of the affairs of the firm, and the rescission of a fraudulent sale, are distinct and unconnected matters, and properly to be determined in separate suits. The defendant Randall, having no interest in the firm, is not a proper party to a bill for the adjustment of its affairs.

Demurrer sustained.

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

MARY E. A. C. BROWN, *Adm'x, versus* GEORGE A. NOURSE *& Trustees.*

In an action of assumpsit, brought by one who sues as administrator, the general issue admits the capacity of the plaintiff. The question of the plaintiff's capacity can be raised only by plea in abatement.

In this State, the rule does not require that the writ should set out where, or by what authority, the administration was granted.

No one but the payee or his personal representative can maintain an action upon an unindorsed negotiable promissory note.

The statute of limitations is no bar to an action in this State, upon a promissory note made in another State, when the defendant has not resided here since the note was given.

After demurrer filed thereto, a plea in abatement cannot be amended.

ON REPORT.

ASSUMPSIT upon an unindorsed negotiable promissory note, dated July 27, 1858, signed by the principal defendant and made payable to J. W. L. Brown. Writ dated July 3, 1865.

The plaintiff alleges herself "of the city, county and State of New York, administratrix of the estate of J. W. L. Brown, late of Dubuque, in the State of Iowa, deceased," and the principal defendant as resident in the "State of Nevada."

The action was duly entered at the October term, 1865, when the trustees, residing in Portland, were charged upon their disclosure, and notice ordered upon the principal defendant.

At the following (April) term, the notice ordered having been complied with, the principal defendant appeared by his counsel and filed a plea in abatement, alleging therein that the plaintiff "is not now and never has been the administratrix of the goods and estate of J. W. L. Brown, late of Dubuque, &c., deceased, in and for the State of Maine;" to which plea the plaintiff filed a general demurrer.

At the January term, 1867, the case came on for trial, when the defendant moved for leave to amend his plea in

abatement by verifying it by affidavit; but the motion being resisted, was denied by the presiding Judge. Whereupon the defendant joined the demurrer, which was sustained and the plea adjudged bad.

The defendant then pleaded the general issue together with a brief statement, alleging in bar that the plaintiff "was never duly appointed administratrix of the goods and estate of her said alleged intestate, within and for this State, and has not so alleged herself in her said writ," &c., and also setting up the statute of limitations.

At the same term, the plaintiff moved for leave, and was allowed, to make upon her writ the following indorsement: "The promissory note within described, is the property of the plaintiff in her individual right and capacity, and this suit is in the name of the plaintiff, as administratrix, for her benefit individually, and not as administratrix."

After reading the note declared on, the plaintiff put in, subject to objection, certain evidence tending to show that the note was her individual property by virtue of a written adjustment between herself and the heirs of her deceased husband, the payee.

It was in evidence that the plaintiff had been appointed administratrix of her husband's estate in this State since the commencement of this action; that previous thereto she was such administratrix in Iowa. It was also proved that the defendant had not resided within this State since the date of the note.

After the evidence was all in, the case was marked law and continued on report, — the full Court to draw such inferences as a jury might, and to enter judgment according to the rights of the parties.

Howard & Cleaves, for the plaintiff.

Bradbury & Bradbury, for the defendant.

An administrator, appointed and commissioned under the authority of another State, cannot maintain an action in this State upon any contract made with his intestate.

The plaintiff's allegation of the capacity in which she sues is equivalent to an allegation that she holds her letters of administration under the authority of another State. She being a foreign administratrix, the plea in abatement need not be verified.

This defence may be pleaded in bar as well as in abatement. *Langdon* v. *Potter*, 11 Mass., 315.

Facts in *Clark* v. *Pishon*, 31 Maine, 501, very different from these.

The general issue or plea in bar admits nothing not set out in the declaration. Plaintiff does not allege herself to be administratrix of her intestate within this State, and she was not.

Counsel also elaborately argued the effect of plaintiff's subsequent appointment.

KENT, J.—There can be no question that the plea in abatement was fatally defective, and that the amendment was not and could not be properly allowed. It is therefore out of the case.

The principal question is, whether under the general issue, the defendant admits the plaintiff's capacity as administratrix, or whether that is or can be put in issue by that plea. This question seems to have been directly determined by this Court in the case of *Clark* v. *Pishon*, 31 Maine, 503. It was there held that, — "by pleading the general issue the defendant admitted the plaintiff's capacity." This case was decided after the decision in *Langdon* v. *Potter*, 11 Mass., 315, in which a different doctrine is indicated, although that case was cited by counsel in *Clark* v. *Pishon*. On examination of the authorities, we are satisfied that the decision by our own Court is, to say the least, as well supported in every respect as the contrary doctrine.

In *Thynne* v. *Protheroe*, in the King's Bench, 2 M. & Sel., 553, the Court decided that even where the plaintiff had made profert of the letters of administration, and the plea was non-assumpsit, yet, as there was no necessity to produce

the letters, and as the plea admitted that he was administrator, the defendant had no right to insist upon their production. "If this could be done it would be the means of getting the benefit of *ne unques administrator* upon the general issue."

In *Gridley* v. *Williams*, 1 Salk., 38, it was resolved that the plea of *non est factum* admits the plaintiff to be a good administrator. The same doctrine is in substance found in Com. Dig. Pleader, 2 D, 10–2 D, 14.

This decision is also supported by its analogy to the numerous cases in which it is decided that, where a corporation sues, the plea of the general issue admits the existence of the corporation and its right to sue. The principle which lies at the bottom is, that where, independently of all merits, a party would deny the capacity of the plaintiff and his right to be heard in Court in the case, the objection must be interposed *in limine*, so as to prevent unnecessary costs and delay. It is a safe and extremely convenient rule in practice, and not unreasonable in its requirements. It only demands that what is preliminary in its nature shall be interposed and determined before the merits are reached.

We do not see any sufficient reason for overruling *Clark* v. *Pishon*.

It is objected that the plea of the general issue admits only what is set forth in the writ, and that the plaintiff does not therein say that she is administratrix of her intestate *within this State*. If the objection is, at this stage of the case, open to the defendant, the reply is that she does allege that she is "administratrix of the estate of J. W. L. Brown, late of," &c. The promises set forth are all to the intestate.

This is the usual mode of declaring in this State. It has never been required that the writ should set out where, or by what authority, the administration was granted. The administrator never makes profert of his letters of administration. The legal inference is, when a suit is brought in the name of an administrator, and he declares that he is administrator of a certain deceased person, that the declara-

tion is, that it was granted in this State. For he cannot be an administrator, with a right to sue in our courts, unless he has been here appointed.

This is clearly stated in the case relied upon by the defendants, before cited. *Langdon* v. *Potter*, 11 Mass., 313.

It becomes unnecessary for us to consider the question, how far a subsequent appointment as administrator would enable him to maintain an action before commenced in that capacity. We are, as before shown, bound to regard the point of capacity to sue, as conceded by the pleadings.

We do not perceive that the indorsement on the writ, that the note in suit was the property of the plaintiff in her own individual right, can affect the determination of this case. The note was payable to the intestate and to his order. It has never been indorsed, and therefore the action could only be brought by him or his personal representative. It is not unusual for one who has an equitable interest in a chose in action, commenced in the name of the original payee, to indorse on the writ a notice of his claim to the proceeds of the judgment. It makes no difference that the claim of such interest is made by the administratrix, in her individual character or capacity. Her rights are as distinctly separate as if vested in another person. It makes no difference to this defendant, whether this debt, when paid, is to be distributed to the creditors, or to be paid to an heir or the widow. This is a matter to be adjusted between those interested in the estate. The action may be maintained by the administratrix, because the legal right and interest in the note has never been transferred by indorsement.

The statute of limitations is invoked by the defendant. But he never resided in this State after the cause of action accrued, and therefore the statute never began to run. R. S., c. 81, § 114; *Brigham* v. *Bigelow*, 12 Met., 270; *Putnam* v. *Dike*, 13 Gray, 535.

As the statute in this case never begun to run, the provisions in § 103, of the above chapter, cannot be applied. That section is intended to reach only those cases in which

the statute has begun to run, and in which, but for this provision for extension, it would be a bar in six years. But here no such state of facts exists. *McMillan* v. *Wood*, 29 Maine, 217.

The judgment must be for the plaintiff.

Judgment for plaintiff for amount of note and interest and costs.

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

WILLIAM L. PUTNAM, *Adm'r*, *versus* GEORGE W. PARKER.

If, upon citation, the surviving partner of a firm decline to give the bond provided in R. S., c. 69, § 2, the administrator of the deceased partner, on giving the bond prescribed for him, is entitled to the possession of the partnership estate for administration; and may maintain replevin therefor against an officer who has attached such estate in an action by a creditor of the firm, against the surviving partner.

ON FACTS AGREED.

REPLEVIN. The facts are sufficiently stated in the opinion.

Putnam, pro se.

Davis & Drummond, for the defendant.

TAPLEY, J.—From the report in this case, it appears, that Andrew T. Dole and Franklin C. Moody, for a time prior to August 7, 1866, were partners in business, under the firm name of Dole & Moody. That, upon the 7th of August, 1866, said Dole died, leaving Moody the survivor. That, upon the 17th day of said August, Jefferson Coolidge *& als.*, sued out a writ against said Moody, as surviving partner, to enforce a claim due from Dole & Moody, as partners. That the defendant, as sheriff of the county of Cumberland, by virtue of said writ, claimed to attach certain goods which belonged to the late firm of Dole & Moody,

and took possession of them. That, in the month of September, 1866, the plaintiff was appointed administrator of the goods and estate of said Dole, and, upon proper anterior proceedings, gave the bond referred to in c. 69 of the R. S., and immediately after, demanded of the defendant possession of the goods and chattels he claimed to hold upon said writ. That the defendant refused to deliver up the goods, and the plaintiff brought this action of replevin for the same.

The defendant claims that he had, at the time the plaintiff's writ was sued out, duly and legally attached the goods in question, upon the writ of Coolidge & *als.*, and had a right to retain the possession thereof, to satisfy any judgment that might be recovered in said action.

This the plaintiff in this action denies, and the real question here is, whether Coolidge & *als.* had obtained such a lien upon these goods as excluded the plaintiff from the right to the possession of them.

The executor or administrator of a deceased member of a partnership is required by law to include, in his inventory of the estate of the deceased, "the property of the partnership," and this property is to be retained, and *administered*, unless the surviving partner gives such bond as is required by law, and takes the property himself. R. S., c. 69, §§ 1 and 2.

From these requirements, it necessarily follows that, the actual possession of "the property of the partnership" falls to the administrator, unless the surviving partner gives the requisite bond.

The administrator, or survivor, however, succeeds to the right of possession, subject to the rights of any other person having an interest in, or a valid lien thereon.

Upon the death of Dole, the partnership was dissolved, and the law contemplates an entire cessation of its business. The goods and effects in possession, are held by the survivor and the representatives of the deceased, as tenants in common. *Cook* v. *Lewis*, 36 Maine, 342.

No sale of the goods, and no transfer or disposition of the effects of the partnership, could be legally made by either before the appointment of an administrator of the estate, or a qualification of the survivor as provided by the statute in such cases. R. S., c. 69; *Cook* v. *Lewis*, 36 Maine, 345.

All power of disposition of the goods being either in an administrator, or surviving partner thus qualified, no valid attachment upon mesne process could be made of them in a suit against the survivor, as upon a demand due from the late firm. The law has provided a different and specific mode of disposing of them in such cases, viz., through the agency of an administrator or the survivor of the firm, acting under the securities of a bond and subject to the supervision of the Court of Probate.

The object of attaching personal property on mesne process is, that it may be taken and sold after judgment, upon execution process, and property which cannot be so sold is not attachable by judicial process under the laws of this State. *Nichols* v. *Valentine*, 36 Maine, 322.

As neither the defendant, or those whom he represented, could sell the property upon any final process which could issue upon the suit they had commenced, the assumed act of attaching upon the writ was void and created no lien. The result is, the defendant held the goods without warrant of law, and was bound to deliver them upon demand to the plaintiff, who had been duly qualified to receive and *administer* them.

Whether the private creditor of the survivor may, or not, attach and sell the interest which the survivor may have in the goods after the settlement of the partnership account, or what particular course of proceeding, (if any,) he should adopt in such a case, are questions not now before us and need not be discussed; neither is it necessary now to determine what the duties and liabilities are, which the law imposes upon this plaintiff in the settlement of the estate, and in the distribution of the funds received therefrom. Such questions will receive attention when they arise; it is suffi-

cient for the purposes of this case, that the law invests the plaintiff with the right of possession and disposition of the goods in question, and therefore entitles him to judgment in this action. *Judgment for plaintiff.*

Damages assessed at one dollar.

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

HORACE BILLINGS *versus* RUFUS GIBBS.

In the trial of a real action between tenants in common, the defendant, under the general issue alone pleaded, cannot give in evidence that he "had never ousted the plaintiff of his portion of the demanded premises, nor in any way hindered his taking possession, but had only been in possession of the same as tenant in common with the demandant."

ON REPORT.

WRIT OF ENTRY by one tenant in common, owning three-fourths undivided of the premises described in the writ, against his co-tenant, owning the remaining fourth.

Plea, general issue.

The defendant offered to prove that he had never ousted the plaintiff of his portion of the demanded premises, nor in any way hindered his taking possession, but had only been in possession of the same as tenant in common with the plaintiff. Plaintiff objected to the admission of the testimony offered, and thereupon the case was continued on report, with the agreement that, if the full Court should be of the opinion that such evidence is admissible under the pleadings, the action to stand for trial; otherwise judgment to be rendered on default for the plaintiff.

N. S. & F. J. Littlefield, for the plaintiff, cited R. S., c. 104, §§ 1 to 10; *Put. F. School* v. *Fisher*, 38 Maine, 324; *Wyman* v. *Brown*, 50 Maine, 139; *Colburn* v. *Gro-*

ver, 44 Maine, 47; *Blake* v. *Dennett*, 49 Maine, 102; *Small* v. *Clifford*, 38 Maine, 213, not adverse.

S. C. Strout, *Gage*, and *S. M. Harmon*, for the defendant.

One tenant cannot maintain writ of entry against his co-tenant unless he has been actually ousted. *Knox* v. *Silloway*, 10 Maine, 211; *Colburn* v. *Mason*, 25 Maine, 435.

Chapter 104, R. S., does not apply to tenants in common. See R. S., 1840, c. 145, § 9. The intention of the Legislature was, that no man not in possession nor claiming any title in the premises should be compelled to litigate the title of the demandant under a constructive disseizin for the purpose of settling demandant's right. But, if defendant was tenant in common with the plaintiff, and in possession, and had never ousted his co-tenant, he could not defend against the action under this section, because a tenant in common, in the enjoyment of his legal rights, must necessarily be in possession of the whole. *Knox* v. *Silloway*, *ubi supra*.

In revision of 1857, the statute of 1840, c. 145, § 9, and stat. of 1846, c. 221, providing non-tenure to be pleaded in abatement, are blended in c. 104, § 6, and is only applicable when the demandant claims the entire estate, and defendant claims and is in possession of no part of it. Under it the tenant "may show that he was not in possession," and disclaim any right or interest, &c.

Possession by the defendant is no evidence of ouster by him. *Small* v. *Clifford*, 38 Maine, 213.

APPLETON, C. J.—By R. S. 1857, c. 104, § 6. "Every person alleged to be in possession of the premises demanded in such writ, claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, and *not in bar*, that he is not tenant of the freehold, or by a brief statement under the general issue, *filed within the time allowed for pleas in abatement*, unless by leave of Court, the time therefor is enlarged; and he may show that he was not in posses-

sion of the premises when the action was commenced and disclaim any right, title and interest therein, and proof of such fact shall defeat the action," &c.

The demandant and tenant are tenants in common of the demanded premises, the demandant owning three-fourths and the tenant one-fourth of the same. The writ as amended is for the demandant's three-fourths.

The tenant pleaded the general issue, *nul disseizin*. This plea admits the tenant to be in possession of the demanded premises. *Colburn* v. *Grover*, 44 Maine, 47. After *nul disseizin* pleaded in a writ of entry by a tenant in common, proof of actual ouster is unnecessary. *Stevens* v. *Winship*, 1 Pick., 317. If the tenant "does not disclaim," remarks PARSONS, C. J., in *Higbee* v. *Rice*, 5 Mass., 344, "or plead non-tenure, he admits himself tenant of the freehold by the plea of *nul disseizin*. In this writ the demandants demand of the tenants seizin of two-eighths. If he admitted the demandants' title he might have pleaded that he did not hold the two-eighths demanded against him, and this he might well plead, although he claimed to be seized of the remaining six-eighths, as tenant in common with the demandants. On this plea of non-tenure, he might have compelled the demandants to prove an ouster, to entitle them to recover. But non-tenure cannot be given in evidence under the general issue in this action," The form of a plea in such case is given in Stearns on Real Actions, Appendix, No. 48.

The tenant did not plead non-tenure in abatement nor file a brief statement setting forth the fact of non-tenure "within the time allowed for pleas in abatement." He asked for no enlargement of time within which to file such brief statement. The language of the statute is peremptory and applies equally to all tenants of the freehold whether holding in severalty or in common. The demandant claims three-fourths of the premises described in his writ. If the tenant did not claim to hold these premises, he should have so said by his plea or brief statement and in due season, and then the cause would have terminated. It is just as easy to dis-

claim any right, title and interest in the demanded premises when the demandant claims a fraction as when he claims the whole of an estate.

By the provisions of the statute, as well as by the reported decisions of this Court, the proof offered was inadmissible under the pleadings. *Wyman* v. *Brown*, 50 Maine, 139; *Putnam Free School* v. *Fisher*, 38 Maine, 324; *Colburn* v. *Grover*, 44 Maine, 47.

In *Small* v. *Clifford*, 38 Maine, 213, it does not appear that the brief statement was not seasonably filed. The counsel did not take that objection. The Court might well assume it duly filed, if the point was not raised.

Tenant defaulted. — Judgment for demandant.

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

HANNAH DUREN *versus* ELISHA GETCHELL.

The general power to "manage" their "real or personal estate as if sole," given to married women by R. S., c. 61, § 1, includes that of submitting to arbitration a question of damages for the flowage of their separate lands, and of covenanting to abide the award.

A valid submission and award in writing, duly published, is sufficient to bar an action upon the original claim submitted.

It is unnecessary to aver a tender of performance, unless the award is made conditional upon the performance of certain acts by the party claiming the benefit of it.

A submission of "all claims and demands of every name and nature between the parties, embracing all questions as to damages for flowing lands, giving said referees power to fix and award a sum in full for said flowage, instead of the yearly damages established by the commissioners, and all claims, matters and difficulties between them," cannot be construed as a submission of prospective damages only.

Whether an award is void by reason of fraud in the party, or corruption, gross partiality or prejudice on the part of the arbitrators, is not a question of law to be determined upon a demurrer to a plea in bar setting out such award, but a question of fact.

Duren *v.* Getchell.

The mere facts, that the commissioners appointed in 1859 to assess the annual damages for flowage, reported the sum of $15 therefor, and the referees, in 1860, awarded $50 for the perpetual right of flowage, and that the same person was one of the commissioners as well as one of the referees, and concurred in both the report and award, are not sufficient to impeach the award for corruption, gross partiality or prejudice.

ON EXCEPTIONS.

DEBT on a judgment for flowing the plaintiff's lands in Raymond.

The writ is dated May 9, 1864, and substantially alleges that the defendant and one William S. Douglass, on and after April 1, 1856, built and maintained a dam across "Duran's brook," whereby plaintiff's lands were flowed; that, on April 1, 1859, plaintiff made complaint to the S. J. Court for the injury; that the respondents did not appear, but made default, whereupon one Jordan, Brown and Baker were duly appointed commissioners to determine the matter of said complaint; that a warrant was duly issued July 13, 1859, to said commissioners, who, after being duly sworn, notified and heard the parties, viewed the premises, estimated the yearly damage at $15, and made due return of their report Oct. 19, 1859; that said report was duly accepted at the October term, 1859, and judgment rendered thereon; that, on the day of the purchase of this writ, the defendant (Getchell) was owner and occupant of the mill and dam; that the said dam was and had been maintained to its original height by the defendant; and that said Getchell and Douglass had paid but $30 damages for two years, and no more.

The defendant admitted the facts set out in the declaration, and pleaded in bar an arbitration and award between the parties, since the rendition of the judgment, of the subject matter in controversy and all other matters in dispute between them, setting out the agreement for arbitration and the award, together with a profert of the award itself, and averring a tender of performance on Sept. 1, 1860, and a continued readiness to perform.

To this plea the plaintiff demurred, alleging that said judgment still subsists and remains unsatisfied; that said

reference and award were not legal and binding; that, at the time they were made, the plaintiff was and still is the wife of Samuel Duren, then living, who did not join with her in said reference, and that said reference was a contract which she, as a married woman, was incompetent to make, and on which she is not liable; that said defendant and Douglass did not comply with the conditions of said award by paying or offering to pay the sum therein awarded when the same became due and payable, according to the terms of said award; that one Brown, one of said referees, was also one of said commissioners; that the yearly damage for flowage was assessed by said commissioners on October 19, 1859, at $15, and the damage for the perpetual right of flowage, on May 1, 1860, as awarded by said referees, was $50, the said Brown concurring therein; that said reference was prospective merely, and did not embrace and include the unpaid yearly damage assessed by said commissioners; that said award was unfair and unjust, illegal in form and intent, and insufficient to bind the parties thereto.

The defendant joined the demurrer, whereupon it was overruled by the presiding Judge and the plea in bar adjudged good; to which ruling and decision the plaintiff alleged exceptions.

So much of the submission as is essential to an understanding of this case is as follow:—

"The undersigned hereby enter into an agreement as follows, to wit:—

"They select the following named persons as referees, to wit:—Samuel S. Brown and William Nason, (and, in case they cannot agree, said Brown and Nason shall choose a third,) and agree to submit to their arbitration all claims and demands between them, of every name and nature, embracing, among other things, * *

"All questions as to damages for flowing land by said Getchell and Douglass, claimed by Hannah Duren, giving said referees power to fix and award a sum in full for said flowage, instead of the yearly damages now established

by report of commissioners. Also, giving said referees full power and authority to make and establish a line, now in dispute, between lands owned and claimed by said Getchell and Douglass and said Hannah Duren.

"The parties to this agreement are said Getchell and Douglass on one part, and Samuel Duren and Samuel Duren, jr., on the other part, as to all matters and claims between them, — and said Getchell and Douglass on the one part, and said Hannah Duren on the other part, as to all claims, matters and difficulties between them.

"Said referees shall have power to award costs to either party. Said parties agree to abide by and perform the award of said referees, which they shall make in writing, and said award shall be a final settlement of all matters and claims as above referred.

"Feb. 16, 1860. — Signed, sealed and delivered in presence of," &c. (Duly signed, sealed and witnessed.)

So much of the award as is pertinent, omitting formal parts, is as follows: * * — "Having viewed the premises when flowed, also when the water was entirely off the same, we award to said Hannah Duren the sum of $50, in full, for damages by flowing any and all land now in her possession, lying, &c.; and that she shall accept said sum, and, upon the payment of which, she shall relinquish and totally abandon all claim to the yearly amount of damage before established by report of commissioners, for flowing her said land; which sum shall be due on the first day of September, A. D. 1860, the payment of which, by said Getchell and Douglass, shall entitle them, their heirs, or any persons legally claiming under them, forever to flow said Hannah Duren's land, as aforesaid, at any and all times a year, so much as the present dam will raise the water."

P. R. Hall, in support of the exceptions, elaborately argued the points alleged in the demurrer, citing, upon the point of the plaintiff's inability to enter into the submission, the following authorities. *Ex parte Thomas*, 3 Maine, 50; *Lane* v. *McKeen*, 15 Maine, 304; *Davis* v. *Millett*, 34

Maine, 429; *Ayer* v. *Warren*, 47 Maine, 217; *Howe* v. *Wildes*, 34 Maine, 566.

J. W. Symonds, for the defendant, cited Story's Plead., 165; *Knapp* v. *Clark*, 30 Maine, 244; R. S., c. 61, §§ 1 and 3; *Springer* v. *Berry*, 47 Maine, 330 and 337; *Smith* v. *Sweeny*, 35 N. Y., cited in Law Register for April, 1867; 1 Chitty's Plead., 928, note W, and cases cited *infra*.

BARROWS, J.—This case comes before us on exceptions to the overruling by the Judge at *nisi prius* of the plaintiff's demurrer to the defendant's plea in bar.

It appears, by the exceptions, that the action is debt on a judgment of this Court against defendant and one William S. Douglass, rendered upon a complaint for flowing plaintiff's land, which action was entered at April term, 1859, and then defaulted without appearence of the respondents, whereupon commissioners were appointed, who reported at the October term, 1859, a yearly damage of $15, upon which report judgment was rendered—and that only $30, or two years damages, have been paid by the defendant.

The defendant, admitting that, at the date of plaintiff's writ, (May 9, 1864,) he was the owner and occupant of the mill and dam, maintaining it to its original height, pleads in bar an arbitation and award between the parties since the rendition of the judgment, respecting the subject matter in dispute and all other controversies between them, setting out the agreement for arbitration and the award, accompanied with a profert of the award itself, and averring a tender of performance of defendant's duties under it, and continued readiness to perform. To this plea plaintiff demurs; defendant joins in demurrer and, upon the case thus presented, the presiding Judge ruled, adjudging the plea in bar good and overruling the demurrer.

1. It appears by the plea that plaintiff, at the time of the submission to arbitration upon which the defendant relies, was the wife of Samuel Duren, and hereupon the plaintiff contends that, being a *feme covert*, she is not bound by her

covenants to submit to arbitration and abide by the award, and is not thereby precluded from maintaining this suit.

The agreement for arbitration, set out in the plea, was made Feb. 16, 1860, was under seal, and was executed by Samuel Duren (husband of the plaintiff,) Samuel Duren, jr., Hannah Duren (the plaintiff herself,) Elisha Getchell the defendant, and William S. Douglass, his co-defendant in the complaint for flowage. By it, the parties executing it, agreed to submit to the arbitration of two persons named therein, "all claims and demands between them, of every name and nature, embracing, among other things," a suit then pending in this Court, wherein Getchell and Douglass were plaintiffs, and Samuel Duren and Samuel Duren, jr., were defendants, and all claims of damages and costs relating thereto, also the question of damages claimed by Hannah Duren against said Getchell and Douglass, for building a stone wall on land claimed by her; "also all questions as to damages for flowing land by said Getchell and Douglass, claimed by said Hannah Duren, giving said referees power to fix and award a sum in full for said flowage, instead of the yearly damages now established by report of commissioners;" also giving said referees full power to make and establish a line now in dispute between lands owned and claimed by said Getchell and Douglass and said Hannah Duren. The parties to the agreement are declared to be "said Getchell and Douglass, on one part, and said Samuel Duren and Samuel Duren, jr., on the other part, as to all matters and claims between them; and said Getchell and Douglass, on the one part, and said Hannah Duren, on the other part, as to all claims, matters and difficulties between them. Said parties agree to abide by and perform the award which they shall make in writing, and said award shall be a final settlement of all matters and claims as above referred;" and power is given to the referees to award costs.

It is urged, on the part of the plaintiff, that this is a mere executory contract, and that, as it was not a statute reference nor a reference under a rule of Court, the proceedings can-

not be maintained under the law authorizing a married woman to prosecute or defend suits at law or in equity for the preservation and protection of her property.

It cannot properly be said, although Samuel Duren was a party to this submission so far as it related to his own controversies with Getchell and Douglass, that he joined with his wife in the submission of her claims and difficulties with the same parties, for, as to these last, it is expressly declared that the parties are "said Getchell and Douglass on the one part, and the said Hannah Duren on the other part," and there are no words expressive of any intention on his part to join in the submission, so far as she was concerned therein. It cannot be said, however, to be in fraud of his rights, for he had none whatever in the premises. The complaint previously instituted was not prosecuted jointly with him, and the judgment rendered therein was in her name only. The question here is simply whether a married woman, as the law then stood, could make a valid submission to arbitration of claims growing out of her own separate property.

Perhaps a reasonable construction of § 3, c. 61, R. S. of 1857, empowering her "to prosecute or defend suits at law or in equity for the preservation and protection of her property, as if unmarried," would give her that power. For what is a suit but a prosecution of one's rights before some tribunal? And what is an arbitration but the hearing and determination of a cause between parties in controversy by a tribunal selected by the parties? The plain object of the statute was to enable the married woman to procure a final adjustment of claims growing out of her separate property, unembarrassed by the joinder or interference of her husband. Why should she not have the power to prosecute or defend those rights before a tribunal of her own selection?

But, however this may be, there can be no doubt that the power to make such an arrangement as this is included in the general power given to her in § 1, c. 61, which (as it stood when this submission was entered into) authorized a

married woman to "own in her own right real and personal estate, acquired by descent, gift or purchase, and to *manage*, sell, convey and devise the same by will, *as if sole*, and without the joinder or assent of her husband." To *manage* property is, (vide Webster's Dict.,) to conduct the concerns of it; and the power to manage it must of necessity include the power to make valid contracts respecting it, by means of which she could acquire rights against those dealing with her in relation to it.

The cases of *Ex parte Thomas*, 3 Maine, 50, and *Lane* v. *McKeen & ux.*, 15 Maine, 304, arose before the enactment of any of the statutes giving power to married women to hold, manage and dispose of their property, without being subject to the control or interference of their husbands, and simply enunciate the familiar doctrines of the common law in this respect.

Nor are the cases of *Howe* v. *Wildes*, 34 Maine, 566, *Davis* v. *Millett*, 34 Maine, 430, and *Ayer* v. *Warren*, 47 Maine, 217, in conflict with the doctrine here laid down. They decide merely that the statutes authorizing a woman to hold, lease, sell and convey her property, (which was as far as legislation upon this subject had then gone,) did not authorize her to enter generally into contracts on her own behalf, by which she would be personally bound, such as contracts for the purchase of property, either separately or in connection with her husband, or as surety for a third party.

The authority to *manage* her property, as if *sole*, was first conferred by the R. S. of 1857; and even that, while giving validity to such contracts as she might make in relation thereto, when exercising that power, could not be construed as giving her power to contract generally, as she was authorized to do by §§ 7 and 8 of c. 61, in certain cases, and now more fully by chap. 52, laws of 1866, which last declares all her contracts made for any lawful purpose valid and binding.

We are aware of no decision since the revision of 1857,

which countenances the repudiation of contracts made by her *respecting the management of her separate property.*

In Massachusetts, a married woman was held liable upon a promissory note, given for money borrowed to pay laborers for services upon a farm which she had purchased and was carrying on. *Ames* v. *Foster*, 3 Allen, 545.

So in New Hampshire, upon a note given for the price of neat stock purchased for the farm of which she was seized to her sole and separate use. *Bachelder* v. *Sargent*, 7 American Law Reg., 253, Feb., 1868.

It presupposes a much less change by virtue of statute enactment, to hold her bound by a submission to arbitration of claims growing out of her separate estate, and precluded from enforcing those claims except under the award of the arbitrators. In *Smith* v. *Sweeney*, 35 N. Y., where a wife permitted an arbitration, respecting damages to her land by the removal of earth and stones therefrom, to proceed in the name of her husband, she not being a party thereto, but knowing herself to be the party in interest, she was held bound by the award.

2. The objection, that Getchell and Douglass did not tender the $50, which they were required by the award to pay, until some days after the time when it was payable, cannot prevail.

A valid submission and award in writing, duly published, is sufficient to bar an action upon the original claim, which was submitted. Thenceforward the remedy of the party is not upon the original cause of action, but upon the covenant to perform the award. It is unnecessary to aver a tender of performance, unless the award is made conditional upon the performance of certain acts by the party claiming the benefit of it. "An award may be pleaded, although the time for performing it be not come, because the matter submitted *transit in rem arbitratam*. And, though the time of performance be come, yet, if arbitrament be pleaded with mutual promises to perform it, the plea is good without

showing that the defendant has performed his part; because an arbitrament is like a judgment, and the party may have his remedy upon it." Lawes on Pleadings in Assumpsit, (American ed., 1811,) 494.

3. Nor will the language of the submission admit of the construction contended for by the plaintiff's counsel, that it was the prospective damage only that was to be ascertained by the arbitrators. Especial pains were taken, as will be seen by reference to portions of the submission hereinbefore quoted, to make the arbitration a final adjustment of "all claims and demands of any name and nature; of all claims matters and difficulties," between the parties, with specifications of what the submission should be considered as "embracing *among other things;*" and in that connection the judgment here in suit is particularly referred to, and power is given to the arbitrators to award a gross sum to be paid by Getchell and Douglass, "*instead* of the yearly damages now established by the report of the commissioners." If the plaintiff had desired to contest the question whether the balance of her claim for past as well as prospective damages was considered by the arbitrators, she should have presented it in some other form than on a demurrer. That such a claim was a legitimate subject for arbitration, provided the parties saw fit to submit it with "all other claims, matters and difficulties," between them, to such a tribunal, cannot be doubted.

4. But the plaintiff's counsel argues that "an award may be set aside upon proof of misconduct, partiality, or fraud in procuring or making it, by a party or by the referees," and professes to believe that "evidence sufficient to show that it was procured by fraud, partiality, or collusion, may be had from a critical examination of the papers in the case." If the plaintiff had designed fairly to rely upon this as a ground for defeating the award, her proper course would have been to reply the fraud and bring that question to an issue to be decided in the light of evidence to be offered by both parties. In lieu of that, she asks us to de-

cide as matter of law, upon a demurrer in law, that there must have been fraud on account of the discrepancy between the conclusion reached by the arbitrators May 31, 1860, and that reached by the commissioners appointed to estimate the damage Oct. 19, 1859, and the further solitary fact that Samuel S. Brown was a member of both boards. It is to be observed that, in setting out the grounds of demurrer, no distinct charge of fraud or collusion is made; the averments in relation to this matter, being only that Samuel S. Brown, one of the two referees was also one of the committee appointed by the Court, — that the yearly damage was assessed on the 19th October, 1859, by the committee at $15, and the award of the arbitrators, made on the 31st of May following, (said Brown concurring therein,) gave only $50 for a perpetual right to flow the land, — and that the award was unfair and unjust, and illegal in form and intent.

Whether an award is void by reason of fraud in the party, or corruption, gross partiality or prejudice on the part of the arbitrators, is not a question of law to be determined upon a demurrer to a plea, but a question of fact to be submitted, if the parties desire it, to a jury, with an opportunity to the party whose award is impeached, to explain by testimony any circumstances on the face of the proceedings that might tend to excite suspicion of unfair practices.

But, if the question were to be determined upon the face of the papers, as the plaintiff claims, it is apparent that there is nothing to justify so grave a charge as is here made against the arbitrator. It is not to be overlooked that he was but one of three commissioners, (all appointed, it would seem, on the suggestion of the plaintiff, Getchell and Douglass not being represented at that hearing,) whose report may have been an average of their judgments, his colleagues on that board, largely exceeding him in their estimates, — and that, in the arbitration various matters were included, one of which was the settlement of the line between the lands of the plaintiff and those of Getchell and

Douglass there, the result of which may have materially affected the quantity of land, for the flowing of which the plaintiff was entitled to recover. There may have been ample grounds at the time the submission was entered into, for a review of the original judgment. In short, there are many hypotheses that would account satisfactorily for the discrepancy between the report and the award, without imputing corruption, partiality or prejudice to the arbitrator.

None of the grounds of demurrer being sustained,

The exceptions are overruled.

Judgment for the defendant.

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

DAVID BUFFUM, *in Eq.*, *versus* ARTHUR W. RAMSDELL.

A judgment against two or more defendants jointly is an entirety, and must stand or fall as a whole.

Such a judgment is erroneous and will not sustain a levy made upon the real estate of the other, if one of the defendants was not an inhabitant of this State, and no personal service of the writ was made upon him.

When a bill in equity is brought to redeem a mortgage, and the complainant bases his right to redeem upon a levy made upon the mortgager's equity of redemption, the respondent, not being a party or privy to the judgment, may prove it erroneous and void for want of jurisdiction of the parties.

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

The bill substantially alleges that, one Bousley, on Oct. 17, 1861, being seized in fee of certain lands [described,] situated in Andover, county of Oxford, then and there, by his mortgage deed of that date, conveyed the same to the respondent, upon the conditions therein named; that he believes said mortgage was without consideration and made by said Bousley and accepted by the respondent for the fraudulent purpose of defrauding, hindering and delaying

said Bousley's creditors; that, at the time of executing said mortgage, the complainant was and still is a creditor of Bousley, and that, by reason of said fraudulent mortgage, he had been hindered and delayed in the collection of his debt; and that said proceedings between Bousley and the respondent ought to be declared void as to the complainant.

It further alleges that, on Dec. 24, 1861, he sued out a writ of attachment against said Bousley and one Locke, upon a lawful demand against them, and justly due from them to him, which was duly served and entered at the March term, 1862, at the S. J. Court at Paris, in the county of Oxford, where the same was pending until the August term, 1863, when judgment was duly rendered against the said Bousley and Locke for the sum of $416,43, debt or damage, and $17,21 costs; that, on Aug. 31, following, execution duly issued and levy was duly made upon the premises and recorded, and seizin and possession thereof delivered to the complainant; that said premises were never redeemed from said levy; that, if the Court shall find that the evidence to be adduced is not sufficient to establish the fact that said mortgage is fraudulent as aforesaid, then the complainant claims the right to redeem the mortgage and offers to pay whatever shall be found due thereon.

Locke is declared in the writ as being a resident of Salem, Mass., and no service of the writ was ever made upon him. The record discloses that, at the return term, the Court ordered notice upon Locke by publication of "an attested copy of the writ with the order of Court thereon, three weeks successively in the "Oxford Democrat," a newspaper printed at Paris, in said county of Oxford, the last publication thereof to be thirty days at least before the next term of said Court," and that said order was complied with.

S. C. Strout and Gage, for the complainant.

W. L. Putnam, for the respondent.

DANFORTH, J.—To enable this complainant to sustain his bill, it is conceded that he must show a good title to the

land claimed. To do this, he offers in evidence a judgment in his favor against Joseph Bousley and Milton P. Locke, recovered at a term of this Court, holden in the county of Oxford, on the second Tuesday of August, 1863, an execution issued thereon, and a levy upon the land as the property of Bousley. The respondent, who also claims under Bousley, by a prior deed, alleged to be fraudulent as against creditors, contests the plaintiff's title on the ground that his judgment is erroneous. It is conceded that Locke was not an inhabitant of the State, that no legal service was made upon him. As to him, the Court had no jurisdiction, and the judgment against him is therefore void. *Penobscot R. R.* v. *Weeks*, 52 Maine, 456.

The judgment being an entirety, if void in part is void in all; if reversed as to one of the parties it must be reversed as to all. 2 Saund., 101; 2 Bac. Abr., 227, 228; *Benner* v. *Weld*, 45 Maine, 483; *Hemenway* v. *Hicks*, 4 Pick., 500.

It is true that, in some cases, where the judgment is several as to the parties, it may be reversed as to one and affirmed as to the others; as in *Whiting* v. *Cochran*, 9 Mass., 532, where judgment was rendered against the principal defendant and a trustee, it was decided that the principal defendant could not avail himself of a want of service on the trustee. So, in *Shirley* v. *Lunenburg*, 11 Mass., 379, where the same principle is recognized. But no such severalty is involved in the judgment under consideration. On the contrary, it is against the parties jointly, and both as to them and the subject matter, is one and entire. It must, therefore, stand or fall as a whole.

The case of *Ellis* v. *Bullard*, 11 Cush., 498, relied upon by the plaintiff, does not weaken this position but tends rather to confirm it. This was a writ of error to reverse a judgment having the same defect as that in the judgment relied upon by the plaintiff in the case at bar. The Court refused to reverse the judgment, not because there was no error, but because one of the plaintiffs, and the one having

cause to complain, had released that error and refused to prosecute the suit. THOMAS, J., remarks,—"Were this not so, yet, as upon the reversal of a judgment on a writ of error, the Court may enter the same judgment which the Court below might have rendered, it may enter judgment against Ellis." Here is a very clear intimation that, but for the release of the error, the judgment must have been reversed,—though, if justice required, another which would have been valid might have been entered. In that case, the parties to the judgment sought to be reversed, were before the Court, and the process pending was such as to authorize the Court to do that between them which the law and justice required. In the judgment relied upon in the case at bar, the error has not been released, the parties to it are not before the Court, and no process is pending which can give the Court any authority to modify or change it in any respect, or substitute a new one in its place. We must take this judgment, or pretended judgment, as it now stands without addition or diminution, and, upon principle as well as authority, it is erroneous.

That the respondent in this process, not being a party or privy to that judgment, may avail himself of any illegality in it is well settled. *Vose* v. *Morton*, 4 Cush., 27, and cases cited. *Caswell* v. *Caswell*, 28 Maine, 237.

Bill dismissed with costs.

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

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

The presiding Judge cannot be required to rule upon the force and effect of testimony upon the position as it is produced; and neither is he under any obligation to make known his views of the relative condition of parties as to the burden of proof at every stage of a trial.

A new trial will not be granted on account of the permission of an improper question, when it is manifest that the answer could not have prejudiced the excepting party.

Where, in the trial of a writ of entry, the validity of a deed under which the defendant holds is attacked upon the grouud of the mental incapacity of the grantor at the time of its execution, a paper purporting to be the last will and testament of said grantor, wherein he makes his nephew instead of his daughter residuary legatee, is too remote and uncertain in its character, and opens too many collateral issues to be admissible.

So is a trust deed of certain stocks and notes from said grantor to his former guardian, made for the avowed purpose of carrying into effect the sundry provisions of said will.

A letter, dated a few days before such deed, written by a relative to the former guardian of such grantor, advising the sale of the land described in such deed, and the mode of securing payment to the grantor's wife, is no part of the *res gestae*, and is not admissible as an ancient contemporaneous document.

To sustain an exception to the admission of testimony, it is incumbent upon the excepting party to make it apparent that there was no phase of the case as presented at *nisi prius* which authorized the admission.

A party cannot be considered as aggrieved by the omission to instruct in form as requested, if the rule, which ought, of right, to govern the decision of the case, was clearly and intelligibly given.

Where, in the trial of a writ of entry, the validity of the deed under which the defendant claims is controverted upon the ground of the incapacity of the grantor, by reason of mental disease, the presiding Judge submitted to the jury certain written questions embracing the substance of the issue, with such instructions as could not fail to give the jury to understand that, upon their answers or some of them at least, the rights of the parties must depend, reserving his instructions as to the legal effect of the answers until these questions were settled: — *Held*, that there was no error in such a proceeding.

Thus, where the questions submitted to the jury were, — (1,) was the grantor, at the time of executing and delivering the deed in controversy, of sound mind? accompanied with the instruction substantially, that he presented no inquiry but simply that of absolute soundness of mind; to which the jury answered that they were unable to agree upon a direct answer: — and

(2,) did the grantor execute and deliver said deed at, or about its date, understanding and comprehending the nature of his act, the consideration to be paid, and that he was thus transferring the title of the property therein described to the grantee, and the consideration to himself? accompanied by proper instructions; to which they answered, "he did;" and thereupon the presiding Judge instructed the jury that, upon their finding, the defendant was entitled to their verdict: — *Held*, that these proceedings were unexceptionable; the ruling in substance being that ability to execute and deliver a deed, understanding and comprehending the nature of the act, the consideration to be paid, and that he was thereby transferring the title to his property to the grantee and the consideration to himself, indicates sufficient soundness of intellect in the grantor to make the conveyance valid, though it be uncertain whether his was in all respects and absolutely sound.

On Exceptions.

Writ of Entry to recover a certain lot of land on State street in Portland. Writ dated July 24, 1858. Plea, general issue and joinder.

The plaintiff read in evidence a deed covering the premises, from Lydia L. Dennett to himself, dated July 15, 1858. He also introduced evidence tending to show that one Stephen Neal owned the premises, in 1833, 4 & 5, and died intestate, Dec. 28, 1836, aged 74 years, leaving said Lydia L. Dennett, then the wife of Oliver Dennett, his sole surviving child and heiress at law; that she was married to said Oliver in 1822, and that said Oliver died December 18, 1851.

The defendant read in evidence a deed dated July 27, 1835, from Stephen Neal to Samuel E. Crocker, together with the several mesne conveyances from Crocker to himself, each of which covered the premises in controversy.

The plaintiff then read in evidence a copy of the record of a decree of the Probate Court, in and for the county of Cumberland, passed April, 1834, wherein the Judge declares that, "it being fully proved * * that the said Stephen Neal is *non compos mentis* and incapable of taking care of himself, I do therefore decree that a guardian be appointed over him * * and that Neal Dow, of Portland, be appointed guardian," &c.

The defendant then offered a record from the same Court of a petition signed by said Neal Dow, representing "that within a few months the bodily and mental powers of his ward have very much improved, so that he is believed to be capable of managing his own affairs and taking care of himself, which he is desirous to do. His improvement in his health and general condition is apparent to all his friends, who are not only willing but desirous that he should now be relieved from the legal disability under which he has been placed, and should have once more the absolute control of his person and property." Also, of the decree upon said petition, passed Sept., 1834, wherein it is declared that, "upon the foregoing petition and representation, the facts therein stated being fully proved, I do therefore decree that the said Neal Dow be dismissed and removed from his office and trust of guardian of Stephen Neal." The plaintiff objected to the record of removal as evidence of said Neal's restoration to a sound mind, because it does not show notice of said proceedings to Lydia L. Dennett, his grantor, the then presumptive heiress of said Neal; but did not object to it as evidence of the removal of the guardian, and that said Neal was without a guardian July 27, 1835, when he executed the deed to Crocker, under whom the plaintiff claims. Upon the statement of the defendant's counsel, that he did not offer it as evidence of said Neal's restoration to a sound mind, the presiding Judge allowed it to be read.

Thereupon the plaintiff's counsel requested the Court to rule that the burden was upon the defendant to prove that said Neal had been restored to a sound mind, subsequent to the appointment of the guardian and prior to the execution of the deed of July 27th; but the Judge declined, remarking, that "he did not feel called upon to determine, at this stage of the proceedings, whether or not the plaintiff had made out a case."

Much evidence was put in by both parties,—that of the plaintiff tending to show that said Neal was, at the time he

executed said deed to said Crocker, of unsound mind, and that of the defendant, that said Neal was of sound mind.

Dr. H. M. Harlow, called as an expert, by the plaintiff, having testified in his examination in chief in answer to several hypothetical questions, put by the plaintiff, involving facts claimed by the plaintiff as proved, and facts anticipated in defendant's proof, to his opinion that Neal was of unsound mind, and that it was a marked case of *senile dementia*, and, having given some testimony as to the character of the disease, was asked on cross-examination, "whether, taking all the facts on both sides to be proved, was or not in your opinion, Stephen Neal, on the 27th day of July, 1835, of so unsound mind as to be incapable of transacting the ordinary business of life?" The question was objected to as involving a question of law; but the Court allowed it to be put, and the witness answered:—"Such a person's mind is sometimes clearer than at others. I cannot draw the line how unsound the mind must be to render a man legally incompetent to do business. But I should say he was of unsound mind, and a fit subject for a guardian. I cannot say whether he was capable of transacting ordinary business or not."

Plaintiff had put in evidence tending to show that said Neal, before his alleged unsoundness of mind, was very much attached to his said daughter Lydia, and that upon receiving a large inheritance from a deceased brother in 1832, he said,—"it would not do *him* much good, as he was an old man, but it might do Oliver and Lydia some good; and, in connection with this, the plaintiff offered an original paper bearing the signature of Stephen Neal, dated Oct. 29, 1835, the body of it being in the handwriting of Neal Dow, his former guardian, and purporting to be said Neal's last will and testament, as proper evidence to go to the jury as an insane act, and to prove an unsound state of mind; but the Court excluded it.

The defendant testified that he occupied the demanded premises, that he purchased them in Oct. or Nov., 1854,

that he lived in the other tenement of same block as early as the fall of 1850. His counsel then asked him "whether he paid a valuable consideration for the premises? and whether, at the time he purchased, he knew of any defect in the title of said premises?" The plaintiff seasonably objected to each of these questions, as being immaterial and irrelevant, and calculated to improperly influence the minds of the jury; but the Court overruled the objections, and allowed them to be put, and the witness answered affirmatively to the former and negatively to the latter.

The plaintiff offered an original paper purporting to be a letter from one David Green, whose signature was proved, dated "Ware, N. H., July 7, 1835," addressed to Neal Dow, acknowledging receipt of a letter, advising as to the sale of certain land owned by Stephen Neal and the mode of securing the payment, &c.; but the Court excluded it.

The plaintiff also offered an original paper purporting to be a receipt from said Green, whose signature was proved, dated Oct. 12, 1835, of a portion of the proceeds of certain land of Stephen Neal's, sold as by the letter offered, &c.; but the Court excluded it.

He also offered a paper purporting to be a copy of a paper, dated Nov. 20, 1835, and called by him a "trust deed," which Neal Dow, on a former trial, testified was a copy of the original. The paper purported to be a deed signed by Stephen Neal, conveying to Neal Dow in trust, ("for the purpose of carrying into effect conclusively and irrevocably sundry provisions of my last will and testament touching the disposition of my property,") certain stocks, notes, &c., authorizing said Dow to manage the property thus conveyed according to his best judgment for the aforesaid purposes. But the presiding Judge excluded it.

The plaintiff requested the Court to give the following instructions: —

1st. The principal question for you to decide in this case, is whether Stephen Neal, on July 27th, 1835, the day he executed said deed to Samuel E. Crocker, was *non compos*

mentis, or, which means the same thing, was of *unsound mind.*

2d. These terms have a fixed and determinate signification in law, and mean a mental incapacity to manage one's affairs and transact business, " with intelligence and an intelligent understanding of what he is doing."

3d. If Stephen Neal was, at the time of the execution of said deed to Crocker thus *non compos mentis* or of unsound mind, according to the above definition, then said deed to Crocker was invalid and did not convey the title of said premises, but the title still remained in Neal till his death, and then descended to his daughter, Mrs. Dennett, subject to life estate in her husband during his life; and she could not commence an action for possession till after his death; for she had no right of possession till that time; and her right of action would not be barred till twenty years had elapsed from that time, viz.,—from the death of her husband.

4th. If said estate descended to her at her father's death, as above, then her title passed by her deed of July 15, 1858, to this plaintiff, and he acquired by that deed all the rights which she had or would have had if she had not given it; and his right to recover in this action is precisely the same as hers would have been had she not given said deed to the plaintiff, but had brought this action in her own name.

5th. The terms of that sale from Mrs. Dennett to plaintiff are not material to this case, and not a subject for your consideration; under modern legislation, she had a perfect right to sell to plaintiff and he had a perfect right to buy on such terms as were mutually satisfactory to themselves. (This instruction was given, and evidence of the consideration excluded.)

6th. Nor is it material whether Crocker or any of the subsequent purchasers, down to, and including this defendant, were ignorant of said Neal's incapacity, if it existed, nor whether they paid a full and fair value for the land at the time they severally purchased. Neither the ignorance

of defendant or of his grantors, back to and including said Crocker, of Neal's incapacity, nor their paying the full value of the property, helps their title in the least, if it was originally invalid for the cause alleged; but it would still be invalid into whosqever hands it might come, and whatever the consideration paid, unless subsequently ratified and confirmed by some one having authority and capacity to ratify it.

7th. "An insane grantor has not the capacity to convey an indefeasible title, and this incapacity inheres in all titles derived from him. The grantee whose title is thus derived must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike, to avoid their contracts, is an absolute and paramount right superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the first grantee."

8th. The main question, therefore, for you to decide, is whether Stephen Neal, on the 27th day of July, 1835, was *non compos mentis* or of *unsound mind* as above defined; that is, had he mental capacity sufficient to enable him *alone* and unaided by others to manage his affairs, and transact business with intelligence and an intelligent understanding of what he was doing. If he had not, then he was not legally competent to act, and said deed to Crocker was invalid and conveyed no title, and plaintiff would be entitled to recover.

9th. "One of the obvious grounds on which the deed of an insane man or an infant is voidable, is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale." *Gibson* v. *Soper*, 6 Gray 282. So that, "to transact business with intelligence and an intelligent understanding of what he was doing," he must not only have intelligence enough to know the value of the property he was selling, but also he must have intelligence enough prudently to manage and dispose of the proceeds. And if he had not intelligence enough for this, but lost the proceeds, or was liable to lose

them through want of such intelligence, then he was not competent to transact business, to sell his property or execute said deed. For he would be no better off if he had not intelligence to take care of and manage the proceeds than if he did not know the value of the property, but gave it away or sold it for an inadequate consideration. If you find from the evidence in the case, therefore, that Stephen Neal had not such intelligence as above described, at the time he executed said deed to Crocker, the plaintiff will be entitled to your verdict.

10th. The record of the original decree of guardianship by the Probate Court, of the third Tuesday of April, 1834, is conclusive evidence that, at that time, said Neal was *non compos mentis* or of unsound mind, as above defined, and that he was at that time incompetent to manage his affairs and transact business. And, having been thus proved to have been incompetent, prior to the execution of said deed to Crocker, the presumption is that his incompetency continued down to and subsequent to the execution of said deed, unless he has been proved by the evidence in the case to have been restored to a sound mind after said decree was made and prior to the execution of said deed.

11th. The record of the removal of the guardian, in Sept., 1834, put in by the defendant, although it removed his legal disability and left him free to execute said deed to Crocker, if he was restored to mental competency, yet said removal having been made without any notice to Mrs. Dennett, or any one else adversely interested, direct or implied, it is no evidence against her or her grantee, (this plaintiff,) that said Neal was restored to mental competency; and it was not introduced by defendant for that purpose, but only to show that he was under no legal disability, provided he was so restored. But his restoration to a sound mind or mental competency must be proved by other evidence in the case; and the burden is on defendant to prove this, and, if he has not done it to your satisfaction, by a preponderance of evidence, then his incompetency, arising from *senile dementia*,

as it does in this case, is presumed to have continued till the execution of said deed, and plaintiff will be entitled to your verdict.

Upon the subject matter of the 10th request, the jury were instructed that the record of the original decree of guardianship, of April, 1834, was conclusive evidence that, in that case, it was fully proved to the Probate Court that Stephen Neal was then *non compos mentis* and incapable of taking care of himself, and such other instructions as hereafter appear.

Upon the subject matter of the 11th request, the record of the removal of the guardian, in Sept., 1834, was introduced and received only as evidence of the removal of the guardian, and not as evidence of a restoration of said Neal to a sound mind; and the jury were so instructed, and that it was not competent for them to consider it for any other purpose; and, for this purpose, no objection was made to its admission, as appears in previous portions of the exceptions. Other instructions upon the presumptions of the continuance of sanity or insanity, appear in subsequent portions of the exceptions.

The foregoing instructions the Court declined to give in the form requested. Among other instructions given, the Court instructed the jury as follows:—

"Some discussion has been carried on in your presence as to the mental capacity required to make a valid conveyance, and, as to what is not in law a *non compos*. I do not think it will be necessary to trouble you with a discussion of those questions at present. I think a correct result will be more surely reached by another method.

"I propose to put before you certain questions in writing to be answered by you, and then to give you the law applicable to them. It will leave your minds untrammelled in the consideration of the questions of fact, by any nice distinctions in law, not always made apparent by once stating in a charge to a jury. The questions are as follows:—

"1st. Was Stephen Neal at the time of the deed of July

27, 1835, to Samuel E. Crocker was signed and delivered, of sound mind?

"2d. Did Stephen Neal execute and deliver the deed of July 27, 1835, to Samuel E. Crocker, at or about its date, understanding and comprehending the nature of his act, the consideration to be paid, and that he was thus transferring the title of the property therein described, to said Crocker, and the consideration to himself?

"3d. If he did not, was it because he was not of sound mind at the time?

"These questions, you will perceive, all pertain to one point of time, viz., the signing and delivery of the deed of July 27, 1835, to Samuel E. Crocker. The first question, you will see, is, was he of sound mind? No inquiry as to the cause or effect is here made. No inquiry as to the legal or medical name attached to it. No inquiry as to the responsibility of the individual, in whatever mental condition you may find him. It is only the simple plain question, was he of *sound mind?*

"The law presumes every man sane and of sound mind until the contrary has been proved. The law presumes that Stephen Neal was a sane man and of sound mind; and if the plaintiff would avail himself of the fact of unsoundness of mind he must prove it. The burden is upon him to overcome the presumption of law by proof. * * * * * The particular time in question is when the deed was signed and delivered. Acts occurring before and after are only evidence tending to show the mental condition *then.* If the plaintiff has shown that Stephen Neal was at any time during the years 1833, 1834 or 1835, of unsound mind, the law presumes it continued down as late as the signing and delivery of the deed, unless the proof shows to the contrary. * * *

"To show there was no unsoundness either before or after the time in question, the defendants have introduced evidence of many incidents tending to show his sanity. If they have proved he was of sound mind at a period later than the plaintiff proves him of unsound mind, then the pre-

sumption of law comes in that he continued so from the time they thus proved him of sound mind until he is again proved of unsound mind." * * * "Dr. Harlow, upon the assumption that certain facts were proved, has given it as his opinion that Stephen Neal was not of sound mind and that he was afflicted with *senile dementia;* that this disease is intermittent in its character and manifestations; that the patient will appear better some days than others. Now if he is correct in this matter, is it unreasonable for us to suppose that the principal part of the testimony on both sides may be true, one side relating to the manifestations when in one condition of mind, and the other when in another condition of mind. May he not, as one of counsel expressed it, have been "now upon the hinge and then off?" If you should find this to have been the condition of Stephen Neal for some considerable portion of the time before and after July 27, 1835, you may find it necessary to carefully consider the evidence nearest to that point of time. * * * * *

"From the evidence, then, was Stephen Neal at the time of signing and delivery of the deed of sound mind?

"The second question, you will perceive, relates to the capacity of Stephen Neal at the time in question.

"Here, as before, the question does not arise as to the cause or name of the unsoundness, or whether it made him what the law denominates *non compos.* All these matters need not now be discussed. The question relates to his capacity to understand and comprehend the transaction in question. It is not whether he could understand the ordinary business of life, but whether he could and did comprehend and understand the transaction in question. If he could not understand and transact the ordinary business of life, it may be evidence tending to show he did not comprehend this; but you will judge if it necessarily does."

What is or not the ordinary business of life, may be difficult to determine, and may depend upon the peculiar business or situation of the party under examination. You will judge whether the ordinary business of a farmer is the

same as that of a merchant. Each might be quite ignorant of the daily routine business of the other. The question here put directed your attention to the transaction in question. What the legal effect of an answer to that question shall be, it is not now necessary that I should instruct you.

"Going, then, all over the evidence in this case bearing upon the question, you will answer the question. Upon this question, as well as upon the other, you will examine the evidence with reference to the time when the deed was signed and delivered. I do not propose to go over the evidence bearing upon these questions. I leave it entirely to you to answer these plain, simple questions.

"The third question is designed to ascertain why he did not comprehend, if he did not, whether it arose from an unsoundness of mind.

"You may now retire and consider these questions, and, when you have answered them, you may come into Court for further instructions."

The jury then retired and came in with the following answers: — Answer to first question, — "The jury are unable to agree upon a direct answer to the first question.

"Isaac Johnson, *Foreman*."

Answer to the second question, — "Yes.

"Isaac Johnson, *Foreman*."

No answer was returned to the third question.

The Court then instructed the jury that, upon this finding, the defendant was entitled to a verdict, and sent them out with a verdict filled out for the defendant, and the jury returned into Court with a general verdict for defendant, which was affirmed, and also the answer to the second question.

To all which rulings and refusals to rule, the plaintiff excepted.

Merrill, for the plaintiff.

1. The jury should have been instructed as to the effect of the record of guardianship, as in 10th and 11th request.

1 Greenl. Ev., §§ 525, 550; *Leonard* v. *Leonard*, 14 Pick., 280; *Kimball* v. *Fisk*, 39 N. H., 117; *Chase* v. *Hathaway*, 14 Mass., 224; *Hovey* v. *Harmon*, 49 Maine, 269; *Hathaway* v. *Clark*, 5 Pick., 491; *Boynton* v. *Dyer*, 18 Pick., 4; *Gibson* v. *Soper*, 6 Gray, 286; *McGee* v. *Gibson*, 1 B. Munroe, 105; *Briggs* v. *Georgia*, 12 Vermont, 60; *Whitney* v. *Lynde*, 16 Vermont, 679; *Meble* v. *McClintock*, 6 W. & S., 58; *Tuttle* v. *Gates*, 24 Maine, 395; *Lane* v. *Crombie*, 12 Pick., 177; *Penniman* v. *French*, 2 Mass., 144; *Lunt* v. *Aubens*, 39 Maine, 392; *Deering* v. *Adams*, 34 Maine, 41.

2. Questions to Dr. Harlow were illegal and misled and confused the jury. *De Witt* v. *Barley*, 17 N. Y., 347; 2 Kent's Com., 452; *Boyle* v. *Coleman*, 13 Barb., 42; *Leavitt* v. *Leavitt*, 4 Maine, 161; *Winkley* v. *Foye*, 33 N. H., 171.

3. The answer was admissible to prove unsoundness of mind. 4 Stark. Ev., 1707; 9 Ver., 601; *Burr* v. *Duval*, 8 Mod., 59; *Patterson* v. *Patterson*, 6 S. & R., 56; 8 S. & R., 573–9; *Dickinson* v. *Barber*, 9 Mass., 225; *Hunt* v. *Adams*, 7 Mass., 518; *Dorsett* v. *Miller*, 3 Sneed, 72; *Whiting* v. *Otis*, 1 Bosw., (N. Y.,) 420; *Baxter* v. *Abbott*, 7 Gray, 71.

4. Defendant's testimony as to consideration and want of knowledge as to defect in title, was inadmissible. *Leavitt* v. *Leavitt*, *ubi sup.*; *Handly* v. *Call*, 27 Maine, 50; *Ellis* v. *Short*, 21 Pick., 142; *Clark* v. *Vorce*, 19 Wend., 232.

5. The letter from Green was admissible as ancient contemporaneous documents, as part of the *res gestae* to show conspiracy to sell Neal's land, thereby treating him as *non compos*. *Irish* v. *Irish*, 8 S. & R., 573; 2 Stark. Ev., 122, 124; *Oldtown* v. *Shapleigh*, 36 Maine, 279; *Steward* v. *Hanson*, 35 Maine, 509.

6. Copy of trust deed, admissible as an act tending to show insanity of Neal. 4 Stark. Ev., 1707, and cases cited in note 2.

7. 3d, 4th, 6th and 7th requested instructions, setting forth the legal rights of plaintiff to maintain the action,

should have been given. For want of which the jury were left in doubt upon questions of law raised and argued by defendant's counsel. *Meble* v. *McClintock*, *ubi sup.*

8. 1st, 2d, 8th and 9th requested instructions, stating the true issue and properly defining *non compos* or unsoundness of mind, and the legal requirements essential to legal competency, should have been given. *Morton* v. *Fairbanks*, 11 Pick., 358; *Commonwealth* v. *Belton*, 5 Cush., 427; *Commonwealth* v. *Barry*, 10 Cush., 480; *Chase* v. *Breed*, 5 Gray, 444, 5; *Stone* v. *Crocker*, 24 Pick., 84, 5 and 6; *De Witt* v. *Barley*, *ubi sup.*; 2 Kent's Com., 452; 1 Black., 304; *Gibson* v. *Jayes*, 6 Ves. Jr., 273; *Ridgeway* v. *Darwin*, 8 Ves. Jr., 65; *Ex parte Cranmar*, 12 Ves. Jr., 454; *In re Parker*, 2 Johns. Ch., 206; *Johnson* v. *King*, 4 Cow., 218; *Hale* v. *Hills*, 8 Conn., 43; *Gibson* v. *Soper*, *ubi sup.*; *Bond* v. *Bond*, 7 Allen, 3; 1 Pow. on Con., 3; *Osmond* v. *Fitzroy*, 3 P. Wms., 129; *Hill* v. *Nash*, 41 Maine, 587; *White* v. *Driver*, 1 Phill., 8; 4 Stark. Ev., 1711, note f; *Hovey* v. *Chase*, 52 Maine, 316; *Harrison* v. *Bowen*, 3 Wash., C. C. R. 580; *Stevens* v. *Van Clerc*, 4 *Ibid*, 262; *Steward* v. *Lispenard*, 26 Wend., 253.

9. The presiding Judge erred (1,) in omitting to give the jury any instructions as to what constituted unsoundness of mind sufficient to avoid a deed; (2,) in the rulings which he did give upon both the first and second questions; and (3,) in ordering the return of a verdict for the defendant upon the answer to a question which was insufficient.

J. & E. M. Rand, and *H. P. Deane*, for the defendant.

Barrows, J.—The motion to set aside the verdict in this case, as against evidence, &c., not being accompanied by the required report of the evidence adduced, must be overruled. The exceptions only are properly before us for consideration. We proceed to consider them *seriatim*, (in the order adopted by the plaintiff's counsel in presenting his argument upon them to this Court,) premising only that, in order to entitle himself to a new trial by means of exceptions,

the excepting party must see to it that he brings before us so much of the case, as it arose at *nisi prius*, as to make it apparent, not merely that the ruling complained of *might be* erroneous in some hypothetical case, but that it *was so* as applied to the case actually presented by the testimony, and that the error was of such a charactor as to affect *his* rights injuriously.

1. The demandant having put in the record of a decree of the Probate Court, passed on the 3d Tuesday of April, 1834; appointing a guardian to Stephen Neal, the tenant offered the record of the same court, showing the removal of said guardian on the 1st Tuesday of September, 1834, upon his own petition, alleging that, "within a few months, the bodily and mental powers of his ward have very much improved, so that he is believed to be capable of managing his own affairs and taking care of himself, which he is desirous to do;" *that* "his improvement in his health and general condition is apparent to all his friends, who are not only willing but desirous that he should now be relieved from legal disability, under which he has been placed, and should have once more the absolute control of his person and property." The record further sets forth that, "upon this petition and representation, *the facts therein stated being fully proved*," the guardian was removed.

The exceptions state that the demandant "objected to this record as evidence of said Neal's restoration to sound mind, because it does not show notice of the proceedings to Lydia Dennett, his grantor, the then presumptive heiress of said Neal; but did not object to it as evidence of the removal of the guardian, and that said Neal was without a guardian at the time of the execution of the deed under which the tenant claims." Upon the statement of tenant's counsel that he did not offer it as evidence of said Neal's restoration to a sound mind, the Judge allowed it to be read. Thereupon the demandant's counsel requested the Court to rule that the burden was upon the tenant to prove the restoration of Neal to a sound mind subsequent to the appointment of a

guardian, and prior to the date of the deed under which he claimed, but the Judge declined so to do, remarking, that he "did not feel called upon to determine at this stage of the proceedings, whether or not the demandant had made out a case." This refusal forms the demandant's first ground of complaint, and is coupled by his counsel, in argument, with the subsequent refusal to give, in the terms requested, his 10th and 11th requests for instructions, which relate to the effect of these records as evidence. Even if it were clear that the requested instructions could be rightfully claimed when the case was committed to the jury, it would still be very certain that the interposition of such a ruling *in the progress of the trial*, at the request of a party, would be purely matter of discretion with the presiding Judge, and the refusal of it before the completion of the case would be no ground for exceptions. The Judge cannot be required to rule upon the force and effect of every piece of testimony upon the position of the parties as it is produced; he is under no obligation to make known his views of the relative condition of the parties as to the burden of proof at every stage of the proceedings. It is sufficient if he gives the right direction to the cause when a party has announced that his case is complete. We are to inquire, then, whether the demandant was justly aggrieved in the matter of his 10th and 11th requests. Without stopping to determine as to the correctness of the rulings requested, it is plain that the demandant has no cause of complaint if those actually given were substantially equivalent. *Dunn* v. *Moody*, 41 Maine, 240. Now the case finds that "the jury were instructed that the record of the original decree of guardianship of April, 1834, was conclusive evidence that in that case it was fully proved to the Probate Court that Stephen Neal was then *non compos mentis* and incapable of taking care of himself, — that the record of the removal of the guardian in September, 1834, was introduced and received only as evidence of the removal of the guardian, and not as evidence of the restoration of said Neal to a sound mind, and

that it was not competent for them to consider it except for the purpose for which it was received." The instruction that "the law presumes every man sane and of sound mind until the contrary has been proved," — *that* the "law presumes that Stephen Neal was a sane man and of sound mind; and if the plaintiff would avail himself of the fact of unsoundness of mind he must prove it, — the burden is upon him to overcome the presumption by proof," if applied to the position of the parties at the commencement of the trial, was unquestionably correct. That it was so applied, and must have been so understood by the jury, appears from the succeeding instructions, as follows: — "The particular time in question is when the deed was signed and delivered. Acts occurring before and after are only evidence tending to show the mental condition *then;* if the plaintiff has shown that Stephen Neal was, at any time during the years 1833, 1834, or 1835, of unsound mind, the law presumes it continued down as late as the signing and delivery of the deed unless the proof shows the contrary." Taken in connection with the previous instructions as to the force and effect of the records of the Probate Court, this certainly leaves *the plaintiff* nothing to complain of, although the presiding Judge did not see fit to adopt the precise words used in the tenth and eleventh requests for instructions.

2. Dr. Harlow, a witness called as an expert by the demandant, having testified in his examination in chief, in answer to several hypothetical questions put by plaintiff, involving facts claimed by plaintiff as proved and facts anticipated in defendant's proof, to his opinion that Neal was of unsound mind and that it was a marked case of *senile dementia*, and having given some testimony as to the character of the disease, was asked, on cross-examination, "whether, taking all the facts on both sides to be proved, was or not, in your opinion, Stephen Neal, on the 27th day of July, 1835, of so unsound a mind as to be incapable of transacting the ordinary business of life?" The question was objected to as

involving a question of law. If we assume that the question was improper and inadmissible, even on cross-examination, as tending to mislead or to draw from the witness an expression of opinion upon a question of law, still, upon looking at the answer, it is not perceived how it could have been in any manner prejudicial to the demandant. The witness says,—"I cannot draw the line how unsound the mind must be to render a man legally incompetent to do business. But I should say he was of unsound mind and a *fit subject for a guardian*, but I can't say whether he was capable of transacting ordinary business or not." The only thing definite elicited by the question was a repetition of the opinion previously expressed, adverse to the tenant and in more emphatic terms, and applied to the very date of the transaction in controversy. A new trial will not be granted on account of the permission of an improper question, when it is manifest that the answer could not have prejudiced the excepting party. To sustain exceptions for such a cause would be more nice than wise.

3. The next subject of complaint is the exclusion of an original paper bearing the signature of Stephen Neal, dated Oct. 29, 1835, and purporting to be his last will and testament, the body of it being in the handwriting of Neal Dow, his former guardian, which was offered "as proper evidence to go to the jury, as an insane act and to prove an unsound state of mind." The reason assigned for offering this document as evidence of Neal's insanity, is that in and by it the principal part of his property is devised away from his daughter, an only child, to whom there was evidence tending to show that he was very much attached at a period some three years earlier than the date of these transactions. Why it was excluded is not stated in the exceptions. The tenant's counsel suggests that the date of the paper is three months later than the date of the deed, and that whether acts of Stephen Neal offered in evidence are sufficiently near in point of time to bear upon the act in question is a question addressed to the discretion of the presiding Judge and

not subject to exception. But it would seem that Neal's acts nearer the close of his life, and more remote in time from the giving of the deed, were offered and admitted in evidence, so that this can hardly be considered as the ground of the exclusion. They further suggest that the body of the paper was not in Stephen Neal's handwriting, and that there is no proof that it was drawn up by his authority or that he knew its contents. But it might be fairly argued that the execution of such a paper, under *such* circumstances, would afford no slight evidence of a demented condition. One of the counsel says there was no proof of the signature, but this contradicts the exceptions, which describe the document as an original paper bearing Neal's signature. It is plain that the true reason for the exclusion was none of these. It may be found in the character of the document itself. Remoteness in the *time* of the act is not the only remoteness from the issue between the parties, which may be, in the discretion of the presiding Judge, a proper ground for excluding evidence of the acts of the person whose state of mind is in question. The sole ground of offering this paper as evidence of insanity is that Neal's nephew, instead of his daughter, is made residuary legatee in it. But while it is apparently drafted by one not learned in the law nor accurate in the use of legal terms, there is nothing fantastic or absurd in its terms. Quite a number of bequests to relatives and friends are set forth in an orderly manner,—provision is made for his wife in addition to her dower, and reasons are duly and carefully assigned for preferring his nephew to his daughter, in the residuary clause, which, if based upon actual facts, might, to many sane minds, seem to justify that disposition. It is plain that, in and of itself, without first raising and settling many collateral issues, the act is not one from which any safe inference as to the state of Stephen Neal's mind could be drawn. There must be a limit somewhere in the discretion of the Court, even in the prosecution of an inquiry taking so wide a range as this. If such evidence did not tend to prejudice and mislead the

jury, at least it would be likely to consume much time to very little purpose. We think it was rightly excluded as too remote and uncertain in its character, and opening too many collateral issues of inquiry, which the tenant could not be expected to be prepared to meet.

4. The next objection is, that the tenant was allowed to testify that he paid a valuable consideration for the land in dispute, and was ignorant of any defect in the title. When this case was last before this Court, (53 Maine, 451,) it was determined that an insane person has not the power to convey an indefeasible title, and does not convey such title, even to a man dealing with him in good faith and paying an adequate consideration, and that, if the deed has never been ratified, the heir of such insane person may avoid it without returning the price, not only as against the immediate grantee but as against remote purchasers deriving their title through him, who have paid the full value of the land without notice of any defect in the title. It follows that, if the issue depended solely upon the question as to Stephen Neal's sanity, the testimony of the tenant was utterly irrelevant and unquestionably calculated to prejudice and mislead the jury. It is claimed by the tenant's counsel to have been "material as tending to show that defendant has *good* cause to defend his premises against the claims of a worthless speculator, so that the jury might fully understand the substantial ground on which he stood." But that is not a "good" nor a "substantial" ground for defence which has been decided not to be a legal ground.

If, therefore, it had appeared in the exceptions, that the *only* ground on which the demandant claimed to invalidate the deed, was a want of mental capacity in Stephen Neal to make an indefeasible conveyance, it would have been plain that this exception ought to be sustained. But this important fact is not asserted in the exceptions. It is hardly just to call upon us to presume that Mrs. Dennett was guilty of so dishonest an act as to make sale of this property to the demandant, claiming to avoid her father's deed, without even

offering to refund the purchase money which had accrued to her father's estate in the transaction, and hence to her, as his sole heiress at law, if she knew or believed that that deed was made in the absence of all fraud or circumvention to one who dealt with him in good faith, paying a fair equivalent for the land. It is more natural to suppose that it was claimed on the trial that Stephen Neal was overreached and defrauded in the original sale of the land, and perhaps some testimony was offered by the demandant, tending to show that some undue advantage was taken of him in his old age, to induce him to part with it for less than its fair value. Such claim or evidence would at once account for and justify the admission of the testimony from the tenant now under consideration. For although the Court, in the former hearing of the cause, established the doctrine that "the right of the insane to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee," they did not fail to recognize the previously well established rule, that while a man who is defrauded, may, as against his immediate grantee, avoid his deed, he is not permitted to do so against those deriving, in good faith and for an adequate consideration, a title from such grantee. *Hovey* v. *Hobson*, 53 Maine, 458.

Inasmuch as it is incumbent upon a party excepting to the admission of testimony, to make it apparent that there was no phase of the case, as presented at nisi prius, which authorized the admission, this exception must fail also.

5. David Green's letter and receipt cannot be considered part of the *res gestae*, or admissible upon any principle known to the law of evidence. Beyond question they were rightly excluded. Conceding all that demandant's counsel claims for them, on the score of antiquity and authenticity, the most strictly legal proof that a man's wife and her brother had conspired ever so successfully to appropriate some of his funds to the wife's separate use, would afford no legitimate inference against the sanity of the man.

6. The "paper purporting to be a copy of paper dated Nov. 20, 1835, called a trust deed," does not appear to have been offered under such circumstances as would have made a copy admissible, and even the original would have been liable to the same objections, on account of which we hold the testamentary paper of Oct. 29, 1835, to have been rightly excluded. There is nothing in the exceptions upon which to base the argument that it should have been admitted for the purpose of contradicting Neal Dow.

7. The three remaining positions taken in argument by the demandant's counsel, relating, as they do, to certain requested instructions, and to the mode in which the case was put to the jury, may properly be considered together, for, looking at the requests and the instructions given, it is plain that the demandant cannot be considered as aggrieved by the omission to instruct in form as requested, if the rule, which ought of right to govern the decision of the case, was clearly and intelligibly laid down. The right of counsel to call for instructions in matters of law does not comprehend a right to have his arguments repeated and endorsed by the presiding Judge, but only to have the question upon which the jury are to pass, correctly presented to them disencumbered of false issues which might tend to prejudice and lead them astray. It becomes important accurately to ascertain what rule was given to the jury in this case, and upon what finding in matters of fact their verdict was made to depend.

The Judge submitted to the jury three written questions with instructions such as could not fail to give the jury to understand, that upon their answers to these questions, or some of them, the rights of the parties must depend, but reserving his instructions as to the legal effect of the answers until these questions of pure fact should have been settled. It is not perceived that there was error in this. Such a course of proceeding, if the questions did, in fact, embrace the substance of the issue presented, would seem well calculated to secure a fair determination of the exact matters of fact in controversy, unembarassed by irrelevant issues, and

unbiased by prejudice or sympathy for or against either party, and, in a case where the result must depend upon the answers to one or two direct questions, we think neither party can object to the adoption of this course by the presiding Judge in his discretion, in lieu of an attempt to disentangle the case from its embarrassments by specific instructions as to all the matters involved in the outset, an attempt which, in complicated cases, it is to be feared, is not unfrequently rendered abortive by the misapprehension or forgetfulness of the jury. The method pursued here seems to have the merit of simplicity and directness.

We are now to inquire whether the questions did cover the whole issue between the parties, and whether the answer returned justified the direction which the Judge gave the jury thereupon, to render a verdict for the defendant. The first question was as follows:—"Was Stephen Neal, at the time the deed of July 27, 1835, to Samuel E. Crocker was signed and delivered, of sound mind?" And the jury answered that they were "unable to agree upon a direct answer to this question."

The second was,—"Did Stephen Neal execute and deliver the deed of July 27, 1835, to Samuel E. Crocker, at or about its date, understanding and comprehending the nature of his act, the consideration to be paid, and that he was thus transferring the title of the property therein described to said Crocker and the consideration to himself." And the jury answered that he did. The third question became immaterial by reason of the answer to the second. Upon these answers the Judge instructed the jury that the defendant was entitled to a verdict, which was accordingly returned.

It is not now contended that the demandant was entitled to recover upon any other ground than the incapacity of Stephen Neal, by reason of mental disease, to make a valid conveyance on the 27th of July, 1835.

If the first question were to be taken as an inquiry whether Stephen Neal was at that time "of sound mind," in the legal acceptation of that term, then the failure of the jury

to agree upon an answer, would have been a failure to agree as to what was vital to the disposition of the case, and the instruction to return a verdict for the defendant would have been erroneous. The grantor *must* be "of sound mind" *as the law understands the phrase*, in order to make a valid conveyance. But it is plain, from the tenor of the instructions given when the question was submitted to the jury, that the inquiry was not so designed to be understood, and was not so understood by them. They were told, in so many words, that "it was not an inquiry as to his responsibility, in whatever mental condition they might find him," and that they need not trouble themselves what legal or medical name to attach to it. It was the naked question — was he of sound mind? i. e. of *absolutely* sound mind, in full possession and exercise of all his mental faculties? and this as contra distinguished from any enfeebled condition of mind which still might be compatible with legal soundness. Their failure, then, to agree upon a direct answer to this question, does not negative the idea that the grantor was of sound mind, *legally speaking*, if the finding in answer to the second question is substantially equivalent to an affirmation of his legal competency to convey. Now, touching this matter of the validity of this conveyance, upon which this case was to turn, the jury have found that the only party to it, whose capacity to consent thereto was doubted, "*did* execute and deliver it, understanding and comprehending the nature of the act, the consideration to be paid, and that he was thus transferring the title to the property therein described, to the grantee and the consideration to himself." Is anything more required to evince an *intelligent assent* on *his part?* or to show that he *was* in "possession of mental capacity sufficient to transact business with intelligence and an intelligent understanding of what he was doing?" The ruling, in substance, is — that ability to execute and deliver a deed understanding and comprehending the nature of the act, the consideration to be paid, and that he was thereby transferring the title to his property

to the grantee, and the consideration to himself, indicates sufficient soundness of intellect in the grantor to make the conveyance valid, though it be uncertain whether his mind was in all respects and absolutely sound. Now in what essential particular does this differ from the rulings and refusals to rule, which were held correct in the suit of this demandant against Chase, involving the same question and title, and reported 52 Maine, 304? There the presiding Judge instructed the jury that "no degree of physical or mental imbecility" (in the grantor) "can avoid his deed if he had legal competency. Legal competency to act, is the possession of mental capacity sufficient to transact business with intelligence and an intelligent understanding of what he was doing;" and he refused to instruct them that, "if he had not sufficient intelligence and understanding to transact business in a proper and provident manner, he was of unsound mind." Thus, the ruling in *Hovey* v. *Chase*, recognizes a distinction between absolute and legal soundness of mind, and the possibility of legal competency to convey where perfect mental soundness is lacking, and makes ability to transact business with an intelligent understanding of what he was doing the test of legal competency in the grantor. Why should it be otherwise? What more could or ought to be done by way of laying down a governing rule for the action of the jury in such cases? The assent of two minds of sufficient intelligence to be capable of comprehending the import of the transaction is necessary to the validity of a contract or conveyance. But *the law* can fix no other or more particular standard of intelligence. Whether mental disease or infirmity has proceeded so far as to destroy that capability is a question of fact to be determined according to the circumstances in each particular case where the validity of the act is in question, and, in the case at bar, was determined by the jury in favor of the tenant in their answer to the second question. Any attempt to lay down other general rules applicable to all cases of this sort would be liable to lead to inextricable confusion and con-

flict in the decisions, and, if adhered to, in many cases, to positive injustice. This seems to have been realized by the Judge, upon whose remark, (in *Gibson* v. *Soper*, 6 Gray, 282,) that "one of the obvious grounds upon which the deed of an insane man is held voidable, is not merely the incapacity to make a valid sale, but the incapacity *prudently to manage and dispose of the proceeds of the sale*," the demandant's counsel here based one of his requests for instruction; for, in another part of his opinion, referring to the case of *Arnold* v. *Richmond Iron Works*, he says, "the tenant relies upon some remarks of the Chief Justice in delivering the opinion of the Court, as sustaining his position. *Nothing is more unsafe* than to rely upon such remarks taken from the connection and context by which their meaning is limited and qualified. In their relation and application to the facts under discussion, they may be sound and pertinent; wrested from their connection and application and applied to a different state of facts, they may be neither just nor sound." Given as the foundation of a reason why an insane man should not be called upon to restore the consideration before avoiding his deed, the remark first quoted is unobjectionable, but, applied *as a test* to determine a man's capacity to make a legal conveyance, it is "neither just nor sound." Many a man has unquestionable capacity to make sale of his property, who has not the faculty "*prudently* to manage and dispose of the proceeds of the sale."

We say, then, that a want of absolute and perfect soundness of mind does not necessarily affect the capacity to make a valid conveyance, provided the mind is still capable of fully comprehending the import of the act.

Insane delusions and mental infirmities may or may not be of such a character as to affect the validity of an act of conveyance. Where they *are* of such a character, they are not to be disregarded, and, if directly connected with the act, incapacitating the party from understanding its nature or character, or the results which would flow from it, they would destroy its validity. And this is the true extent and mean-

ing of the case of *Bond* v. *Bond*, 7 Allen, 1, cited for the demandant.

In the case now before us, there is nothing indicating the existence of such delusions. So far as we can gather the facts from the exceptions, the demandant claimed that there was a gradual decay, ending, in old age, in the utter destruction of the mental power of the grantor, and the case seems to range itself more nearly in its facts with those of *Hill* v. *Nash*, 41 Maine, 585, and *Jackson* v. *King*, 3 Cowen, 207, the doctrines of which are too familiar to need rehearsal.

In all cases involving an inquiry of this sort, in order to avoid erroneous conclusions, the strictest attention must be paid to the particular circumstances, so as to ascertain, if delusion and infirmity appear, whether they are so connected with the act, the validity of which is in dispute, as to show that, *as to that act*, the intelligent assenting mind was wanting.

"Every instance must be judged on its own merits, and, while weakness of understanding deserves protection, it should be remembered that too nice an investigation of eccentricities and imperfections may lead to oppression and injustice." Beck's Medical Jurisprudence.

It is not upon proof of a few irrational or absurd acts *merely*, that mental alienation, incapacitating a man for the management of his own affairs, and avoiding his contracts at the option of his heirs, is to be inferred. *Semel insanivimus omnes*, — and are fortunate if *only* once.

The learned Professor Casper, Forensic Physician to the Courts of Justiciary in Berlin, (whose cautious scrutiny, physicians who are called to testify as experts to the mental condition of those whom they have never seen, where an opinion, if formed at all, must be based upon the necessarily imperfect observation and detail of witnesses not experts, would do well to bear in mind and imitate,) remarks as follows; — "Of all the questions which the physician has to treat in medico-legal practice, there is, without exception, no one more difficult to solve than that of the disputed mental

condition of any individual. * * There is difficulty, in many cases an actual impossibility, of determining the limits between mental health and mental disease. Those fortunate individuals gifted by Providence with a perfectly proportionate and completely harmonious development of all the fundamental powers of the mind, representing, as it were, the perfect *norm* of mental health, are extremely rarely to be met with."

"In forensic medicine, in every matter, and nowhere more than in psychological affairs, individualization, the critical examination of the individual case, is the only proper method of inquiry."

Elsewhere he speaks of "the important consequential and dangerous results to which the habit of generalization in medico-legal matters has led." And again, he says,—"there is nothing else for it but to consider the practical circumstances of each case, and the principle of the individualization of each case, in my opinion, ought to be firmly maintained throughout the whole of forensic psychology."

But the authority of the learned need not be quoted in support of these ideas. They are the utterances of the plainest common sense. Apparently the presiding Judge had them in mind when he put the second direct question to the jury and ruled so as to make the case turn upon their answer.

The partially insane or feeble in intellect are responsible even *criminaliter*, if they understood the nature of their acts and knew that they were wrong. It is not every kind or degree of insanity which exempts from punishment. "The test of such insanity as will excuse the commission of crime is whether the accused, at the commission thereof, was conscious that he was doing what he ought not to do. *United States* v. *McGlue*, 1 Curtis' C. C. Reports, 1; *State* v. *Spencer*, 1 New Jersey, 196; *Roberts* v. *State*, 3 Kelley, 310.

And see Casper's Forensic Medicine, vol. 4, p. 238, Case CLXXX, for details of an instance where a man was rightly

held competent for the management of his own affairs without the intervention of a guardian, and actually for years transacted business as a house agent, though all the while laboring under most manifest and obstinate insane delusions, which, however, appeared not to affect his comprehension of business matters. Though not *absolutely*, he was *legally* of sound mind.

Not finding that the excepting party lost anything to which he was rightly entitled by the manner in which this case was given to the jury, or by the rulings in respect to the admission and exclusion of testimony, the entry must be

Motion and Exceptions overruled.

Judgment on the verdict.

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

NATHANIEL F. DEERING, *Ex'r & Tr.*, *versus* MARY P. TUCKER *& als.*

In a bill in equity, brought to give construction to a will, which, after providing for the payment of all debts and certain specific legacies, and appointing the executors as trustees, further provided, that the remainder of her whole estate, real, personal and mixed, should remain and be kept, for the full period of twenty years from the date of said will, under the care and management of said trustees, for the benefit of certain grandchildren named; that so much of the income of said estate as might be deemed necessary by said trustees, should be applied to the education and support of said grandchildren, and for a suitable provision for them in case of marriage, * * "before said period shall elapse," and the remainder thereof to be judiciously invested until said grandchildren should become entitled to receive their respective proportions; that, at the expiration of said period, the "whole of the" testator's "estate and property" should be equally divided among those of said grandchildren then surviving, and the lawful issue of such as had deceased: — *Held*,—

1. That the trusts were determined at the expiration of the period named;

2. That the devisees, without regard to sex, were to receive equal proportions of the realty in fee simple.

Deering *v.* Tucker.

A provision in a will, restricting the rights of the devisees in the control and disposition of estates therein devised to them in fee, is void for repugnancy.

Where a will devised an estate in fee to the testator's grand-daughters, to vest in them at the expiration of twenty years from the date of the will, and provided that said estate should "be so received" (by the trustees having its care and management prior to the expiration of such period,) "for the use and benefit" of said grand-daughters, "as not to be subject to the control and disposition of their or either of their husbands:" — *Held*, — That the last clause was not in limitation but in furtherance of the rights of the devisees.

APPLETON, C. J. — This is a bill brought by the surviving executor and trustee under the will of Mary Preble, to obtain the legal construction to be given to certain provisions in the same, and to ascertain the mode of executing the trusts created thereby. All interested are made parties to the bill.

Mary Preble, by her last will and testament, appointed her executors as trustees. They were to have the entire care and management of her estate, to be holden and managed by them for the benefit of her grandchildren, a son and two daughters of her only son Edward, agreeably to the provisions and directions contained therein. After payment of all her just debts, charges and legacies, her whole estate, real, personal and mixed, was to remain and be kept under the care and management of the persons named as trustees, to be by them managed with care and prudence for the benefit of her said grandchildren; and so to continue and remain *for the period of twenty years from the time of making this will;* during *which period*, the whole of said property is directed and intended to continue and be kept in that condition, undivided, under the care and management of the executors for the purposes aforesaid, *until the said period shall fully expire.* So much of the income and profits of the estate, as may in their judgment be necessary and proper, was to be applied to the education and support of her said grandchildren and for suitable provisions out of the same, in case of their marriage and coming to have

families *before the period shall elapse;* and the remainder was directed to be invested from time to time in some safe and judicious manner, according to their best judgment, to be added to her said estate, *until* her said grandchildren shall become entitled to receive the proportions respectively intended for them by this will. *At the expiration of said period of twenty years from the date of the will*, the whole of her said estate and property was to be equally divided among those of her said grandchildren who may then be living, and the lawful issue of any one or more that should then be deceased, in the same proportion that would belong to any such grandchild, if living, &c. If all the grandchildren should die without leaving lawful issue in being, *before* the said period of twenty years should expire, then the estate was to constitute a fund for charitable purposes, and the estate to become vested in the new trustees specially designated by the will.

It is apparent that, for twenty years, the grandchildren were to have no control over the estate. It was to be under the care and management of the executors and trustees. Their powers and duties were accurately defined. The trust is limited in time. It embraces the whole estate, and not a fraction. When it ends, it ends as to the whole estate. When the trust expires by the limitation of time, no further duties are to be done by the trustees. The estate, at the expiration of the period prescribed by the will, is to pass from the trustees and to vest in the grandchildren. In every part of the will, in all its various clauses, the trust estate is continued only for the period of twenty years. The trust estate limited in time by the will, and expiring by its own limitation, what then is to become of the estate of which the trustees have had charge since the decease of the testatrix?

The answer to this question is to be found in the ninth clause in the will, which is in these words:—"Ninthly. It is my will that *at the expiration of said period of twenty years* from this time, *the whole of my estate and property*

shall be equally divided among those of my said grandchildren, who may then be living, and the lawful issue of any or more that shall then be deceased, in the same proportion that would belong to any such grandchildren if living. And, if either of my said grandchildren should then be deceased, without leaving lawful issue living at the end of the said time fixed, then the whole shall go to the surviving grandchildren or grandchild, or lawful issue of any deceased grandchild, in such proportion as aforesaid; or, if there be but one surviving grandchild, or issue of but one, then the whole to go to such single grandchild or his or her issue as aforesaid; and that said estate shall not vest in them or either of them before the end of that period in any manner."

The language of this clause is clear and precise. The whole estate is to vest "at the expiration of said period of twenty years." Nothing is to remain in the care or under the management of the trustees. No distinction is made on account of sex. The words used apply irrespective of sex. They cannot be made to vary in their signification because one devisee may be a grand-son and the others daughters. If they give the fee to the grand-son, they give the same estate and none other to the grand-daughters.

"The word "estate," as held in the American Courts, is a word of the greatest extension, and comprehends every species of property, real and personal, and will carry a fee unless restrained. It describes both the *corpus* and the extent of interest." 2 Redfield on Wills, c. 14, § 48. A devise of all "my real estate," without words of limitation, passes a fee simple by force of the word "estate." *Godfrey* v. *Humphrey*, 18 Pick., 537; *Putnam* v. *Emerson*, 7 Met., 333. The words "all of the estate" of the testator, pass a fee simple. *Josselyn* v. *Hutchinson*, 21 Maine, 339. Indeed, it cannot for a moment be doubted that the words "all of my said estate and property," as used in this section of the will, give the devisees a fee simple. If they give this to the grand-son, the grand-daughters, by force of the same words, must take an equal estate.

The testatrix then proceeds as follows:—"It is further

herein my express will and direction that my said estate shall go or descend, in no other wise than is by this will directed and provided. And it is moreover my express direction that, in case of the marriage of either of my grand-daughters, at any time before they may be twenty-one years of age, or after, it shall be the duty of the said executors * * or whoever may be appointed in their places and be invested with their powers, to secure or cause the portions of property that may be coming to such grand-daughters, *at the expiration of said period of twenty years*, or to either of them, to be *so secured* for their or her own use and benefit, *as not to be subject to the control and disposition of their or either of their husbands;* and this direction not to be altered by any request or consent of either of such grand-daughters thereunto."

The testatrix, by a previous clause, had devised her grandchildren an estate in fee simple, — thus giving to each and alike the complete control over their share in her estate, and the full power of alienation. This last clause was not in limitation but in furtherance of the rights of the grand-daughters. It was to prevent any control of their estate by their husbands, — to preserve their entire rights without let, hindrance or interference on their part.

The "control" to be guarded against was legal control on the part of the husband, by virtue of his marital rights; the "disposition" of their estates to be feared was one in the exercise of those rights. The grand-daughters could not be, nor was it desirable they should be protected from and against the just and natural influence arising from the marital relation, — so far as that might affect their conduct in the management of the estate, or in the spending of their incomes. That influence could only be avoided, by the avoidance of matrimony.

The testatrix did not intend the husbands should have power to lease, mortgage, sell, or in any way dispose of or manage the estate devised, — nor that it should in any way be liable for their debts.

Now, by the existing laws of the State, the objects which the testatrix had in view by the clause under consideration are fully accomplished. By R. S., 1857, c. 61, § 1, "a married woman, of any age, may own in her own right, real and personal estate acquired by descent, gift or purchase; and may manage, sell, convey and devise the same by will without the joinder or assent of her husband." By § 2, the husband, by marriage since March 22, 1844, "acquires no right to any property of his wife." By § 3, she may prosecute and defend suits at law or in equity, for the prosecution and protection of her property as if unmarried, or may do it jointly with her husband. In *Southard* v. *Plummer*, 36 Maine, 64, it was held that a marriage contracted since the Act of 1844, c. 117, conferred upon the husband no ownership in property which at the time belonged to the wife, and that the right to the exclusive possession and control of such property remained in her after the marriage equally as before.

It is apparent, therefore, that a release to the grand-daughters will secure the estate to them for "their own use and benefit," so "as not to be subject to the control and disposition of their or either of their husbands."

If the design of the testatrix was to restrict the rights of the grand-daughters in the control and disposition of these estates devised to them in fee, such design would be against law. A provision in a devise of land, that the same shall "not be subject or liable to conveyance or attachment," is void, because repugnant to the estate devised. *Blackstone Bank* v. *Davis*, 21 Pick., 42; *Gleason* v. *Fairweather*, 4 Gray, 348.

According to the true construction of the will of Mary Preble, it is declared:—

(1,) That the trusts created thereunder and thereby cease and are terminated at the expiration of twenty years from the date of said will.

(2,) That, at the expiration of said period, "the whole of her said estate and property" is to be equally divided be-

tween her said grandchildren, and that the same shall vest in them at the end of said period, they taking an estate in the realty in fee simple.

And it is ordered, that the surviving trustee, after paying all debts and settling his final account, pay over to the devisees all moneys remaining in his hands belonging to the estate, releasing to the grandchildren all his title to the estate and property of the testatrix.

And it is further ordered and decreed that the costs of these proceedings are a charge upon the estate of said Mary Preble.

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

N. Webb, for the complainant.

J. D. & F. Fessenden, for the respondents.

GEORGE S. HUNT *versus* COLUMBIAN INS. CO. *& Trustees.*
CHARLES H. CHASE *versus* SAME *& Trustees.*

The judgment of another State, decreeing a dissolution, and appointing receivers to wind up the concerns, of a corporation created by its laws, will not prevent an action commenced against such corporation here, prior to such dissolution, from proceeding to judgment, unless it be shown that the corporation is utterly extinct.

It is not sufficient to show that, by the law and usage in the Court of the State where such decree of dissolution is passed, such corporation is permanently dissolved, although it still has a qualified existence, capable of being a party to a judgment there.

The legal authority of receivers, duly appointed in another State, is co-extensive with the jurisdiction of the Court by which they were appointed.

Comity does not require the S. J. Court of this State to permit receivers appointed by the Court of another State to exercise privileges detrimental to our own citizens, while pursuing appropriate legal remedies here.

ON REPORT.

ASSUMPSIT on an account annexed and on a count for money had and received. The writ was served upon the trustees in the first named action, January 13, 1866.

The remaining facts are sufficiently stated in the opinion.

In the second case, the trustees did not disclose that they had been notified of any claim for an assignment of the funds in their hands.

W. L. Putnam, for the plaintiffs.

Davis & Drummond, for the receivers and principal defendant.

I. In proceedings *in rem*, where the Court has jurisdiction of the parties and the subject matter of the suit, whether its decisions are correct or not, its judgment, until reversed, is binding in every other Court. *Elliot* v. *Piersol*, 1 Peters, 328, 340. If the Court has jurisdiction, we cannot go behind the decree. *Thompson* v. *Tolmie*, 2 Peters, 157. These cases cited and approved in *Voorhees* v. *U. S. Bank*, 10 Peters, 449. To same effect, *U. S.* v. *Arredondo*, 6 Peters, 191. The doctrine that excess of judgment beyond jurisdiction is void, applies only to courts of limited jurisdiction. *Williamson* v. *Berry*, 8 Howard, 495.

II. The law applicable to judgments *in rem*, applies with equal force to judgments *inter partes*, which declare the *status* of the parties; and such judgments are conclusive as to all the world. 1 Greenl. Ev., § 525; *Burlen* v. *Shannon*, 3 Gray, 389; 2 Smith's Leading Cases, 514; *Lord* v. *Chadbourne*, 43 Maine, 429. Judgments *in rem* or *inter partes*, where they are adjudications upon the *status* of a particular person, are admissible in all cases in which the *status* of such person is in issue.

III. A corporation may be dissolved by judgment of Court. Angel & Ames on Corp., § 774, and cases cited. In New York, by proceedings in chancery. Angel & Ames on Corp., § 777; *Mannea* v. *Potomac Co.*, 8 Peters, 281. The obligations of its contracts are not thereby impaired, because, (1,) its creditors contracted with reference to such a

contingency; and, (2,) because their obligations survive. *Mannea* v. *Potomac Co.*, *ubi sup.*

IV. The judgment of dissolution was for a violation of the law and conclusive. 4 Saund, 559; 11 Paige, 118; 23 Wend., 254; 10 Paige, 380.

V. It was not a *quasi* dissolution, as under insolvent laws. In this case, after payment of debts, the remaining assets are to be divided among the stockholders. Corporation is absolutely and irrevocably dissolved.

VI. Such a dissolution takes away all power of rendering a valid judgment against the corporation, for it is dead to all intents. *Merrill* v. *Suffolk Bank*, 31 Maine, 57; *Rankin* v. *Sherwood*, 33 Maine, 509; *Merrill* v. *Shaw*, 38 Maine, 267; *Leathers* v. *Shipbuilders' Bank*, 40 Maine, 386. Effect is same whether the corporation is dissolved by legislative Act or by judgment of Court. *Bacon* v. *Robertson*, 18 Howard, 480. It cannot be pleaded in abatement, or *puis darrein continuance*, for the dead cannot plead. Cases already cited. Therefore judgment cannot be taken in this suit against the corporation. The result will be the same in effect as if the claim of the receivers prevail.

VII. Under the laws of N. Y., the corporation is not kept alive for any purposes, but they provide for an administration upon the estate of a dead corporation same as of a dead man. The N. Y. statute providing that, in case of dissolution of a corporation, an action in its favor may be continued and prosecuted by the receivers in their name, is similar to the provisions in our statute which authorizes administrators to assume and carry on suits pending at the death of his intestate. In N. Y., the receivers represent the corporation and can do certain things in its name; if their power comes to Maine, they are entitled to the funds, but if not, there is no party defendant and the suit fails.

In *Keazer* v. *these defendants*, commenced in the U. S. D. Court of Maine, after this dissolution, Judge Fox dismissed the case, remarking that he could find no authority

for maintaining a suit against a corporation, commenced after its dissolution.

VIII. If the corporation is not dead, it is kept alive by the *remedial* laws of N. Y., operating here. If these operate here for one purpose, they must for all.

BARROWS, J.—In both these cases the plaintiffs are resident citizens of this State, as are also the parties who are summoned as trustees of the principal defendant, a corporation located, at the time of the commencement of the action, in the city of New York, and doing an extensive business in the taking of marine risks here, by means of its agents.

In the first named case, which was entered at the April term, 1866, the trustees appeared at the return term and filed their disclosure, admitting a considerable amount of funds in their hands, which they said was claimed by the receivers of the insurance company; and the defendant corporation also appeared by respectable and well known counsel, members of this bar, and there was a continuance to the October term, previous to which the principal defendant regularly filed specifications of defence, and the cause was thereupon continued from term to term to the April term, 1867, when the principal defendant was defaulted, and the receivers appeared and filed their claim to the moneys of the company in the hands of the trustees, put in copies of the proceedings in the New York Supreme Court, showing a decree of dissolution of the Columbian Insurance Company and the appointment of receivers, Feb. 6, 1866, within a month after the attachment of the funds of the company in the hands of these trustees. The plaintiff thereupon put in certain extracts from the statutes of the State of New York, and the case was reported to this Court, upon the stipulation that the trustees should be charged for $2382,30, less their costs, unless, upon the matters appearing in the report, the claim of the receivers should prevail, or unless, by reason of the proceedings in the New York Court, the

plaintiffs are precluded from taking judgment in this suit against the principal defendant.

I. As to the effect of the judgment in New York upon the *status* of the corporation, which is the principal defendant here, and consequently upon the right of the plaintiff to pursue this action to final judgment — it is plain, that we should have had a materially different question presented for our decision, so far as this point is concerned, if the effect *in New York* were what is claimed for it *here*.

But certainly, such judgment cannot have any greater force or effect here, upon the condition and existence of the corporation, than it has by law in the State where it is rendered. The utmost that can be required in this respect is that the records of judicial proceedings there, duly authenticated, shall have such faith and credit given to them here as they have by law or usage in the Courts of the State from whence they are taken. Such is the tenor of the Act of Congress, passed May 26, 1790, § 1, in pursuance of the power given by the first section of the fourth article of the constitution of the United States.

To substantiate the position that the plaintiff cannot take judgment in this suit against the Columbian Insurance Company, whose credits were duly attached in the hands of the trustees, and who appeared and answered, and filed their specifications of defence, and subsequently submitted to a default, it must be shown that the corporation is not merely prohibited from the customary exercise of its corporate functions, but is actually extinct. It is not merely a perpetual paralysis but an unqualified dissolution, alone, that can defeat the plaintiff's right to a judgment. If, by law or usage in the Courts of the State of New York, where the judgment was rendered, the corporation may still be a party of record, and suits maintained or defended in its name, though its affairs there are under the guardianship of the servants of the Court, it must be considered as having a qualified existence so long as judgments can be rendered for or against it in the Courts of that State.

Looking now to the extracts from the laws of New York, which are made part of the case, we find many provisions which seem to recognize the existence of a corporation, in favor of and against which suits may be prosecuted and judgments rendered after the passage of the decree for what must be deemed only a *quasi* dissolution, which is entered at an early stage of the proceedings, in order to prepare the way for certain proceedings against the stockholders, which can only be had after such decree. But, notwithstanding such decree, it seems judgment may still be rendered in pending suits for or against the corporation, as well as in suits in favor of or against the receivers appointed by the Court; in certain cases moneys are to be retained in the hands of the receivers, to be applied according to the event of the suit, or otherwise distributed on a second or third dividend; (Revised Code of N. Y., vol. 2, p. 492, §§ 78 & 84,) and finally, (vol. 3, p. 674, c. 295,) by § 4, it appears that "the Court in which any suit or proceeding against a corporation *which shall have been dissolved by the decree of the Court of Chancery*, or by the expiration of its charter or otherwise, shall be pending at the time of such dissolution, shall have power, on the application of either party thereto, to make an order for the continuance of such suit or proceeding, and the same may be thereafter continued *until a final judgment or decree shall be had therein, which shall have the like effect upon the rights of the parties as if such corporation had not been dissolved.*"

The dissolution of the Frankfort Bank, which was under consideration in the cases of *Merrill* v. *Suffolk Bank*, 31 Maine, 57, and *Rankin* v. *Sherwood*, 33 Maine, 509, (cited for claimants,) reaffirming *Reed* v. *Frankfort Bank*, 23 Maine, 318, and *Whitman* v. *Cox*, 26 Maine, 335, was effected by an Act of the Legislature, passed March 29, 1841, *repealing the charter*, and followed, April 16, 1841, by an additional Act requiring all creditors to present their claims to the receivers, and make proof of them on or before the 1st day of July, 1842, on pain of being forever barred.

The corporation in *that* case was utterly extinguished; a different remedy was provided for creditors, and it was rightly held throughout the subsequent litigation, that judgments rendered against the bank, after *such* a dissolution, were erroneous.

In *Leathers* v. *Shipbuilders' Bank*, 40 Maine, 386, in place of such provisions as we have above recited from the statutes of New York, we find, assigned as one of the grounds of the decision, the statute of March 16, 1855, expressly forbidding the maintenance of any action against a bank after the appointment of receivers.

It is manifest that these decisions throw little light upon the effect produced upon the *status* of the Columbian Insurance Company by the decree of the Court in New York.

Looking at the statutes of New York, to ascertain the effect which it has by law and usage in the Courts of that State, we find no difficulty in concluding that there is nothing in those proceedings to prevent the plaintiff from taking judgment in this suit against the principal defendant, as a corporation still having a qualified existence, though permanently disabled. Like the apocalyptic church in Sardis, when its existence was recognized and it was addressed in the language of reproof by the apostle, though in some sort it may be said to be dead, "it has a name to live;" and, for the furtherance of justice, it is best to "strengthen the things that remain that are ready to die."

II. But hereupon, it is argued for the claimants, with not a little plausibility, that if the corporation is not completely defunct, so that no judgment can be rendered against it, it is kept alive by allowing the remedial laws of New York to operate here, and that, if they operate here for one purpose, they do for all; if their effect is to give authority to prosecute cases against the corporation, it must be through the receivers, and if the receivers as such can be prosecuted here, they must be entitled to the funds in the hands of the trustees, the Act that created them giving them title to the funds. At the first glance this seems but reasonable,

but the fallacy creeps in with the assumption that it is only by giving a positive force and operation to the laws of New York *here*, that the action can be maintained against the principal defendant. Not so. The problem stands thus; — Given a corporation actually transacting business in this State, appearing and answering generally to this suit, — the question which we have just been considering is, whether the judgment introduced by the claimants had the effect to annihilate the corporation *there*. Finding that it still has sufficient vitality by law and usage in the Courts of New York to be capable of being a party to a judgment *there*, we have only to answer *that* question in the negative, and we are left with the presumption arising from the proceedings in our own Court in this suit unimpaired. Another, and, as it seems to us, notwithstanding the ingenious argument of the claimant's counsel, a *totally distinct* question is now presented.

The plaintiff, by the service of his trustee process upon the debtor of the principal defendant, has obtained a lien upon the debt, and upon the disclosure is entitled to an adjudication in his favor against the parties summoned as trustees of the Columbian Insurance Company, unless the appointment of receivers in New York has transferred to them the right to control, not only the property of the defendant corporation there situated, but also that which is within our own jurisdiction, in such a manner as to defeat the plaintiff's previously acquired lien. That an actually subsisting lien, regularly acquired by proceedings in a court of competent jurisdiction, cannot be thus defeated seems too plain to require argument or elucidation, and even the claimant's counsel prudently declines any futile attempt to support the claim of the receivers, except in the indirect mode before adverted to. The receivers, who assert this claim here, are merely the servants of the Court in New York, having *legal* authority coextensive only with the jurisdiction of the Court by whom they were appointed. Upon principles of *comity*, often recognized and always acted on,

except when they come in conflict with paramount rights of suitors in our Courts, they might be admitted here to protect the interests and enforce the claims of the corporation, of whose affairs they are the legal guardians there. But comity does not require us to permit the exercise of such privileges to the detriment of our own citizens who are pursuing appropriate legal remedies in this Court.

Chancellor KENT declares that "it may now be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitae* prevails over the law of the domicil, with regard to the rule of preferences in the case of insolvent's estates. The laws of other governments have no force beyond their territorial limits; and, if permitted to operate in other States, it is upon a principle of comity, and only when neither the State nor its citizens would suffer any inconvenience from the application of the foreign law." See Kent's Commentaries, 4th ed., p. 406, where the strong current of American authorities sustaining the doctrine, that even "a *prior* assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment (by an American creditor) of the bankrupt's effects found here," is passed in review, and cases arising in the Courts of the different States and of the United States are cited to show that "our Courts will not subject our citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control."

If an assignment by the creditor himself, in conformity with the laws of another State, or a transfer to assignees in the regular course of foreign proceedings in bankruptcy, cannot avail to prevent a creditor here from pursuing his remedy against property found within this jurisdiction and subsequently attached, there is plainly no ground whatever for the claim that a prior attachment shall be vacated at the instance of receivers appointed in New York, upon summary proceedings like those in the record before us in this

case. Such an excess of comity could neither be expected nor desired.

The view which we have taken of the points raised in the case first abovenamed, enables us to dispose of both cases, without adverting to the particulars wherein the disclosures filed by the trustees in Chase's suit differ from the others. The same result must necessarily follow in the second case, and it is unnecessary to give any opinion upon the points raised and argued by counsel therein, as distinguished from the case of Hunt against the same defendants.

Holding, as we do, that the proceedings of the Court in New York did not operate an extinction of the defendant corporation, and cannot prevent the plaintiff from proceeding to judgment against it, in a suit commenced here before those proceedings were instituted, and that the claim of the receivers appointed there cannot prevail to defeat the lien previously created by the service of the writ here, the proper entry in both cases will be

Trustees charged on disclosure
for sum indicated in report.
*Judgment for plaintiff.**

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

* See *Boston Iron Co.* v. *Boston Locomotive Works & Trustees*, 51 Maine, 584. — REPORTER.

JOHN A. HOLMES *versus* ELBRIDGE GERRY.

A count in case, under c. 136 of Public Laws of 1862, substantially alleging that, prior to a day named, the defendant had, at various times, loaned to plaintiff large sums of money, amounting to $3100, and, on said day named, he did take and receive from the plaintiff $2500, as usurious interest, may be amended by setting forth specifically the several sums loaned, together with their respective dates, and the several sums received as usury upon each loan, if the aggregate amount of usurious interest does not exceed that in the original count.

To enable the plaintiff in such action to recover of the defendant money alleged to have been paid as usurious interest upon a loan, it must appear by a preponderance of evidence that the plaintiff was legally liable to the defendant for the money loaned.

Where the proof manifestly fails to establish such liability, a verdict for the plaintiff will be set aside.

On Exceptions and Motion to set aside the verdict as against the law, the evidence and the charge of the presiding Judge.

Case, under c. 136 of the Public Laws of 1862, to recover back usurious interest.

The writ was dated May 20, 1865. The presiding Judge, against the defendant's objection, permitted the plaintiff to amend the eleventh count alleging that,—"Whereas the said defendant, prior to the fifth day of July last, had at various times loaned to the plaintiff large sums of money, amounting in the whole to a large amount, viz., three thousand one hundred dollars, and the said defendant, at said Portland, on the fifth day of July last past, in violation of law, and contrary to the provisions of the statute in such case made and provided, did demand, take and receive of the said plaintiff a large sum of money, as excessive and usurious interest on said loans, to wit, the sum of twenty-five hundred dollars, and the plaintiff did then and there, as a consideration for said loans and the use of said money, pay to said defendant, in lawful money, said sum of $2500 over and beyond the legal interest on said loans, and in excess of the legal interest thereon, whereby and by force of the statute, an action hath accrued to the plaintiff to have and recover of said defendant said sum of $2500, with legal interest thereon from said fifth day of July last past," by alleging as follows:—

"That the said defendant, at said Portland, on the twenty-fifth day of April, A. D. 1856, having loaned and advanced the plaintiff money on that date, upon a certain contract or promissory note of that date, for the sum of five hundred dollars, signed by one Hiram H. Dow, for that purpose, at the special instance and request of the plaintiff, and

of which request said defendant then and there had notice, did then and there take and reserve upon said contract or note, of and from the plaintiff, a rate of interest exceeding that established by law, amounting to the sum of thirty-four dollars, and in violation of law and contrary to the statute in such case made and provided, and, on the seventeenth day of August, A. D. 1856, at said Portland, in a contract made between plaintiff and defendant, of and on three certain contracts or promissory notes of that date, each signed by said Dow, for that purpose, at the special instance and request of the plaintiff, and of which said defendant had then and there notice, one of said notes amounting to the sum of six hundred and twenty-three dollars, payable in three months, and one of said notes, amounting to the sum of six hundred dollars, payable in three months, and one of said notes, amounting to the sum of six hundred dollars, payable in four months, — and all of said notes being made and given as aforesaid, and received by said defendant of said plaintiff in substitution and renewal of said first described contract and promissory note, and on certain other money then and there loaned and advanced by said defendant to the plaintiff, said defendant did then and there take and reserve, in said last named contract and three promissory notes, a rate of interest exceeding that established by law, amounting to the sum of eighty-five dollars, fifty-nine cents, in violation of law, and contrary to said statute; and, on the 13th day of November, A. D. 1856, in a certain other contract of loan of money, made by the plaintiff with the defendant upon two other certain promissory notes of that date, signed by said Dow at the special instance and request of the plaintiff, for that purpose, and of all which said defendant had notice, — one of which said notes being for the sum of six hundred and twenty-three dollars, payable in four months, and one of said notes being for the sum of seven hundred dollars, payable in four months, and given by the plaintiff to said defendant in renewal and substitution of and for his last previously named contract with the defendant, and of and for two of said last

three named notes, to wit, of said notes given as aforesaid, for the sums of $623 and $600, each payable in three months from date, did then and there take and receive of said plaintiff on said contract, and in said two notes, bearing date as aforesaid on said 13th day of November, 1856, a rate of interest exceeding that established by law, amounting to the sum of seventy-four dollars and fifty-four cents, in violation of law and contrary to said statute,—the same sum being in addition to the unlawful interest previously reserved as aforesaid; and did, on the twentieth day of December, 1856, then and there at said Portland, in a certain contract made by the plaintiff with the defendant, and upon a certain other promissory note, bearing said last named date, for the sum of six hundred and forty-eight dollars, signed by said Dow at the request of the said Myers, for said purpose, and of all which said defendant had notice, and in renewal of said note for six hundred dollars, dated August 19th, 1856, as aforesaid, and payable in four months from date, to be and recover of said defendant a rate of interest exceeding that established by law, amounting to the sum of thirty-six dollars, in addition to unlawful interest received as aforesaid, and in violation of law and the statute aforesaid; and did, at said Portland, on the eighteenth day of March, A. D, 1857, in a certain other contract made by and between the plaintiff and said defendant, of and on three other certain promissory notes, signed by said Dow at the request of the said defendant, for that purpose,—and all of which the defendant then and there had notice,—bearing said date and given and received of said plaintiff by said defendant, in renewal and substitution of and for the last previously named contract with the plaintiff, and of said three notes last described above, to wit, for the sums of $623 and $700 and $648, and which said notes, so substituted and renewed, were each and respectively for the sum of $709,56, did take and receive of the plaintiff a rate of interest exceeding that established by law, amounting to the sum of one hundred eighteen dollars and twenty-six cents, in violation of law

and of the statute aforesaid, in addition to the said several sums of unlawful interest aforesaid, and said defendant, at said Portland, on the eighteenth day of July, 1857, by and in another contract made by and between said plaintiff and said defendant, and of and on three other certain promissory notes bearing said date, and signed by said Dow at the request of the plaintiff, for said purpose, and of all which said defendant had notice, received by said defendant, in renewal and substitution of the three last described contract and promissory notes, and being respectively for the sum of eight hundred and nine dollars, did take and reserve of and from the plaintiff a rate of interest exceeding that established by law, amounting to the sum of two hundred and twenty-five dollars, in violation of law and contrary to the statute aforesaid, in addition to the several sums of unlawful interest above named.

"And said defendant, on the eighteenth day of August, A. D. 1861, at said Portland, in and by a certain other contract made and entered into by said defendant with the plaintiff, for the amount of four thousand one hundred and eighty dollars, partly in renewal and substitution of and for said last above described contract and said three promissory notes, so signed by said Dow, and for and in renewal of another certain promissory note for five hundred dollars, dated the twenty-seventh day of June, A. D. 1857, signed by said Hiram H. Dow and indorsed by one John G. Myers, and payable in sixty days from date, and paid by said defendant at the request of the plaintiff, did take and reserve a rate of interest of and from the plaintiff exceeding that established by law, amounting to the sum of six hundred and twenty-five dollars and fifty-three cents, in violation of law and contrary to said statute, and in addition to the several sums of unlawful interest beforementioned.

"And that said defendant, on the fifth day of July, A. D. 1864, at said Portland, in a certain other contract for and amounting to the sum of six thousand dollars, then and there made by and between the plaintiff and said defendant,

in substitution and renewal of, and to carry out the aforesaid last named contract of loan, and for money advanced by said defendant to the plaintiff as aforesaid, did then and there take and reserve and receive in money from the plaintiff, to wit, in the sum of six thousand dollars on said last previously described contract, dated the eighteenth day of August, A. D. 1861, a rate of interest exceeding that established by law, amounting to the sum of three hundred and seventy-five dollars and ninety-eight cents, in violation of law and of the statute aforesaid, and in addition to the several sums of unlawful interest previously named, making in all of said several sums of interest so taken and received of the plaintiff by said defendant, and in said several times, and in said renewals and substitutions of said several loans and contracts aforesaid, a rate of interest exceeding that established by law, amounting in the aggregate, as aforesaid, to the sum of fifteen hundred and seventy-four dollars and ninety cents, whereby and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, to have and recover of said defendant said sum of fifteen hundred and seventy-four dollars and ninety-eight cents, together with lawful interest thereon from said fifth day of July, A. D. 1864, on which day, as the plaintiff avers, he paid said sum of money on the contracts aforesaid, for unlawful interest, to the defendant."

Hiram H. Dow, called by the plaintiff, testified:—I have known Mr. Holmes thirty or forty years; he is a brother-in-law of mine. I have known Mr. Gerry a dozen or fifteen years. I gave a note April 25, 1856, of $500, for four months, for the benefit of Mr. Holmes, at his request. I did not see any money pass; I only know I signed the note for his benefit. The rate of interest was talked over; Mr. Gerry generally figured it at two per cent. a month. On August 19, I gave notes, at the request of Holmes, payable to Mr. Gerry; I gave a note on three months for $623, another on three months for $600, and on four months for $600,—the three of the same date. I have

no recollection about the money. I cannot explain them in any other way than that they were for the benefit of John, to go to Mr. Gerry; two per cent. a month was the interest upon these notes taken and reserved. On Nov. 13, 1856, I renewed the note of $623, on four months, and gave another $700 note, for four months; these were given on renewal of two of the three months notes, dated Aug. 19, 1856. In December 20, I signed a note to renew the $600; I signed a note for $648, on four months; I did not see any money paid when these notes were renewed; the interest was added to the notes that were renewed. In the year 1857, March 18, I signed three notes on four months, to renew the old ones to Mr. Gerry, of $709,56, each, amounting to $2128,68, dated March 18, on four months, all of them. I have no doubt that these notes were given for the renewal of the notes of Nov. 13 and Dec. 20. When the notes matured, I gave a new one with the interest added. In July, 1857, I gave three notes, of $809 each, on seven months, all the same amount, same date, same time; I have no doubt they were given to renew the notes of March 18. When these notes were given, Gerry wanted a mortgage, — the notes were increasing very fast; I did so at John's request. It was property I took from him to save me harmless for indorsing for him. My name was upon another note, — a $500 note, called the Porter note. Mr. Porter held it; it was negotiated to a broker, dated June 24, 1857, on sixty days; that note was not given to Mr. Gerry. When the notes became due, Mr. Gerry said if I would give him the deed outright of the property, (he had then only a mortgage,) he would take up that note, and release me; he did so; I never heard from it afterwards. The property that I was to give him a right-out deed of, was John Holmes' homestead, on Stevens' Plains, — the same property that I had previously mortgaged to Mr. Gerry. Mr. Gerry would do that if I would give him the deed; and he would give back John a writing that, when he paid what was due, he would give a deed to him; he said he should prefer not to

do it then, as that would give it the form of a mortgage, but, after a short time, he would give him a writing that he would do that. It was a part of the arrangement between Gerry, Holmes and myself, that Gerry should take that note up, and hold it as a claim against Mr. Holmes, secured by this real estate. All these notes were given by me; all the transactions about these notes were performed by me solely for Holmes' benefit. John G. Myers did not request me to sign any papers for him, and I did not sign any at his request. During this period I had frequent interviews with Mr. Gerry, at his office and other places, and frequently conversed in reference to these matters between himself and Mr. Holmes; we talked as friends, very freely; he often said to me he did not think I would lose anything,—that Myers was likely to be successful, and, if Myers was successful, he thought John would get his pay from Myers, for the matters between us. Mr. Gerry certainly knew that I was doing all this for Mr. Holmes, and not for my own account. He and John fixed up the matters; I used to go there, and fix up the notes.

Cross-examined.—I was the promisor in all these notes I have spoken of,—they were all made payable to Elbridge Gerry; I am not positive that John Holmes' name was on any of these notes; I should say it was not; I am very sure it was not on; he might put his name on after I signed it. This paper, dated April 19, 1860, has my signature. I should doubt if I was present at any negotiation between Mr. Holmes and Mr. Gerry. I could not say what the bargain was. I know I went at his request; I think I was not present at any of the negotiations of any of these notes. I heard the rate of interest talked over, at the time the notes were cast; I was present at the signing of the notes. Mr. Holmes would ask me to go into Mr. Gerry's; he supposed we should have to renew. I signed them all at his request. I never did anything in reference to the notes except to sign them. How I know that it was two per cent. per month is, that I saw them make the figures. I can't state

what was said about it; I can't remember the particulars. I did not have my own notes out except for him. When this note came due, in August, I presume it was renewed; I know they were renewed; my book says they were. When I gave new notes in August, they were computed at two per cent. per month. My book says that I signed three notes in August, for $623, $600 and $600. I signed for renewal. I believe these notes were ultimately paid in 1864; I know something about it. It strikes me that in 1857 we settled with him, and he looked to the property and John; they were paid when the quit-claim deed was given, so far as I was concerned. I think John did it all before I saw Mr. Gerry; I went to see Mr. Gerry about it afterwards. The Porter note was $500; no interest. Mr. Gerry took a deed of the property, and looked to the property and John for the pay; I understood Gerry took up that note; he promised to; I did not see it. That Porter note was made payable to Myers, and Rich negotiated it. I don't know anything about Porter. Ilsley presented it to me for payment; I don't know who was the owner of it; it was at L. Cummings' office. I don't know that there was any name on the notes to Gerry but mine. I had a place of business in Portland street, in this city, at that time, where I made my stopping place. I think Gerry did not come to my stopping place to get these notes renewed; I think I invariably went to his place of business. I think we never signed any of them out of his office. I suppose the money to pay the Porter note came from Mr. Gerry. When this Porter note was payable I lived in Westbrook, about a mile from Deering's house, out on the Saccarappa road.

Re-direct. — You are right in understanding me to say that the Porter note was signed by me at the request of Mr. Holmes, and for his benefit; that Holmes negotiated with Gerry for the arrangement of that note; Mr. Holmes requested me to go to Gerry's office; it was there said that Gerry would take care of it if I would give him a right-out deed of that property; he said he had made such an arrange-

ment with John; it was made by him; I am not positive whether Holmes was there. I wanted Mr. Gerry to give me up my notes; Mr. Gerry said he would make a memorandum, and, if anything should happen to him, it will be understood what was the condition of the notes; at any time John and I would come in, he would settle it up, but he would prefer to have Myers come in also; he said he had some matters with Myers; he would prefer all three together; he would settle up and give up the notes; I never got those notes; Mr. Gerry told me he had lost them, and gave me a memorandum. Subsequently to the time of giving this mortgage, Mr. Gerry once, or more than once, anticipated me in making a request for those notes, and said he would give them up; I did subsequently ask him to give them up in 1863 or 1864; I was at his house; he gave me something to cut the notes. I have no recollection of ever seeing Myers at Gerry's office, at any of the conversations between Gerry, Holmes and myself. At the request of Mr. Holmes, I signed the note for $2426,49,—about the same amount as the three notes that I gave Mr. Gerry, combined; it was signed by John G. Myers, and I indorsed it, at the request of Mr. Holmes; it was dated the 18th of July, 1857; it was given for $2426,49. I think Mr. Holmes gave Mr. Gerry $4000 of York and Cumberland bonds, as collateral; I don't remember all the particulars. Mr. Myers gave the collaterals. Holmes and Gerry had talked over matters about Myers' inability to pay; I heard the conversation between them and participated in it,—that they should have something tangible from Myers to show that he was indebted so much; they thought they better make up a note of that kind; Myers would be likely to sign it. This arrangement was exclusively for the benefit of Holmes, to get security for him. I so understood it from Gerry and Holmes, both.

To the Court.—This is to show the amount of Myers' liability to Holmes. According to that agreement, that note was given for the special benefit and security of Holmes. I

I so understood from Gerry and Holmes, both; we were all present. Sometime in the summer of 1864, I went with Holmes to Gerry's house. The substance of the conversation was, Holmes offered to pay Gerry what Gerry claimed he owed him; Gerry had already fixed upon the sum. Holmes paid him $6000,—both appeared to be satisfied. There was no conversation about the amount to be paid. It had been previously arranged. Gerry delivered him a deed of his estate in Westbrook,—the same property I had previously conveyed Gerry. I have no doubt that the paper shown me is the paper; it is dated July 5; I think that was the date of the paper. 'Received of Hiram H. Dow one dollar, in full of all demands, notes and accounts.' It was on that date that the $6000 payment was made. The $6000 was paid in a certified bank check.

Cross-examined.—On the 18th of July, in which Myers gave his note for $2426,49, about the same time that I gave the three notes for $809 each, it was a part of the same transaction; his note was for $2426,49; my three notes for $809 each, would come to $2427. I don't know where the discrepancy is. It was outside of Holmes' and my notes that we had arranged with Gerry; it was connected with it. I could not say about the precise date; I don't remember these were the precise notes. I should not have stated yesterday that it was for these particular notes; it was given to secure whatever indebtedness I was under to Gerry,—whether $2427, I don't remember. I think the deed was made; I saw the check given and the deed delivered; he wanted me to see that he paid it, and I did so. I don't recollect that I signed any other papers; I don't recollect that I gave Gerry any paper. [Paper shown.] I signed that paper, dated July 5, 1864; I presume it was signed at the time,—it was dated Portland, July 5, 1864,—a receipt in full of all demands, and especially for discharge of Y. and C. bonds,—said bonds having been held by him as collateral, and sold by public auction, by H. Bailey. I have no doubt I gave that paper at that time; I have no recollec-

tion about it. To the question, whether I recollect that, at the same time, a duplicate receipt precisely like this, was written and handed to Holmes for him to get John G. Myers to sign, and bring back to Gerry, — I answer, it may be so, but I have no recollection of it; it was a matter I never expected to hear from again, and I did not pay attention to it. In relation to this $2426,49 note that I said I signed, I indorsed it; I could not say where it was left; the arrangement was, that Gerry was to have possession of it; I don't know what was done; it was indorsed in Gerry's office. If I indorsed one, I could not say that it was secured by those $4000 Y. and C. bonds, — if secured by collaterals, it was by these bonds. Robinson, clerk to Myers, brought those bonds there. I understood them to be Myer's bonds; I suppose Myers had the money. So far as I was concerned, I looked to nobody but Holmes. I never saw the money; I heard Holmes say that Myers had the money; he raised the money for Myers as I understood it. The understanding was, that Holmes was holden to pay the money to Gerry. I think he did not give him any paper of that kind. It might have been obtained at the bank on Gerry's indorsement; I do not distinctly remember. I did not intend to state yesterday that they were renewed three or four days before they fell due; I had the impression that sometimes they run past a little. Gerry spoke to me several times about having these notes renewed to get money to pay the other notes. It may be, that Gerry told me where he got the money from, but I don't remember; I could not say that he told me how he obtained it.

When the quit-claim deed was given, it was only to be for security to Gerry for the amount due; I was to be released. I understand that Gerry took the property to secure him and agreed to give Holmes a deed back when he paid him what was due. I don't recollect that Gerry had any claim against John A. Holmes, except these notes. I recollect that we had a conversation at Gerry's house, in 1860, in the spring, between Holmes, Gerry and myself. Gerry

said that he did not consider that I was released from obligation from that arrangement; he wanted me to take up the notes and take back the property. I think that, in 1860, Gerry wanted me to take these notes, pay him back his money and take back the property; I refused; Holmes was present. I refused, because we made an arrangement that I was to be clear from it. John C. Gerry was there. [Note of April 25 shown.] I wrote it myself, as well as signed it.

Direct. — He retained all the notes; he said he would keep them till he and I and John made a settlement; he said he would give them up at any time when John and I would come in and end matters. I was acquainted with the value of the property described in the mortgage and quit-claim deeds from me to Gerry; the fair value, at the time I made the conveyance to him by quit-claim, was four or five thousand dollars; it was rated at $10,000; it was talked of as a hotel stand, and rated pretty high; they called it $10,000.

[A receipt, signed by witness July 5, 1864, was put in.] I did not claim an interest in the York and Cumberland consolidation bonds, referred to in this receipt; I did not own them; I never held them as security. I had no conversation with Myers at all; John Holmes made the arrangement. The bonds were never in my hands or in my control, and I never had anything to do with them, — that fact was known to Gerry.

Cross-examined. — $4000 in bonds was deposited for the 2400 (and odd dollars.) I suppose the other thousand dollars came from Myers; I don't know what note it was connected with. I gave the Porter note running to Myers.

John A. Holmes, plaintiff, testified: — Mr. Gerry was my counsel in 1853. The account that I settled with him for professional services commenced in 1853. The first negotiation with Gerry for the loaning of money was in the Spring of 1856; it was made for Myers' accommodation. Myers owed me a large amount and he wanted me to help him to money to carry on his lawsuit; and, if he succeeded

in that he would pay me up my claim. I asked Gerry at his office about it. No one was present when I made the arrangement with Gerry in reference to the loan of April 25, 1856, the $500 note. I was to give him Hiram H. Dow's note. I had $25,000 or $30,000 in there; to nurse that along I wanted to help Myers to some money to carry on his suit. My credit was not good. I gave Dow a deed to indorse my notes for that purpose. In pursuance of the agreement between myself and Gerry, I procured Dow's note and delivered it to Gerry; the interest discounted on that note was two per cent. per month or more; I think it was more. At a subsequent time in that year, I negotiated a further loan of Gerry. I think this first note was running three or four months, and that, on or before that time, we arranged that note and got two other loans. The amount of the notes was a good deal more than the money we got. The notes, I think, were $600 apiece, two of them; the other one, more than that. One was to renew the $500 note; the other, two new loans. He never let me have any money less than two per cent., and sometimes more. These notes were renewed again at or about their maturity. There never was any more money paid after the first three notes were given, Aug. 19, until they resulted in the three notes amounting to $2427. The three notes were renewed in 1857, about the 18th of March, for $709,56 each. They were renewed whenever it was necessary. About July 18, 1857, when these notes were renewed for the last time, Gerry did not want to advance any more money, unless Dow would give him some security. It was my property; nobody else had any claim on it but Dow, and that was for being bondsman for me. A mortgage was made to Gerry at my request. Myers wanted more money. I got Dow to give John (Myers) his note for $500, for him to go into the market. Myers gave Rich his brother-in-law, the $1000 Y. & C. bond as collateral, for my benefit, and it was negotiated. Cummings afterwards had this note. I wanted Gerry to take it up; he said if I would get Dow to give

him a right-out deed of the place, he would take this note up; I got Dow to do it. This was my property that had been mortgaged prior. Gerry agreed that he would take up the note, and would give me a writing back to release the property to me again, by my paying him the amount due. In connection with this settlement, one inducement I had to let Dow quit-claim to Gerry was, that he should release Dow from all his liabilities; upon that, I consented to do it, upon Gerry giving me a bond to release the property upon my paying the debts. I expected he would release Dow and then give me a bond, but he said it would make it the same as a mortgage; he said he would give it at some subsequent time, some future day; so that he refused to give me a bond at that time, and never did give me one.

[Paper shown witness, marked "A," dated August 18, 1861.] "It was signed by Elbridge Gerry and myself, and was taken up July 5, 1864." [The paper read.] "My impression is, that the $4180 took in these three notes of $809 each; it took in the $500 Porter note; two per cent. per month interest was included upon these notes; we made that settlement and agreed to call it twelve per cent. per annum. Previous to this, the interest on the notes was two per cent. per month.

That note dated Portland, May 22, 1863, for $732, on six months from date and interest, was given in the settlement of his accounts against me for professional services. There was a compromise, deductions made, and some other little matters settled. He took my note for the $732; $632 was the result of the settlement.

Gerry & Robinson's bill, commencing 1859 and extending down to June 15, 1861, for $145, receipted by Gerry & Robinson; this bill was in addition to the other. I never gave any note on that. I think it must have been settled in 1864.

Gerry kept hurrying me up about the matter; he told me if I would give him $6000 in cash, he would release my property and give me up these notes against Myers and the

rest of us; that was prior to the 5th of July, 1864. I had an interview with Gerry previous to July 5, 1864, and he told me he would release my property and give up all these documents if I would pay him $6000, and nothing less. I went and made arrangements to get my money. I gave the check to Gerry and got a deed of the property. I got a certified check that he had deposited for his credit, $6000, in cash. I carried that check to Gerry myself; Dow went with me. I received paper 'A,' Dow's three $809 notes, and mine of $672, the same day that I paid him $6000. He gave me a deed that day. The history of the transaction about a note for $2426,49, signed by Myers and indorsed by Dow, as between me and Gerry, is this:—I had been advancing Myers this money and had got nothing from him to show for it. I wanted to get Gerry's advice how to get something. He told me he would help me do it. I got Myers to go to Gerry's. We got Myers to leave $4000, in bonds. We got Dow to indorse the note, so as to make John more anxious to pay it when it was out, and he did so. It was not for Gerry's benefit at all; it was for my own entirely. He had ample security for his money three times over. Before doing this I had conversations with Gerry upon the subject. I got it upon his recommendation and advice. The note was given for my own benefit and nobody's else, and the bonds were pledged for my particular benefit. Gerry never asked me for any more security for the loans he had made, than my property, which he held through Dow's conveyance. I never saw the time that I would take less than $10,000 for that property. Myers never paid a cent of his indebtedness to me. From the best information I can get he is dead.

Cross-examined.—I think I was not liable for any of the April or August, 1856, notes, through my name on the notes, but I had given security for these notes. My impression is that I did not sign any of the notes that have been testified to. I got Dow to sign them for me; he gave his notes for me. My name was not on the $2426,49. That note was

made payable to Gerry. I did not say Dow indorsed it. Previously I got Dow to indorse the John Myers note for $2400. I think it was made payable to Gerry. Dow did indorse it at my particular request for my benefit, with the bonds, to make Myers more certain to pay it. I think he did. [Note shown, $2426,49, July, 1857, payable to Elbridge Gerry.] I think that is the note. I say I don't recollect that I saw him indorse it; it was my request that he should do it, and that was the understanding that he should, because we wanted to make Myers more sure to pay it. The bond was left for my special benefit. Gerry had nothing to do with the note or bond. It was made payable to Gerry because Gerry advised me so. He advised me to let it be payable to himself and let Hiram H. Dow indorse it. I could not get a settlement with Myers, because Gerry would not give me up the note. I got Myers to sign it and carried it to Gerry. F. W. Robinson wrote the note. I think he carried it to Gerry with the bonds. It was understood by Robinson, Gerry and Dow, that that was for me. I had Gerry's honor to show that the $2426,49 was mine and not his. He was my adviser and counsellor. It was left in Gerry's hands so that Myers would pay it to him. I don't know about the few cents difference in the two notes. That note was given for the amount I owed Gerry. I had given him a deed of my property to secure him. The note was written by Robinson at my request. I directed him how to write it. I directed him to make it payable to Elbridge Gerry; I am not positive. I supposed Gerry would give it to me, but he did'nt. The $2426,49 was all that Myers owed me *on this matter*, but it was not all he owed me by $30,000. He took Gerry's receipt for the bonds and gave it running to Myers and Myers gave it to me. I have got the receipt here.

That matter has not been adjusted.

That $6000, or more, is behind yet. Dow gave his note for $2427. I would not say it was the same time. It was for the same debt and about the same time. I got all this

money for myself to loan to Myers. When I applied to Gerry for this money I told him it was for Myers. F. O. J. Smith was one of the counsel; I don't know but what he was the only one.

As to what it was that Dow indorsed for Myers, when, at the same time, he gave his own note for the same:—I got Myers to give his own note for the amount of money that I let him have, and got him to put up $1000 bonds as collateral; got Dow to indorse, so as to make Myers more sure to pay it for my benefit. Myers gave his note for the same amount, because it was the amount of Myers' indebtedness to me. Myers gave his note for what I owed Gerry; he gave his note for more money than he received. I raised this money for Myers at Myers' request. The notes were signed by Hiram H. Dow, because Gerry would not take my notes, and would take Dow's. Dow and I are cousins, and married sisters; he has indorsed for me more than $200,000. He had nothing but my word; he called it good, and it is now. I had his honor to deed back to me if I cleared it. The Porter note I got Dow to sign; he never signed any note for Myers.

Cross-examined by Mr. Gerry.—I should think very likely that I applied to you several times before you consented to take that $500 note; I do not recollect anything definite about it. You gave me the money for that note in your office. After the first note I recollect there was something said about a widow woman furnishing money. I afterwards learned it was Luther B. Dow's widow. I was sometimes present at the renewal of the notes and sometimes not; they were sometimes renewed a few days before payable, to please you. I never knew you to indorse Dow's note in my life. I could not recollect that you refused Dow's note; I thought you were rather fast to get it. In case of renewals you always spoke to me invariably. I always went to Dow and he renewed them at my request, and nobody's else. I don't know how much money I obtained on the 18th of August, 1856.

I conveyed this property to Hiram H. Dow a year or two before these notes were given. I think it was not till 1855 or 1856 that Dow began to sign notes at my request, for Myers' benefit. I sold it out-right to Mr. Smith, for $6000, because I was obliged to pay you the money. I could sell it to-day, if I owned it, for a good deal more than that.

Direct. — I myself received the money of Gerry, at the different times the loans were made. Myers had never anything to do with it. I never had a cent security from Myers for any money that I loaned him, until he gave these notes secured by the consolidation bonds.

Elbridge Gerry, the defendant, called for the defence, testified: — Sometime just prior to June, 1855, Holmes came into my office with John G. Myers, and introduced him to me. Myers stated at that time, that he wished to procure a loan of money, and desired me to assist him in procuring that loan of money; he wished to procure the loan of money upon a claim that he then had against the York & Cumberland Railroad. After conversing with him, I told him I was willing to assist him, and asked him what he desired me to do; he requested me to go to Portsmouth and Boston and see if I could raise some money on this security. I went to Portsmouth and Boston for the purpose of trying to negotiate a loan for him. I failed to get any money, and frequently from that time to the 25th day of April, 1856, Myers, and Holmes for Myers, made application to me to assist them in some way to get some money. Finally, about the 25th day of April, 1856, Holmes and Myers, or Myers alone, came to me and made a very urgent request that I should do something by which they could obtain a small amount of money for the purpose of a railroad lawsuit, his lawsuit with the St. Andrews Railroad. The particulars were stated to me at the time, and they made the case a matter of such necessity, and Holmes so pressed the matter, as a friend of Myers, that I understood it to be a great accommodation if they could get some money. Finally, I consented to in-

dorse a note for $500. I so told them that I would indorse a note for them and see if the money could be obtained at the bank. I indorsed the note. I think I carried it to the bank myself, but I am not certain about that, at any rate, it was carried to the bank and the money was obtained at the bank on that note. The note was discounted at the bank, and, from the money that was obtained at the bank, I deducted one per cent. for my indorsement of that note, and this was assented to by Myers and Holmes, and they were very much pleased to obtain the money on these terms. I told Holmes and Myers both, that I had no money of my own, that I could possibly loan or furnish.

The money was obtained at the bank and delivered to these parties after a deduction. I don't know to whom. I don't recollect. It was delivered either to Holmes or Myers. I don't know which of the men, but know they were both together. Just before this note became due Myers applied to me again and wanted some more money, and wished me to indorse Dow's note again and get some more money. I finally indorsed three notes of Dow, two for $600 each, and one for $623; these notes, two of them, were indorsed by me and the money obtained out of the bank, as before, the other was indorsed and delivered to Mrs. Luther B. Dow and the money obtained of her; a part of that money was appropriated to pay the note that had previously been given, when it matured, the note of April 25; the balance I delivered to Myers himself, in my office. One per cent. for my indorsement was assented to and was agreed to, which made the interest on the note, so far, about 1½ per cent. on the notes. The note which was delivered to Mrs. Dow, was renewed from time to time, with my indorsement, up to July 18, 1857. Mr. Dow made a new note, I indorsed it, handed it over to Mrs. Dow, and she gave me up the old note. I do not distinctly recollect how often these notes were renewed. I have no minutes of these notes, they were renewed on all occasions just before they became due; I state the renewal was procured just before due, with the view that they might

be negotiated to meet the payment of these notes. The reason why the old notes were left in my hands is that I had not the notes at the times the renewals were made, that I obtained the notes after the renewals were made. I cancelled them and laid them away, that's the reason they were left in my possession and not given up to Mr. Dow; he never called for them, if he had, I should have given them up to him.

The $600 notes of August, 1856, were discounted at the bank. After that time they would not take Dow's note at the bank at all. I failed to get Dow's note discounted at the bank. The other two notes I got Mr. J. J. Brown to negotiate with my indorsement upon them, and he carried those notes along by renewals up to July, 1857, the time the mortgage deed was given, at any rate, with my indorsement.

I paid Mr. Brown one per cent. for the money. I took one per cent. for my indorsement. I never charged a cent over that; sometimes I think it was less, but never in no instance whatever did I charge over that.

Previous to July, 1857, I began to feel very uneasy in regard to Dow's notes; they were very difficult to negotiate at that time, and I called upon Dow and Myers to tell them that these notes must be settled up in some way, that I wanted to get my name off from them, or have them secured. I saw Myers and Dow in regard to the matter, and have no doubt that I talked to Holmes in relation to it. Finally, Myers and Dow, and Holmes, perhaps. I did not call upon any of them except Dow, because he was the only man I had any legal claim against up to that time.

Finally, it was proposed that Myers should give his note for the money that had been procured on the previous note, and was to pledge, as collateral to his notes, $4000 of York and Cumberland bonds, and that, also, Dow should give his notes for the same amount, and give a mortgage deed of the place that he then owned in Westbrook, and,

that the mortgage and the notes should be held as collateral to Myers' note and bonds.

That arrangement was carried out, that was about July 18, 1857. Both of those notes were left in my possession; both notes were given to me and I was to hold them as security for the debt, but, of course, if Myers' note was paid that relieved the other notes; there was a slight discrepancy between these notes. I recollect distinctly the difference was, that I paid for the recording of the mortgage deed, and that was added into Dow's notes. This note embraced all the money that had been obtained for Myers up to that time, but I want to state here in connection with this, that sometime between the first loan and the last, I had let Myers on his own note have some small amount of money. It was in the neighborhood of $200, and I think it was $250. The amount I have not got. It was in the note of July 18, 1857. That was also embraced in the Myers' note. It was lent money with no interest of any kind charged. Nothing was embraced in that settlement except what was against Dow and Myers.

Soon after this transaction of July 18, 1857, Dow told me he had been sued on one of these Myers' notes, as he called them, and he wanted I should settle it. In the first place he wanted me to pay that note and another note of some $300 or $400, I do not recollect the precise amount. I declined to pay the other note, but finally told him, if he would give me a quit-claim deed of the property, I would pay this note and interest and cost upon it. That was the deed of the place in Westbrook that I had a mortgage on. The deed was made, delivered to me, and I paid the note, interest and cost, to E. L. Cummings, who had the note in his office and sued it. About the notes in the mortgage, — nothing was said about them, one way or the other. I told Dow, at the time, that I did not want the property, at any rate whatever, nor at any price; it was not property that I wanted. I told Dow that the reason that I wanted a quit-claim deed, was to prevent this from being a mortgage.

Either at that time, or subsequently, I told him that I was ready, at any time, to give any third person a writing or bond, any one he might suggest, to convey the property on payment to me for what I had already procured for him on the notes. For the amount of the notes and the money I had paid out.

Holmes and Dow came to my house, into my room where I was confined, and my brother, John C. Gerry, was there with me. Dow remarked, when he came in, that he had come up to see about our affairs. He replied that the notes had been paid by the quit-claim deed. I told him I did not so understand it, that I supposed he was to take up the old notes by payment, or else, if they were not taken up, there were to be new notes, and I was to give a bond to some third person that, when these notes were paid, the property should be conveyed. I mean the mortgage notes and the $500 Porter note.

Mr. Dow repeated, in words, that the notes were paid, that the property was mine, and, not only that, but the bonds that I had as collateral; that was really what the controversy was about, that was spoken of here, by Holmes, yesterday. The bonds were relieved and he wanted the bonds. Said I, Mr. Dow, you consider this property unconditionally mine. He said yes. I asked him who was to pay me rent of the property since the quit-claim deed had been given. Holmes was present in the room and heard the conversation. Dow replied, he supposed the man who occupied it, and looked to Holmes and smiled. I then turned to Holmes directly, and asked him if he so understood this transaction, that he was to pay me rent, or the property was mine. He said he did, and replied that he was ready to quit the premises at an hour's notice. I then said, Mr. Holmes, I then notify you on the spot to quit those premises forthwith, and immediately Dow and Holmes left, and, from that time forward, I treated that property as my own, and in no other way.

A few days after that, I saw Myers and Holmes together,

and then I communicated to Holmes that Myers had proposed to me that, if I would let him remain there on the place, not turn him off, as I had notified him to quit, that the bonds should remain as collateral security for the rent, that he would allow his bonds to remain as collateral security for the rent. We did agree to that arrangement until I returned, until some future arrangement was made between Holmes and myself. Holmes and I then agreed that the rent should be $300 per year. That is the reason why the rent runs back a year behind the paper. It goes back to the time that Holmes and I agreed upon the price of rent. It was agreed to be $300 per year.

I went to Virginia and was gone some months. I returned in the fall of the same year, 1860. Matters remained in this state until August 18, 1861. Holmes came to me and proposed to buy the place of me, and I was exceedingly anxious to sell it to him or anybody else.

We subsequently made a contract in writing; that's the contract of August 18, 1861. Holmes and Dow stated that contract was given up; there was no giving up about it, he had one and I had one, the amount named in that is the consideration, the amount to be paid was made by adding the rent of the property, from the time of the quit-claim deed up to that time, and I made Holmes a liberal discount from the rent at that time.

The next transaction that I had with Holmes occurred in May, 1863. I had several small notes against Holmes and an unsettled account against him for professional services, and I had also a $500 York and Cumberland bond, which he had left with me as collateral on these small notes, my accounts were getting outlawed and the notes were getting outlawed, and I called upon Holmes to come and settle them up. We settled the professional account, we cast the interest upon the small notes, and the amount of the notes and interest was added to what I agreed to take for the professional account, and the two sums together, the notes and the professional account, was put into a new note of $732.

The account was $500, and the notes and interest must have been $232. All the demands and claims Holmes then had against me were settled and cancelled, of every name and nature, and a receipt in full of all demands, was taken at that time. I have one somewhere. "Portland, May 22, 1863. Received of Elbridge Gerry one dollar, in full of all demands. John A. Holmes." This $500 bond was to be mine. I was to sell and dispose of it, at my own election. I was to appropriate the proceeds of it upon the payment of this $700 note. The bond was pledged to secure the small notes, collateral to the small notes which were put into the $700 note.

At this time it was agreed between us, that I was to sell the $5000 bonds just when I pleased, and as I thought best, and, whenever I did sell them, the proceeds of them was to go towards the rent on that place. In pursuance of the original agreement of Myers, to apply the proceeds to the rent. It was left entirely with me. Holmes stated, over and over again, that I could dispose of the bonds whenever I pleased, and as I pleased, without any sort of reference, one way or the other, to Myers or himself. I did'nt choose to do that way; I wanted to avoid any question, but, for the purpose of settling all the difficulties in regard to what the bonds might be worth, I caused them to be advertised and sold at public auction, giving thirty days notice, or more, in the newspapers of this city.

I caused them to be sold, and authorized Robinson, who was a broker, if the bonds went less than a certain sum, it was less than twenty per cent. some eighteen per cent. on the bonds, that if he would buy them in and did'nt want to keep them at that price, I would take them off his hands. I think it was eighteen per cent. They sold for less than the sum named, consequently he bid them in. He bid them off at any rate. Robinson bid off the bonds, and kept them until this assessment was made a year ago last October, I think, and then turned them back upon my hands.

I showed Holmes the account of Bailey's sales. Some

days previous to July 5, 1864, Holmes came to me and said he wanted to buy that property out there, and square all the claims that I had against him. I told him I would sell it to him and should be very glad to settle up with him. In a day or two he called, and I had in the mean time taken the rent on the place, at $300 a year, and cast the interest on it at six per cent. at the end of each year in succession.

I have the original paper, upon which the final settlement was made; the rent and the interest, from the date of the quit-claim deed, to the day I sold it to Holmes,. amounted to $2517,40. I called the insurance during that time $100 for seven years, for what I paid out. The $732 note was computed at six per cent. and no more, and amounted to $783,67, and Gerry and Robinson's bill for professional services was $208,81. The items amounted to $3609,88. From this $3609,88, $757,73 was deducted, which was the proceeds of the sale of all these bonds, $5500 of them. After deducting $757,73, it left a balance due me of $2852,15, that was the amount due from Holmes. That $100 was put in as a basis of the sale, but it was not an indebtedness from him to me.

Now add the real estate to it, $3147,85, that's what I called the real estate at the time, and that makes an aggregate of $6000. I had previously offered to sell this to Holmes for just what it cost me, but I told Holmes at that time, that I could not then sell him that property so cheap as I could years ago, for the reason, that the horse railroad had made it more valuable, and also, if I took my pay in currency, that I could not take the money and invest it in any other property without a great loss. This property, at the time it came into my hands, at the price it cost me, at $3000, was property that I did not want at that price. I have called it in round numbers $3000.

He looked the figures over; he looked them all over at the time and never made the slightest objection to the amount of the sale of these bonds, but what it was all right, acquiesced in the manner in which it was made, as being in

conformity with our original agreement, and in pursuance of that, Dow gave that receipt which was shown here yesterday, in full. As one of the bonds came directly through him (Dow) and my wife wrote a duplicate receipt for Myers to sign, of precisely the same character. When he did that the thing might be closed up. He took that receipt and promised when he went away to get Myers to sign it or return the receipt to me. Upon that condition I was to give him up the Myers note. The reason why that note was not given up at the time, was because he had no orders from Myers for it; I was not authorized to do it, that was the reason the note was not given up at that time. He never brought me the order nor never brought me the receipt back. Hiram H. Dow was with him when the sale was consummated. The payment was made by a certificate from the cashier of the Mechanics' Bank, that Hiram H. Dow had deposited $6000 to my credit. John Holmes' name was not mentioned in it.

At the time I took the mortgage, July 18, 1857, I was on the $809 notes. I procured the money to take them up of Richard Jenness, of Portsmouth, N. H. I borrowed the money of him, every dollar of it; with the exception of the small notes that I have testified about. I have never loaned any money to John A. Holmes during the periods of time that have been testified to. I might have let him $10, $20 or $40 for a few days. From April 25, 1856, to July 5, 1864, I have no recollection of loaning him any money where I had any security. I lent him no money, that has been mentioned in this transaction, during this period of time except the small notes.

I will state as a fact that occurs to me, that, when the deed was made to Holmes, the deed of July 5, 1864, he wanted me to put the consideration at $10,000. I told him it was absurd and I would not do it, but I finally consented to call it $5000 and the consideration was merely arbitrary, without any reference to what was paid.

John A. Holmes' name I never had on one of the notes

from April, 1856, to July, 1857. I never knew him in the transaction except as a friend to Myers and Dow. At the time this conveyance was made, this account of Gerry and Robinson, was settled. The $732 note was given up. Hiram H. Dow's receipt was given at that time, when the deed was given, in Holmes' presence.

Much other evidence was put in. Agreement "A." was as follows: —

"I, Elbridge Gerry, hereby agree to release to John A. Holmes, all my title and interest in and to the real estate conveyed to me by H. H. Dow's deed, dated Aug. 8, 1857. Also deliver up to him three several notes signed by said Dow, dated July 18, 1857. Also deliver up to him, on the order of John G. Myers, and the surrender of a certain receipt given by said Gerry to said Myers, for certain York & Cumberland Railroad bonds, the note of said Myers, dated July 18, 1857, and four bonds of $1000 each, of the York & Cumberland Railroad, called consolidated bonds. Also give up to said Holmes one other note signed by said Dow, dated June 27, 1857, and a $1000 York & Cumberland consolidated bond, upon the followlng conditions: —Provided always, that the said Holmes shall pay to said Gerry $4180 and interest, within six months from the date hereof, and also all taxes now assessed or that may be hereafter assessed on said premises, and all money paid hereafter by said Gerry for keeping the buildings insured on said premises, and also produce the order of the said Myers for the note of the said Myers before mentioned, and also for the four one thousand dollar bonds before mentioned, and cause to be surrendered to the said Gerry the receipt before mentioned, given by the said Gerry to the said Myers, for four of the bonds aforesaid, all of which conditions the said Holmes hereby promises and agrees to perform and fulfil, as conditions on his part.

"And it is further agreed and understood by and between the said Gerry and said Holmes, that in case the said Holmes shall fail to pay the money as aforesaid, and per-

form the conditions as aforesaid, that the said Holmes shall pay as rent for the use and occupation of the premises aforesaid, at the rate of three hundred dollars per annum, said rent to be paid from and after the first day of May, A. D. 1860, so long as the said Holmes shall continue to occupy the said premises, and the tenancy of the said Holmes shall be regarded as terminated on the performance of the conditions or the failure to perform the conditions to be performed on his part, as before mentioned.

"PORTLAND, Aug. 18th, 1861.

"Elbridge Gerry,
"John A. Holmes."

The verdict was for the plaintiff, for more than was claimed, whereupon the plaintiff filed a *remittitur* for the excess.

The defendant alleged exceptions to the ruling allowing the amendment.

Gerry, pro se, and with him *J. & E. M. Rand.*

B. Bradbury, for the plaintiff.

KENT, J. — The only exception to the rulings of the Judge is that he allowed an amendment of the eleventh count. The rule on the subject of amendments is now very broad, and gives great discretion to the Judge presiding. Where the proposed amendment clearly describes and introduces a new cause of action, exceptions will lie to the allowance of such amendments.

The original eleventh count sets forth a claim to recover back money paid as usurious interest to the amount of twenty-five hundred dollars. The amendment does not enlarge this claim or change its nature, or the cause of action. The original count sets out that, before a certain day named, the defendant had, at different times, loaned to the plaintiff large sums of money, amounting in all to three thousand one hundred dollars, and on that day did take and receive the excessive interest. The amendment sets forth in detail and specifically the various loans and their dates, but does

not enlarge the claim for excessive usury. It does set out a large number of loans, — but most of them as renewals of former loans. The amount of the actual loans paid in money does not appear to exceed the sum stated in the count. And if it did, it would not apparently change the real claim set out in the count, which does not depend so much upon the sum loaned, as on the rate of interest. The gist of the count, as originally drawn, was that the defendant had received of plaintiff twenty-five hundred dollars as excessive interest, on loans. The amendment sets forth the several loans, and the interest paid on each, but reduces, by its specific declaration, the whole sum claimed as usury, paid to the defendant.

We think the amendment was properly allowed.

The defendant filed a motion to set aside the verdict as against evidence and the law as given to the jury, — and urges upon us several grounds for the maintenance of his motion.

The verdict, as it stands, is confessedly wrong. It is for more than is claimed in the declaration, and the plaintiff's counsel admits that it is so, — to the amount of something over one hundred and sixty dollars. He suggests that he is willing to remit that sum. This is often done, where it is clear that an unintentional mistake has been made by the jury, and that the party is entitled to a verdict in his favor, and the amount is a matter of mere calculation, and not seriously in dispute. But it does not follow, as a settled rule, that in every case where a jury gives all that is demanded and something beyond, that the verdict may be amended by a remission of the excess. This must depend upon the facts in the case, and the judgment of the Court in view of the whole evidence.

An error like this, if not fatal to the verdict, yet suggests that there must have been some mistake, misapprehension, or carelessness on the part of the jury, — or possibly some bias or prejudice, inclining them to swell the verdict, even beyond the claim of the plaintiff. At least it, to some ex-

tent, weakens its force as a *veredictum*. The defendant contends, if he is liable at all, that he is not liable to the full extent of the claim, and he contends that it would not be just to assume that, although the verdict is confessedly erroneous, because for too much, yet it should be taken as certainly correct up to the amount claimed.

But the defendant further claims that the verdict for any amount against him, is unsupported by the evidence and the law. He says that *this plaintiff* cannot recover back money paid, even if any one else could, because, he says, he was never a debtor of the defendant, and never stood in that relation to him.

The evidence in the case is very voluminous, but the points on which it turns are few. It is clear that, in order to sustain the action, the proof must establish the *last* allegation in the eleventh count, after the amendment was inserted. That allegation is that the defendant, on *the 5th of July*, 1864, in a certain contract *then* made between the plaintiff and defendant, in substitution and renewal of a former contract of loan, and for money advanced *by the defendant to the plaintiff*, did take and reserve, and receive in money of the plaintiff, — to wit, the sum of six thousand dollars, on the said previous contract, (of 1861,) a rate of interest exceeding that allowed by law by the sum of $375,98. In the preceding allegations in this count, a large number of contracts is set forth, on which it is declared the defendant had taken and reserved usurious interest. But all these were more than one year before this suit was commenced, and therefore apparently barred by the statute. But the plaintiff avers that all this excessive interest was actually paid on the 5th of July, 1864, in and by the $6000, and that was within the year. There is no question that the plaintiff did pay the defendant that sum on that day. The Court very properly instructed the jury that the cause of action accrues when the excessive interest is *paid*. *Furlong* v. *Pearce*, 51 Maine, 299. The question then was

whether the plaintiff paid the defendant excessive interest on that day.

The Court instructed the jury, (and his rulings on this point seem to have met the approval of both parties,) that the plaintiff must set out and prove a loan to him, or contract between the plaintiff and defendant, and that, on that loan or contract, so proved, excessive interest was retained or received by the plaintiff; that it must be a loan made by the defendant to the plaintiff, and the excessive interest must be received *from him* on that loan, and that it must be a *loan on which the plaintiff was legally liable to the defendant.* This is clearly correct according to the authorities.

It is to be observed that this action is to recover back money paid as illegal interest. It is not a case, where the lender attempts to recover on the promise or contract, in which usury has been reserved or received. Formerly such usury rendered the whole contract voidable or void. And there are many cases, under this provision of the law, where questions arose as to the rights of parties to the instrument sued to set up this defence, although the actual borrower, who made the agreement to pay usury, was not himself on the note. But those actions were based on the agreement, and the defendants were bound on the notes declared on. But it has never been decided, so far as we have examined the cases, that any one, not a party bound to pay, who pays voluntarily a note or debt, which is wholly or partly for excessive interest, can recover it back in an action in his own name. The following cases, more or less directly sustain the rulings of the Court. *Boardman* v. *Roe*, 13 Mass., 105; *Gray* v. *Bennett*, 3 Met., 529; *Stanley* v. *Kempton*, 30 Maine, 119; *Brickett* v. *Minot*, 7 Met., 291; *Stevens* v. *Lincoln*, 7 Met., 525; *Billington* v. *Wagoner*, 33 New York Rep., 31.

In examining the evidence as reported, it is clear, and not disputed, that the plaintiff was at no time a party on any one of the notes or the renewals. He was neither maker, indorser or guarantor. He was never the legal debtor of the

defendant, unless he was so outside of the notes and written contracts. He never made any written contract, signed by himself, by which he bound himself to pay any of the notes. Paper A does not bind him to pay, except at his option.

What was his relation to the defendant, on the 5th of July, 1864, when he paid him the $6000?

Was he under any legal obligation to pay the defendant anything? Could the defendant have maintained any action against him for money before loaned, on that day?

It is clear that the defendant could not maintain any action against Holmes, the plaintiff, on any of the notes, for he was no party to them. Nor could he maintain any such action on the agreement of the 18th of Aug., 1861. (Paper A.) That was an agreement to give a deed of certain property and to deliver up certain notes and papers, on condition that the plaintiff paid him a certain sum in six months. This he did not do, and therefore no action could be sustained on that paper. That paper contained no promise to pay.

The substance of the allegations in the count relied upon, as well as we can gather them, is that, before the 18th of August, 1861, the defendant had loaned the plaintiff certain sums of money, on certain notes of Myers and Dow, which had been renewed from time to time, and each including excessive interest; that the loan was to the plaintiff and the notes were but security.

He then alleges that, on the said 18th of August, in and by a certain contract made and entered into by plaintiff and defendant, (A,) defendant did take and receive excessive interest of plaintiff, to the amount of $625,53.

But this was more than one year before suit. To bring the actual receipt of the money for such illegal interest within the year, he finally alleges that, on the 5th of July, 1864, in another contract between plaintiff and defendant, in substitution and renewal of and to carry out the last named contract, and for money advanced, he did then and there

take, reserve and receive, in money, of the plaintiff, in the sum of six thousand dollars, a rate of interest exceeding that established by law, by the sum of $375,98, in addition to the sums of unlawful interest before named, making in all $1574,90 usurious interest, at the times named; and the plaintiff alleges that he in fact paid the said sum of money ($1574,90) in the $6000 *paid that day.*

As to the original loan:—Was this plaintiff the debtor or liable to the defendant? It is certainly remarkable, if he was, that he should not have been a party to any of the notes, from the beginning to the end. If he was the debtor, and these notes but collateral security for his indebtedness, it would seem singular, at least, that no note, bond, obligation or writing of any kind from him should have been given or taken. There can be no doubt that the plaintiff was active and interested in the negotiations for obtaining money for the use of Myers. But was he legally bound to pay the defendant? Is it shown that the defendant loaned money to him, and looked to him as his debtor? Whatever arrangements might exist between the plaintiff and Dow and Myers, the plaintiff could only become the debtor of the defendant by his assent or agreement. The defendant testifies that he never lent any money to Holmes on these transactions.

Myers, whose deposition was taken by the plaintiff, although used by the defendant, testifies that he received all the money and that plaintiff did not, that Holmes negotiated for him. There was evidently considerable looseness and indefiniteness in the transactions. But it is to be remembered that the point here is, whether the plaintiff was a party to any of the contracts in which excessive interest was reserved or taken, so that the defendant could call upon him for payment and, if refused, enforce it by suit. We confess that, after a careful examination of the evidence, we think that there is a failure to establish the proposition by a preponderance of testimony. It was ruled by the Judge that, if the contract was for indorsement by plaintiff

only, the action based on illegal interest could not be sustained. The evidence as to the first note, if not as to the others, seems to look as if that was the contract.

However this may be, there seems to be wanting that amount of evidence which, in the absence of any connection of the plaintiff's name with the notes, would establish "any loan on which the plaintiff was legally liable to the defendant."

Again, the only payment made was the sum of six thousand dollars, on the 5th of July, 1864. What was that for? Was any part of it in fact paid and received as excessive interest on prior loans. The defendant says that it was not, and that, even if it had been paid by Dow or Myers, who were on the notes, yet that it could not have been recovered back as illegal interest received on a contract or loan. He also contends that, if a party to the loan or notes could have recovered it, yet that this plaintiff could not, even if it was a payment of the notes, which included illegal interest.

It seems to be well settled that, if a third party, not bound himself to pay, voluntarily pays a note given for usurious interest and takes the note up, *he* cannot recover it back, unless he pays it as agent for the promisor, or under an agreement with the promisor to pay it for him. As where a mortgage is assigned and the assignee agrees to pay the balance due on the note secured by mortgage, which is usurious. *Cunningham* v. *Hall*, 7 Gray, 559; *Stanley* v. *Kempton*, 30 Maine, 119.

Now, if the notes of Dow and Myers *were* outstanding on the 5th of July, 1864, and the plaintiff, not being held on them, paid them voluntarily, *he* cannot recover back the part which was usurious.

But, were they in fact outstanding and due and in legal force on that day, against any one? It seems very clear, on the whole testimony, that the notes were virtually paid and cancelled when the absolute deed was given in July, 1857. This is the testimony of all the parties, and it does not seem to be controverted that, on the 5th of July, when the $6000

were paid, there were no existing valid notes to be paid or enforced. But the defendant had taken a quit-claim deed of the land from Dow, to whom Holmes had conveyed it, in lieu of the mortgage before given. The defendant says this was in full payment of all his claims, and that thenceforward he was the absolute owner of the estate, and the other parties were released from their indebtedness to him. The plaintiff, however, insists that this was a mere change of security, and that the land was substituted as security for the original loan to plaintiff, instead of the notes. That is, following the idea, that the loan was to the plaintiff and he was the debtor, and the notes only security or pledge for that debt, — that, under the new arrangement, land was substituted as security and the notes given up. We have before spoken of the unusual mode of transacting business, if the plaintiff was the original debtor.

But this would seem to be still more remarkable. The defendant had a mortgage to secure these notes, of the same real estate, conveyed to him by Mr. Dow. He had then the notes and the security by mortgage. The assumption is, that he gave up the notes, and changed the form of the security only, by taking an absolute deed in lieu of the mortgage, but regarding it only as security and to be in effect a mortgage. Why should he do this? And more especially why should he give up all the written evidence of indebtedness and release his debtors, and not take any note or bond or written contract from the plaintiff? Why leave all his debt against any one to rest, at best, on verbal testimony, relating to the mixed matters between all the parties. Do men usually take a mortgage to secure a loan without taking a note? Would a man be likely to change a mortgage, which clearly defined the notes secured, and give up those notes and take an absolute deed as security only, leaving it to parol testimony to show for what it was security.

The paper A does not refer to his holding as for security only. In its form and apparent purpose it is such an agreement as one holding the absolute and unconditional

title to real estate would give to one who desired to purchase. It does not provide that, upon payment of the sum due on certain notes held, as in force, but, upon payment of a certain sum named and interest from date, within six months, and all taxes and insurance *hereafter*, the defendant agrees to release all his interest in the real estate. It does not say that Holmes *owed* the defendant that sum and upon payment of *his debt* a release should be executed, as in case of a mortgage. It is left entirely optional with Holmes to pay the price fixed or not. If he did not, the title to the property would remain as before, in the defendant. See, as bearing somewhat on this point, *Fales* v. *Reynolds*, 14 Maine, 89.

It may be that, in fixing the price or sum to be paid, the defendant had more or less reference to the amount which would have been due on the notes, if they had remained in force. But that would not establish the fact that this plaintiff or any one was still his debtor. It is not unusual for a person who has taken real estate in payment for his debt, to fix the price for which he will sell it or reconvey to its former owner, by reference to the sum and accruing interest, which it represents and stands in lieu of, in his calculations. And if, in making that mental calculation, he includes extra interest, which was reckoned in the notes paid and discharged by the real estate, and the new purchaser pays him his price, thus fixed, it could hardly be seriously contended that any part of the price paid could be recovered back by any one, as excessive interest received.

The condition in this paper A, in reference to rent to be paid by plaintiff, in case he did not choose to pay the price fixed, corroborates the idea that both parties regarded the absolute title, free from any subsequent claims, as in the defendant.

It is not questioned that, if the real estate was given and received in payment of the notes, which included illegal interest, and that, if any action could have been maintained to recover back such interest, where the payment had been

made in real estate, yet that such claim in this case was barred by the limitation of one year in the statute.

In fact, this absolute deed was given in 1857. There does not appear to have been any attempt to enforce those notes by suit. There were no renewals after the deed was given. It was evident that, for a time, the defendant preferred that his loan and interest should be paid, rather than hold the real estate in payment. But we fail to see any evidence that either party really claimed that the notes were in force and not discharged. The conduct of the parties was inconsistent with the idea that the last notes, on seven months from July 18, 1857, were in force. If they were, why were they not renewed or sued?

The allegation in the writ is that the last agreement, when the $6000 was paid, was in substitution and renewal of, and to carry out the contract of Aug. 18, 1861. (Paper A.) If so, we are met by the same objections, which have been stated, that there was no actual debt due, or which the plaintiff was bound to pay to the defendant. This was the only money paid. As before shown, it could not make the transaction usurious, if the defendant, in fixing the sum for which he would release his title to the real estate, chose to have reference in his calculations to former transactions, unless there was a payment of the loan by a party bound to pay it.

We will add but a single further suggestion. If Holmes was the debtor of the defendant, he became so, either at the commencement of the transaction, or when the absolute deed was given, and the notes (which he now claims were mere securities) were paid by the real estate.

In either case, the claim against him would have been barred by the general statute of limitation of six years, at the time he paid the $6000. It is true, a man may properly pay a debt thus barred, and may recover back usurious interest so paid. But it is certainly a remarkable fact, if he was in truth the debtor of Gerry to the whole amount, that he should never have been called on to give his note or any

written evidence of indebtedness, or to renew his promise, or to pay accruing interest from time to time, and that his creditor should have allowed six years to elapse without any attempt to enforce his claim.

On the whole, we think that this verdict, under the evidence before us, ought to be set aside.

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

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

EZRA CARTER, JR., *in Eq.*, *versus* STEPHEN PORTER.

When real estate, held *in trust* by a debtor having no beneficial interest therein, has been conveyed by him to a third person, and by the latter to the *cestui que trust*, it cannot then be levied upon as the property of the trustee, notwithstanding he may have made the conveyance to such third person with intent to defraud his creditors; and it is immaterial whether the deed from such third person to the *cestui que trust* has or has not been recorded.

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

The bill substantially alleged that, in April, 1863, the complainant recovered judgment against one Seward W. Porter for $8452,23 and costs, for a debt which accrued prior to Jan. 12, 1855; that, on Jan. 12, 1855, the judgment debtor was seized in fee and severalty of certain parcels of land, described in a deed from said Seward to the respondent, dated Jan. 12, 1855, and by said deed he conveyed said land to the respondent, for the nominal consideration of $10,000; that said conveyance was made by said Seward for the purpose and with the intention, on his part, of defrauding and delaying the complainant and other creditors, and to secure said property from attachment and execution,

and that the respondent, in receiving the conveyance and continuing to hold the same, combined and confederated with said Seward in his said purpose and intention; and that said conveyance was without any valuable consideration.

The bill further alleged that, on Jan. 12, 1865, the complainant duly extended his execution upon a certain portion of the premises, and the levy was duly recorded; and that the respondent has never surrendered possession of the land levied on, but unjustly withholds the same.

That, at the time of said conveyance, said Seward was insolvent, and his insolvency known to the respondent; that, about the same time, said Seward, with the knowledge of the respondent, conveyed away all his attachable property; that the conveyance to the respondent was made to, and accepted by him, with the understanding that he should hold the same by secret trust for the use, and subject to the direction of said Seward; that, pursuant to such understanding, the respondent did, on Nov. 27, 1861, by deed duly acknowledged, &c., in accordance with the direction of said Seward, and without any valuable consideration, convey a portion of said real estate, other than that levied upon, to the wife of said Seward.

The prayer of the bill is, that the respondent be compelled to convey to the complainant in fee, the legal title of the real estate levied upon; and for general relief.

In his answer the respondent denied all knowledge of the complainant's claim against said Seward, the judgment and levy, and prays that the complainant be required to set forth the origin and nature of the claim and establish its validity as well as that of the judgment and levy.

The answer further alleges that the premises upon which the alleged levy was made, was formerly the homestead of Nehemiah Porter, respondent's father, which, through divers conveyances, had come to Seward W. Porter, respondent's brother; that the respondent, a farmer, having been reared upon the premises, was strongly attached thereto; that,

while the same was held by said Seward, the respondent repeatedly tried to purchase it, and finally succeeded Jan. 12, 1855, giving his notes therefor.

That, at the time of such purchase, said Seward was a merchant in Portland, engaged in an extensive wholesale West India business, and the respondent believed him worth $50,000 above his liabilities, and had never heard any rumor to the contrary; that he did not purchase the premises with the intent charged, nor did he suspect that Seward had any such intention; that he purchased the same in good faith, having no suspicion of said Seward's pecuniary embarrassments; that he had no knowledge of other conveyances, as alleged in the bill; that the conveyance was not made or accepted by him to hold by secret trust, for the use and subject to the directions of said Seward, but that the respondent purchased said estate unconditionally, and for his own exclusive use and benefit.

That, at the time of the conveyance to the respondent, by said Seward, the said premises were in the occupation and improvement of their brother, Rufus Porter, who was formerly the owner thereof, and who had conveyed to said Seward in Dec., 1853, remaining, however, all the time in possession thereof; that, previous to his purchase, the respondent was never informed of the nature and purpose of the conveyance by said Rufus to said Seward; that, at the time of his purchase, the respondent supposed and believed that said Seward was the real sole and actual owner of said estate, free and unencumbered by any trust, either secret or express, and, so believing, he purchased it in good faith; that, soon afterwards, he informed Rufus of his purchase and payment therefor, and desired him to surrender possession of the premises; that Rufus then, for the first time, informed him that said estate was conveyed to said Seward in trust, to hold as security for his certain claims and demands, and his liabilities on account of said Rufus, and that the same was to be reconveyed by said Seward on discharge of such indebtment and release from such

liabilities; that said Rufus was exceedingly angry with said Seward, charging him with a violation of his agreement in relation to the estate, and absolutely refusing to yield possession thereof to the respondent, or to recognize him as the owner thereof, alleging a readiness to pay all Seward's claims against him, and demanding of the respondent a conveyance of the premises; that, being unwilling to become involved in a family quarrel with his brother, the respondent did not take legal measures to obtain possession of the premises, but trusted that some satisfactory arrangement could be made by which the rights of said Rufus could be protected.

That, after the conveyance by said Seward, he removed out of the State, so that the respondent was unable to have any personal interview with him touching the premises, and he has never seen him since; that said Rufus persisted in retaining possession, claiming to have the better equitable right, and offering to pay the respondent the amount he agreed to pay to Seward, and procure the respondent's said notes; that, believing Rufus' statements to be true, and that the estate was held by said Seward in trust and as security only, the respondent was unwilling to oust said Rufus, or deprive him of his beneficial interest; that, although at the time of his purchase, the respondent was desirous of occupying said estate, yet within a short time afterwards, by the illness and decease of his wife and the marriage of his only daughter to a resident in Camden, with whom he was desirous of living, he was ready and willing to release to said Rufus all his interest in the estate, on being paid the amount paid by him and for his time and expenses about said estate, and so informed said Rufus.

That he is informed and believes, that said Seward and Rufus adjusted all matters between them, and thereby said Rufus obtained the respondent's notes, and, at the request of both, the respondent conveyed a small portion of said estate to said Seward's wife, and, on Nov. 24, 1857, the remainder thereof to the said Rufus, receiving therefor his

said notes, and the agreement of said Rufus to pay him for time and expenses aforesaid, which agreement not being fulfilled, the respondent sued therefor and the suit was settled in June, 1863, by said Rufus' note for $1044, and secured by mortgage on said premises.

That, prior to said mortgage, said Rufus mortgaged the premises to J. O'Donnell, and thereafter, to wit, on June 22, 1863, conveyed said premises, subject to said mortgages, to one Nehemiah Porter, who has ever since been in possession.

The proof tended to establish the material allegations in the answer.

W. L. Putnam, for the complainant.

The claim that Seward held the property as collateral security cannot affect the case. The legal title being in Seward was subject to the claims of his creditors. The assignment by which he held it in trust, if any existed, was but verbal, and not binding upon Seward or his creditors, and the conveyance to Stephen shows he did not recognize it. Had Stephen conveyed directly to Rufus, in consequence of any trust, it might have been valid; or, if Stephen's deed to Rufus had been recorded prior to our levy, it might have purged the fraud; but such were not the facts.

Davis & Drummond, for the respondent.

WALTON, J.—This is a bill in equity, the prayer of which is that the defendant may be compelled to convey to the plaintiff certain real estate.

The real estate in question was formerly owned by Rufus Porter. In 1848, he conveyed it to his brother Seward W. Porter, to secure him against liabilities incurred as an indorser for Rufus, who was then engaged in building the Buckfield Branch Railroad. The conveyance was in form absolute, but the evidence satisfies us that it was intended as security only. In 1855, Seward, being in failing circumstances, conveyed this real estate to his brother Stephen

Porter, the defendant. The plaintiff claims that this conveyance was fraudulent, being made to hinder and delay creditors. Whether this was so or not, we will not now stop to discuss. But we will here remark that the evidence satisfies us that the liabilities, to secure which the land was conveyed to Seward, were all discharged by Rufus, and that the land was then held by Seward in trust for him, and that he was entitled to a reconveyance of it whenever he demanded it. The conveyance to Stephen was therefore very clearly a fraud upon Rufus, if it was thereby intended to keep it from him. And, as soon as Rufus learned of the conveyance, he complained of his brother and denied his right to make it. The result was that the notes which Stephen had given for it, (amounting to $10,000,) were given up by Seward to Rufus, and by him to Stephen, and Stephen conveyed the land to Rufus. Rufus thus got his land back again, except that he was compelled to convey a thousand dollars worth of it to Seward's wife, and secure Stephen by a mortgage of it, for a thousand dollars more. Rufus neglected to put his deed from Stephen on record, and, seven years afterwards, and ten years after the alleged fraudulent conveyance to Stephen, the plaintiff levied an execution upon it as the property of Seward, and now asks the Court to confirm his title. It should be stated that, two years nearly before this levy was made, the premises had been mortgaged to James O'Donnell, to secure between four and five hundred dollars, and to Stephen Porter, to secure about one thousand dollars, and then conveyed to Nehemiah Porter, and that these conveyances were all on record; and that neither Rufus, Nehemiah, or Mr. O'Donnell are made parties to the bill. Under these circumstances can the bill be maintained? We are clearly of opinion it cannot.

To say nothing of the want of parties, and nothing of the validity of the plaintiff's judgment, we think the plaintiff's case is fatally defective for want of equity.

It is by no means clear that a creditor can in any case levy his execution upon real estate held by the debtor in trust.

If he has notice of the trust, unqestionably he cannot. But suppose he has no notice of the trust, will the law allow him to take the property of one man to pay another's debt? This question was very ably discussed by Chief Justice SHEPLEY, in delivering the opinion of the Court in *Warren* v. *Ireland*, 29 Maine, 62, and the conclusion reached, that a trust estate could not be levied upon.—"The rule is well established," said he, "that the judgment creditors of a trustee are not allowed to hold a trust estate against the *cestui que trust*." After quoting the words of the statute, that the creditor may "levy his execution upon the debtor's real estate," he continues:—"If the words 'debtor's real estate,' are to receive such a construction as to include an estate in which he had no beneficial interest, and the title to which he held in trust for another, the effect may be to enable a creditor to obtain payment, not from the estate of his debtor, but from the property of another person. It might compel the debtor, against his will, to violate a most sacred trust, for the purpose of paying his own debt out of another's property. Could it have been the intention of the Legislature, by the use of such language, to authorize the property of one person to be taken to pay a debt due from another, and to compel him to violate a trust, to accomplish such a purpose? The statute also provides, that the levy 'shall make as good a title' to the creditor 'as the debtor had therein.' If the debtor's title was subject to the beneficial interest of another person in the estate, will any more perfect title be conveyed by the levy and statute provisions to the creditor? If so, the rights of the *cestui que trust* may be destroyed without any act of his own or of his trustee. To determine that they can be, is to decide that the Legislature, without a violation of the fundamental law, may appropriate the equitable property and rights of one person to pay the debts of another. And, if the rights of the beneficiary are not destroyed, but still adhere to and follow the title, so that they can be enforced against the statute purchaser, the effect will be, that he will be made by the satisfaction of his judg-

ment to pay for the estate without obtaining any value, for he will become the holder of a title from which he can derive no benefit. The language of the statute may have its full effect and these mischiefs be avoided, if it be construed to include those estates only in which the legal and beneficial interests are united in the debtor. It may be, if such be the construction of the statute, that a creditor may have no means of information, whether an estate, apparently owned by his debtor, be a trust estate; and he may fail to obtain any value by a levy, when he has been vigilant to obtain his rights. This may also happen in other cases, when his debtor has a title to an estate apparently good, which proves to be wholly defective. In such cases, the debt remaining unpaid, he may by a proper course have his judgment revived."

And Judge STORY, in his work on Equity, (2 Story's Eq. Jur., § 977,) denies that a trust estate can be bound by any judgments, or other claims of creditors against the trustee. And in a note to this section Judge REDFIELD says, that it has been recently decided in Vermont, after a very full examination of the authorities, that creditors levying upon lands held by the debtor in trust, *although they have no notice of the trust*, acquire no title against the *cestui que trust.*

If this view of the law be correct, it is difficult to perceive how an alienation by the trustee of a trust estate, can be a fraud upon his creditors, since, if the title had remained in him, the property could not be appropriated to pay their debts.

But, whether this view of the law be correct or not, we cannot doubt that when, as in this case, the legal title has passed out of the trustee, and is actually restored to the *cestui que trust*, it is too late for a creditor to attempt to follow it upon the ground that, when the trustee conveyed, he intended a fraud upon his creditors as well as upon his *cestui que trust.* The fraudulent intentions of the trustee cannot and ought not to work a forfeiture of the rights of the *cestui*

que trust. His claims are as strong as those of a creditor, and as much under the protection of the law.

But it is contended that, inasmuch as the deed from Stephen to Rufus, although executed many years before, was not recorded till after the plaintiff's levy, it cannot affect his rights acquired under the levy. Suppose this be so; suppose, for the purposes of this investigation, the title is to be regarded as still in Stephen; what is the result?

Stephen discloses that, after the conveyance to him, he was informed and believed that in equity the estate belonged to Rufus; that he was willing to execute the trust which Seward by conveying to him had violated, and restore the estate to Rufus, if he could be indemnified for what he had paid out, and for his time and trouble. The evidence shows that he has been fully indemnified, and if it were true that he now held the legal title, he would hold it without consideration and in trust for Rufus. Would this Court compel him to violate his trust and convey to the plaintiff? Upon what principle could such a decree be claimed? Are not the claims of the *cestui que trust* equal at least to those of a creditor of his former trustee? It may be true that, because there was no record evidence of the trust, a creditor might have seized and appropriated this property to the payment of his debt while the legal title was in the debtor; but we know of no rule of law that will allow him to follow it into the hands of one not his debtor. If it had been the property of the debtor in fact, as well as in appearance, undoubtedly he could. But being the property of the debtor in appearance only, and not in fact, he cannot. If a debtor fraudulently conveys *his* property, the creditor may follow it. If he fraudulently conveys the property of *another*, — property which he holds in trust merely, — the creditor cannot follow it. In such case, the fraudulent purpose of the debtor is of no importance. It cannot make that his which in equity belongs to another.

Treating, therefore, the unrecorded deed as if it had never been executed, and assuming, for the purposes of this

investigation, that the title at the time of the levy was still held by the defendant, it appearing to our satisfaction that the property never in fact belonged to the debtor, and that the defendant held it in trust for another, it is still the judgment of the Court that it could not legally be levied upon as the property of Seward W. Porter. It was never equitably his; it had ceased to be colorably his. Being in the hands of one willing to execute his trust, willing to hold it for the benefit of the equitable owner, the Court would not compel him to violate his trust and convey it to another.

Bill dismissed, with costs for the defendant.

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

JOHN FOXTON *versus* THEODORE KUCKING AND PORTLAND SAVINGS BANK, *Tr.*

Upon the condition that his bounty money should be deposited for his benefit in the Portland Savings Bank, the trustees of the State Reform School permitted one of its inmates to enlist as a volunteer in the military service of the United States, and thereupon they deposited his bounty money in the bank, in his own name, upon the following special condition prescribed in all such cases, and entered upon the books of the bank, viz.: — "All bounty money received by said boys, shall be deposited in the Portland Savings Bank, and there remain * * till they have severally reached the age of twenty-one years, and no part of said deposits is to be withdrawn without the consent of the trustees of the State Reform School." In a trustee process, brought by a creditor against such volunteer, for necessaries purchased after his discharge from the service and before he had attained his majority: — *Held*, —

1. That the money is due absolutely to the defendant and is payable to him or his order on his reaching the age of twenty-one years, without the consent of the trustees of the Reform School; — and

2. That the bank is chargeable as trustee, and will be compelled to pay the amount charged, when the same is payable according to the terms of the deposit.

ON EXCEPTIONS.

ASSUMPSIT on account annexed.

Upon representation that the principal defendant was a minor, a guardian *ad litem* was appointed. After appearance by the guardian, a default was entered against the principal defendant for an agreed sum found and admitted by the guardian to be for necessaries.

At the return term, the alleged trustee, by Joseph C. Noyes, treasurer, disclosed: —

That before Feb. 2, 1864, the principal defendant was an inmate of the Reform School, under judicial sentence, and, upon his request, was permitted by the trustees to enlist as a volunteer in the military service of the United States. The trustees gave permission, upon the condition that his bounty money, or such part of it as they thought proper, should be deposited for his benefit in the bank, and, on the day above named, there was deposited, in his name, by the trustees, the sum of two hundred fifty-five dollars, upon the following special condition prescribed by the trustees in all such cases and entered in writing on the books of the bank.

"All bounty money received by said boys, shall be deposited in the Portland Savings Bank, and there remain, with such additions as may be made from time to time, under their allotments, till they have severally reached the age of twenty-one years, and no part of said deposits is to be withdrawn, without the consent of the trustees of the State Reform School."

The dividends accrued upon this deposit, up to and including the dividend of Nov., 1865, amounting to thirty-two dollars sixty-five cents; and, on the date of service of the plaintiff's writ, Nov. 7, 1865, the bank held, on this account, under the foregoing conditions, the said amount of $255, and $32,65 — in all $287,65 and no more — and had not, otherwise, any goods, effects, or credits, of the defendant in its hands.

That the said Theodore Kucking was then a minor, and no consent was then, or had been given by the trustees for

the withdrawal of said deposit, or any part of it; and that he will not be of age until July 4, 1868.

The presiding Judge ordered the trustee to be charged on the disclosure for the amount of the plaintiff's judgment, being less than the amount disclosed. Whereupon the trustee alleged exceptions.

P. Barnes, for the trustee.

1. The arrangement, by which the money in question was placed beyond the control of the minors, was one of which his creditor has no right to complain.

Plaintiff either did not know of the existence of this fund, and gave no credits on the strength of it, or, if he did know of it, he knew its conditions and had no right to assail them.

The case is in no respect different from the agreement, by which a father, consenting to the enlistment of a son who was under military age, might arrange for the safe keeping and control of his bounty money.

2. The disclosure shows a case which is not within the statute of foreign attachment at all. That statute provides only for cases where goods, effects or credits are "due" or "payable," as a matter of mere paternal relation solely between the depositor and the depositary, — a case of ordinary contract between two parties, founded upon values passing between them alone.

But the present case is a case of *trust*, in the sense of the general law, and one where the trust was created by the lawful appointment of a third party, which party has prescribed, and had a right to prescribe the conditions of the trust. The terms so prescribed affect the trust, from its beginning to its termination, and must be observed by the trustee. They control the trustee as well as the beneficiary.

Whenever, by such appointment, whether by gift, grant, devise, or in whatever other lawful way, the donor, or party lawfully constituting the trust, has placed the property be-

yond the control of the beneficiary, the Court cannot abrogate such appointment.

3. Not only does the control instituted but reserved by the trustees of the Reform School, affect and bind this trust from its inception to its end, but the trustee, the bank, also has an interest, which cannot be vacated by the beneficiary, or by any claiming under or through him. By positive law, the bank, on receiving this deposit, was bound to invest it productively; and has a right to keep the fund until the proper consent is given for its withdrawal. The investment had been made. No consent for withdrawal or change is shown. The bank is under no obligation to break up such investment, and be at the trouble of converting it into money for the use of the beneficiary, or to pay his debts at this time.

It makes no difference in such a case, whether the beneficiary is a minor or an adult.

4. Nor does it make any difference that the claim is for necessaries. The *prochein ad litem* might give the plaintiff judgment on that point, but that consideration does not affect the party who constituted the trust nor the trustee. The trustees of the Reform School, if they anticipated that the minor's enlistment would expire before his majority, knew well enough that he must then have the necessaries of life. But they assumed, and had a right to assume that, as he would then have, by their consent, the command of his own time, he could subsist himself by his industry. By such habits of enforced industry, he might gain such steadiness of character and knowledge of the value of money, that he could, eventually, usefully receive and enjoy the fund which they had taken care to have laid up in store for him.

5. As to a judgment payable in the future;—besides the excessive inconvenience of keeping a trustee in Court until July, 1868, or the impracticability of issuing an execution now, which cannot be enforced until that time, it is enough to repeat that, even when the minor becomes of age, this fund will not be "payable absolutely," in the sense of the

foreign attachment law. The reserved discretion and control of the trustees of the Reform School extends quite to that time. It will then be for them to see and say, whether or not this fund shall be withdrawn for the use of the beneficiary. The conditions do not provide that the money shall be kept until the minor is of age, and then paid over to him, but, plainly and simply, that the fund is to "remain" till he has reached the age of twenty-one years, and "no part to be withdrawn, (that is, not at any time,) without the consent of the trustees."

The bank must have that consent when this minor becomes of age.

Nor is this any hardship upon the minor. It is simply a disability, which relates back to his sentence and to the misconduct for which that sentence was imposed.

6. Bounty money is not trusteeable.

Howard & Cleaves, for the plaintiff.

TAPLEY, J.—The main question involved in this case is whether the Portland Savings Bank is chargeable as the trustee of Theodore Kucking, the principal defendant, for the money deposited therein in the name of said Kucking.

From the disclosure of the treasurer of the Bank, it appears that the principal defendant, who is a minor, was, prior to the time of the making of the deposit hereinafter to be mentioned, an inmate of the State Reform School; that while there under judicial sentence, the trustees of this institution, upon his personal request, granted him permission to enlist as a volunteer in the military service of the United States, "upon the condition that his bounty money, or such part of it as they thought proper, should be deposited for his benefit, in the bank;" that, on the second day of February, A. D. 1864, the trustees deposited, in his name, the sum of two hundred and fifty-five dollars upon the following special condition prescribed by the trustees in all such cases, and entered upon the books of the bank, viz.:

"All bounty money received by said boys shall be depos-

ited in the Portland Savings Bank, and there remain, with such additions as may be made from time to time under their allotments, till they have severally reached the age of twenty-one years, and no part of said deposits is to be withdrawn without the consent of the trustees of the State Reform School."

Upon a proper construction of the contract of deposit mainly depends the solution of the question in issue.

The trustees of the State Reform School are public officers whose powers and duties are prescribed by statute. In the absence of all evidence to the contrary, it will be presumed that their acts were intended to be within the scope of their legal powers and duties. Being public officers, all persons are presumed to know the extent of their powers, and to confine the contracts made with them within the legitimate scope of the trustees' powers.

One construction of the contract of deposit contended for is that this defendant can draw the fund whenever he shall reach "the age of twenty-one years."

The other is that it can never be drawn by any one without the consent of the trustees.

By the latter construction, the trustees would have the power to make the money deposited the absolute property of the bank; for he, in whose name and for whose benefit it was deposited, would thereby become as incapable of controlling it, at any period of his life, as would a stranger.

The first question which naturally suggests itself in connection with the latter construction is, had the trustees power to make such a disposition of the funds of the persons committed to their charge? There is no such power specifically granted them by any legislative enactment; and we cannot believe any such power is incidental to the powers specifically granted.

No person can be sentenced to the State Reform School for a term extending beyond his minority. R. S., c. 142, § 6. The control of the trustees over the person or property of one under their official charge absolutely ceases upon

his reaching his majority, and nothing else is necessary to reinstate him in all of his civil rights. His person and property are as free from all legal restraint and control by them as before commitment; and unless he has a legally appointed guardian, his rights and powers over his property are as full and complete as those of any citizen of the State.

This being the legal result of his attaining his majority, the trustees of the school and the alleged trustee are presumed to have known it and to have entered into the contract in view of and in subserviency to those limitations of power and authority.

If the construction contended for by the counsel for the bank be the true one, we must find that both the bank and the trustees of the Reform School intended to exceed the lawful authority of the latter, and assume a right over the defendant's property which the law had not given them. Such a presumption would be against law and cast an unjust reflection upon the integrity of the officers of the Reform School. The results which might arise from such a construction would be too iniquitous to be allowed to go into practice. The law imposes upon a person legally committed to the Reform School no such enduring disabilities. Whatever they are, they cease with the expiration of his term; we cannot believe these officers intended to usurp powers which are plainly against the clearest rights of the citizen, that of "possessing and protecting property."

An examination of the contract in the light of the legal powers and duties of these public officers and the presumptions of law heretofore alluded to, discovers the evident purpose of the trustees to have been to prevent the defendant's bounty money from being squandered while they had the care, custody and control of his person. There is no evidence that they assumed to be his guardian beyond that time and to transmit such guardianship to their successors throughout all time.

The first clause in the contract of deposit is, that it shall remain until the defendant has "reached the age of twenty-

one years." If the contract had stopped here, the money, being the defendant's own property, and it having been deposited in his name and for his benefit, could have lawfully been paid out by the bank to the defendant or upon his order before he had reached his majority. Perhaps the bank might not be compelled to pay before that time, but it might lawfully do so. And, to guard against such a possibility, the subsequent clause, that no part of it should be withdrawn without the consent of the trustees, was inserted, thus preventing any collusion between the bank and the defendant to defeat the designs of the trustees to protect the fund until its owner had "reached the age of twenty-one years," when he, by law, would pass out from their control. The real meaning is, that the deposit should not be withdrawn, during the defendant's minority, without the consent of the trustees of the Reform School. This construction accords to the former clause in the condition the full import of the language in which it is expressed; while the construction contended for by the bank renders it superfluous and wholly irreconcilable with the latter.

If the time when the deposit could be withdrawn depended absolutely upon the "consent of the trustees," why say anything about the "age of twenty-one years?" Whether twenty-one or forty-one, the "consent" is the indispensable prerequisite to the withdrawal; and, if there should never be any "consent," there never could be any withdrawal, and the bank would always retain the funds.

We concur with counsel, that we "ought not to assume in this suit" that these trustees "acted without authority;" for they have disclosed their authority, and we believe that such a construction should be given to their acts as will make them harmonize with that authority.

While it is true that, in making the deposit and in laying the restrictions upon it, the trustees acted in pursuance of the express consent of the minor, it is also true that that express consent is found only in the words, "the trustees gave permission upon the condition that his bounty money,

or such part of it as they thought proper, should be deposited for his benefit." There is no evidence of any other consent or authority from the minor. Nor is there anything in this consent warranting the conclusion that the minor intended any such contract as is contended for. Every reasonable presumption is against it.

The whole extent of the consent is that his bounty money should be deposited in the bank for his benefit. There is no time mentioned in the consent given; but the simple fact that it was to be deposited shows it was to remain sometime. Immediately following this consent, the trustees made the deposit and fixed the time, viz., until he "reached the age of twenty-one years." What more reasonable time; and how unreasonable that they should have gone beyond that time, and assumed to control it during his entire life, and even beyond that. To our minds, it is quite apparent that the clause prohibiting withdrawal, without the consent of the trustees, was not inserted as a nullification or qualification of the clause fixing the time at his reaching the "age of twenty-one years," and was not intended as a time limitation, but simply as a restriction upon the drawing of the funds during the time which had been fixed. By no other construction can both clauses be made effectual in accordance with a well settled rule of law.

The conclusion to which we have arrived is that the money deposited is due absolutely to the principal defendant, and payable to him or his order, at his arrival at the age of twenty-one years, without the aid of the consent of the trustees of the Reform School.

Being money "due absolutely to the principal defendant," it "may be attached before it has become payable," and the trustee "compelled to pay" at "the time appointed by the contract." R. S., c. 86, § 61.

Exceptions overruled.

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

HENRY H. HAY *versus* GEORGE PARKER.

A mortgage of an apothecary's stock, consisting in part of intoxicating liquors, is a sale upon condition of such liquors, and a violation both of the spirit and letter of § 1, c. 33, of the Public Laws of 1858.

The mortgagee in such a mortgage cannot maintain an action of trespass *de bonis* against an officer for attaching the stock covered by the mortgage, as the property of the mortgager, unless the latter was duly licensed under c. 33.

ON EXCEPTIONS.

TRESPASS, for taking a stock of goods, consisting in part of $1,523,62 worth of intoxicating liquors, in the possession of one Atwell.

The plaintiff's title depended upon a mortgage from Atwell to himself. The defendant undertook to justify the taking under an attachment made by him as sheriff, upon a writ against Atwell and subsequent sale upon execution. There was much evidence in relation to the execution and delivery of the mortgage, which the view taken by the Court renders it unnecessary to report.

C. W. Atwell, called by the plaintiff, testified on cross-examination that the stock of liquors were kept by him for sale, and that he was not licensed to sell the same, at the time of executing the mortgage to the plaintiff.

After the testimony for the plaintiff was all in, the presiding Judge, on motion of the defendant, ordered a nonsuit; whereupon the plaintiff alleged exceptions.

McCobb & Kingsbury, for the plaintiff.

The liquors were not attachable. *Nichols* v. *Valentine*, 36 Maine, 322; *Foss* v. *Stuart*, 14 Maine, 312. Plaintiff did not keep the liquors for sale, but had them simply as security. *Pollard* v. *Som. M. F. Ins. Co.*, 42 Maine, 221; R. S., c. 1, § 4, cl. 1.

It does not appear that Atwell had them for sale in this State. There is no presumption as to the place. *Com.* v. *Blood*, 11 Gray, 77.

The liquors could not be seized upon a warrant even, unless kept illegally. *Reed* v. *Adams*, 2 Allen, 413; *Brown* v. *Perkins*, 12 Gray, 89; *Kent* v. *Willey*, 11 Gray, 368; *Ewings* v. *Walker*, 9 Gray, 95. Even if sold in violation of law, the defendant could not convert the liquor to his own use. *Sullivan* v. *Park*, 33 Maine, 438.

Howard & Cleaves, for the defendant.

WALTON, J.—The plaintiff's right to maintain this action depends upon the validity of his mortgage. He has no other title, no other right of possession, than what his mortgage gives him. Is it valid? We think not. The stock of goods mortgaged included over fifteen hundred dollars worth of intoxicating liquors. The sale of liquors "*directly or indirectly*," by one not licensed, is illegal. Act of 1858, c. 33, § 1. And a contract for the sale of a stock of goods, consisting in part only of intoxicating liquors, is wholly illegal, and no action can be maintained upon it. *Ladd* v. *Dillingham*, 34 Maine, 316.

But the plaintiff contends that a mortgage is not a sale, and cites *Pollard* v. *Ins. Co.*, 42 Maine, 221. That was an insurance case, and the Court held that a mortgage is not such an alienation as will avoid the policy. But, in explanation of this decision, it must be remembered that it is a well settled rule of the law of insurance that a sale or alienation of the property avoids the policy, whether there is a proviso to that effect in the policy or not; but that the words *sale* and *alienation*, when thus used, have always been construed to mean a complete, absolute conveyance, such as leaves no insurable interest in the party. When, therefore, a policy of insurance, or an Act incorporating an insurance company, is found to contain a proviso, that a *sale* or *alienation* of the property shall avoid the contract, we think the Court may very properly come to the conclusion that a complete and absolute conveyance is meant, because such has always been the meaning attached to those terms when used in such a connection. But when the character of a

mortgage has come in question, in cases arising under the statutes of 13 and 27 Elizabeth, it has always been held that a mortgage is a sale, and a mortgagee a purchaser. Thus, in *Chapman* v. *Emery*, Cowper, 280, in reply to the same argument here urged, namely, that a mortgage is not a sale, the Court (per Lord MANSFIELD) said, "there is no doubt but a mortgagee is a purchaser." See also, to the same effect, 1 Am. Leading Cases, 48, and cases there cited. So, whenever it has been necessary to distinguish between a mortgage and a pledge, a mortgage is declared to be a *sale* upon condition, while a pledge creates only a lien. With respect to the former the title passes, while with respect to the latter it does not. So, if we look to the form of mortgages in general use, we find that they purport to sell and convey the property absolutely in the first instance, and then a condition is annexed upon the performance of which the *sale* is to become void. A mortgage is a sale upon a condition subsequent, not precedent. The title passes to the mortgagee, and there it often does and always may remain. The prohibitory law of 1858, declares that no unlicensed person shall be allowed to sell intoxicating liquors "directly or indirectly." Can the proposition be maintained that the title to large quantities of intoxicating liquors may be transferred from one to another by way of mortgage, and not violate both the spirit and the letter of this statute? We think not. We think a sale by way of mortgage is as clearly prohibited, and therefore as clearly illegal, as an absolute sale.

Our conclusion, therefore, is that the plaintiff's mortgage is not valid, and, as he has no other title or right of possession to the property sued for than what his mortgage gives him, that this action cannot be maintained. It is therefore unnecessary to determine whether the officer has done anything or omitted to do anything which makes him a trespasser *ab initio* or not. He seems to have acted in good faith, and to have applied the proceeds of the property to the discharge of executions legally in his hands for collec-

tion; and as the property was all attached and in the custody of the attaching officer at the time the plaintiff's mortgage was executed, and this fact was known to the plaintiff, we presume his disappointment will not be very great when he learns that his mortgage is wholly unavailing.

Exceptions overruled.
Nonsuit confirmed.

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

THANKFUL CROWTHER *versus* JOHN W. CROWTHER.

R. S., c. 61, § 3, does not enable a married woman to maintain an action against her husband on a note given by him to her.

ON FACTS AGREED.

ASSUMPSIT upon two promissory notes, signed by the defendant and payable to the plaintiff; one dated Dec. 22, 1859, for $375, and the other May 12, 1860, for $700, payable on demand with interest. Writ dated May 10, 1866. Plea, general issue, with specifications of defence. It was admitted that the notes were given for a valuable consideration, delivered by the defendant to the plaintiff, on May 12, 1860; and that the plaintiff then was and still is the lawful wife of the defendant.

The Court to enter such judgment as the law required.

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

R. S., c. 61, § 3, is broad enough to support the action, and it should be so construed as to make it effectual for the protection of the private property of married women, even in the hands of their husbands.

The defence cannot be made under the general issue. Objection should be presented by plea in abatement.

Howard & Cleaves, for the defendant.

APPLETON, C. J. — The case comes before us on an agreed statement of facts, and the question presented is whether a wife can maintain a suit against her husband on a note given her by him.

At common law such a suit could not be maintained. By R. S., 1857, c. 61, § 3, the wife is authorized to "prosecute and defend suits at law or in equity for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband." This section manifestly refers to suits by the wife against third persons and empowers her to maintain an action in her own name or in the joint names of herself and husband, at her election. It does not contemplate a suit by the wife against the husband, nor that he should be arrested and imprisoned at her instance. Such has been the uniform construction of this and similar statutes in this State and in Massachusetts. *Smith* v. *Gorman*, 41 Maine, 408; *Jackson* v. *Parks*, 10 Cush., 550; *Ingham* v. *White*, 4 Allen, 412. If the present statutes do not adequately protect the rights of the wife, it is for the Legislature to make such further provision for their protection as it may deem expedient. *Plaintiff nonsuit.*

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

HATTIE W. TOTMAN, *Complainant*, *versus* FREDERICK A. FORSAITH.

The complainant in a bastardy process need not state during travail the time and place when and where the child was begotten.

ON EXCEPTIONS.

COMPLAINT under the statute relating to bastard children, &c., entered in the Superior Court for Cumberland county and certified to this Court in accordance with the Public Laws of 1868, c. 161, § 7.

At the trial in the Superior Court, at the Sept. term, 1868, before GODDARD, J., Lucy A. Hill, called by the complainant, testified that she was present during the travail of the complainant, and heard her then accuse the respondent of being the father of her child; but that the complainant did not then and there state the time and place when and where the child was begotten.

The respondent's counsel requested the presiding Judge to instruct the jury that, to entitle the complainant to recover, she should during travail not only have accused the respondent of being the father of the child, but also have then stated the time and place when and where the child was begotten; the latter clause of the requested instruction the presiding Judge declined to give. But the Judge did instruct the jury that they must be satisfied that, being put upon the discovery of the truth during the time of her travail, the complainant accused the respondent of being the father of the child of which she was about to be delivered, and that she has been constant in the accusation.

The verdict was for the complainant, and the respondent alleged exceptions.

J. D. Simmons, in support of the exceptions.

H. Orr, for the complainant.

APPLETON, C. J. — The statute relating to "Bastard Children and their maintenance," c. 97, requires that the complainant, "being put on the discovery of the truth during the time of her travail," should accuse the person charged "of being the father of the child," and should remain "constant in such accusation." It is not necessary that the accusation should have been in answer to any inquiry by others, nor that she should expressly declare in the time of her travail that the respondent was the father of the child; if in any form she should intelligibly mention the fact, it is an accusation within the statute. *McManagil* v. *Ross*, 20 Pick., 99; *Bailey* v. *Chesley*, 10 Cush., 285.

In her accusation and examination before the magistrate, she is required to state "the time and place when and where the child was begotten, as correctly as they can be described." The complainant is not to be examined as to "the time and place," during the pangs of child-birth, nor is she required to do more at that time than to accuse the respondent of being father of the child. This she did, and, having so done, has fully complied with the requirements of the statute. *Exceptions overruled.*

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

SILAS A. COFFIN, *Lib'l'nt, versus* ELIZABETH COFFIN.

A libellee, named in a libel praying to have the marriage between the parties annulled on account of an alleged prior marriage, is not entitled to a trial by jury.

ON REPORT.

LIBEL to annul a marriage between the parties under R. S., c. 60, §§ 14 and 16. The respondent seasonably claimed a trial by jury, which the libellant resisted on the ground

that there is no authority in the constitution or statute for a trial by jury in this case. The case was thereupon reported to the Law Court, which was to determine whether the case shall stand for trial by the presiding Judge at *nisi prius*, or whether an issue shall be framed and submitted to the jury.

Davis & Drummond, for the libellant.

Geo. F. Shepley & A. A. Strout, for the libellee.

DANFORTH, J. — This case does not come within § 20, art. 1, of the constitution, providing for a trial by jury. The practice has been otherwise. Nor is there any statute authorizing it. On the other hand, the statute provides that "the Court shall decree it (the marriage) annulled or affirmed according to the proof." R. S., c. 60, § 14.

The case to stand for trial by the Court.

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

GEORGE W. PARKER *versus* CHARLES H. HALL.

By the statute, a defendant in replevin, having caused the writ to be abated by reason of the informality of the replevin bond, may, if entitled to a return, have a judgment and a writ of return accordingly. He may also have a remedy on the replevin bond, or an action on the case against the officer, for the insufficiency of the bond.

So, in such case, the defendant may regard the taking as tortious, and maintain trespass against the replevying officer.

But he cannot have an action of trespass in addition to the statute remedies.

ON EXCEPTIONS.

TRESPASS *de bonis*, tried in the Superior Court for this county, at the September term thereof, 1868.

The case was tried by GODDARD, J., without the intervention of a jury.

The bond in the replevin suit mentioned, was made to Jonathan Dow instead of George W. Parker.

The Judge ruled that this action is maintainable, and ordered judgment for the plaintiff for the value of the piano and costs; and the defendant alleged exceptions, and thereupon the case was duly certified to the Chief Justice of this Court, in accordance with c. 151, of Public Laws of 1868.

The remaining facts sufficiently appear in the opinion.

J. H. Williams, and with him *Howard & Cleaves*, for the defendant.

George B. Emery, for the plaintiff.

This action is maintainable. R. S., c. 96, § 18; *Parker* v. *Simonds*, 8 Met., 209; *Simmons* v. *Bradford*, 15 Mass., 82; *Heppel* v. *King*, 7 Term R., 370; *Tuck* v. *Moses*, 54 Maine, 120.

APPLETON, C. J. — This is an action of trespass for taking and carrying away a piano alleged to be the property of the plaintiff.

The plaintiff, sheriff of the county of Cumberland, having a writ *Jonathan Dow* v. *James A. McNab*, on the 4th Nov. 1865, attached the piano in controversy as the property of the defendant McNab, and made return thereof on the writ.

The piano, the case finds, was the property of Caroline A. McNab. The defendant, a coroner of this county, after the attachment, took the piano on a replevin writ in favor of Caroline A. McNab against George W. Parker, and made return thereon that he had replevied the piano and had delivered it to the plaintiff in replevin, who receipted for the same on the replevin writ.

The defendant in the replevin, the plaintiff in this suit, procured the replevin suit to be abated because the bond was not in accordance with the provisions of law. A return was ordered, and the writ of return and restitution has issued against the plaintiff in the replevin suit, Mrs. McNab.

The judgment in the replevin, the writ having been dis-

missed for informality in the bond, would constitute no bar to a new suit of replevin, if Mrs. McNab had surrendered the piano to the officer having the writ of return. Her title being unquestioned, she would successfully have maintained her suit. *Walbridge* v. *Shaw*, 7 Cush., 560.

This plaintiff has no title to the piano. If he recovers, he holds the money recovered either to protect himself, or as trustee for the creditor Dow, or for Mrs. McNab. He does not need the money for his own protection. Mrs. McNab, having the property in her own possession, could not recover for its value against him; she certainly could not do it, the writ of return and restitution being unsatisfied. He would not hold the money for Mrs. McNab, for she has her own. He would not hold it for the creditor, in the suit Dow against McNab, for the debtor had no interest in the piano, and the attachment was a trespass. He should not hold it for himself, for the piano was never his. The most he could hope for would be nominal damages, if this action were maintainable.

The defendant in replevin may abate the writ if the bond is not in conformity with the requirements of the statute, R. S., c. 96, and, upon his motion, he may have a return. The writ of return and restitution will issue. If the officer having the writ cannot find the property replevied, the Court "may grant a writ of reprisal in the form prescribed by law, against the plaintiff in replevin, to take his goods and beasts not exempt from attachment, of the full value, to be delivered to the defendant, to be held and disposed of by him according to law, until the plaintiff restores the beast, or other property, replevied by him." § 17. In addition to this, by § 18, he may resort to his remedy in the bond, or "against the officer for the insufficiency of the bond." The remedy here provided is an action on the case for official neglect, and not trespass.

So the plaintiff may regard the taking as tortious, and bring his action of trespass for such tortious taking. But

he cannot have an action of trespass against the officer in addition to the remedies given by statute.

The plaintiff in the case at bar has elected the statute remedy. He has his writ of return and restitution. He may have his writ of reprisal and his suit against the officer "for the insufficiency of the bond." These remedies would seem sufficient for his protection, without the addition of a suit in trespass for the same property.

Exceptions sustained.

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

STATE *versus* SAMUEL HILL.

Under R. S., c. 119, § 1, when arson is committed by setting fire directly to the dwellinghouse of another, the indictment need not expressly allege the intent.

Aliter, when the crime is committed by setting fire to any building adjoining the dwellinghouse, or to any building owned by the accused or another.

ON EXCEPTIONS.

INDICTMENT, alleging with proper averments of time and place, that the accused "the dwellinghouse of one Barnard Daley, there situate, feloniously, wilfully and maliciously, did set fire to, and the said dwellinghouse, then and there, in the night time, feloniously, wilfully and maliciously, did burn and consume, against the peace," &c.

After a verdict of guilty, the defendant moved in arrest of judgment,—

1st.—Because said indictment does not set forth any facts which constitute any offence upon which any valid judgment can be rendered against him.

2d.—Because there is no allegation in said indictment

that the supposed setting fire to the dwellinghouse therein named was done with the intent to burn said dwellinghouse.

3d.—Because it is not alleged in such indictment that the supposed acts of the said Samuel Hill, as therein set forth and alleged, were done with intent to burn such dwellinghouse, or with any illegal intent.

4th.—Because said indictment does not contain, describe or set forth any offence upon which any valid judgment can legally be rendered, according to the laws of this State.

The presiding Judge overruled the motion *pro forma*, and the defendant alleged exceptions.

Howard & Cleaves and *O'Donnell*, in support of the exceptions.

The intent and the act must both concur to constitute the crime. 3 Greenl. on Ev., § 13. The intent must be criminal and so alleged. R. S., c. 119, § 1; *People* v. *Johnson*, 1 Parker's Crim. Rep., 564; *Com.* v. *Slack*, 19 Pick., 307; *same* v. *Collins*, 2 Cush., 558; *same* v. *Boynton*, 12 Cush., 499; *same* v. *Buckheimer*, 14 Gray, 29.

Defective indictment not cured by verdict. 2 Hale's P. C., 193.

If any one fact or circumstance which is a material element in the crime, as defined by the statute, be omitted, the indictment will be bad. 1 Arch. Crim. Pr., 86; *Com.* v. *Bean*, 11 Cush., 414.

The words "wickedly," "maliciously," are mere matters of aggravation. 6 East, 472; *Com.* v. *Dougherty*, 6 Gray, 349; *Smith* v. *State*, 33 Maine, 49–58. The provisions of the statute must be formally and fully set out. *State* v. *Learned*, 47 Maine, 430.

There is a distinction between the statutes of Massachusetts and Maine descriptive of arson, hence precedents of indictment are not the same. Until Public Laws of 1828, c. 430, § 4, intent was not an element of arson by our statute, but it has been ever since.

The wilful and malicious setting fire to a dwellinghouse

may be a wrong and a misdemeanor, and yet done without an intention to burn it; as in *People* v. *Cotterel*, 18 Johns., 115; *State* v. *Mitchell*, 5 Ired., 350.

Grammatically, as well as by the ordinary rules of the construction of language, "the intent" was designed to apply to each of the offences, and to constitute an essential element of each described in R. S., c. 119, § 1.

N. Webb, County Att'y, *contra*.

KENT, J. — The question made in this case is, — whether an indictment, charging the prisoner with having feloniously, wilfully, and maliciously set fire to and burned and consumed a dwellinghouse in the night time, is fatally defective, because it does not allege in terms that it was done "with intent to burn such dwellinghouse."

The indictment was framed under § 1, c. 119, R. S., which provides that "whoever wilfully and maliciously sets fire to the dwellinghouse of another, or to any building adjoining thereto, or to any building owned by himself or another, with the intent to burn such dwellinghouse, and it is thereby burnt in the night time, shall be punished by death."

It is undoubtedly well settled at common law that the indictment must set out all the ingredients of the offence, and all the matters, whether of intention or of act, which are essential to the description of the offence in the statute. If, therefore, the fair construction of the statute is that the words "with the intent to burn such dwellinghouse," are to be applied to the whole description of the offence of burning, contained in this section, we should strongly incline to hold the indictment defective. But the government contends that these words only apply to and qualify the act of setting fire to any adjacent building, by which the dwellinghouse is burnt.

The substantive offence, and the only one described in this section, is the burning of a dwellinghouse in the night time. There is but one offence here set out. This section does not provide punishment for setting fire to and burning an

adjacent building, — even with intent to burn also a dwellinghouse adjacent if the dwellinghouse is not thereby burned, — nor does it punish such burning of such adjacent building, if burned with intent to consume the dwellinghouse, even when the dwellinghouse is thereby burned. The offence is the burning of *the dwellinghouse*, and the burning of the adjacent building is regarded as the means used to burn the dwellinghouse when set on fire with that intent. It does not follow that because a man wilfully and maliciously sets fire to a building, not a dwellinghouse, and by reason of the burning of that outhouse a dwellinghouse is consumed in the night time, he is guilty of a capital offence. Another element must enter into the offence before his life is forfeited. He must have set the fire with intent to burn the particular dwellinghouse, which is in fact, by the burning of the first building, set fire to and burnt. A man may set fire to a detached, and apparently isolated, barn or outbuilding with a felonious intent to burn that building, and that only. And for this act he may be punished, but not capitally. And yet a dwellinghouse may be burned by reason of the kindling of the fire, although not anticipated by any one, and clearly not intended by the incendiary.

When a person is charged with having directly set fire to the dwellinghouse of another, it is enough to charge that he did set fire to the house itself, and that it was thereby burned, feloniously, wilfully and maliciously. The intent to burn is necessarily indicated and included in the charge so made. But if he did not set fire directly to the house itself, but did cause its destruction, by setting fire to it by means of kindling another fire, then the intent to do more than burn the first building must be set out, for the reasons before stated.

An examination of previous statutes on this subject confirms this view.

The Act of 1821, c. 4, § 1, enacted that, "if any person shall wilfully and maliciously set fire to the dwellinghouse

of another, or to any out-building adjoining to such dwellinghouse, or to any other building, and, by the kindling of such fire or by the burning of such other building, such dwellinghouse shall be burnt in the night time," the offender shall suffer death.

It will be observed that the distinction, before alluded to, is clearly made between a fire set directly and one which indirectly causes the destruction. But it was seen that the penalty of death was imposed, if a dwellinghouse was burned in the night time, by reason of a fire set to any other building. The intent was not alluded to. Therefore, in 1829, (c. 430,) this section was repealed and a new one substituted, in the same words, except that after the words, (as above set out,) " or to any other building," these words were inserted, " with the intent that such dwellinghouse shall be burned." Here, for the first time, we find those words, and they plainly show that the intent named had reference to the firing of the out-building alone.

The Act of 1841, R. S., c. 155, § 1, inserted another clause, which made it equally an offence to set fire to one's own building as to that of another, if the intent was thereby to burn another's dwellinghouse.

This law of 1829, with this addition, was incorporated into the R. S. of 1841. The whole section was condensed in the section of R. S., 1857, under which this indictment was drawn, with no apparent intent to change the former law in any particular. The subsequent sections of this chapter also show that the construction of the first section contended for by the prisoner's counsel is not correct. Those sections relate to the burning of other buildings, which are set fire to directly, and burned. The words there used, to describe the offence, are " wilfully and maliciously." The words " with intent to burn such building" are not inserted in those sections. There is no apparent reason why they should not have been inserted, if, in the first section, these words were intended to apply to a case where a dwellinghouse was itself set fire to. The " intent" named must be

limited to the case of setting fire to another building for the purpose and with the intent that, by such kindling, a particular dwellinghouse should be burnt and it is burnt.

It is to our minds perfectly clear, on a full and careful examination and consideration, which, in view of the importance of the case, we have felt it our duty to make, that the objections made to the sufficiency of the indictment cannot be sustained. *Exceptions overruled.*

Indictment good.

Judgment for the State.

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

CYNTHIA J. MERRILL *versus* JACOB P. SHATTUCK.

To enable a divorced wife to recover her dower in the real estate of him from whom she has been divorced, she must prove a demand the same as if she were prosecuting her suit as a widow.

To constitute a legal demand for dower, there must be a verbal or written request to the other party to do the definite act of setting out the demandant's dower in certain lands sufficiently described.

Negotiations or discussions upon the subject of her dower, between the parties; or propositions for a compromise or for a relinquishment of her right for a sum of money, made and considered; or the proposal of certain persons named as arbitrators to set out the dower in lieu of legal proceedings, are not sufficient to constitute a demand.

ON REPORT.

DOWER, by the demandant, who had been legally divorced from the bonds of matrimony between her and the defendant, Nov., 1862.

The three following letters from F. O. J. Smith, demandant's attorney, to the defendant, were read as evidence of a demand: —

"Aug. 21, 1863. — Can we agree on either three of the following persons, as appraisers to set off dower in the sev-

eral parcels of real estate, to which your former wife is entitled." [Here follow the names of seven persons.] "If so, please inform me. If not, say on what names will you agree, and save proceedings in Court on the subject."

"Sept. 18, 1863. — In lieu of other proceedings for setting off the dower in your several parcels of property in favor of your former wife, can we agree on either of the three following persons as appraisers?" [Here follow the names of fifteen persons.] "It seems as if from these we can agree on three and proceed immediately to a set-off. And what can we do respecting the property in Massachusetts, and in Ohio? Can we agree amicably for set-offs there?"

"March 19, 1864. — I find a writing of reference between you and Mrs. Cynthia J. Merrill, for setting off dower, and met with an entirely new proposal, to which we cannot consent, viz., the set-off to be either in separate parcels, or in one parcel. This we cannot consent to, and if you insist on it, that ends a reference. Please inform me before Monday noon of your decision."

Also a letter from Shattuck to Smith as follows:

"Oct. 17, 1863.

"Your note of the 18th ult. did not reach me until the 13th inst. I respectfully beg to say, I will agree that John Read, Jonas Raymond and Hosea Kendall, (of Portland,) may act as appraisers, or commissioners, in setting out her dower to my former wife in my estate in Maine, and am ready to complete the arrangement at any time. In regard to your proceedings in other States, I have nothing to suggest."

It appeared from evidence introduced by the demandant, that there were several personal interviews between her attorney and the defendant concerning the matter of setting off her dower, but as to the demand the attorney testified: "The demand I made of dower for the demandant was in the form of a letter. Cannot state what description of the lands there was in my letters to Shattuck, if any, but he understood what lands were referred to."

After the testimony was all in, the case was withdrawn from the jury and submitted to the full Court.

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

1st. Demand of dower may be made by parole. *True* v. *Stubbs*, 35 Maine, 92; *Curtis* v. *Hobard*, 41 Maine, 230. It may be proved by admissions of the tenant, or it may be inferred from facts and circumstances. *True* v. *Stubbs*, above.

2nd. A request or demand for dower may be laid at one time, and proved at another time. 1 Esp. N. P., 137.

3d. In case of decree of dower by the Court, conjunctively with a decree of divorce, no demand subsequently is necessary to support an action for dower.

"No notice or special demand is necessary, where the thing to be done rests equally in the knowledge of the defendant as of the plaintiff." *Farwell* v. *Smith*, 12 Pick., 83; *Hobard* v. *Hilliard*, 11 Pick., 143; *Lent* v. *Paddelford*, 10 Mass., 230.

4th. The demand in this case, although not needed, is proved in the testimony submitted, both in writing and by parole.

5th. The demand, if needed, is proved to have been made within the year preceding the date of the writ, and so seasonably under the statute.

Geo. F. Shepley & A. A. Strout, for the defendant.

KENT, J.—The question is whether a demand was legally made for dower, or, if not, whether any demand was necessary. As to the last question, we have no doubt that a demand is necessary, when a divorced wife claims dower in the estate of the husband. The statute which gives her this right says, that this "dower in his real estate is to be recovered and assigned to her as if he was dead." If he were dead, the statute, c. 103, §§ 18, 19, provides the mode of procedure, to wit, if her dower is not set out to her by the heir or tenant of the freehold, or assigned to her by the

Judge of Probate, she must demand her dower of the person who is at the time seized of the freehold, but she shall not commence her action before the expiration of one month, nor after the expiration of one year from the time of the demand. We see no reason why a divorced wife should be exonerated from making such demand. There is no statute exempting her from pursuing the same course to obtain her dower, as if her husband were dead.

Was there a sufficient demand made in this case, on the proof before us? This is a question of fact. No particular form is required. Nor is it essential that it be made in writing. But it must be shown that in some form a demand or request was made on the party who held the land, that he should do a precise and defined thing, viz., — set out to the demandant her dower in certain lands sufficiently described. It is not enough to show negotiations or discussions between the parties on the subject of her dower, or that propositions for a compromise or for the relinquishment of her right, for a sum of money, had been made and considered, — or that the suggestion had been made, that certain arbitrators might set out the dower in lieu of legal proceedings, by amicable arrangement. All these failing, if the wife would resort to her strict legal rights, she must make a demand on the other party to do this one specific act. It would be clearly unjust to the party holding the land, to allow the other party, pending these negotiations, to commence a suit for dower before there was an end of them. Whenever the demandant chooses to put an end to negotiations and to pursue legal remedies, her demand of dower will inform the other party that, if he does not set it out within thirty days, a suit may be commenced.

It seems, from the testimony of the demandant's attorney, that the only demand made was in form of a letter.

The defendant testifies that no demand of dower, in any form, was ever made on him, and that the three letters in the case were all that were ever received by him in relation to this dower. The first two of these letters relates to a

proposition to select certain men to appraise and set out dower, "in lieu of other proceedings." It is also suggested that, if the parties could agree on three men, they could "proceed immediately to a set-off." In the last letter, he objects to what he deems a new proposal, and says "if this is insisted on, that ends a reference," — and concludes with a request to be informed of his decision. This seems to leave the parties where they were when negotiations commenced. We cannot find the evidence of a demand to have dower set out required by law.

Plaintiff nonsuit, without prejudice to an action on a new demand of dower.

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

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CYNTHIA J. MERRILL, (*late* SHATTUCK,) *pet'r for review*, *versus* JACOB P. SHATTUCK.

A petition for a new trial in respect to the specific sum decreed instead of alimony, on the ground of the discovery of new evidence, is fatally defective, unless,

1. "The names of the witnesses to prove it and what each is expected to testify, be stated under oath;" and unless,

2. It alleges that "the parties have not cohabited since the former trial, and that neither of them has contracted a new marriage."

ON EXCEPTIONS.

PETITION for a new trial in respect to the specific sum decreed to the petitioner instead of alimony.

The petition alleged that the specific sum decreed was "wholly disproportionate to her just claims, and that she has since discovered that the representations then made by this respondent of his property and income were fraudulent, false and unjust towards her," &c.

The presiding Judge ruled *pro forma* that the decree of alimony cannot legally be revoked and the question reopen-

ed and readjusted upon this petition; and the petitioner alleged exceptions. The remaining facts appear in the opinion.

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

Geo. F. Shepley & A. A. Strout, for the respondent.

KENT, J. — This is a petition for a review and new trial, in respect to the alimony, or specific sum granted instead of alimony, at the time a divorce was decreed on libel of the wife.

Several objections are made by the respondent, to the granting of such a review. The petition alleges that since the trial she has discovered that the representations then made were false and fraudulent. The statute in relation to reviews, c. 89, § 3, requires that, "when a discovery of new evidence is alleged in the petition, the names of the witnesses to prove it, and what each is expected to testify, must be stated under oath." This condition has not been complied with. There are no names of witnesses and no oath administered. This seems fatal. The second objection is that this Court had no power to grant a review of a part only of the decree, before the statute of 1863. It seems that the Legislature originally made special provision as to reviews and new trials in cases of divorce, as those cases were somewhat exceptional in their nature. The power to grant such application was limited to the cases where the parties had not cohabited since the former trial, nor either of them had contracted a new marriage. R. S., c. 60, § 8. This power was extended by Act of 1863, c. 211, §§ 2, 3, which gives the power to the Court, on petition of the party aggrieved, to grant a new trial, either in respect to the divorce granted, or amount of alimony, or specific sum instead of alimony, when the parties have not cohabited since the former trial, nor either of them contracted a new marriage.

There is no allegation in this petition that the parties have not cohabited, or that neither has contracted a new marriage.

It seems to be understood that, in fact, one of them has since married. The Legislature having seen fit to annex this condition to the exercise of the power to grant a review in case of divorce, even when the question is only one of alimony or allowance, we are not at liberty to override it.

The probable reason for the original restriction was, that public policy and domestic harmony, and the rights of the second husband or wife, whose marriage was legal, all required that, when a divorce had been legally decreed and the new relation formed, the question of divorce should not be opened. These reasons do not apply with much, if any force, to the question of alimony. The opening of that question would not affect the subsequent relations or conditions of the parties. The Legislature, however, has not made any distinction, but retains the condition in both cases.

Petition dismissed.

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

CHARLES R. FROST *& al. versus* JOSEPH ILSLEY, *Adm'r.*

To entitle a party, under the U. S. Judiciary Act of 1789, § 25, to cause to be reexamined in the Supreme Court of the U. S., upon a writ of error, a final judgment rendered in the highest Court of this State, in which was drawn in question the validity of a statute of the State on the ground of its being repugnant to the constitution of the United States; it must appear that such statute was not only decided to be valid, but that such decision was indespensable to the judgment here, and that, without it, the judgment would have been in favor of the other party.

ON EXCEPTIONS.

ASSUMPSIT to secure a mechanic's lien, reported 54 Maine, 345. At a *nisi prius* term, held January, 1868, the presiding Judge, on motion of the plaintiff's counsel, ordered the

clerk, in making up the record of the case, to set forth therein the following:—

"In this cause there was drawn in question the validity of a statute of the State of Maine, to wit, a statute passed March 29, 1858, entitled 'An Act to amend section sixteen of chapter ninety-one of the Revised Statutes, relating to lien claims,' on the ground of its being repugnant to the constitution of the United States; and the decision of the Court is in favor of its validity," reserving to the defendant the right of exceptions; and thereupon the defendant alleged exceptions.

Davis & Drummond, for the defendant.

Howard & Cleaves, for the creditors of the intestate's estate.

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

DANFORTH, J.—We acknowledge the duty, as it is the pleasure of the Court, to afford all needful facilities to parties to carry their causes to the tribunal legally competent for the correction of such errors as may have occurred in the decision of such causes. In so doing, however, the rights of both parties are to receive equal care and equal protection. The 25th section of the Act of the United States, commonly known as the Judiciary Act, provides that cases, in which final judgment has been entered in the highest State Courts, involving certain questions therein enumerated, may be carried to the Supreme Court of the United States for revision.

The plaintiffs, claiming that the case at bar comes within this provision, move that a clause of the following tenor be inserted in, and made a part of the record of the case, viz.: "In this case there was drawn in question the validity of a statute of the State of Maine, to wit, a statute passed March 29, 1858, entitled 'an Act to amend section sixteen of chapter ninety-one of the Revised Statutes, relating to lien claims,' on the ground of its being repugnant to the consti-

tution of the United States; and the decision of the Court is in favor of its validity."

If this clause be true, and needful to secure the plaintiffs' rights, their motion should be granted, if otherwise, the granting of it might put in jeopardy the rights of the defendant. In order to avail the plaintiffs, the language used in their motion must be so interpreted as to convey the meaning, that the statute of 1858 was not only decided to be valid, but that such a decision was necessary to the judgment rendered by this Court and, without it, the judgment would have been for the plaintiffs.

In *Crowell* v. *Randell*, 10 Peters, 368, this question was discussed, and all the cases previously reported cited and commented upon. It was there held, on page 392, that it must appear "that the question was made, and that the Court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

So, in *Commercial Bank* v. *Buckingham's Executors*, 5 Howard, 317, GRIER, J., on page 341, says:—"It must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment." In all the cases which have been brought to our notice, in which this question has been raised, the same doctrine has been held, and we apprehend that it is now well settled law. If this is to be the interpretation of the clause asked to be inserted in the record, it is clear we cannot grant the motion without depriving the defendant of a right which he claimed at the hearing, and still claims, and which the law gives him, that of having the question settled as to whether the plaintiffs have a lien independent of the Act of 1858. This question has not yet been decided. True, the statute referred to was held valid, as applied to the plaintiffs' case; but it was not decided that its validity was necessary to the judgment rendered, or that the lien claimed by the plaintiffs would be good without it. On the other hand, in the opinion in that case, as reported

in 54 Maine, 345, —"the various objections urged by the defendant to the validity and sufficiency of the attachment," are passed over without a decision, with the remark that "it is unnecessary to consider" them. These objections were entirely independent of the statute of 1858.

It is true that in the opinion is found the remark, page 350, that, "considering the long lapse of time during which the hotel 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, (the time of payment,) 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." But this is not the decision of the Court. It is not necessarily the conviction of the learned Justice who drew the opinion. It is not a direct statement of the law, but it is put in the potential form, we might hold, &c., and not we do hold.

But, observe further, so far as it is a statement, it is that the lien might still attach to the contract, as thus modified and varied by the original parties to it, &c. On looking at the writ, we find that the plaintiffs did not rely upon any express contract, either as originally made or "as modified and varied by the parties to it." Therefore there is no occasion for deciding the question, whether the plaintiffs had a lien upon the original contract, or as modified, but only whether their claim of lien, as presented in their writ, could be sustained, and this question, an important one to the defendant, is still open. And we deem it not only probable, but quite certain that, upon this question alone, without the statute of 1858, the judgment of the Court would have been the same as it now is. It will be seen therefore, that, if the motion of the plaintiffs is granted with such an interpretation as will avail them, the defendant would be precluded from a hearing upon this question in the Court above,

and possibly every where, and thereby suffer injustice. If the case is to go up, the rights of the parties require that the whole should go together; then the Court above can judge for themselves whether the Act of 1858 was indispensable to the judgment rendered by this Court, and this we understand to be the law as applicable to such matters. While the granting of the motion is not safe for the defendant, it is not necessary to the plaintiffs.

In *Crowell* v. *Randell*, above cited, and in the cases there referred to, it is held "that it is not indispensable that it should appear on the record, *in totidem verbis* or by direct and positive statement, that the question was made and the decision given in the Court below on the very point; but it is sufficient, if it is clear, from the facts stated, by just and necessary inference." The remarks of STORY, J., in *Martin* v. *Hunter's Lessee*, 1 Wheaton, on pages 255-6-7-8, set this point in a clear light, and are particularly applicable to the case at bar. See also *Harris* v. *Devine*, 3 Peters, 292; *Craig* v. *The State of Missouri*, 4 Peters, 410; *Davis* v. *Packard*, 6 Peters, 41.

In *Commercial Bank* v. *Buckingham's Executors*, 5 Howard, 317, and *Lawler* v. *Walker*, 14 Howard, 149, the Court go further and refuse to take jurisdiction of those cases, notwithstanding there were certificates from the State Courts similar to the one asked for in the case at bar, for the reason that, when the whole case was examined, it was found to be not within their jurisdiction. The fair inference from these cases is that the appellate Court will examine the whole record and judge for themselves whether it presents a case within the 25th section of the Judiciary Act.

In applying this principle to the case at bar, we should bear in mind that this came before the Court upon an agreed statement of facts, which are equivalent to a special verdict, and become a part of the record. This record presents all the questions to be decided. The Court above will take judicial cognizance of our laws, and can see, and will, as in the cases above cited, judge for themselves whether, with-

out the statute of 1858, on the case presented, the plaintiffs have the lien they claim. If they have, it will follow, "by clear and necessary intendment," "by just and necessary inference from the facts stated," that the Act of 1858 was indispensable to the judgment rendered by this Court, and that its validity, as applicable to this case, was sustained. If, on the other hand, there is no lien by the law as it was at the time the materials and labor were furnished, then the Act of 1858 becomes of no consequence. The rights of the defendant require such a presentation of the case, and the rights of the plaintiffs do not suffer by it.

Exceptions sustained.

KENT, DICKERSON and BARROWS, JJ., concurred.

TAPLEY, J., concurred in the result.

CHARLES C. COBB *versus* CITY OF PORTLAND.

A city is not liable for a personal injury sustained by one while aiding, at their request made in accordance with a city ordinance,* its police officers, in arresting violent disturbers of the public peace.

ON EXCEPTIONS.

An action for a personal injury received from certain malefactors, while aiding the police officers of the city in arresting them. The officers being unable to arrest the offenders, requested the plaintiff, by virtue of a city ordinance, to aid them. While complying with such request, the plaintiff received a severe injury in his side, by a kick from one of the party sought to be arrested.

The defendants demurred to the declaration, and the pre-

* "If any person shall neglect or refuse to aid and assist the police, or any member thereof, when called upon so to do, he shall forfeit and pay not less than five nor more than twenty dollars." *Revised Ordinance of Portland*, 1856, p. 185, § 11.

siding Judge sustained the demurrer; whereupon the plaintiff alleged exceptions.

F. O. J. Smith and B. D. Verrill, for the plaintiff, cited Story on Agency, c. 13, § 339; 2 Kent's Com., 775; Story on Bail., § 201.

Davis & Drummond, for the defendants.

DICKERSON, J. — This is a case of novel impression, and involves an important principle. A police officer of the city of Portland, by authority of a city ordinance, the validity of which is not controverted, called upon the plaintiff to aid him in arresting certain turbulent persons who were disturbing the public peace. The plaintiff obeyed the summons, and was severely injured by one of them, while in the performance of that service. The question to be determined is, whether the plaintiff has a remedy against the city of Portland for such injury.

As the statute does not expressly provide a remedy against the city in such case, such liability, if any there be, must be founded in tort or contract.

It is not claimed that the city committed any tort in passing the ordinance, or the policeman in applying it. Nor was there an express contract of indemnity. Was there an implied one?

Assuming that, by consenting to perform the service, as requested, (for it was optional with him whether to do so, or subject himself to a small fine,) the plaintiff became the agent or servant of the defendant, would the defendant be liable for the injury complained of? While it is true, as argued by the counsel for the plaintiff, that an agent or servant in certain cases is entitled to full compensation for any pecuniary losses he may sustain in the course of his employment, without fault on his part, it is otherwise in respect to compensation for personal injuries received in such service.

The master is not responsible for any accident happening to his servant in the course of his service, unless the master

knew that it exposed the servant to peculiar danger, and the servant did not. The general rule governing the relation between master and servant in this respect is, that the servant takes upon himself the natural and ordinary risks and perils incident to the performance of such service, and the law presumes that the contract is adjusted upon this principle. This doctrine has been carried so far as to exonerate the master from liability for an injury to one servant, received in consequence of the carelessness of another engaged in the same service, when he has used due diligence in the selection of competent and trusty servants, and furnished them with suitable means to perform the service in which they are employed. *Buzzell* v. *Laconia Manufacturing Co.*, 48 Maine, 113; *Priestly* v. *Fowler*, 1 M. & W., 1; *Braun* v. *Maxwell*, 6 Hill, 594; *Farwell* v. *Boston & Worcester Railroad Co.*, 4 Met., 57.

The demand for assistance advised the plaintiff of the turbulence of the disturbers of the peace, and the risk he ran in attempting to arrest them. There is no pretence that the nature or the extent of the danger was concealed from him, or that he did not comprehend them both as fully as the officer. If, therefore, the plaintiff, in consenting to render the service requested, became the agent or servant of the city of Portland, he has no legal claim upon it for indemnity, upon the principles of the authorities cited.

But the plaintiff was not the agent or servant of the city of Portland; nor was the policeman whom he assisted. Both were acting under the authority of the State as the conservators of the public peace, the peace of the State, not the peace of the city of Portland alone. It is true they derived their authority immediately from the city of Portland, but that was done by Act of the Legislature as a matter of convenience. While engaged in the service stated, they represented the authority and dignity of the State, and not that of the city of Portland merely. The obligation devolved by statute upon the city of Portland to appoint police officers, in order to promote the general welfare and preserve

the peace of its inhabitants, or the community, confers no particular interest, benefit or advantage upon it in its corporate capacity, and creates no liability on its part for the acts of these officers. Nor does it *a fortiori* insure the safety of their persons by indemnifying them against any personal injuries they may receive from others, or from the accidents that may befall them in the discharge of their duty. If such officers have any claim for compensation for such injuries, it rests on moral grounds, and is more properly addressed to the Legislature than to a judicial tribunal. *Fox* v. *Northern Liberties*, 3 W. & S., 103; *Butrick* v. *Lowell*, 1 Allen, 172.

Even municipal officers proper, who are not entrusted with the preservation of the public peace, are not the agents or servants of the cities or towns by whom they are chosen, rendering their principals liable for their acts as such. The liabilities of municipal corporations are fixed by statute, and do not depend upon any so uncertain contingency as the conduct of their officers. For such liabilities alone have they authority to raise money. *Small* v. *Inhabitants of Danville*, 51 Maine, 360; *Mitchell* v. *City of Rockland*, 52 Maine, 118.

The doctrine of liability on account of "a compulsory agency without hire," ingeniously suggested by the counsel for the plaintiff, but unsupported by authority, does not relieve the plaintiff's case from these difficulties. There was no physical compulsion. If compulsion there was, it was a moral compulsion, arising from the alternative of compliance, or liability to a small pecuniary fine. But this alternative, as we have seen, was presented by authority of the State and not the defendant. There is no ground, either at common law or by statute, upon which this action can be maintained. *Exceptions overruled.*

Judgment for the defendant.

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

JOHN GODDARD *versus* EBEN S. COE *& al., Ex'rs.*

A stipulation, that the conveyance is to be void upon payment of the sum due thereon, is one of the essential elements of a mortgage.

By a sealed instrument, signed by both parties, the plaintiff conveyed to the defendant's testate, certain timber as security for the former's indebtedness to the latter, and stipulated that, if the plaintiff paid such indebtedness according to its terms, the defendants' testate would "transfer" said timber and "whatever proceeds thereof" he might thereafter receive to the plaintiff, discharged of all claims; that, if the indebtedness was not paid as stipulated, the defendants' testate might "sell and dispose of so much of said timber as shall pay and reimburse him;" that, when paid by a sale of a portion of the timber, the defendants' testate was to "transfer to the plaintiff all the timber undisposed of, free from all claims." In trover for selling more of the timber than was necessary to discharge the plaintiff's indebtedness: — *Held*, —

1. That the contract was not a mortgage;
2. That trover would not lie;
3. That an action on the contract is the proper remedy.

ON REPORT.

TROVER, for the conversion of the plaintiff's logs by David Pingree (defendant's testate) in his lifetime. The writ was dated Jan. 6, 1862; the specifications of defence deny the plaintiff's title and also the conversion.

The plaintiff introduced a sealed instrument, executed by the plaintiff and David Pingree, dated July 24, 1861, which, after stating the several large sums of money due and owing from the plaintiff to David Pingree, for stumpage on timber cut on lands of Pingree under licenses, proceeds as follows:—

"And whereas the said timber and logs, or a large part thereof, are now situated in and upon the waters and shores of the St. John River, * * in ponds, booms or otherwise on the way to market, according to the conditions of said licenses, and whereas the said Goddard has other timber and logs, in and upon said shores and waters, in ponds, booms, or otherwise on the way to market, intermixed with the timber and logs first aforesaid, and whereas the said Goddard

has not paid said stumpages according to the conditions of said licenses, and is desirous of further time, to pay the same, and is desirous of further assuring to said Pingree, his title to the aforesaid timber and logs, and further securing the payment of said several sums of money, owed by him as aforesaid: —

"Now it is agreed, by and between the said Goddard and said Pingree, as follows, to wit: —

"1. The said Goddard, in consideration of the premises, and of the several sums of money due from him to the said Pingree, * * * * as aforesaid, hereby grants, bargains, sells, releases, transfers and delivers to the said Pingree, his executors, administrators and assigns, to his and their sole use forever, all the timber, logs and lumber belonging to him the said Goddard, * * * situated in or upon the waters or shores of said St. John river, or in the ponds or booms thereon, or in his mill, mill yard, or mill pond at Carleton, in said Province, wherever the same may be found, a schedule of which, as nearly as practicable, is annexed hereto; and said Goddard agrees with said Pingree that he will at his own expense forthwith deliver all said timber, logs and lumber to Mark Barker, the agent of said Pingree, who is hereby authorized to take possession thereof, wherever situated, for said Pingree, and that the said Goddard will, at his own expense, and under the direction of said Barker, cause all said timber, logs and lumber to be driven to and secured at such places as said Barker shall designate for said Pingree, said Goddard and his agents and servants, at all times, holding the same, while temporarily having custody of it, for the purpose aforesaid, for said Pingree and his agent, said Barker.

"3. The said Pingree further agrees with said Goddard, that, if said Goddard shall within thirty days from the date hereof, pay to him the amount of said Goddard's indebtedness as aforesaid and his costs in this behalf, either in cash, or by the acceptance of," [certain persons named,] "on six and twelve months, payable at Suffolk Bank, in Boston,

Massachusetts, with interest added, making the same equal to cash, that then the said Pingree will transfer the aforesaid timber, logs and lumber, and whatever proceeds thereof he may hereafter receive, to said Goddard, discharged of all his, said Pingree's, claims thereon.

"4. And it is mutually agreed between said Goddard and said Pingree that, in case the said Goddard shall not, on or before the first day of November next, pay to said Pingree the full amount of his aforesaid indebtedness, and the cost and expenses of said Pingree and his agents, except the services of said Barker, in relation to said timber, logs and lumber, then the said Pingree may sell and dispose of so much of said timber, logs and lumber, as shall pay and reimburse to him all of the same and his costs, in making said sale; said sale to be at public auction, or by private sale, at such terms and in such quantities as said Pingree may elect, and that the said Pingree, after having fully reimbursed and paid to himself all said indebtedness, cost and charges, shall transfer to said Goddard all said timber, logs and lumber, which may remain undisposed of, free from all claims to be made by him."

The plaintiff then offered to prove that, on Nov. 6, 1861, Pingree sold at a price less than one-third their actual value, enough of the logs described in the sealed instrument, to bring the sum of $35,000, nearly $10,000 more than was actually due to him, including all expenses, and, on the same day, redelivered the balance of the logs to the plaintiff's agent, and that Pingree made the over-sale knowingly, or carelessly and recklessly.

The presiding Judge ruled that, under said agreement, when the logs were delivered to Pingree, the legal title became vested in him to secure the amount due to him from Goddard; and that, though Pingree had no right to sell more than enough to pay the amount due to him, still, for any wrongful over-sale made by him, he was not liable in this form of action; and a nonsuit was thereupon ordered.

The case was then reported to the full Court, with an

agreement that, if the ruling was right, the nonsuit should be confirmed.

J. H. Drummond, for the plaintiff.

The instrument was not an absolute sale. It was to secure and not to pay. It was a mortgage, with a power to sell enough to pay the debt,—no more. After Pingree sold enough to pay the debt, his power of sale ceased. No particular form of words is necessary to constitute a mortgage. An absolute deed from a debtor, with a separate agreement to reconvey, by the creditor, is a mortgage. 1 Hill. on Mort., 18, 34, a; *Ibid,* c. 2, § 1. Counsel also cited 2 Hill. on Mort., 278, and *infra; Parks* v. *Hall,* 2 Pick., 206; 2 Hill. on Mort., 457; *Gordon* v. *Mass. F. & M. Ins. Co.,* 2 Pick., 249.

Trover will lie for a cause growing out of a contract. *Homer* v. *Thwing,* 3 Pick., 492; *Rotch* v. *Hawes,* 12 Pick., 136. See also, *Smith* v. *Hodsdon,* 4 Tenn., 211; 2 Greenl. on Ev., 640.

Shepley & A. A. Strout, for the defendants, cited

Briggs Iron Co. v. *N. Adams Iron Co.,* 12 Cush., 114; *Burdick* v. *McLane,* 2 Denio, 170; *Plunkett* v. *M. E. Church,* 3 Cush., 561; *Hoadly* v. *McLane,* 10 Bing., 487; *Smith* v. *Hodsdon,* 4 Tenn., 211; 2 Greenl. on Ev., 640; Story on Sales, § 221.

APPLETON, C. J.—A mortgage is the conveyance of real or personal estate for the security of a debt by way of pledge, and to become void upon its payment.

The contract under seal between the plaintiff and David Pingree, dated July 24, 1861, was not nor was it intended to be a mortgage. By its terms, certain lumber, logs and timber, were conveyed by the plaintiff to said Pingree as security for the plaintiff's indebtedness to him. If the plaintiff should pay the various claims set forth in the contract according to its terms, Pingree was to "transfer the aforesaid timber, logs and lumber, and whatever proceeds thereof he

may hereafter receive, to said Goddard discharged of all his, said Pingree's, claims thereon." If the debt was not paid as stipulated, Pingree had the right to "sell and dispose of so much of said lumber, logs and timber as shall pay and reimburse him * * * * and his costs in making said sale," &c. When paid by a sale of a portion of the logs, Pingree was to "transfer to said Goddard all said timber, logs and lumber, which may remain undisposed of, free from all claims to be made by him." There are other stipulations not material to be considered.

The title to the timber, logs and lumber, was to remain in Pingree until he should "transfer" the same to the plaintiff. The estate was not to revest in the plaintiff upon payment by him of the sums due. It was to be transferred to him. The conveyance was not to be void upon payment of the sum due, which is one of the essential elements of a mortgage.

The remedy for the plaintiff is upon the contract, and upon that, if violated, the law will give him ample indemnity. *Plaintiff nonsuit.*

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

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

The defendant sold to the plaintiffs in the Province of New Brunswick, 800 tons of timber to be delivered by a third person, and received his pay therefor. Subsequently, the plaintiffs sued the defendant in New Brunswick, for an alleged non-delivery of the timber, and, upon trial, recovered judgment for an amount equal to the original price paid for the timber. In the trial of an action subsequently commenced here by the defendant against the plaintiffs, for the price of the timber, the defendant offered to prove that 620 tons of the timber sold were delivered to the plaintiffs before the commencement of their foreign suit against him and 38 tons after the commencement, but before the trial of the same action; — *Held*, 1. That these facts should have been set up, the former in defence, and the latter in mitigation of damages in the foreign suit; and,

2. The foreign judgment having been rendered by a Court having jurisdiction of the parties and the subject matter, and not having been impeached, is conclusive here.

ON EXCEPTIONS.

On Dec. 20, 1855, the defendant, a citizen of this State, at St. John, in the Province of New Brunswick, sold to the plaintiffs, citizens of the latter place, 800 tons of merchantable white pine timber, to be delivered by one Josiah Adams, receiving therefor the plaintiffs' acceptance, for £1790, on three months, which was duly paid at maturity. The timber not having been delivered according to the contract, the plaintiffs, in August, 1856, at St. John, commenced an action against the defendant in the Supreme Court of New Brunswick, for damages for the non-delivery of the timber. At the trial in June, 1858, the defendant personally appeared and contested the suit upon the ground —

(1.) That the plaintiffs' claim for non-delivery was upon Adams.

(2.) That the defendant was discharged for want of notice within a reasonable time of the non-delivery; but the decision was adverse to him.

On April 4, 1861, the defendant sued the plaintiffs in this county for the timber, recovered judgment Feb. 7, 1863, for $10,792 debt and $20,75 costs, and satisfied the execution issued thereon by a levy on the real estate within this State of the judgment debtors.

Subsequently, the plaintiffs petitioned this Court for a review of the action, Goddard against them, which being granted, they, on February 20, 1864, sued out this writ of review. At the October term, 1865, the case came up to this Court on facts agreed, (54 Maine, 28,) whereupon it was ordered to stand for trial.

At the Jan. term, 1868, before opening his case to the jury, Goddard, the original plaintiff, by leave, amended the original writ, by changing the date from Dec., 1855, to Dec., 1856, when 38 tons of the timber was alleged to have been delivered to the plaintiffs in review. Thereupon Goddard

offered to prove, *inter alia*, that, in 1856 and 7, he delivered into the actual possession of the plaintiffs in review 658 tons of the timber sought to be recovered, 38 tons of which were delivered after the commencment but before the trial of the suit against him in New Brunswick. The presiding Judge ordered a nonsuit, and the defendant alleged exceptions.

N. Webb, for the defendant.

Geo. F. Shepley and A. A. Strout, and Wm. McCrillis, for the plaintiffs.

DANFORTH, J.—This action has once been before this Court, and is reported in 54 Maine, 28. It was then decided that the judgment between these parties, rendered by the Supreme Court of New Brunswick, is not conclusive in this State, but that the jurisdiction of the Court might be inquired into, or the judgment impeached for fraud, and, for that purpose, the action was ordered to stand for trial. It now comes before us upon the evidence of the original plaintiff, the presiding Judge having ordered a nonsuit. It is not now pretended that the Court rendering that judgment had not jurisdiction both of the subject matter and of the parties, and a careful examination of the testimony fails to reveal anything, even tending to prove fraud. That judgment, therefore, stands unimpeached.

But it is now contended that the nonsuit was improperly ordered, because it was found that 658 tons of the timber sued for, was actually received by the original defendants, and it was a question for the jury, whether it was delivered before or after the date of the writ in New Brunswick, and that 38 tons of it were certainly delivered after the date of that writ. It will be found, from an examination of the testimony, that the 620 tons were delivered before commencement of the suit, and the 38 tons before the trial. It further appears that, not only the 620 tons, but the 38, were delivered in fulfilment of the contract of sale evidenced by the

acceptance of Dec. 19, 1855. This was, so far as appears, the only sale of timber from Goddard to Rankin & Co. Goddard himself states that this 658 tons were delivered and received "towards the 800 tons for which his acceptance was given, which I sold Rankin & Co." Now, all this timber, for which the acceptance was given, has been once paid for, and no reason is suggested why he should recover for it again.

Besides, the action in New Brunswick was for damages for the non-delivery of the timber, under that contract. The 38 tons having been delivered and received in part fulfilment of that contract before the trial, it was competent for the defendant to prove it in mitigation of damages, equally so as if delivered before the suit was commenced; and, if he neglected to avail himself of that, he has lost his remedy. There is no ground on which an implied promise to pay can rest. If, therefore, we view this action as one to recover pay for lumber delivered under the acceptance, it must fail, for payment has been made. If we consider the amendments proposed, as adopted, then, as an action to recover back the money paid under the foreign judgment, it must fail, for that judgment is unimpeached.

Nonsuit confirmed.

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

F. M. THAYER *versus* JOSEPH CHESLEY.

The alleged maker of a promissory note defended a suit thereon upon the ground that he could neither read nor write, and that the signature purporting to be his was not genuine. The plaintiff testified that the defendant wrote the signature in question by copying his name from a copy written for him, by the plaintiff, on another piece of paper. The plaintiff then called an expert in handwriting, and, after showing him a letter identified as the handwriting of the plaintiff, asked him, — "Do you not think it possible that a person unaccustomed to write, might copy the signature in question by the aid of another signature before him, written on a separate sheet of paper by the person who wrote the letter." — *Held*, that the question was not a proper one.

ON EXCEPTIONS to the ruling of GODDARD, J., of the Superior Court.

ASSUMPSIT by the payee against the alleged maker of a promissory note.

Plea, general issue, with an affidavit denying the signature.

The plaintiff testified that he saw the defendant write the signature to the note in suit, and that he did it by copying his name from a signature written by the plaintiff on another piece of paper, as a copy.

Several of the defendant's neighbors, called by him as witnesses, testified that they were well acquainted with the defendant; that they had never seen him write his name, but had frequently seen him make his mark, and produced nine notes and two mortgages bearing the defendant's mark.

Robert A. Bird, called by the plaintiff as an expert in handwriting, after being shown a letter identified as being in the plaintiff's handwriting, was asked by the plaintiff's counsel, among other questions not objected to, the following: — "Do you or not think it possible that a person unaccustomed to write, might copy the signature in question by the aid of another signature before him, written on a separate sheet of paper, by the person who wrote the letter?" which was objected to, but admitted by the presiding Judge.

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

T. H. Haskell, for the defendant.

J. W. Symonds, for the plaintiff.

DICKERSON, J.—Exceptions from Superior Court. This was assumpsit on a promissory note, and the question arose with regard to the genuineness of the signature. The plaintiff testified that the defendant signed the note in his presence by copying his name from a copy set him by the plaintiff on another piece of paper. The defendant testified that he did not sign it, that he is unable to read and write, and always makes his mark. The defendant also called several witnesses to prove that he was accustomed to make his mark, and also introduced certain mortgages and notes thus executed by him.

The plaintiff called an expert in handwriting, and, after showing him a letter identified by the plaintiff as in his own handwriting, put the following question to him:—"Do you not think it possible that a person unaccustomed to write, might copy the signature in question by the aid of another signature before him, written on a separate sheet of paper, by the person who wrote the letter in evidence?" The defendant's counsel objected to the question, but the Court overruled the objection and admitted the question, and the defendant excepted.

The question objected to does not involve the identification of the signature to the note, as the signature of the defendant, by persons having knowledge of his handwriting or by comparison of such signature with other writing proved or admitted to be his, the legal modes of proof in such cases, but the possibility that a person, not the defendant, unaccustomed to write, might make the signature in question from the aid of another signature, written by the plaintiff. An affirmative answer to the question, at most, would only show inferentially, not the probability, but the possibility that the defendant wrote the signature in ques-

tion. The question for the jury to decide was, not whether the defendant might have written the signature to the note, but whether he actually did write it. It would be unsafe to infer an actuality from an inferential possibility. If such testimony were admissible on the part of the plaintiff, it would be competent for the defendant to rebut it by evidence, — 1, that such a person could not thus write the signature in question, and, 2, that it would be impossible for him to do it, — an issue quite too remote to be serviceable in eliciting the truth called for by the pleadings. We know of no rule of law by which such a question is admissible.

The other instructions seem to have been as favorable to the defendant as he was entitled to. In this view of the case it becomes unnecessary to consider the motion.

Exceptions sustained.

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

ETHER SHEPLEY *& als., in Eq., versus* ATLANTIC & ST. LAWRENCE R. R. CO. & G. T. RAILWAY CO. OF CANADA.

A railroad company, pursuant to votes of their stockholders and directors, conveyed all their property and franchises to three trustees and their survivors and successors, by deed conditioned to be void upon payment of certain bonds issued by the corporation. It was stipulated in the deed that, if the company shall at any time fail to pay the interest or principal of the bonds according to their tenor, the mortgagees may take the mortgaged property into their actual possession, manage and control the same, and apply the net income and proceeds thereof to the payment of such interest and principal. On demurrer to a bill brought by the trustees against the corporation to obtain possession, — *Held*, —

1. That the mortgage having been ratified by statute, is valid; —
2. That, whether it was valid prior to such ratification, *quere*; —
3. That this Court has jurisdiction to decree a specific performance of the stipulation in the mortgage, authorizing the trustees to take possession of the mortgaged property for non-payment of the bonds; and, —
4. That a bill in equity is a proper form of proceeding to obtain it.

Shepley *v.* Atlantic & St. Lawrence R. R. Co.

BILL IN EQUITY, commenced by Ether Shepley, John Rand and George F. Shepley, trustees under a mortgage executed by the Atlantic & St. Lawrence Railroad Co., on the first day of April, 1851, a copy of which was annexed to the bill.

The mortgage conveyed to Ether Shepley, John Anderson and John Rand, and to their survivors and successors, "all the railroad of the Atlantic & St. Lawrence Railroad Co. situated in the counties of Cumberland and Oxford, in the State of Maine, and continued, and to be continued, through the northern parts of the States of New Hampshire and Vermont, including all the land and right of way taken and held by said company in the States aforesaid, for the purposes of its road, and all the franchise of said company granted by the several States aforesaid, together with all the real estate of said company situated in the said counties of Cumberland and Oxford and in * * the States of New Hampshire and Vermont, and all the rails and superstructure, cars, engines and other furniture, machinery and equipment of said road, and all personal property of said company, appertaining to, and connected with the customary use and working of said railroad and the machinery thereof, subject to the prior liens of the city of Portland upon the said railroad, and all the property and franchises of said company created by the several Acts of the Legislature of Maine, passed August 1, 1848, and July 27, 1850, and subject to a mortgage dated Feb. 3, 1851, executed and delivered by said company to said city of Portland, under the provisions of the Act of July 27, 1850," &c. "To have and to hold the premises, with all the privileges and appurtenances thereunto belonging, to them, the said grantees, their survivors and successors, upon the conditions, trusts and agreements, hereinafter set forth, as follows": — Then follows a recital of a vote of the company, passed Feb. 3, 1851, authorizing the issue of a series of bonds to the amount of one million five hundred thousand dollars, payable in fifteen years, with semi-annual interest, of specified denominations, all to bear

date April 1, 1851; also of a vote of the stockholders passed March 6, 1851, authorizing the directors to make this mortgage; following which were these provisions:—

"Now, if said company shall well and truly pay the interest which shall from time to time accrue and become payable upon any and all of said bonds, and shall well and truly pay the principal of the same, at the maturity thereof, then this deed shall be void, otherwise shall be and remain in full force.

"It is agreed that the said company may continue in possession of, and manage the said railroad and other property aforesaid, so long as it shall punctually pay the interest and principal aforesaid, according to the tenor of said bonds, and may, from time to time, renew and replace any of the personal property hereby conveyed, by other property of like character, and suited in like manner for the purposes of said railroad," &c.

"This conveyance is made upon the following further trusts and agreements, that is to say:—

"*First*,—If the said railroad company shall at any time fail to pay the interest which shall become due and payable upon any of the bonds aforesaid, or shall fail to pay the principal of the same, according to the tenor thereof, it shall then be lawful for the trustees aforesaid, their survivors and successors, subject to the prior rights of the city of Portland, as aforesaid, into and upon all and singular the premises heretofore granted, to enter, and the same to take into their actual possession, with full power and authority, as trustees as aforesaid, to manage and control the said property, franchise and estate, and to work the said railroad and machinery, and equipment, and receive the income, rents and profits thereof; and after providing for the expenses incident to such management, working and control, and necessary to keep the said railroad and other property in suitable condition for business according to the charter of said company, and after paying whatever sums may become due, from time to time to provide for payment of in-

terest and reimbursement of principal of the scrip issued by the city of Portland, and delivered by said railroad company in pursuance of the several Acts authorizing the said city to aid the construction of said railroad, to apply the net proceeds and balance of such income remaining in the hands of said trustees, to the payment of the interest or principal aforesaid of the bonds secured by this conveyance, which shall be then due and unpaid as aforesaid."

The third condition provided that a vacancy in the number of trustees may be filled by appointment by the others.

The bill, after setting out the mortgage, alleged that the bonds, to secure which the mortgage was made, were duly issued and negotiated, and are still outstanding in the possession of the holders thereof, creditors of said corporation; that the same became due and payable April 1, 1866; that, although payment thereof has been duly demanded, they have not been paid; that the complainants, as trustees, under and by virtue of the mortgage, have been duly notified by the holders of the bonds of the non-payment thereof, and requested to exercise the powers and perform the duties and obligations conferred and imposed upon them, in and by the mortgage.

It further alleges that, after the execution of the mortgage, John Anderson had died, and the vacancy caused by his death had been duly filled by the surviving trustees by their appointment of George F. Shepley; that the appointment has been duly certified; and the conveyances, assignments and transfers required by law and by the mortgage have been duly made.

It further alleges that, after the execution of the mortgage, and the negotiation of the bonds, viz.: on Aug. 5, 1853, the At. & St. L. Railroad Company demised and leased to one Ross, and one Holmes, and one Jackson, subject to the mortgage, all the property theretofore mortgaged, a copy of which lease was annexed to and made a part of the bill.

It further alleges that Ross, Holmes and Jackson, on Feb. 9, 1855, assigned the lease to the "Grand Trunk Railway of

Canada," a corporation doing business in the Province of Canada, a copy of which assignment was annexed and made a part of the bill.

It further alleges articles and covenants supplemental to the lease entered into Dec. 6, 1855, by and between the A. & St. L. R. R. Co. and the G. T. Railway; that the G. T. Railway Company are in the actual possession, occupation and use of the mortgaged property, and are receiving the income and profits thereof; that they neglect and refuse to apply the income and profits or any part thereof to the payment of the mortgage bonds; that the complainants are informed and believe the G. T. Railway are insolvent, and they believe it to be their duty to take proper steps to secure to the bondholders the payment of their bonds from the property held in trust for that purpose.

That, under and by virtue of the provisions of the mortgage, and by reason of the breaches of its conditions, the complainants have the legal right to have possession of the mortgaged property, for the purpose of applying the same and the income and profits thereof to the payment of the bonds, and that they are desirous of having such possession for such purpose.

That, on June 4, at Danville station, on the line of said road, and on June 19, 1866, at the station in Portland, the complainants demanded possession of the railroad and other mortgaged property, of the G. T. Railroad Company and of its servants and agents in the actual possession thereof, and endeavored to take possession thereof, and were by them obstructed and prevented from obtaining such possession, to their great wrong and injury and to that of the bondholders.

That they have been informed and believe that the G. T. Railway Co. has placed upon the railroad sundry engines, cars and other rolling stock and materials for running and operating the railroad, not covered by the mortgage; that it is necessary for the safe conduct and proper performance of the official duties of the complainants, that they should be

enabled to distinguish between these articles of equipment and those mortgaged, and such as have been substituted therefor by virtue of the provisions of the mortgage; that they have no means of ascertaining what and what portion of the engines, cars and other equipment they are entitled to take and use under the mortgage without a discovery from the G. T. Railway Company of these facts; that these facts are material to enable the complainants to perform their official duties; and that a discovery of them is indispensable as proof of the property to which they have title.

The bill prayed for an injunction to restrain the G. T. Railway Company and their servants from interfering with and resisting the lawful proceedings of the complainants, in entering upon and taking actual possession of the mortgaged property and receiving the income and profits thereof;

For a discovery of the amount of outstanding mortgage bonds; together with the number and quantity of cars, engines and other furniture mortgaged or substituted therefor;

For a surrender of the mortgaged property by the Atlantic & St. Lawrence Railroad Co. and G. T. Railway Co.;

For an account and payment of all earnings of the railroad since the demand; and

For general relief.

The respondents demurred.

P. Barnes, in support of the demurrer, contended that, independent of statute ratification, the instruments on which the suit was brought are invalid. *Commonwealth* v. *Smith*, 10 Allen, 455; *Richardson* v. *Sibley*, 11 Allen, 65.

If valid now, the statute remedies must be followed. R. S. c. 51, §§ 53 to 62.

The statute makes it the duty of the trustees, after breach of condition, to call a meeting of the bondholders, that the latter may determine for themselves whether or not possession shall be taken of the mortgage property. It also provides that, if the trustees shall be so instructed by the bondholders, they shall proceed to take possession, &c. No such instruction is alleged in the bill. None has been

given. No meeting of the bondholders has been called. The trustees, therefore, were not authorized to maintain this bill.

The same statute that gives validity to the contract as a conveyance also declares what shall be done to secure the practical fruits of such a conveyance. The reasons are obvious, — from the nature of the property, the character of the trust, the peculiarity and importance of the public rights involved in the conveyance, and from the fact, also, appearing on the face of the instruments, that the trustees are mere naked holders of the title. All these charters contemplate that the public interest will be best promoted by the active private interest of the body of responsible shareholders, to whom the management of the enterprise is given. The Legislature contemplate that the holders of the share capital shall not be dispossessed of their interest or responsibility, unless the holders of the debt capital shall put themselves, by their own acts, into a position to assume, eventually, a similar interest and responsibility.

Howard & Cleaves, on the same side, contended that, —

I. The bill presents no case within the equity jurisdiction of the Court.

1. The conveyance, under which the complainants claim, is a mortgage; and, not less a mortgage, because it confers on the grantees unusual and extraordinary powers and authority, affecting the rights of other parties. For, as yet, the mortgagees are not in possession, and have not assumed or executed the power specially conferred by the instrument, or placed themselves in a condition to execute the supposed trust. They are now but mortgagees out of possession, and, when in possession, may or may not need the intervention of this Court, as a court of equity. *Howard* v. *Harris*, 1 Vernon, 190; *Manlove* v. *Ball*, 2 Vernon, 84; Co. Lit., 203, Hargrave & Butler's note, 96; *Eaton* v. *Whiting*, 3 Pick., 491; *Shaw & als.* v. *Norfolk County Railroad Co. & als.*, 5 Gray, 162, 181-2.

2. The complainants claim possession of the property covered by the mortgage, for breach of its conditions; and assert that they "have the legal right to have possession of the mortgaged property, for the purpose," &c., "and that they are desirous of having such possession for such purpose."

The object, it seems by the bill, is to obtain possession of the "mortgaged property." The reasons for the possession claimed, and the purposes, may vary with time and circumstances, and change with the views and opinions, and motives of the mortgagees; and, of these, the Court here will take no cognizance. But the jurisdiction of this Court in equity does not embrace such cases; it does not extend to the foreclosure of estates mortgaged, generally, and much less, to the investing the mortgagee with such estates, when they are in possession and control of the mortgager or his assignee, who asserts his right to such possession. R. S., 1857, c. 77, § 8; *Shaw* v. *Gray*, 23 Maine, 174.

"The Legislature have prescribed with precision what shall be done to foreclose a mortgage." 23 Maine, 178–9; R. S., 1840, c. 96, § 10; *Brown* v. *Snell*, 46 Maine, 490.

The Legislature have prescribed the law and the method by which the mortgagee may obtain possession of the mortgaged premises,—R. S., 1857, c. 90, §§ 1–8, (§ 7,)—and that is a plain and adequate remedy at law. *York & Cumberland Railroad Co.* v. *Myers*, 41 Maine, 109.

But the complainants do not, by their bill, seek to foreclose the mortgage. Yet, if they did, their bill could not be maintained in its present form, for want of jurisdiction of this Court, in this regard, as before stated.

3. If it be assumed that this Court has jurisdiction, as a court of equity, for the foreclosure of mortgages of railroads, under R. S., c. 51, § 62, our only reply now, is, that the case stated in the bill does not fall within the provisions of that section.

II. The complainants cannot maintain their bill on the ground of trust.

They are not in a condition to execute the supposed trust, or to invoke the authority of the Court, in equity, to aid them in enforcing and executing it, until they have legally acquired possession under the mortgage; nor until they have exhausted their remedies at law. Trustees, as such, do not lose their rights and remedies at law, because they may be within the jurisdiction and control of a court of equity, in certain cases. They are neither above nor below the law, though favored in equity. *Caswell* v. *Caswell*, 28 Maine, 232; *Fletcher* v. *Holmes*, 40 Maine, 364; *In re*, — *Bondholders of York & Cumberland Railroad Co.*, 50 Maine, 552.

III. The discovery sought and claimed by the bill, will not enable the complainants to maintain it. For discovery can be decreed only where relief can be given, — R. S., 1857, c. 77, § 8, clause 8, — and in cases where this Court has jurisdiction by statute.

IV. If this Court had the unrestrained jurisdiction and powers of courts of chancery of the most enlarged jurisdiction, it would not interfere in the case at bar. For, by the R. S. of 1857, c. 51, §§ 53, 54, 55, *et seq.*, specially enacted for cases of this kind, the complainants can have a plain and adequate remedy at law, which they are not at liberty to overlook. Nor can this Court, as a court of equity, disregard it, upon their complaint. Stat. 1858, c. 30; Stat. 1860, c. 193; *In re*, — *Bondholders of York & Cumberland Railroad Co.*, 50 Maine, 552.

Upon general principles, a party who has a plain and adequate remedy at law cannot seek relief in a court of equity.

By the Judiciary Act of the United States, 1789, § 16, it is provided that suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain and adequate and complete remedy may be had at law.

It has been held that this is merely declaratory, making no alteration whatever in the rules of equity, on the subject

of legal remedy. *Boyce's Executors* v. *Grundy*, 3 Peters, 215.

The equity jurisdiction of the United States Courts is the same in nature and extent as the equity jurisdiction of England, from whence it is derived. *Robinson* v. *Campbell*, 3 Wheaton, 212; *United States* v. *Howland*, 4 Wheaton, 108; *Hunt* v. *Danforth*, 2 Curtis' C. C., 592, 603.

Equity is for "the correction of that, wherein the law, (by reason of its universality,) is deficient." Grotius, *de aequitate*, § 3; 1 Black. Com., 61.

And, where there is a plain and adequate remedy at law, the defendant has a constitutional right to trial by jury in the State and Federal Courts.

In *Shaw & als.* v. *Norfolk County Railroad & als.*, 5 Gray, 162, which the complainants claim to be like the case at bar, the Court had jurisdiction, as a court of equity, in "suits for the redemption of mortgages or to foreclose the same." And, "in all other cases, in which there are more than two parties having rights or interests, which cannot be justly and definitely decided and adjusted in one action at common law." R. S., (Massachusetts,) 1836, c. 81, § 8, *et seq.* That was a suit in equity for the foreclosure of a mortgage, but this is not such. There, the jurisdiction was conferred expressly by statute. Here, this Court has no such jurisdiction, or, if it has jurisdiction in case of railroad mortgages, the bill does not present a case of that sort.

The statutes of this State direct what course the complainants should pursue, upon the facts stated in the bill, in order to secure the rights of all parties interested. R. S., 1857, c. 51, §§ 53 to 62; 1858, c. 30; 1860, c. 193.

But in Massachusetts there were no such statutes, and the Court had special jurisdiction in equity, in such matters. And therefore, we submit that the case of *Shaw & als.* v. *The Norfolk County Railroad & als.*, forms no precedent for the case at bar.

V. The bill does not seek the specific performance of a contract in writing; and, if it did, there is a plain and ade-

quate remedy at law, — and, by statute regulation, (R. S., c. 51, § 53, &c.,) which does not require a decree for specific performance. Therefore, we submit, if this suit is prosecuted as within the provisions of R. S., c. 51, §§ 53 to 62, the bill presents no case requiring the aid of this Court. But, if this case does not fall within the provisions of that statute, then the complainants cannot sustain their bill before this Court with its limited jurisdiction in equity.

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

WALTON, J. — This is a bill in equity to which the defendants have demurred.

April 1, 1851, the Atlantic & St. Lawrence Railroad Company mortgaged their franchise, and all their property, real and personal, including their right of way, to secure the payment of bonds issued by said company to the amount of $1,500,000. In that mortgage it is agreed, among other things, that if the railroad company should at any time fail to pay the interest which should become due upon any of said bonds, or the principal, according to the tenor thereof, it should then be lawful for the trustees, (subject to the prior rights of the city of Portland,) to take possession of said property, and to work the railroad and machinery and equipments, and receive the income, rents and profits thereof.

The bill alleges that a portion of the bonds became due April 1, 1866; that payment was demanded, but they were not paid; that the trustees have been notified by the holders of said bonds of the non-payment and requested to exercise the powers and perform the duties and obligations conferred and imposed upon them by said mortgage; that, on June 4, and on June 9, 1866, they demanded possession of said railroad and other property included in the mortgage, of the Grand Trunk Railway Company, now in possession of the same under a lease, and endeavored to take possession of the same, but were obstructed and prevented from so doing. Wherefore they pray, among other things, that the

Grand Trunk Railway may be decreed and required to surrender, quietly and peaceably, to the trustees, the railroad and other property mortgaged to them.

It is contended that it was not the duty or the right of the trustees to take the possession and management of the road, because they had not been directed so to do by a vote of the bondholders at a meeting notified and held as provided in R. S., c. 51, § 54. The answer is that they do not claim possession by virtue of the provisions of the public statutes for the foreclosure of railroad mortgages, but by virtue of the express stipulation in the mortgage. In other words, they ask for a specific performance of their contract in this particular. We think they are entitled to it, and that a bill in equity is a proper form of proceeding to obtain it. So held in *Shaw et als., trustees*, v. *Norfolk County Railroad Co.*, 5 Gray, 162. (See opinion of the Court on pages 182–3.) Also by Mr. Justice CURTIS, in *Hall et als., trustees*, v. *Sullivan Railway*, (U. S. Circuit Court for district of New Hampshire,) cited by Judge REDFIELD in his work on Railways, page 578, where the opinion of Judge CURTIS is given at length.

It has been argued in defence that this mortgage was originally illegal and void; that it owes its validity to subsequent statutory ratification; and, inasmuch as the same statutes which give it validity prescribe the remedies for a breach of it, those remedies are exclusive, and the only ones that can be adopted; and we are referred to several decisions in other States in which it is held that in the absence of legislative consent such mortgages are invalid.

We do not consider it necessary to enter into a discussion of the question whether this mortgage was originally valid or not. It being conceded that it is now valid, probably the bondholders will be content with the result, and will not care to know particularly how that result is reached, provided it is not hampered with such embarrassments and difficulties as to make it practically unavailing as a means of getting their pay.

Such mortgages have always been regarded and treated as valid in this State, by the courts as well as the Legislature, and we confess that the contrary doctrine seems to us little better than practical repudiation, and not supported by reasons sufficiently weighty to commend it to our judgment. The whole argument seems to have no greater force than this, that it is dangerous to the public interests to have the powers and privileges conferred by a railroad franchise transferred from the original corporators to a new body. But when we consider how little importance is attached to the persons of the original corporators, how soon death must and other circumstances may remove them from all participation in the affairs of the road, how constantly those who have the active management of it are in fact being changed, we shall see how little practical merit this argument has. At the beginning the corporators undoubtedly have a controlling influence, but afterwards the directors are elected by the stockholders, and are often changed. Is there any reason to suppose that if a mortgage should, by foreclosure, transfer the franchise to new hands, that as capable men would not be appointed to manage the road as before? Would not the bondholders be as interested and as capable of appointing suitable managers as the stockholders? Does any one fear that the public interest would not be as safe with the former as the latter? Why then is it dangerous to the public interests to allow such a transfer?

We confess that, after giving the matter much thought, the doctrine that all railroad mortgages made without the consent of the Legislature are illegal and void, because they may operate as a permanent transfer of the corporate powers from the original corporators to another body, seems to us to have little to commend it and much to condemn it.

We do not understand that by this bill the trustees seek to obtain a decree of foreclosure of their mortgage. The objection, therefore, that this Court has no jurisdiction in equity to decree such a foreclosure is not well taken. The bill does not ask for such a decree. Nor do we understand

that possession of the mortgaged property is claimed by virtue of any rule or express provision of law. The objection, therefore, that they have not performed those acts which the statutes referred to make conditions precedent to such a right, is equally foreign. What the trustees claim is to have their contract, by which it was agreed that in a certain contingency they should have possession of the mortgaged property, specifically performed. They do not claim the possession as the result of a rule of law, (except so far as the law requires parties to keep and perform all their lawful contracts,) but as the result of an express agreement. That the Court has jurisdiction of the case made by the plaintiffs' bill we cannot doubt. We do not, of course, undertake to determine with which party the merits will be upon further answer and proofs.

Demurrer overruled.

Defendants to answer further.

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

WILLIAM NOYES *& al., Appellants, versus* SAMUEL V. LORING.

The only remedy against one who falsely represents himself as an agent of a town and authorized to contract for it, and does so contract without authority, is an action on the case founded on deceit.

Thus, where the defendant, a deputy collector of town taxes, directed the plaintiffs to publish an advertisement requesting tax-payers to pay their taxes to him forthwith, and charge the price of such publication to the town; and the plaintiffs followed the defendant's direction, but the town denied the defendant's authority to contract for the publication and refused to pay for the same; in assumpsit against the defendant for the price;—*Held*,—1. That case was the only remedy against the defendant.

2. That the plaintiffs could not waive the tort and bring assumpsit.

ON EXCEPTIONS.

INDEBITATUS ASSUMPSIT on account annexed, as follows: "1865, Oct. 17. To advertising taxes, 2½ sq., 18 w. $14,37."

The writ contained also a count for money had and received, and *quantum meruit*, for services, &c.

At the trial at *nisi prius*, it appeared that one Perkins was duly elected treasurer and collector of Saco for the year 1865; that, at the annual meeting, the town voted an abatement to those who should voluntarily pay their taxes on or before certain specified days, and that notifications of this vote and of the time when the tax-bills were committed to him, were duly posted up in post-bills, by the treasurer, the expense of printing and posting which was paid by orders drawn upon the selectmen.

It also appeared that, in October, 1865, after the expiration of the time for the allowance of such abatements, Perkins appointed the defendant assistant collector; that the defendant was duly qualified, and he gave bond for the faithful discharge of his duties; whereupon the tax bills of the unpaid taxes, amounting to between $17,000 and $18,000, were committed to him. The defendant then prepared a notice of his appointment, with a request that all who had not paid their taxes would forthwith make payment thereof at his office; and requested the plaintiffs to print a certain number of copies thereof in the form of post-bills, and to insert the same as an advertisement in the newspaper published by them in Saco till otherwise ordered, and to charge it to the town. And the plaintiffs did as requested.

In March or April following, the plaintiffs presented a bill for printing done for the town, including the charges for the printing ordered by the defendant, to the selectmen of Saco; but they refused to allow the items ordered by the defendant, denying his authority to order the work done at the town's expense. Subsequently, however, they drew an order for the post-bills, but refused to allow the charge for publishing the advertisement, although it was the usual price. The defendant also refused to pay the same.

It also appeared that, when the printing was ordered by the defendant, he did not intimate in anywise that he would pay therefor. It was charged to the town.

The presiding Judge instructed the jury that the action was upon a contract. That to support the action a contract must be proved. That a contract consists of mutual promises; that two kinds of promises are recognized in proof of contracts, one is a special promise and the other an implied promise. That the special promise is shown where the parties definitely and specifically fix the terms and conditions of their contract. The implied promise is a promise implied and arising from the acts and circumstances proved in a case where no special promise is proved. They consist of such acts and circumstances as raise in law an implication of those promises necessary to complete a contract.

That, where there is a special contract founded upon special promises, the law does not imply promises inconsistent with those. The special promise excludes the idea of an implied one. The parties having seen fit to make their own terms and engagements, the law leaves them upon those terms.

That, in this case, the contract being an oral contract, if any were made, it is a question for the jury to find what that contract was. That, if there was a special contract to do the work and look to the town for pay, the parties, being legally competent to make a contract, must abide by the terms of it.

That, if there was a special contract in this case, the fact that the services rendered may have operated to the benefit of the defendant does not relieve the parties from the legal effect of their special contract. They were competent to make it as they did, and must abide by it.

That, if the defendant represented himself as an agent of the town and authorized to contract for them, and did so contract, and was not so authorized, he might be liable in another form of action to the plaintiffs, but not in this action, for any damage resulting therefrom to the plaintiffs.

The verdict was for the defendant, and the plaintiffs alleged exceptions.

Philip Eastman & Son, for the plaintiffs, contended that the instructions relative to special and implied contracts, were inapplicable, and misled the jury. Counsel cited *Jefts* v. *York*, 10 Cush., 392; *Folsom* v. *Skofield*, 53 Maine, 171. To the point that the action was maintainable under the count for services done, 1 Parsons on Contracts, c. 3, § 7.

John M. Goodwin, for the defendant.

WALTON, J.—The remedy against one who fraudulently represents himself as the agent of another, and in that capacity undertakes to make a contract binding upon his principal, is an action on the case for deceit, and not an action of assumpsit upon the contract. *Long* v. *Coburn*, 11 Mass., 97; *Ballou* v. *Talbot*, 16 Mass., 461; *Jefts* v. *York*, 4 Cush., 371; *Abbey* v. *Chase*, 6 Cush., 54; *Jefts* v. *York*, 10 Cush., 392; *Smout* v. *Ibery*, 10 Mees. & Welsb., 1; *Jenkins* v. *Hutchinson*, 13 Ad. & El., N. S. 744.

The gist of the action in such cases is not a failure to keep and perform a promise, but a false representation. Why then should the injured party be allowed to bring an action of assumpsit? If one without authority undertakes to make a contract for another, the contract is necessarily void. It is not the contract of the principal, for the pretended agent had no power to bind him. It is not the contract of the agent, for in making it he did not attempt to bind himself. How then can such a contract be the basis of a suit? Very clearly it cannot.

Nor should the injured party be allowed to waive the special contract, waive the tort, and recover upon an implied assumpsit, for such a form of declaring gives the defendant no notice of the real cause of complaint against him. Take, for instance, the declaration in this case. It contains nothing but general *indebitatus assumpsit* counts on an account annexed. Who, on reading such a writ, would ever suppose that the real ground of complaint against the de-

fendant is that he undertook to make a contract for the town without authority?

It may not indeed seem unjust that the party who has undertaken to contract for another without authority should be held to perform the contract himself. In fact the law seems to have been so held in an early case in New York. (*Dusenberry* v. *Ellis*, 3 Johns. Cas., 70.) It was there held that one who without authority signed a promissory note as attorney for another was personally bound to pay it. But the inconsistency of such a doctrine, to use no stronger term, will be apparent by supposing that instead of a promise to pay money, the pretended agent had signed a promise that his principal should marry the plaintiff within a given time, or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?

It is undoubtedly true that if a person falsely represents that he possesses an authority which he does not possess, and another is injured by such misrepresentation, he is liable; but the remedy should be sought in a proper form of action. The plaintiff should not be allowed to allege neglect to keep and perform a promise, and then recover for a false and fraudulent allegation of authority.

But the plaintiffs claim that, inasmuch as the labor which they performed was beneficial to the defendant, he ought to pay for it; and that they may waive the tort, if any, which the defendant committed, and recover the value of their services in an action of assumpsit. No case has been cited in which such a course has been allowed; and, in *Jones* v. *Hoar*, 5 Pick., 285, the Court say that the doctrine, that the injured party may waive the tort and bring assumpsit, is allowed only to this extent, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the

sale, and have an action for money had and received for the proceeds.

So, if one acting as the agent of another without authority, receives money, and has not paid it over to the principal, it may be recovered back in an action for money had and received. *Jefts* v. *York*, 10 Cush., 392.

But it is only in favor of the action for money had and received, which has been likened in its spirit to a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations, and be confined to the matter in issue, and this relaxation, by which a party is allowed to aver a promise and recover for a tort, being a departure from principle and the correct rules of pleading, ought not to be extended to new cases.

Our conclusion therefore is, that the ruling of the presiding Judge, to which exception is specially taken, namely, "that, if the defendant represented himself as an agent of the town, authorized to contract for them, and did so contract, and was not so authorized, he might be liable in another form of action, but not in this," was correct.

The other rulings of the presiding Judge, reported in the bill of exceptions, seem to require no further notice than to say that they are in accordance with well settled principles of elementary law, and, so far as we are able to judge from the brief report of the evidence contained in the bill of exceptions, were pertinent to the issue.

Exceptions overruled.
Judgment on the verdict.

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

FREDERICK E. FERNALD *versus* THOMAS GARVIN, *App'l'nt.*

A defendant can take advantage of a misjoinder of counts only by demurring to the whole declaration.

He cannot plead to one count and demur to another.

The defect of misjoinder of counts may be cured by motion to amend.

Where an action of *indebitatus assumpsit* upon an account annexed came to this Court by an appeal from the judgment of a trial justice, and the cause proceeded to the jury with instructions precluding the possibility of error arising from the omission to annex the particular items of the account, this Court declined, after verdict, to interfere to prevent a judgment on the verdict against the defendant.

ON EXCEPTIONS.

The writ contained a count upon an account annexed for $20, without any account; a count for same sum for money had and received; and a count in case, under R. S., c. 22, § 4, for double the value of a line fence built by the plaintiff, and the fees of the fence viewers, and it was returnable before a trial justice for this county. At the trial before the justice, the plaintiff recovered judgment, and the defendant appealed.

After the action had been more than one term in this Court, the defendant moved its dismissal, because the writ contained two counts of *indebitatus assumpsit*, with a special one on the case, which motion was overruled.

After the evidence was all in, the defendant contended that the plaintiff, from all the evidence in the case, could not recover in this action. Not on the special count in plaintiff's writ, because the doings of the fence viewers, in dividing the fence between the parties' lands and adjudicating the value thereof after it had been built by plaintiff, was not in conformity to law, and that there was no legal division or assigment of fence between the land of plaintiff and defendant, and that the evidence did not show that there had been any demand made by plaintiff of defendant to pay for building said fence, pursuant to the statute in such case

made and provided, in order to bind the defendant to pay for the same.

The defendant also contended that the plaintiff could not recover under the first count, because there was no account annexed to said writ. No objection was, however, made for want of account annexed, until after the testimony was all in. Neither could the action be sustained under either of said counts, there being no promise, either express or implied, which was binding in law on the part of the defendant.

The presiding Judge instructed the jury that the proceedings of the fence viewers were so defective that the plaintiff could not recover on the special count in the writ, and that they would leave that entirely out of the case, with the evidence relating thereto. But as to the first and second counts in the writ, he instructed them that, to enable the plaintiff to recover, he must satisfy them by the testimony that there was, on the part of the defendant, a promise to pay, either express or implied; that if in building the fence the plaintiff rendered services or paid money, which, by an agreement between the parties, belonged to the defendant to perform or pay, and which were valuable to him; and if this were done with the knowledge and consent of the defendant, the law would imply a promise on his part to pay what such services were reasonably worth; but that if done without his knowledge that the services were being rendered for him, or if against his objection, no promise to pay would be implied; that if such services were rendered and money paid, and the defendant afterwards promised to pay the plaintiff for the same, this would be an express promise.

The jury returned a verdict for $16,72 in favor of the plaintiff, and the defendant alleged exceptions.

The defendant also moved that the verdict be set aside as being against the weight of evidence and also against law.

Kimball, for the defendant.

The action should have been dismissed. Gould's Plead.,

c. 4, § 97, and c. 8, § 31. The judgment would be reversed upon error. *Fairfield* v. *Burt*, 11 Pick., 245; 5 U. S. Dig., (Supplement,) 535; *Boston* v. *Otis*, 20 Pick., 41. Assumpsit not maintainable. *Sanford* v. *Haskell*, 50 Maine, 86; *Peabody* v. *Hoyt*, 10 Mass., 36. Counsel elaborately argued the motion to set aside the verdict as being against the evidence.

Drew & Hamilton, for the plaintiff.

APPLETON, C. J.—The writ in this case was returnable before a trial justice of York county. It contained two counts in assumpsit and one in case, under R. S., 1857, c. 22, § 4, for double the value of building the fence and the fees of the fence viewers, as ascertained in accordance with the provisions of the Act. At the return day, the defendant pleaded the general issue to the first two counts, and to the last filed what was apparently intended for a demurrer. A trial was had and judgment was rendered in favor of the plaintiff from which an appeal was taken.

After the action had been more than one term in this Court, the defendant moved its dismissal, because the writ contained two counts of *indebitatus assumpsit* with a special one in case. The motion was overruled, the cause proceeded to trial, and a verdict was rendered in favor of the plaintiff.

The objection mainly relied upon is that there is a misjoinder of counts. Assuming such to be the case, how is advantage to be taken of such misjoinder? "The consequences of a misjoinder are more important than the circumstances of a particular count being defective; for, in the case of a misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on demurrer or in arrest of judgment, or upon error. * * A demurrer for misjoinder must be to the whole declaration, and not merely to the defective count or breach." 1 Chitty on Pleading, 205. When there is a misjoinder of counts,

the defendant can avail himself of the objection only by demurring to the whole declaration. The defendant cannot plead to one count and demur to the other. *Smith* v. *Merwin*, 15 Wend., 184.

The defendant, neither by his pleading below nor by his motion in this Court, has properly taken advantage of the alleged defect.

The defendant cannot move in arrest of judgment, because, by R. S., 1857, c. 82, § 26, "no motion in arrest of judgment in a civil action can be entertained."

At common law, in *Knightly* v. *Birch*, 2 M. & S., 533, it was held, if there be a misjoinder of counts, and a verdict for the plaintiff on the counts well joined, and for the defendant in the others, the misjoinder is not a cause for arresting judgment. The counsel moving in arrest of judgment referred the Court to *Bage* v. *Brownel*, 3 Lev., 99, but the Court discharged the rule, Lord ELLENBOROUGH saying, "the case referred to had had its day, and that it was time it should cease."

The case is not before us upon error. It is not necessary, therefore, to consider what construction should be given to R. S., 1857, c. 82, § 25, which prohibits a reversal of judgment by writ of error, for a misjoinder of counts, in certain cases.

The defect of misjoinder might have been cured by motion to amend. 1 Chitty on Pleading, 205. *Prescott* v. *Tufts*, 4 Mass., 146. Although assumpsit and tort cannot be joined, yet the Court will permit the plaintiff to elect in which count he will proceed, and strike out the other. *Noble* v. *Laley*, 50 Penn., 281; *Pennsylvania Railroad Co.* v. *Zug*, 47 Penn., 480. The verdict in the case at bar was rendered on the counts in assumpsit. It cannot harm the defendant to allow the count in case, if misjoined, to be stricken out and judgment to be rendered on the others. If a new trial were to be granted, the count in case might, by leave of Court, be stricken out. It may equally well be allowed now, without granting a new trial.

The defendant, as before remarked, filed his motion in this Court to dismiss the suit. But, if advantage could be taken of a misjoinder by plea in abatement, or by a motion in the nature of such plea, the motion comes too late.

In *Chamberlain* v. *Lake*, 36 Maine, 388, SHEPLEY, C. J., says, "when a defect is apparent of record, advantage may be taken of it by motion, and a decision upon that motion will present a question of law arising upon the sufficiency or insufficiency of the record." But this remark applies specially to defects to be taken advantage of by way of abatement of the suit and not by demurrer. The same is true of the remarks of RICE, J., in *Greeley* v. *Currier*, 39 Maine, 517. The objection in a case of misjoinder should have been taken by demurrer. *Fritz* v. *Fritz*, 23 Ind., 388.

The magistrate had jurisdiction, inasmuch as "the debt or damages demanded do not exceed twenty dollars." R. S., 1857, c. 83, § 1.

It seems there was no account annexed to the writ. The case proceeded to trial without objection for this cause until all the testimony was out. The defendant did not move for a bill of particulars, as he might have done. It is manifest, from the report of the case, that the plaintiff claimed in assumpsit for the expense of building the fence in controversy and for moneys paid the fence viewers. Both the parties understood what was in dispute. The omission might have been cured on motion by either party. The cause proceeded to the jury, and with instructions which precluded the possibility of error arising from the omission to annex the particular items in litigation. No injury is shown to have arisen to either party.

The verdict was on the counts in assumpsit and upon an express or implied promise arising from the circumstances of the case, and not upon the count based upon R. S., c. 22, § 4. The instructions, as applicable to the first and second counts, are free from objection.

Whether the recognizance is sufficient or not, the defendant takes no exception thereto.

The English Courts, when the verdict is under £20, refuse to grant a new trial, though the verdict is against evidence, unless there has been a misdirection on the part of the presiding Justice, or misconduct on that of the jury. *Bevan* v. *Jones*, 2 Young & Jervis, 264; *Grimm* v. *Fischer*, 25 Upper Canada Rep., 383. No sufficient reason is perceived in this case to justify our interference.

Motion and exceptions overruled.

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

JASON HAMILTON *versus* RICHARD H. GODING.

The owner of intoxicating liquors held in this State, and intended for illegal sale in this or another State, may maintain trespass *de bonis* against the unauthorized conversion of them by a sheriff, acting by his deputy, under color of his office.

The recovery in trespass of the value of intoxicating liquors thus held, and the consequent transfer of the title to them to the defendant by the mere operation of law, do not constitute a sale "by any person or persons," within the spirit of c. 33 of the Public Laws of 1858.

ON EXCEPTIONS.

TRESPASS DE BONIS, for taking and carrying away 515 gallons of whiskey belonging to the plaintiff and stored in Biddeford, in this county.

It appeared that the plaintiff purchased the whiskey in controversy, May 12, 1865, in Boston, of Smith & Willis, and had it shipped to and stored in Biddeford; that he intended to sell the liquor at North Conway, N. H., whenever he should transport it there; that he had not sold any there; that he had engaged a store there and had had some negotiations with a person to go there and sell for him; that one Durgin, a deputy of the defendant, attached said whiskey on a writ in favor of *James Slade* v. *Smith & Willis*, and carried it away; and that it was worth from $3,50 to $4 per gallon. The statute of New Hampshire was put into

the case by the defendant. There was also evidence tending to show that the plaintiff intended to sell the liquors illegally in *this* State.

The presiding Judge instructed the jury that the evidence in this case relative to the intention of the plaintiff to sell the liquors in *this* State, or in the State of New Hampshire, does not preclude the plaintiff from maintaining this action, if he has suffered damage from the unauthorized act of the defendant acting by his deputy under color of office, but they might consider the evidence upon that matter so far as it affected the question of damages.

The intoxicating liquors kept and deposited and intended for sale in this State, in violation of law, are declared contraband; such liquors are not declared in direct terms to be a "common nuisance."

That they are the subject of property, and are not in and of themselves a "common nuisance." That if so at all they are made so under certain circumstances by the statute, and, the statute having provided a mode of abatement, that mode must be followed in abating.

The presiding Judge submitted the question of unlawful intent by written interrogatory for special finding, and the jury found that the liquor was not intended for unlawful sale in this State.

The defendant requested the presiding Judge to give the following instructions to the jury: —

1st. That the defendant is not liable as sheriff for the acts of Durgin, his duputy, in attaching these spirituous and intoxicating liquors at the direction of the plaintiff in the writ of attachment, and without the knowledge or assent of the defendant.

2d. No action can be maintained in this State against one who wrongfully takes and converts spirituous and intoxicating liquors, by one who has them deposited or in possession here with the intention of selling them in another State, in violation of the laws of the other State.

But he declined, and instructed them that the evidence

in this case, relative to the intention of the plaintiff to sell the liquors in question in the State of New Hampshire, does not preclude the plaintiff from maintaining this action.

The verdict was for the plaintiff, and the defendant alleged exceptions, and moved the special finding be set aside as against the weight of evidence.

S. W. Luques, in support of the exceptions.

Holding intoxicating liquors in this State for the purpose of sheltering them securely in a place of deposit here, from which they may from time to time be smuggled into an adjoining State, there to be distributed in violation of laws made for the protection of public morals, is a gross violation of the great fundamental moral law enunciated for the government of States as well as individuals, and contrary to public policy. Broome on the Common Law, 359, 365–6; *Holman* v. *Johnson*, 1 Cowp., 343.

The laws of Maine and New Hampshire prohibit the indiscriminate sale of intoxicating liquors, and the possession of such liquors with intent to sell them illegally.

These laws were not enacted for mere revenue purposes; their main object was the protection of public morals and the suppression of crime. Anything done in contravention thereof must necessarily be prohibited. *Ritchie* v. *Smith*, 6 M., G. & Scott, 475, 476. Inter-state comity, good faith, good morals, our own safety forbid the maintenance of this suit. Counsel cited *Lord* v. *Chadbourn*, 42 Maine, 429.

The special finding was wrong.

The instruction that it was unimportant whether plaintiff had these liquors for illegal sale or not, in this State, is erroneous.

The acquisition of title by judgment has all the elements of acquisition by contract. 2 Kent's Com., 387–8, and cases *infra*. There can be no judicial sale of liquors. *Nichols* v. *Valentine*, 36 Maine, 322. If case at bar is sustained, a man may *take* a gallon of whiskey, be sued and pay for it on execution. Why may not he settle damages before suit,

or plaintiff waive the tort and bring assumpsit? One's right to *hold merely*, and not to sell, may be sustained by replevin.

Ira T. Drew, for the plaintiff.

KENT, J.—The defendant, who is sheriff of the county, took and carried away, by his deputy, from the possession of the plaintiff, who was the owner, certain liquors. Although this was done under the command of a writ, against a third party, as appears by the evidence introduced by the plaintiff, yet the defendant sets up no defence on that ground, but at the trial abandoned all attempts to justify the taking under legal process.

The defendant then appears to stand as a naked trespasser, having taken the property away and setting up no defence for his act peculiar to himself, but claiming that he, or any other private citizen, might do the acts that he did with legal impunity, because the articles taken were not property, protected by law, for the taking or destruction of which the law would afford redress. The case presents the naked question, whether intoxicating liquors, owned and possessed by an individual, he having an intention to sell them illegally at some time thereafter, are, by this intention, unexecuted, so absolutely and entirely put out of the protection of the law, that any other person may, at his will and pleasure take, carry away and convert them to his own use, or destroy them, with entire impunity, and without color of legal authority, or individual right in them; or in other words, are they outlawed?

It is admitted that there is nothing in the nature of the article in question, which, independently of any statute, renders it incapable of being a subject of property. The common law never has so declared. Indeed, until within a few years, spirituous liquors have been regarded as property, without limitation or qualification. A hogshead of rum was exactly the same, as an article of property and merchandise, as a hogshead of sugar. And, whatever the Legislature might do if it saw fit, we find no existing provision

which declares that no person can acquire property in liquors. But, on the contrary, we find a constant recognition of such right of property in individuals for their own use, by towns, and even in those liquors which have been seized and confiscated under process of law, and delivered by decree to the municipal authorities. This purging process restores the liquors to their original condition as articles of property. This point is fully discussed and clearly stated in *Preston* v. *Drew*, 33 Maine, 558, where the generality of the language which prohibited any action of any kind for the recovery or possession of intoxicating liquors or the value thereof was limited and restrained so as not to apply to liquors held legally and not intended for illegal sale. And this, on the ground that such must have been the intention of the Legislature, notwithstanding the very positive and apparently all embracing language of the statute. Otherwise property which the law had always protected and still recognized would be precluded from the benefit of the constitutional provision, — the right of every man to acquire, possess and have protected, property, and its practical enforcement in the provision that "every person for an injury done him in person, property, reputation or immunities shall have remedy by due course of law." These provisions would be rendered nugatory and unavailable. *Fisher* v. *McGinn*, 1 Gray, 33. It is therefore clear, to start with, that something more must be established against the liquors, than the fact that they are spirituous and intoxicating and by their use cause serious and sad effects in the community.

If then, such liquors are property at the common law, and entitled to protection as such against the unjustifiable or inexcusable acts of third parties, — the question is how far the Acts of the Legislature restricting or prohibiting the manufacture, sale or keeping or possessing of such liquors, have given or attempted to give a right to any and all persons at their pleasure to take and carry away, and convert to their own use, or to destroy them, when held with an illegal intent.

It is certain that there is no such express provision, — no language which directly and in terms confers such powers. If it exists it must be derived by inference drawn from the language of the statute, and its scope and purpose. It is a power of too transcendent a nature, and too much opposed to the general spirit of our laws to be legally inferred, or hastily sanctioned.

It is to be observed that the general scope of all the provisions is to remedy or prevent a public evil, — one affecting the community as a body politic, and calling for the aid of the law and its officers to enact and execute such provisions as shall reach and overcome, if possible, such evil. Individuals are, undoubtedly, sufferers, but it does not therefrom follow that the law is to be executed, without the sanction of the forms of law, by the individuals who may suffer, in one form or another, the evils resulting from the uncontrolled sale of liquors. The apparent intent is, that this law, like all other laws for preventing and punishing crime, is to be enforced by the officers of the law, under the forms provided, and by the existing courts of law.

The *status* of this liquor in question before us, is exactly this: — It was the property of the plaintiff, if it was capable of being the subject of property. It was held by him at the time it was taken, with the intention on his part to sell it in violation of the law of the State. What was the legal effect upon this liquor, when this intent was formed? Before such intent, it was property and fully recognized and protected. Did the intent, when formed, take from it the capacity of being property, — divest the owner of all right to have it protected, and take away all remedy by due course of law for the injury done to his property? Did it become derelict, so that any one might seize it and destroy it, or convey it away?

That its *status*, character, condition in the eye of the law, was essentially changed by the provisions of the statute, is unquestionable. The intention to sell it in violation of law rendered it liable to seizure, confiscation and destruc-

tion, or to be transferred to the town or city for lawful sale by its agent. But the same law made distinct and clear provision for such seizure and condemnation by the officers of the law, under legal process and procedure, after due notice and giving a right to any claimant to appear and claim the property. But this liquor was never so seized. Nothing is said in the law about the rights of private persons to seize or convert the liquors. Now, on what ground is it claimed that, before any such action by the authorities under the law, any unauthorized person may anticipate the regular action of those entrusted with the duty, and take the property from the possession of the owner, and do with it all, and more than all, that the legal officers could do.

Is it on the ground that the liquor thus held becomes at once a nuisance, public or private, and may be abated, as such, by any private person?

It would be difficult for the most ingenious and ardent friend of temperance to seriously maintain the proposition, that liquors, against which all that could be proved is that the owner intended them for sale, but had never so offered them, — were at common law a nuisance, within any recognized definition of that offence. Liquor is not in itself a nuisance. *Preston* v. *Drew*, *ubi supra*; *Brown* v. *Perkins*, 12 Gray, 89. We do not question the right of the Legislature to determine what shall be regarded as a nuisance. We do not question the soundness of the views taken by the Court in the above case of *Brown* v. *Perkins*. On the contrary, we refer to it, without quoting from it, as a clear, strong and correct statement of the extent of legislative power on this subject.

But the first question is whether the Legislature has declared that liquors, not offered for sale, but intended to be so offered, are to be held and treated as a common nuisance. The language of the statute now in force does not in any form declare them expressly to be a nuisance. In § 13, c. 33, laws of 1858, liquors thus held are declared to be "contraband and forfeited to the cities, towns and plantations in which

they are so kept, at the time when they are seized by virtue of any of the provisions of this Act." The Act then goes on to specify, in detail, the mode by which the liquors may be complained of, seized, tried and condemned, by due process of law, to be destroyed or given over to the town. If the law-makers had intended to make them a nuisance, which any man might abate, it would have been a shorter way to effect their object to so declare in express and unqualified terms.

But, if we could find that the statute declared that to be a nuisance which was not one before, the point here would not be reached, unless we can find that the same statute, or statutes, had given to private persons the right to abate it, without process of law; and, in this particular case, whether it had given the power to choose their own mode of abatement, and substitute a seizure under process, afterwards abandoned, and a transfer of the liquor to another jurisdiction, to be there again sold or used, instead of the effectual abatement by destruction by pouring it out upon the thirsty sand, which could drink it with impunity. As before stated, there is no such right or authority given by the statute in direct terms. Is it to be inferred from the other provisions?

If a nuisance at all, it is a public nuisance, for the statute only deals with the subject as one of common and general concern, and attempts to guard the whole people from the demoralizing and destructive effects of the liquor traffic, which can in no proper sense be regarded as a private injury, so peculiarly affecting an individual member of the community as to enable him, of his own motion, to abate it as a nuisance.

In the case of *Brown* v. *Perkins*, 12 Gray, 89, C. J. SHAW has stated, in the rescript sent down, the conclusions, without elaboration of the Court, overruling his own charge to the jury. One of the propositions is, that an individual may abate a private nuisance which injures him, when he might maintain an action; and, also, when a common nuis-

ance obstructs him in the exercise of his individual right. An unlawful obstruction across a highway, or navigable stream, may be removed by any one who has occasion to pass over, either by himself or his property.

It was also held that, by the common law, it was not lawful for any and all persons to abate a common nuisance, merely because it is a common nuisance, although the rule has sometimes been stated in terms so general as to give some countenance to this supposition; and, further, that the power has not been given to individuals, without process of law, to vindicate public right; but the only power thus given to the private citizen is to remove or abate a common nuisance when his individual right to act is obstructed, or prevented, by such nuisance. It was further held that spirituous liquors are not of themselves a common nuisance, and, if a nuisance at all, are made such by the statute, which provides a mode for their destruction; that, when a statute declares that to be a common nuisance, which was not one before, and specifies and directs the mode of abating it, that is the only mode which can be pursued, and that it is not lawful for any private person to destroy the property by way of abatement of a common nuisance.

The Court in Massachusetts has also, in several cases, practically applied these principles. In *Evans* v. *Walker*, 9 Gray, 95, and in *Arthur* v. *Flanders*, 10 Gray, 107, where liquors had been seized by an officer, acting under a regular warrant, the officer, failing to show a legal right to take and hold a part of the liquor seized, undertook to defend as to such part, by showing that all the liquors taken were held by the owner with intent to sell them in violation of law, and therefore, that no action could be maintained for their value; the Court overruled the point made, and held that the officer could not thus protect himself. And these decisions were made under a law of Massachusetts, which declared that no action should be maintained against any officer for seizing, detaining or destroying liquor or the vessels in which it was kept, unless such liquor and vessels

were legally kept by the owner. The Court held that the Act did not in its terms protect the officers in the above cases. And further, that, if the statute had so undertaken to leave the owner remediless for injury to property, and with no right to be heard, they should not hesitate to say that it was a clear violation of the bill of rights in the constitution.

The question, how far a person can defend an otherwise indefensible act, by showing the criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result, generally reached is that no man can set up a public or private wrong, committed by another, as an excuse for a wilful or unnecessary, or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases. It may be regarded as among those condensed maxims or statements of the common law, which, by their simplicity and brevity, and, more than all, by their flexibility and almost universality, give to that system its wonderful adaptedness to the varying circumstances of particular cases as they arise, and to the changing condition of society and its new combinations and discoveries.

The common law does not arm and send forth single knights errant to vindicate its authority or avenge its wrongs, by inflicting punishment on supposed offenders, according to the individual opinion and judgment of the avenger. Much less does it authorize any Quixote to assume, of his own will and motion, that character, and sally forth to put down even acknowledged evils and wrongs.

Private action is, as a general rule, confined to private wrongs, and then only to be used when it becomes necessary to prevent or remove imminent and present obstructions to the exercise of his private right.

Many recent English cases are found which illustrate and adopt these views. It is held that it is not enough for a defendant, to show an illegal act or intent on the part of the

plaintiff, even if it constitutes a public nuisance. Want of care, in driving, for instance, on the highway, cannot be excused by proving that plaintiff's animal, which was injured, was illegally there, or that the plaintiff was driving on the wrong side of the way, contrary to the statute. The rule clearly to be deduced from these cases, is that the fact of the existence of a nuisance, created by one party, or any illegal doing on his part, will not give a right of action, or be regarded as a defence, where there has been a want of due care to avoid injury, and where the other party has voluntarily, and with no other excuse, injured or destroyed or converted the property. *Davies* v. *Mann*, 10 M. & W., 548; *Bridge* v. *G. Junction Railroad Co.*, 3 M. & W., 244; *Mayor of Colchester* v. *Brooks*, 7 Queen's Bench, 339; *Bateman* v. *Black*, 18 Ad. & Elles, N. S., 870, (83 E. C. Law,); *Dunes* v. *Petley*, 15 Q. Bench, 276.

The same doctrine is recognized in this State in the case of *Bigelow* v. *Reed*, 51 Maine, 325.

The application of these principles to the case before us is apparent.

If, then, spirituous or intoxicating liquors are property which the law will protect, until itself interferes and claims them on the ground of an illegal intent to sell them, on the part of the possessor, — if that intent does not change or destroy the property in the liquors, so as to make them, in the language of the law, derelict and liable to be seized, destroyed or carried away by any person at his will, — if the statute which denounces the holding with the intent, declares that they may be seized under a legal process and judicially condemned after hearing all claimants, and points out the mode, can this fact of holding with an alleged intent be invoked in defence by one who has not himself sought the aid of the law, either by its civil or criminal process, and stands a naked trespasser on his neighbor's property, because, as he alleges, and is prepared to prove, that neighbor intended to use the property in an illegal manner?

We have seen that he cannot justify himself on the ground of nuisance, and as a volunteer enforcer of law.

The only question left, is whether there is any such authority given, directly or by necessary inference, by the Legislature in the statutes passed on this subject. We can find none.

It is insisted that, by the law and the decisions, no action for a tort can be maintained when the subject matter is intoxicating liquors. The reason assigned, whether intended for illegal sale or not, is a technical one. It is said that by a recovery at law, in an action of trespass or trover, of the value of a specific chattel, of which the possession has been acquired by tort, the title is altered by the recovery, and is transferred to the defendant and, the damages recovered on the price of the chattel, which is sold by operation of law, and thus the law is a law-breaker, and is guilty of an unlawful sale of liquor, if it allows the plaintiff to recover.

This is certainly an ingenious argument, but it proves too much. According to this theory, a man in possession of liquors, with no intent to sell them, but to use them himself, perhaps medicinally, can maintain no action against the person who has carried them off and converted them to his own use. The prohibition of the statute is against the sale "by any person or persons." It is true that it has been decided that there can be no sale of liquors by an officer on execution. *Nichols* v. *Valentine*, 36 Maine, 322. The reason given is, that all persons, except town agents, are prohibited from selling,—"it would be an absurdity to say that the officers of the law may become the vendors." But the sale, intended by the statute, is the transferring of the property from one person to another by the agreement and acts of those persons for a consideration agreed upon. When the title passes, not by act of sale, but by operation of law, it is not a sale "by any person or persons." When goods are sold on execution, the title passes by virtue of the public sale, as in other cases of sale,—not by mere op-

eration of law, transferring the title, without any act of sale. In the latter case, the law is not a vendor nor does the title pass as to a vendee. It is not within the language or intent of the statute forbidding sales by any person or persons, for it is not a sale, and it is no act of any person.

It is further urged that if these liquors were kept and deposited in this State by the plaintiff for illegal sale, that no action can be maintained against the defendant.

It is contended that, by the decisions of this Court, no such action can be sustained.

It will be found, on examination, that the cases relied upon were decided in suits arising under the Act of 1851, c. 211, § 16, and Act of 1855, c. 166, § 23. That statute declared that "no action of any kind should be had or maintained in any Court in this State, for the recovery or possession of intoxicating or spirituous liquors, or the value thereof."

This was clear and inclusive language, reaching, in its terms, torts as well as contracts. But the Court held strongly, in *Preston* v. *Drew*, 33 Maine, 558, that the generality of this language must be restricted to cases in which the liquor was held with an intent to sell unlawfully, as before stated. But, in this case, and in the case of *Black* v. *McGilvery*, 38 Maine, 287, and in *Lord* v. *Chadbourne*, 42 Maine, 429, and in *Robinson* v. *Barrows*, 48 Maine, 186, and perhaps some other cases, the Court did decide, in substance, that the statute, thus restricted, did positively and directly prohibit the maintenance of any action, either contract or tort, for liquors thus held with an intent to sell. It is difficult to perceive how any other construction could have been given to that section of the statute, if it was held in any degree constitutional. The prohibition against any action was positive and without qualification or restriction. These decisions rest, so far as they are authoritative, upon this language of the statute. Has that prohibition been retained in the statute in force at the time this cause of action accrued?

The history of the legislation in this State, on this sub-

ject, may be thus briefly stated. In 1846, by c. 205, § 10, it was provided that "no action should be maintained upon any claim or demand, whether it be note, account, bond, order, draft, acceptance or other security or evidence whatsoever, made, had or given, in whole or in part, for wine, brandy, &c., sold in violation of the provisions of this Act," but not to extend to negotiated paper in hands of *bona fide* holders.

A construction was given by the Court to this section, in *Sullivan* v. *Park*, 33 Maine, 428, which was trover for a cask of alcohol. It was contended that the action was prohibited by this section. It was held that "the Act relates to contracts. It does not prohibit suits for acts of tort."

The next year after this decision, the Act of 1851, before recited, was passed, making the prohibition of any action distinct and absolute. The same prohibition is found in the Act of 1855. This remained in force until 1858, when the present liquor law was enacted. The Legislature had the former statutes before them and also the decisions of the Court, under the Act of 1846, and also those under the Act of 1851.

In the new Act of 1858, they adopt, in substance, the provisions of the Act of 1846, in language somewhat condensed, but limiting the restriction to actions on claims or demands contracted or given for intoxicating liquors sold in violation of the Act. No language is used like that in the statute of 1851.

The conclusion seems manifest that the Legislature deliberately decided between the two provisions and adopted the law of 1846, and its construction by the Court. And, in effect, intended to adopt the doctrine which limits the prohibition to actions on contract. There being positive prohibition of any action of tort, the case must rest upon the general principles of law, applicable to the facts, which we have before considered. Our conclusion is, that proof of an intention to sell the liquors unlawfully, by the plaintiff, would not be a defence to an action against one who had

taken them from him without any right to interfere with them, except under the claim made, that the intent to sell gave a right to any person to seize or destroy them, or at least debarred the plaintiff from any legal remedy or redress. This was in effect the instruction given.

The jury found specially that there was no intent to sell these liquors unlawfully in this State. The defendant claims that that finding was against the evidence, and also, that the ruling being that such intent, if proved, would not be a defence, the jury might well infer that it was of no consequence how they answered the question. The answer, in the view we have taken, is immaterial, as it could only be material in case the fact of intent was important. The view we have taken assumes the existence of such intent, and disregards the special finding, and looks only to the ruling of the Judge. It is not necessary for us to consider whether the finding was against the evidence or not.

The ruling of the Judge, as to the liability of the sheriff for the acts of his deputy, appear to be in accordance with well settled law. The learned counsel for the defendants makes no point on this ruling in his argument.

Motion and exceptions overruled.

Judgment on the verdict.

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

APPLETON, C. J., concurred in the result.

JOHN M. GETCHELL *versus* INHABITANTS OF WELLS.

The selectmen of the defendant town addressed and delivered to the plaintiff, a duly appointed and sworn highway surveyor of the town, a written order, officially signed, of the following tenor: — "You are requested to keep the snow broken down within the limits of your district, so as to make it passable, and to do it with as little expense to the town as possible, and to

keep an account of each one's own labor and make return of it to us five days before next annual meeting." Thereupon the plaintiff employed several men to aid him in suitably removing the snow, and paid them a reasonable compensation therefor, but made no return of their labor as directed. In assumpsit, for his own labor and for the money paid his employees, — *Held*, that —

1. The written order was directed to the plaintiff in his official capacity, and required the performance of an official duty;

2. It did not authorize him to perform the labor, pay the employees, and look to the town for reimbursement; but that,

3. As a surveyor under the statute, to employ, with the consent of the selectmen thus expressed, men, of whose work be was to make a return, and who would thereby become entitled to their pay from the treasury of the town.

A town may, at the same, or a subsequent meeting duly called for that purpose, rescind a vote previously passed, whenever the rights of other interested parties have not intervened.

On Report.

Assumpsit, on an account annexed, for the labor of the plaintiff, and for money paid by him to several persons employed by him in January and February, 1861, in removing the snow from the highways within the limits of a certain highway district in the defendant town, of which the plaintiff had been previously duly appointed highway surveyor by the selectmen of the defendant town.

It was in proof that the plaintiff was officially appointed and qualified to fill a vacancy occasioned by the resignation of the former incumbent, who, before vacating the office, had expended all the taxes appropriated to his district; that the labor was necessary and compensation was reasonable.

It also appeared that, at meetings duly called at the respective times named, the town passed the following votes:

Sept. 9, 1861, — "Voted, to instruct our selectmen to draw orders to pay for breaking down and removing snow last winter."

Dec. 11, 1861, — "Voted, to raise $1200 to pay the bills for breaking down and removing snow in the winter of 1861, and divide it equally in the several districts."

Dec. 11, 1861, — "Voted, to rescind the vote wherein we voted to raise $1200," &c.

Dec. 11, 1861, — "Voted, to raise $1000 to pay the bills for breaking down and removing snow in all sections of the town in winter of 1861."

Same date. — "Voted, that the selectmen be auditors to settle the bills against the town for breaking down and removing snow in the winter of 1861."

Dec. 26, 1861, — "Voted, to rescind the vote whereby we voted to raise $1000, at a town meeting holden Dec. 11, 1861."

Same date. — "Voted, that the town do not raise any money to pay bills against the town for breaking down and removing snow in the highways, in the winter of 1861."

Same date. — "Voted, to instruct the selectmen, and that they are instructed, not to draw any orders or make any assessments, to pay bills for breaking down and removing snow in the winter of 1861."

The Court to render such judgment as the law and facts required.

I. S. Kimball, for the plaintiff.

Dane & Bourne, for the defendants.

BARROWS, J. — If the plaintiff could make good his position that he, in his individual capacity, was employed by a majority of the selectmen, who are the prudential agents of the town, to keep a certain portion of the roads in the town free from obstruction by snow, (after the amount raised by the town for that object had been expended, and the power of the surveyor to employ laborers who might recover their pay from the town, had been exhausted,) and for that purpose to procure necessary help at his own expense, his claim for a reimbursement, upon proof that he had performed the service, might be considered as established.

But, unfortunately for him, the case presents a very different aspect; and we are bound to decide it according to the legal rights of the parties, although we may thus find ourselves compelled to refuse compensation to the plaintiff

for expenses incurred by him in good faith for the benefit and advantage of the defendants.

On the 24th of January, 1861, the plaintiff was duly appointed by the selectmen, acting under R. S., c. 3, § 12, a surveyor of highways in a certain district, to fill a vacancy caused by the resignation of Gilman Bennett, who had previously expended all the moneys appropriated for the repairs of highways in the district, including their proportion of the "snow tax." In that appointment he was regularly invested with all the powers and required "to execute all the duties appertaining to said office." He accepted it and was duly sworn. On the same day he received the following paper (signed by two of the selectmen,) which is the only evidence he produces of authority from the selectmen to make this bill against the town: —

"To Mr. John M. Getchell, Sir, — You are requested to keep the snow broken down within the limits of your district, so as to make it passable, and do it with as little expense to the town as possible, and keep an account of each one's own labor and make a return of it to us five days before our next annual town meeting."

Signed,— "Wm. Storer, jr., } *Selectmen*
"Wm. Gooch, } *of Wells.*

"January 24, 1861."

That this order was directed to the plaintiff in his official capacity, and required of him the performance of a certain duty in the office to which he had that day been appointed, is too manifest to admit of doubt or to require discussion. Its plain intent and meaning is, not to authorize him to do the work, pay the help, and look to the town for reimbursement, but, as a surveyor, in his district, under the statute, to employ, with the consent of the selectmen thus expressed, men of whose work he was to make return, and who would thereby become entitled to their pay from the town treasury. The rights and duties of surveyors of highways are specifically defined by statute, and their powers are limited to those thus conferred by legal enactment. And the tendency

of all the legislation we have recently had has been rather to restrict than enlarge their powers. That it was not originally designed to be an office of profit or emolument, may be inferred from the fact that the statute of 1821, c. 118, § 13, specifically imposes a forfeiture of $10 to the use of the town upon any man, who, being elected, shall refuse to serve, with a proviso that no man shall be held to serve more than one year in three. By § 15, of the same chapter, it was provided that, in case the sum appropriated for any particular district proved insufficient for the repair of the ways, the surveyor, with the consent of the major part of the selectmen, might employ inhabitants enough to make up the deficiency, not, however, giving him a right of action against the town therefor, but providing that the persons thus employed should be equitably paid out of the town treasury, or have credit on the next highway tax, or be otherwise compensated in any manner previously prescribed by the town, who might authorize the surveyor to agree with them as to the manner of the compensation; but this has been since reduced to an authority, in such case, if he have the consent of the selectmen in writing, to employ inhabitants of the town to labor for pay, not exceeding fifteen per cent. of the amount committed to him. R. S., 1857, c. 18, § 50.

It is not perceived that the condensation of this § 50 from § 74, c. 25, R. S. of 1841, was designed to affect the mode of making payment to the parties rendering the service, or that it gives to the surveyor the right to volunteer a payment to the persons employed, and recover of the town. He was requested to make return to the selectmen "of each one's own labor" in order that the selectmen might know how much each man was entitled to receive. To enable him to recover even the trifling amount of fifteen per cent. of the snow tax for his district, it should at least have appeared that he made the required return, and that those whom he had rightfully employed had been refused their pay by the town authorities, and had claimed and received it at

his hands as their immediate employer. That both he and the selectmen apparently overlooked the statute limitation of his power does not better his condition. The only authority he received was as a surveyor. What that was the statutes declare. He can acquire no right of action by exceeding it. It was his duty, as a surveyor, if the 15 per cent. proved insufficient, as well it might, to inform the selectmen of any exigency which might require an expenditure exceeding that which he, as surveyor, could lawfully make, and if, thereafterwards, the prudential agents of the town saw fit to contract with him for the performance of additional service, he might maintain his action therefor. The difficulty is, there is no proof of such contract. The plaintiff must fail unless relieved by the votes of the town subsequently passed. But those votes were general in their terms, and might apply to other bills that had legally accrued for breaking down and removing snow, and were all rescinded without having been acted upon by anybody,—certainly not by the plaintiff; he did nothing in consequence of the vote. As in *Wellington* v. *Howard*, 8 Cush., 68, the vote was, at most, an authority to the town officers to pay, "and being revoked by the reconsideration before it was acted on, it ceased to have any effect, as if it had never been passed." *Ingalls* v. *Auburn*, 51 Maine, 352. *Judgment for the defendants.*

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

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PETER HILL *versus* PORTLAND & ROCHESTER RAILROAD COMPANY.

The maxim—"So use your own property as not to injure the rights of another," is applicable alike to corporations and individuals.

A railroad corporation has the right to establish reasonable signals to be given for the starting of trains from its stations.

Hill *v.* Portland & Rochester R. R. Co.

Whether or not the loud and sudden sounding of a steam-whistle is a reasonable signal for such purpose, and within the rule of ordinary care, depends upon all the circumstances of each particular case; and it is a question for the jury.

In the trial of an action for personal injury to the plaintiff, caused by being thrown from his carriage in consequence of his horse becoming frightened at the sound of a locomotive whistle, at a railroad crossing near a station, it is competent for the plaintiff to show that the sound of the whistle produced a similar effect upon other horses, at the same time and place.

Also to show the usual effect of that whistle, at the same place, on ordinary horses.

It is not competent for the corporation to ask a witness acquainted with the practice of railroads generally, and who had had charge of another railroad for sixteen years, whether or not, in his opinion, the signals in question were "reasonable or unreasonable," "prudent or extraordinary;" or whether or not similar signals were given by other railroad corporations.

On Exceptions and Motion to set aside the verdict as being against law and evidence.

Case, for personal injury to the plaintiff in consequence of his horse becoming frightened by the loud and sudden blowing of defendants' locomotive whistle, at a railroad crossing near the Buxton station.

The verdict was for the plaintiff, and the defendants alleged exceptions.

The case is sufficiently stated in the opinion.

Deane & Verrill, for the defendants, cited

1 Redfield on Railroads, 397; *Illinois Central Railroad* v. *Rudy*, 17 Ill., 580–3; *Gahagan* v. *B. & L. Railroad*, 1 Allen, 187; *Seaver* v. *B. & M. Railroad*, 14 Gray, 469.

Chisholm & E. B. Smith, for the plaintiff, cited

1 Greenl. on Ev., §§ 82, 83, 84, & 431; *Bradley* v. *B. & M. Railroad*, 2 Cush., 539; *Linfield* v. *O. C. Railroad*, 10 Cush., 562; *Cope* v. *Dodd*, 13 Penn., 33; *Leach* v. *Perkins*, 17 Maine, 464; *Custill* v. *Crawford*, 7 Ala., 335; *Miller* v. *Pendleton*, 8 Gray, 547; *Maury* v. *Tallmadge*, 2 McLean, 157; *Cole* v. *Fisher*, 11 Mass., 137.

Kent, J. — The defendants move for a new trial on the ground that the verdict is against evidence and the weight

of evidence. On a careful examination of the evidence as reported, we think there was evidence from which a jury might find these facts, viz.,—that the plaintiff, driving a quiet and safe horse, stopped near the crossing, because the train was at the depot and apparently about to start, and he did not think it prudent to attempt to pass over the track, the head of the engine being 15 or 20 feet only from the highway at the crossing; that the time of stopping the train at the depot was irregular, sometimes 10 or 15 minutes and sometimes the train making but a momentary stop; that, in this condition of things, the engineer, according to the custom then on this road, sounded the whistle twice, very suddenly, and the sounds were very loud and sharp, and brief; that these sounds alarmed plaintiff's horse very much, and he suddenly turned and threw the plaintiff out of his carriage, who, by his fall and the consequences resulting from it, suffered injury and damage to his person; that the engineer was in a situation to see the plaintiff and his horse, before he sounded the whistle; that it was sounded before the train started.

There was evidence in some degree qualifying, or perhaps contradicting some of these positions,—but it seems to us that a jury might honestly find them to be true on the whole evidence. If so, then the verdict for plaintiff can only be set aside by establishing one of the following positions; that the engineer had a legal right to sound the whistle as he did, and that the company would not be responsible for the act, under any circumstances; or that, under the circumstances of this case, it was proper and prudent, and not exceeding the rule of ordinary care, for him to do what he did; or, that the plaintiff contributed to the accident and injury by his own want of reasonable prudence and ordinary care on his own part.

As to the first proposition, we do not find any specific ruling reported in the exceptions, except the following,—"that the mere fact that such a rule of blowing the whistle as had been testified to, had been established, and practiced for a year or more by this company, does not operate as a

justification in this case, if it was an unreasonable, unauthorized rule, and an infringement of the plaintiff's rights."

The exceptions state that other rulings, not excepted to, were given.

A railroad company has an undoubted right to establish rules and regulations in reference to the mode and manner of giving notice at stations or other places. It is right and proper that sufficient notice should be given to passengers, that the train is about to start. But all such rules must be subjected to the test of reasonableness, in view of the rights and duties of citizens who may be affected by them. No corporation can rightly disregard these rights, when adopting its own rules of action, or giving directions to its servants or agents. The great maxim of "*sic utere tuo*" applies to corporations as to individuals. *Shaw* v. *Worcester Railroad*, 8 Gray, 66. A mode of giving notice, for instance, may be convenient and save some labor, and may answer well all the purposes of the company, and yet may be used at some time or place when it is liable to cause damage, whilst, at some other time or place, it would not be subject to such objection. It might be safe and prudent to sound a loud and sudden whistle at a station, at a distance from any highway or crossing, when it would not, where there was such crossing, with many horses near it, awaiting the passing of the engine and train. We cannot sanction the claim of any railroad to establish and execute its own rules, at its own pleasure, without reference to others' rights and privileges.

The whistle seems to be particularly adapted to give notice of the approach of a train to a crossing of a highway. The object then is to warn all persons of such approach in season to enable them to stop at a safe distance, and thus avoid the risk of collision and of alarm to horses. Indeed, the law requires that such notice shall be given by bell or whistle. Of course, no railroad company can be held liable for damages for giving such notice as is required by law,

when given at the distance named in the statute. The company may be liable for the damages occasioned by a neglect of this duty. But the statute does not authorize or require the sounding of the whistle at any other time or place. The right or liability, at other times and places, depends upon the general principles of law, as before explained, applicable to the particular facts in each case.

In every case, then, it becomes a question, whether, in that particular case, the act was reasonable and within the rule of ordinary care, under all the circumstances of time and place and all the surroundings. It would seem, that there may be a decided difference in "whistles," in their suddenness, loudness and brevity, and consequently in their liability to alarm horses. Again, reasonable care might require of the engineers to look ahead to see if any horses are on or near the track, particularly when near to a highway, which crosses the railroad immediately in front of the engine, and to abstain from the use of the whistle and resort to his bell, if he sees any animal within twenty feet and in front of his engine. There can be no doubt, we presume, that the ringing of the bell is the safest and, usually, the best understood notice to passengers that the train is about to start.

We do not mean to decide that a whistle can never properly be used for this purpose, although the use of a bell for this particular purpose seems less liable to objection. But it is a question, in every case, for the jury to decide whether in the case before them its use was justifiable, or prudent, or proper. We cannot doubt that proper instructions were given by the Court on this point, and we see no sufficient reasons for setting aside the verdict on this ground.

The other point on which the motion rests, is that the plaintiff contributed to the injury by his own want of care and prudence. It is urged that he might have crossed the road and gone beyond danger of alarm, after he arrived at the place where he stopped. The answer to this is, that the

time when the train would start was not regular or fixed, but quite uncertain.

It is said he did actually start to go over, an instant before the whistle sounded, and that this was want of care and contributed to the injury. If the injury had arisen from a collision between his horse and carriage and the engine, this fact would be of more importance, and might go far to show a want of care. But there was no collision. The horse was frightened. And, it might be fairly urged that he would have been equally alarmed if he had stood still where he was a moment before. He could not have moved many feet from that spot. At all events, all these facts and circumstances were before the jury, and their decision is not, in our view, manifestly wrong on the evidence. There are no exceptions to the law as given to the jury on this part of the case.

The exception taken to the question proposed to S. L. Hill cannot be sustained. This witness was on the spot with his own horse. It was competent, clearly, for the plaintiff to show that the whistle produced the same effect on his horse that it did on plaintiff's horse. This was pertinent to the issue, and bore directly on the nature, extent and actual effect of the noise made by the defendants' engine.

A witness for plaintiff was asked by him, in reference to the whistle on this road at this place, what is the usual effect of this on ordinary horses? This question was objected to, but admitted. The witness answered,—"I have seen a great many horses frightened by it." It is stated, in the exceptions, that no answer, given to any question objected to, was made on the ground of not being responsive to the question, or as being more objectionable otherwise than the inquiry, nor was any request made concerning the same. Was it competent for the plaintiff to show the usual effect of this whistle on horses of ordinary character. Why not? One leading question in the case was,—whether it was reasonable for the engineer to apprehend or suppose that the noise

suddenly made would frighten horses. In other words, it was competent to show to the jury, some of whom might never have heard such a whistle, the nature, extent and all the characteristics of the sound emitted, and its effects on horses of ordinary steadiness. We think the defendants might have proved, if they could, that the whistle had been in use for years, and that no horse had ever been alarmed by it. And so, as bearing on the same points, the plaintiff might show what effect had actually been produced by it on horses.

The objection is restricted to the question. If there was any objection to the answer, it should have been made specially, and the exceptional part might have been stricken out, or if not, been excepted to. The question was not as to the usual effect of railroad whistles, but what the effect of this particular whistle at this place had been within the knowledge of the witness. We think the question admissible, within the rules of evidence.

The questions put to S. T. Corser, and objected to by plaintiff and excluded, related chiefly to the witness' opinion and judgment whether the blowing of the whistle was safe and prudent. He was asked whether in his opinion this practice on this road was "reasonable or unreasonable," "prudent" or "extraordinary," or "an unreasonable manner of proceeding on the part of the engineer." It is very clear that these questions were inadmissible. They proposed to obtain from the witness answers to questions which the jury were to answer, where the facts were of a character equally within the knowledge and comprehension of the jury as of the witness. They ask for mere naked expressions of opinion as to the character and quality of acts open to common observation. *Mulray* v. *Railroad*, 5 Gray, 541.

This witness was also asked whether it was not a custom on other railroads to blow two whistles upon starting the train, the witness having stated that he was acquainted with the customs of railroads generally, and that he had been in charge of one sixteen years. This was also excluded. It

does not appear in terms, whether the object was to prove a general custom on all railroads. The question might be limited to one or two roads. But, if such a general custom could be established, it would not be a legitimate defence in this case, or tend to establish it. If all the railroads in the country adopt any rule or custom, which is unreasonable or dangerous and productive of injury, the generality of the custom cannot, in a given case, in any degree excuse or justify the act. Every case must be determined upon its facts, and not upon the proceedings of other corporations in somewhat similar cases. *Miller* v. *Pendleton*, 8 Gray, 547.

Exceptions and motion overruled.

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

SARAH J. HEARNE, *Adm'x*, *versus* JOHN HEARNE.

Proof that the defendant, as trustee of the plaintiff, at a time named, deposited in a certain savings bank, a certain sum of money; that the money was delivered to the defendant by the plaintiff; and that, upon demand by the plaintiff, the defendant refused to pay over the money, is not sufficient to sustain *indebitatus assumpsit* for money had and received.

ON EXCEPTIONS.

ASSUMPSIT for money had and received.

After the plaintiff had put in all his testimony, the presiding Judge, upon motion of the plaintiff's counsel, ordered a nonsuit, and the defendant alleged exceptions. The remaining facts sufficiently appear in the opinion.

Chisholm & G. A. Emery, for the plaintiff, cited

Hall v. *Marston*, 17 Mass., 579; Chitty on Con., 604; *Wiseman* v. *Lyman*, 7 Mass., 288; *Lockwood* v. *Kelsea*, 41 N. H., 185; Com. on Con., part 2, c. 4, §§ 1 & 7; *Moore* v. *Maudlebaum*, 8 Mich., 433; *Blood* v. *Wood*, 3

Cush., 416; *Low* v. *Thorndike*, 20 Pick., 317; *Conant* v. *Kimball*, 21 Pick., 36; *Jennison* v. *Hapgood*, 7 Pick., 7; *Arms* v. *Ashley*, 4 Pick., 71; *Hobson* v. *Hall*, Peake, 172; *Richardson* v. *Woodbury*, 43 Maine, 213; *Cowan* v. *Wheeler*, 25 Maine, 280.

E. B. Smith, for the defendant.

TAPLEY, J.—The plaintiff is administratrix of the estate of Luther Hearne, who was a brother of the defendant. The action is assumpsit, and, if sustained, it must be done by proof of a promise, express or implied, and a failure to comply with the terms of that promise.

Admitting all the evidence offered, as if no objection had been made to its reception, we find it proves or sustains three positions:—

1. That this defendant, as trustee of Luther Hearne, in July and September, 1864, deposited a certain sum of money in the Saco & Biddeford Savings Institution.

2. That this money was delivered to the defendant by said Luther.

3. That upon demand made by the plaintiff, as administratrix, the defendant refused to pay her the money.

Does the maintenance of these several propositions entitle the plaintiff to recover in this action?

Is there anything in these facts which shows that the defendant was under legal obligation to pay this money, or any portion of it, to this plaintiff upon her demand?

The plaintiff shows by the evidence she adduced, that the money she seeks to obtain was held by the defendant, as the trustee of Luther Hearne in his lifetime. She further offered to prove that the money was delivered to the defendant by said Luther.

It will be noticed this was not an offer to prove that he did not hold as trustee, but rather to show that when it came into the defendant's hands, as trustee, it came by the manual delivery of Luther.

The mere proof of delivery of money by one to another,

has often been held to be insufficient to support this action, the presumption being that it was delivered as a payment of a preëxisting liability. 2 Greenl. Ev., § 112.

If, therefore, this offer or evidence stood disconnected from the other proofs offered, it was not sufficient to sustain the plaintiff's action. Taken, however, in connection with the other evidence in the case, the presumption that it was delivered as a payment of a preëxisting debt is rebutted, and the fact that it was received, subject to the terms of some trust, is made apparent.

It cannot matter from whom the money was actually received, if, when received, it was delivered to, and received by the defendant, to be by him held or expended in the execution of some trust. This offered evidence was material only so far as it tended to confirm the other evidence, that it was held upon some trust and not as a loan.

The plaintiff also proved a demand upon the defendant for the money and a refusal by him to pay the same over to her. No inference of a promise or liability can be drawn from this fact. It was a very distinct denial of liability.

We therefore find the case resolves itself into this inquiry, can a plaintiff recover in assumpsit, when he shows that the defendant holds money as his trustee, without showing the conditions of the trust, and that, by its conditions, the defendant is bound to pay him the same upon demand?

We think he cannot; and, in the consideration of such a question, it should be noticed that it presents an entirely different case from that where the plaintiff presents a *prima facie* case of liability, without disclosing the fact of the existence of a trust, and the defendant seeks to avoid by establishing the relation of trustee and *cestui que trust*. A *prima facie* liability being established, the burden rests upon the defendant, and he must show the relation, and such a trust or situation of the trust funds, as excuses him from liability in this form of action.

In the case under consideration it is the plaintiff who shows the relation; she proves as fully the fact that the

money was held by the defendant as the trustee of Luther, as she does that he held it at all.

Holding the money as trustee, where is the evidence that it was upon such terms as to make him liable at all in this form of action, and more especially to this plaintiff upon her demand simply? It is quite apparent none appears in the report of the case.

Does the law raise any promise from the mere relation of trustee and *cestui que trust*, without any evidence concerning the character of the trust and the condition of the trust fund? Clearly, it does not. The very fact that such a relation existed between the parties raises the inference that the liability is contingent. Whenever the character of the trust shall be shown, it may, or may not appear, that a contingency has arisen or happened, rendering the defendant liable to an action of assumpsit. Until his liability is made to appear by legitimate evidence, neither Court or jury can adjudge him liable. Whatever the character and terms of the trust may be, there is no evidence that it has not been, or is not being performed according to its terms. In the absence of all evidence to the contrary, the law presumes this trustee is executing his trust in a lawful manner.

If the plaintiff knows the terms and conditions of the trust, she should show them and such other facts as entitle her to maintain this action. If she does not know the conditions upon which it was received, and held, she may seek the information by some of the appropriate methods provided in such cases. By whatever form she proceeds, she must establish the defendant's liability to pay her before she can recover. The burden is upon her.

The numerous authorities, to which our attention has been directed, in no degree conflict with the views here expressed. The general rule is undoubtedly correctly expressed by the counsel for plaintiff, that, "when a person has in his hand money, which in equity and good conscience belongs to, and ought to be paid to another, assumpsit for money had and received will lie."

Mr. Greenleaf says, the count for money had and received, "may in general be proved by any legal evidence, showing that the defendant has received, or obtained possession of the money of the plaintiff, which in equity and good conscience he ought to pay over to the plaintiff." 2 Greenl. Ev., § 117.

The difficulty in the plaintiff's case lies in the want of proof that this money ought to be paid to her.

The cases of trust funds to which our attention has been called were cases where the terms of the trust, and the facts concerning its execution were proved. No case is referred to where this action has been sustained when it was shown by the plaintiff that the money was held by the defendant under a trust, the terms and conditions of which were undisclosed. But, on the other hand, the authorities cited by the learned counsel for the plaintiff, declare that the plaintiff must affirmatively prove the trust closed, and show distinctly a title to the balance. Comyn on Con., part 2, c. 4, 301.

If it appeared the trust was closed, there is no evidence a balance remains. Were both these facts proved or admitted, there is no evidence that the title to the balance is in the plaintiff. None of these things, however, appear in this case.

Mr. Greenleaf further says, "if the money has been deposited in the hands of a trustee for a specific purpose * * it cannot be recovered back in this action till the trust is satisfied." 2 Greenl. Ev., § 119.

There is no pretence or evidence that the money was loaned to the defendant, or that it came to his hand in any illegal or improper manner, but the evidence is, that it was delivered to him by his brother Luther for some purpose, unknown by, and unexplained to the Court. The Court cannot assume that the trustee is acting *male fide*, but must presume the reverse.

There being no evidence adduced of a breach of any promise by the defendant, express or implied, the jury

would not have been warranted in finding a verdict against him, and the nonsuit was properly ordered.

The view we have taken of the case renders the consideration of the objections urged against the admissibility of portions of the testimony of the plaintiff's witness, Burnham, unnecessary. We have thought it more for the interest of the parties to render our decision upon the whole evidence offered than upon such fragments as may have been found admissible. *Exceptions overruled.*

Nonsuit confirmed.

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

IRA T. DREW *versus* PRESIDENT, DIRECTORS & COMPANY OF ALFRED BANK.

An attachment of real estate, made upon a writ containing a count upon a note, and a count for money had and received, without any specification of the claim to be proved under it, is void.

Such an attempted attachment is not rendered valid by striking out the general count and taking judgment upon the count on the note alone.

An attachment of real estate, invalid when made, cannot be rendered valid by any amendment of the writ.

ON FACTS AGREED.

REAL ACTION. Writ dated April 15, 1868.

The facts are sufficiently stated in the opinion.

Ira T. Drew, pro se.

Dane & Bourne, for the defendants.

When an amendment has been properly made and is for the same cause of action originally embraced in the writ, the amended writ is treated as it would have been if so made when the suit was commenced. *Heath* v. *Whidden*, 29 Maine, 108; *Prescott* v. *Tufts*, 4 Mass., 146. This rule is applicable in its effect to the whole process, the rights of

the parties under it and even to those of third parties. *Wright* v. *Hale*, 2 Cush., 492; *Haven* v. *Snow*, 14 Pick., 28; *Seely* v. *Brown*, 14 Pick., 180; *Miller* v. *Clark*, 8 Pick, 412; *Ball* v. *Claflin*, 5 Pick., 303.

The reasons given in the opinions in *Osgood* v. *Holyoke*, 48 Maine, 410, and in *Neally* v. *Judkins*, 48 Maine, 566, do not apply to case at bar; for the amendment was made before the date of the mortgage.

The docket, which is made part of the case, shows the plaintiff was counsel for Stimson in the action of the *Bank* v. *Stimson*, made no objection to the amendment of the writ, and knew judgment was recovered. Then he took his mortgage with the knowledge of all the facts. It is analogous to knowledge of unrecorded deeds. *Norcross* v. *Widgery*, 2 Mass., 508; *Farnsworth* v. *Childs*, 4 Mass., 637; *Prescott* v. *Heard*, 10 Mass., 62; *Priest* v. *Rice*, 1 Pick., 164.

DANFORTH, J.—Both parties claim title to the demanded premises under John N. Stevenson. The plaintiff by a mortgage deed dated August 13, 1867, duly recorded, and the defendants under an attachment made Nov. 2, 1865, followed by a judgment and levy, November 11, 1867. If, therefore, the attachment of the defendants was valid, they have the better title. If otherwise, the plaintiff must prevail. The writ, upon which the attachment was made, at the time of its service, contained two counts on promissory notes and one general count without any specification of the claim to be proved under it. It is well settled that an attachment on such a writ is void. R. S., c. 81, § 31; *Osgood* v. *Holyoke*, 48 Maine, 410; *Neally* v. *Judkins*, 48 Maine, 566; *Hanson* v. *Dow*, 51 Maine, 165; *Farrin* v. *Rowse*, 52 Maine, 409.

It is, however, claimed that the case at bar does not come within the principle settled in these cases, inasmuch as the writ upon which the defendants' attachment was made, was, before judgment, amended by leave of court by striking out

the general count. But, according to the decisions already referred to and many others, the attachment, when made, was void. If so, the subsequent action of the party and the Court could not revive it, because there was none to revive; nor could it create an attachment, because that can only be done by the proper officer, having in his hands at the time a sufficient precept. *Brigham* v. *Este*, 2 Pick., 423.

No subsequent doings of the Court can affect the acts of the officer in making the service, so as to render that valid which, when performed, was void.

It is undoubtedly true, as settled in the authorities referred to by the counsel for the defendants, that the amendment of the writ relates back to its date, and gives it the same effect, as between the parties, as if so made at first; but the return of the officer is not a part of the writ. It is outside of it and must be valid or invalid according to the facts existing at the time it is made. Nor is the fact, that the amendment was made before the date of the plaintiff's mortgage material, for the effect would be the same if made subsequently. If it makes valid the attachment, it must do so from the date of the officer's return, and it would take the precedence of all subsequent sales and attachments, whether made before or after the amendment, which is clearly inadmissible. It cannot be that a sale or attachment, valid when made, can be destroyed by giving to an amendment of the writ the effect of reviving or making valid a former attempt to make an attachment. This would seem to have been settled in *Osgood* v. *Holyoke*, above cited, where it is held that, "the rights of the parties depend upon the facts disclosed by the declaration; not upon such as may be subsequently proved or ascertained."

Nor can any notice which the plaintiff may have had of an attempted attachment avail the defendants. If the attachment had been valid and had failed through want of record, a different question would have been presented, and one more analogous to the effect of a notice of a prior unrecorded deed. A notice of a void deed would hardly en-

able the grantee named in it to hold against a *bona fide* purchaser, even though he subsequently obtained a good deed. No more can a subsequent purchaser be affected by a prior invalid attachment.

Judgment for plaintiff as on mortgage.

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

WILLIAM PERRY *versus* INHABITANTS OF KENNEBUNKPORT.

The word "plaintiff" as used in R. S., c. 82, § 107, means the plaintiff of record.

Where the indorsee of two negotiable promissory notes made payable to different payees, causes each of the notes to be sued, at the same term, in the name of its respective payee, the plaintiff of record will be entitled to costs in each suit.

ON EXCEPTIONS.

In 1864, one Lord bought two negotiable promissory notes, given by the defendants, one payable to one Wakefield, or order, and the other to the plaintiff, or order, both of which were duly indorsed by their respective payees. In March, 1865, Lord caused the notes to be sued in the names of the payees and subsequently indorsed in the writs as assignee. The suit upon the note payable to Wakefield was prosecuted to final judgment, full costs taxed and the judgment satisfied.

This action went to the Law Court on exceptions by the defendants after verdict. At the May term, 1868, the exceptions were withdrawn and judgment was rendered upon the verdict. Thereupon the defendants contended that, by virtue of R. S., c. 82, § 107, no costs should be allowed in this case, because both actions might have been joined in one. The presiding Judge ruled, as matter of law, that

costs be allowed to the plaintiff, and the defendant alleged exceptions.

S. W. Luques, for the defendants.

E. B. Smith, for the plaintiff.

KENT, J.—The plaintiff on record is the prevailing party and, therefore, entitled to costs, unless there is some statute provision which takes away this right. Costs are regulated by statute. The defendants claim that the general rule is not applicable to this case, and refer to c. 82, § 107, R. S., which provides that "when a plaintiff brings divers actions at the same term of a court, against the same party, which might have been joined in one, or brings more than one suit on a joint and several contract, he shall recover costs in only one of them, unless the Court certifies that there was good cause for commencing them."

It is not pretended that this plaintiff on record did bring two actions at the same term, but it is stated, in the case, that D. W. Lord was the actual owner of this note sued and of another similar to it, payable to another party, and that they were both payable to order and indorsed in blank by the respective payees, and that an action on each was commenced in the name of the payee at the same term, and that judgment for debt and costs in one of them has been rendered and been satisfied. The argument is, that as Mr. Lord might have brought one action, as indorsee, on both notes, that he must be regarded as the "plaintiff," named in the statute, and therefore but one bill of cost can be allowed in the two suits. That, as Mr. Lord might have been the plaintiff of record in another suit, he must be held to be such in this, or at least be regarded as the "plaintiff in both these suits."

The whole question turns upon the point, whether the "plaintiff" named in the statute is the plaintiff on the record, or whether we can go beyond the record and regard an assignee or indorsee, or actual owner, as the "plaintiff" named.

On examination of the statutes, it will be found that the Legislature has constantly made a distinction between the plaintiff, who is the party in whose name the action is brought, and the party in interest, as assignee, or, as he is sometimes spoken of, as the plaintiff in interest. The "plaintiff," when spoken of simply without qualification or limitation, is the person who has "presented himself on the docket of the Court, and is the one subject to costs if such there should be." *Moore* v. *Maine*, 29 Maine, 560.

The distinction between the plaintiff on record, and the real party in interest, is to be found in many places in our statutes. Thus, § 102, of this chapter 82, provides for the case of an action in the name of the State, for the benefit of an individual, and provides that he shall indorse the writ, and, if the defendant prevails, judgment shall go against such person, as if he were plaintiff. Not saying that he is plaintiff.

It was always held, until the statute was changed, that costs can only be awarded against the party who does not prevail, and, "by the uniform practice of our courts, this is the adverse party on record." *Freeman* v. *Crane*, 13 Maine, 260.

So in *Skillings* v. *Boyd*, 10 Maine, 43, it was held, where the statute required that the writ should be indorsed "by the plaintiff, or his agent or attorney,"— that it meant the plaintiff of record, —and not an assignee or party in interest, and that the indorser who indorsed the writ as attorney of the plaintiff in interest, and not of the plaintiff on record, was not holden.

And the Court has always, whilst protecting the equitable rights of assignees, or actual owners, held that, without a statute provision, no judgment can ever be rendered against them. 29 Maine, 560, — before cited.

These decisions led to the enactment contained in § 105, of c. 82, that the defendant may require an assignee to indorse the writ, and, if the defendant prevails, judgment for his costs shall be rendered against the plaintiff and such

assignee. Thus clearly distinguishing between the plaintiff of record and his assignee. It also shows that without a statute provision the assignee cannot be regarded as a party. We are not insensible to the force of the argument on the part of the defendants, — that this case is within the mischief intended to be guarded against. But we cannot give to the language used a forced or extended meaning. It is for the Legislature, if it sees fit, to furnish a remedy for a case like this. We think it would be unsafe and lead to many new questions and invoke new constructions if we should depart from the rule, that where a statute names a "plaintiff," as the party to be affected by its provisions, and uses no word of qualification, it must be construed to mean the plaintiff of record.

Exceptions overruled.— Judgment for plaintiff with costs.

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

ELIPHALET F. PACKARD *versus* THE CITY OF LEWISTON.

The word "place," as used in the proviso in § 41, c. 106, of the Act of Congress of June 3, 1864, refers to the location of the bank and not to the State authority under which the tax is to be assessed.

Such part only of a statute, as is repugnant to an Act of Congress, will be adjudged void.

Section 2, c. 126, of the Public Laws of 1867, is consistent with § 41, c. 106, of the Act of Congress of June 3, 1864, and must govern in this State, so far as place is concerned, in the assessment of taxes on shares in National banks.

Sections 3, 4 and 5, being inconsistent therewith, are void.

ON FACTS AGREED.

ASSUMPSIT FOR MONEY HAD AND RECEIVED.

The writ was dated April 8, 1867. Plea, general issue and joinder.

It was admitted that the plaintiff was, on April 1, 1867,

and that he still is, a resident of the town of Auburn; that, on that day, he was and still is the owner of seventy shares of the stock of the "First National Bank of Lewiston, situated in the city of Lewiston; that he was not the owner of any other property in said city; that no property of the plaintiff other than said bank stock was entered upon the assessors' book of valuation of property taxable in said city; that said bank shares were assessed in said city as of the value of $4900, and a tax was legally assessed thereon of $127,40, provided said shares were legally taxable in said city."

It was also admitted that said tax was paid by the plaintiff to the defendants under protest.

Judgment was to be rendered according to the legal rights of the parties.

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

DANFORTH, J. — By the decisions of the U. S. Supreme Court, it has been settled that shares in national banks may be taxed by State authority. *Allen* v. *The Assessors*, 3 Wallace, 573; *People* v. *The Commissioners*, 4 Wallace, 244. The only other question involved in this case is whether the plaintiff's shares, in a national bank located in Lewiston, are taxable by Lewiston, he residing in Auburn. For if they are so, it is admitted that the tax was legally assessed and by the agreement of the parties the plaintiff is to become nonsuit.

By the Act of 1867, c. 126, § 2, it is provided that all the shares of national banks shall be assessed to the owners thereof, in the place where the bank is located, to be collected as other taxes, except as thereinafter provided. In the subsequent sections follow the provisions by which such taxes are to be collected for the benefit of the several towns in which the stockholders respectively reside. If these latter provisions are in force, the plaintiff must recover, because the tax would belong to Auburn and was wrongfully collected by Lewiston. If, on the other hand, these

provisions are inconsistent with the law of the United States and consequently void, then, by the provision of section two, the tax was properly collected by Lewiston and the plaintiff must fail. For, although all these provisions are contained in one chapter and are parts of one statute, yet they are so disconnected in meaning and so independent of each other, that the latter part may be declared void without affecting the former. In such a case, the part which is valid must stand, though the other fall. *Commonwealth* v. *Hitchings*, 5 Gray, 485, and cases there cited. If the law of Congress requires that the tax assessed upon the shares of national banks shall be assessed in the place where the bank is located, then sections 3 and 4 of the Act of 1867 are inconsistent therewith, leaving § 2 in force without the qualifying clause at the close, "except as hereinafter provided." That this was the intention of the Legislature is clear from the provisions of the eighth section. In answer to certain interrogations propounded by the House of Representatives, a majority of the Court have heretofore given an opinion upon this subject in which they came to the conclusion that §§ 3 and 4 were inconsistent with the law of Congress. That was not a decision in any case pending, and is not therefore binding upon the parties to this suit. It was not filed in the office of the Secretary of State before the thirtieth day of March, 1867, and for that reason had no effect upon the statute. We are therefore at liberty to examine the subject anew and correct whatever errors we may have formerly fallen into.

We have made this examination with much care, and with an earnest effort to guard against any bias which may have resulted from our former opinion. We have given a due degree of attention to the discussion which the subject has excited, and duly considered the arguments adduced. We have not, however, forgotten that this is not a question of policy as to what the law should be, but one of the construction of a law already made, by which we are bound. Nor are we unmindful of the fact that the Legislature, un-

derstanding that the United States statute required the assessment of national bank shares in the place where the bank is located, attempted to avoid any inconsistency by providing for the assessment in that place and for the collection of the tax in the place where the stockholder resides. Now it is evident that such an avoidance of the law is a violation of its spirit. All the authorities, so far as they have come to our knowledge, agree that the meaning of the Act of Congress is, that the product of the assessment is for the benefit of, and belongs to the place where made. Hence, if the national law requires the assessment of bank shares in the place where the bank is located, the statute of 1867 is just as much a violation of that law, as though it provided in express terms for assessing the tax in the place of the stockholder's residence. It is clearly an attempt to do indirectly what cannot be done directly. But were this admissible, it will appear from an examination of the law that such is not its effect. True, in § 2, provision is made for the assessment in the place where the bank is located, by including the shares in the valuation of that place. But, in § 5, it is provided that the shares of non-residents shall not be included in the valuation for the purpose of ascertaining the rate at which the taxes shall be assessed. The Act of Congress provides that the shares shall be "included in the valuation of the personal property of the owner in the assessment of taxes imposed," &c., or what is the same thing, gives no authority for taxation in any other way.

How an assessment of a given tax can be made upon different pieces of property without including them all in one valuation to ascertain the rate, is not easy to perceive. It certainly cannot be done consistently with the ordinary mode of assessing taxes, and, if so, then the statute must be inconsistent with the law of Congress in this respect, whatever construction may be given it in regard to the place of assessment.

But what is the proper construction of the Act of Congress as to the place where the tax is to be assessed? Does

the word place in the proviso in the 41st section of the National Bank Law of June 3, 1864, refer to the location of the bank or to the authority under which the tax is to be assessed? The former construction has been adopted by the Courts of New York and New Hampshire, the latter by the courts of Massachusetts and Pennsylvania. We have carefully examined the very able opinions in *Austin* v. *The City of Boston*, published in the Daily Advertiser of July 25th, 1867, and *Markoe* v. *Hartranft*, 15 Law Register, (June 1867,) 487, without being able to concur in the construction there adopted. It is evident that the natural and obvious meaning of the language is that adopted in our former opinion. The Legislature so understood it, otherwise they would not have undertaken to do indirectly what might much better have been done directly. It is quite evident that Congress so understood it, as we learn from the debates at the time it was adopted, and from the fact that subsequently the matter was brought to their attention, and a proposition for a change in the reading submitted, which they refused to adopt, knowing the construction which had been put upon the proviso. So far as we know, no other construction was adopted or suggested until after this refusal of Congress to change the language used. Besides it would be a new, and in this case a very unnecessary, use of the word place, to apply it to the authority to tax, but a very common one to designate the town or city where the tax is to be assessed. If Congress had intended to have designated the authority simply, it would have been much better done by omitting the word "place" and transposing the words "authority" and State, so that it would read, taxes imposed under the authority of the State where such bank is located. If Congress had intended to have designated the authority by which the tax is to be assessed, we cannot understand why they should have been at so much pains to render their meaning obscure. On the other hand, if they had intended to designate the place where the tax is to be assessed, then they seem to have used proper language to express that in-

tention. After an examination of all the suggestions to which our attention has been directed in the examination of this subject, we can come to no other conclusion than that there would have been but one opinion, but for the different policy which prevails in different States in regard to the taxation of personal property, located in a particular place for the purposes of business. We see, therefore, no reason for changing our former opinion, and must come to the conclusion that § 2 of c. 126 of the laws of 1867, unqualified by the subsequent sections, must govern, so far as place is concerned, in the assessment of taxes upon the shares in national banks, and consequently the plaintiff's shares were properly taxed in Lewiston.

It is true that the second section of the Act of 1867 does not adopt the limitation contained in both the provisos of the Act of Congress; but our laws for the assessment of taxes require that the rate upon all property assessed shall be the same. R. S., c. 6, § 28. Therefore, the shares of national banks cannot be legally taxed "at a rate greater than is assessed upon other moneyed capital in the hands of individual citizens of such States," nor can it legally "exceed the rates imposed upon the shares in any of the banks organized under the authority of the State." So that our laws for the assessment of taxes, taken together, in effect, if not in terms, adopts the limitations imposed by the Act of Congress. *Plaintiff nonsuit.*

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

WALTON, DICKERSON and TAPLEY, JJ., non-concurred.

JAMES S. FILLEBROWN *versus* THE GRAND TRUNK RAILWAY COMPANY.

By the common law, common carriers are regarded as insurers of goods delivered to them for transportation, except when their loss is occasioned by the act of God or the enemies of the government.

Common carriers may reasonably restrict their common law liability, by notice brought home to the owner of goods, before or at the time of delivery to them, if such notice is expressly or impliedly assented to by the owner.

Such notice, given to a person who was simply directed by the owner to deliver the goods to the carrier, is not sufficient to bind the owner, in the absence of all knowledge of and assent to such notice on the part of the latter.

ON REPORT.

CASE, to recover for the loss of 100 empty barrels delivered to the defendants as common carriers, at Detroit, Michigan, to be transported to Utica.

The specifications of defence alleged,—

"That the barrels mentioned in the writ were delivered to the defendant company, under a contract evidenced by a written instrument in the nature of a bill of lading then delivered to the plaintiff, and accepted by him; and while in the possession of the defendant were destroyed by fire, for which loss, by the terms and conditions of said bill of lading, the defendant company was not responsible and is not liable."

The defendants' counsel called from the hands of the plaintiff's counsel, and offered in evidence, a paper of the following purport: —

"Duplicate. (No. 131.)

"Grand Trunk Railway, Oct. 18, 1865.

"Received from F. A. Stokes, the undermentioned property, in apparent good order, addressed to J. S. Fillebrown, Utica Plank, Michigan, to be sent by the Grand Trunk Railway Company, subject to their tariff, and under the conditions stated on the other side. One hundred empty barrels. (Signed,) "W. Thorp, Agent G. T. R."

Upon the back of this bill, eighteen "notices and conditions of carriage," signed "C. J. Brydges, managing director," were printed. Number 3 was as follows:—"The Grand Trunk Railway Company give public notice that they will not be responsible for damages from the weather, fire, heat, frost," &c.

The plaintiff's counsel objected to the paper as evidence of a contract, because the plaintiff did not authorize it, was not a party to it and in no wise connected with it; but the objection was overruled.

From the deposition of William Thorp, introduced by the defendants, it appeared that he was defendants' passenger and freight agent, at Detroit, during the month of October, 1865; that, on the 18th of the month, "either the agent or consignee of the barrels shipped by Stokes," informed the defendant that he desired to ship 100 empty barrels to Utica Plank, Mich.; that he had previously spoken to him about shipping the barrels, and asked the rate of freight on them, which was given him; that Stokes was not present and knew nothing of the bill and shipping note; that he had no conversation with Stokes; that the barrels were delivered at the defendants' station about four o'clock P. M., and the bill signed by me delivered to the party who delivered the barrels; that the depot and barrels were destroyed by fire within three hours after the barrels were delivered; that every effort was made to save freight and warehouse. On cross-examination, he testified he did not see the person who delivered the barrels and signed the shipping note, and received the bill of lading; that the shipping note was destroyed by fire; and that "the plaintiff or his agent called before the barrels were delivered, and talked with deponent about the shipment, simply as to the rate."

From the deposition of Bartholomew Healey, introduced by the defendants, it appeared that he was the defendants' receiving clerk in October, 1865, at their Michigan Central Station at Detroit; recollected receiving the 100 barrels to

be shipped to Utica Plank; that he never received any goods without a shipping note on company's forms and giving a bill of lading on same; that the barrels were delivered to deponent for Mr. Thorp, and were all received before five o'clock P. M.; that they were not laden on the cars, but remained at the warehouse until burned, about three hours after delivery.

From the deposition of Marvin H. Chamberlain, read by the plaintiff, it appeared that he was F. A. Stokes' book keeper, at Detroit, Mich., October 18, 1865; that, on that day, plaintiff purchased of Stokes, through the deponent, 100 barrels, at $1,50, and $4 for cartage; that plaintiff directed the barrels to be taken that day to the station of the Michigan Central Company, at Detroit, occupied by the defendant company, to be shipped by the Grand Trunk Railway Company to a station thereon called "Utica Plank;" that they were so taken on the day of the purchase, consigned to the plaintiff and a receipt given to F. A. Stokes when delivered; that the plaintiff was not present when said receipt was given and had no knowledge of it until after the fire; that at the time of receiving the receipt the deponent gave a shipping note signed by him for F. A. Stokes, shipper, to the defendant company; that the plaintiff did not expressly authorize the deponent to sign any such paper or deliver any such to the defendants; that the plaintiff told deponent prior to the delivery of the barrels that arrangement for the delivery had been made with the defendants; that deponent did not attend personally to the delivery of the barrels, but they were delivered by a carman.

The plaintiff testified substantially, that he purchased 100 empty barrels of Stokes, Oct. 18, 1865, paying $1,50, and $4 for cartage to station; that he never saw the receipt or bill of lading until a month after the fire; that he was never a party to it and never authorized any one to make any contract with the defendants for the transportation of the barrels, or to sign any; that, on the 17th October, he made

inquiries of some one in charge of the station as to the rates of freight, and made verbal arrangements about shipping the barrels; that he never gave any directions to Chamberlain except to deliver the barrels at the station.

After the evidence was all in, the defendants agreed to submit to a default, upon the condition that, if the full Court, upon the evidence in the case, should be of the opinion that the default should stand, damages were to be assessed at *nisi prius;* otherwise the plaintiff to be nonsuit.

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

Phineas Barnes, for the defendants.

This is not a case where the default is to stand if there is any evidence that would authorize a verdict against the defendants, but the question is whether, upon facts not contested, the law is with the plaintiff or defendants.

The contract was in writing. Conditions upon the back of the bill of lading. Plaintiff or his agent at liberty to decline the conditions. If accepted by the person who brought the goods, that was enough. *Vide* authorities below. The persons to whom the plaintiff entrusted the delivery of his goods were aware of the conditions. Stokes was a merchant in Detroit,—his clerk, Chamberlain, signed the shipping note containing the conditions. Plaintiff's testimony of want of knowledge is immaterial. Angell on Carriers, § 251; *Bean* v. *Green*, 3 Fairfield, 422; *Dorr* v. *N. J. St. Nav. Co.*, 1 Kernan, 485; *N. Y. Manuf. Co.* v. *Ill. Cent. Railroad Co.*, Sup. Court U. S., Dec. T., 1865.

APPLETON, C. J. — The defendants are common carriers. By direction of the plaintiff, on 18th Oct., 1865, one hundred barrels were left with the defendants at their depot in Detroit, Michigan, to be by them transported from thence to a designated place of destination. The defendants received them in charge for that purpose. Within one or two hours after they were so left, the depot, in which they were deposited, was burned without fault on the part of the defendants.

By the common law, the common carrier being regarded as an insurer, except when the loss is by the act of God or the enemies of the government, the defendants are responsible.

The defendants seek to avoid their common law liability by reason of notice and a special contract limiting and restricting their responsibility. It has been finally settled, after much fluctuation of judicial opinion, that carriers may restrict their general liability by notices brought home to the owner of the goods, before or at the time of delivery to the carrier, if assented to expressly or impliedly by the owner.

The legal presumption, in the absence of all proof, is, that the owners of goods contract with the carrier under their common law liability. It is for the carrier to show any qualification of his responsibility.

The case shows that the plaintiff purchased the barrels in question of one F. A. Stokes, on 17th October, and, on the same day, called on the agent of the defendants, with whom he verbally arranged for the price of transportation. The agent testified "the only contract which was made was at the stipulated rate. It was verbal." The agent gave no notice of any special terms or any restrictions upon the general liability of his principals as common carriers. The plaintiff, therefore, was justified, in the absence of any notice, in presuming that the defendants would carry his goods subject to all the responsibilities incident to their vocation. "In all cases where the notice cannot be brought home to the person interested in the goods, directly or constructively, it is a mere nullity; and the burden of proof is on the carrier, to show that the person with whom he deals is fully informed of the terms and effect of the notice." Angell on Carriers, § 247, and cases cited; *Simons* v. *The Great Western Railway Co.*, 89 E. C. L., 619.

Where, by a memorandum on a receipt for baggage, issued by an express company, it was stated that the "liability" of the company was "limited to $100, except by special agreement to be noted" thereon; it was held that, in the

absence of any knowledge, by the owner of the baggage, of such condition, there was no consent to it by him and no bargain between the parties limiting the liability of the company. *Lemberger* v. *Westcott & al.*, 49 Barb., 283.

A carrier cannot, by a general notice, exonerate himself entirely from his legal duty and liability for property delivered him for transportation, or fix the amount beyond which he will not be responsible, in case of injury or loss. "It would in effect," observes BIGELOW, C. J., in *Judson* v. *Western Railroad Corporation*, 6 Allen, 486, "put it in the power of the carrier to abrogate the rules of law by which the exercise of his employment is regulated and governed. Certainly such a notice, even if shown to have been within the knowledge of the owner of the goods, would, in the absence of evidence of his direct assent to its terms, afford no sufficient ground for the inference that he had voluntarily agreed, without any consideration, to relinquish and give up the valuable right of having his goods carried at the risk of the carrier. On the contrary, it would be quite as reasonable to infer, under such circumstances, that the carrier did not intend to rely upon a notice upon which he could not legally insist, as that the owner of goods meant to surrender a right to which he was entitled by law. In such case, mere silence cannot be said to amount to acquiescence."

The plaintiff, after his conversation with the defendants' freight agent, directed the clerk of Stokes, of whom they were purchased, to send the barrels to the defendants' depot, informing him that he had made an arrangement with them as to their delivery, but giving him no authority to act in any way for him. Nor does the evidence show that he did any act whatever as the agent of the plaintiff, — but that, if he signed any paper, it was as the agent of Stokes, who had ceased to have any interest in the barrels to be transported.

The only question remaining is whether, upon the facts disclosed, Chamberlain, the clerk of Stokes, had any authority from the plaintiff to exonerate the defendants from their general liability as common carriers.

It is for the defendants to show he had such authority. The barrels were the plaintiff's. The defendants' agent was aware of that fact. The clerk of Stokes had no authority, express or implied, to do any act for the plaintiff except to send the goods to the defendants' depot. The clerk could not bind the plaintiff and did not attempt to. Acting only for Stokes, his signature as his agent, the defendants were aware, could not affect the rights of the plaintiff. Whether the consignor of goods, or the person depositing them with the carrier, has authority to contract, on the part of the consignee, being the owner or party interested in the transportation, for exemption of the carrier from his ordinary responsibility, is in each particular case a question of fact depending upon its special and peculiar circumstances, and to be determined by the jury. *Am. Transportation Co.* v. *Moon*, 7 Law Register, 352.

"It is no longer open to controversy in this State," observes BIGELOW, C. J., in *Buckland* v. *Adams Express Co.*, 97 Mass., 125, "that a carrier may limit his responsibility for property entrusted to him, by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered." In the present case, we think Chamberlain had no authority, express or implied, from the plaintiff, to relieve the defendants from their legal responsibility as common carriers. *Default to stand.*

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

WALTON, J., did not concur.

INHABITANTS OF LIVERMORE *versus* INHABITANTS OF PERU.

By virtue of R. S., c. 75, § 3, when, before his death, the parents of an antenuptial child, intermarry and have other children and adopt him into their family, he is thereby legitimated, and he derives his pauper settlement according to the rules governing that of legitimate children.

A party, who, under a mistake as to the law, but with a full knowledge of all the material facts, has voluntarily paid a claim asserted against him in good faith, cannot, in a suit at law, recover back the money thus paid.

Thus, the town in which a soldier has his settlement, having, upon a suit brought in good faith therefor, voluntarily paid the town in which his family has its residence for aid furnished such family while he was in the military service of the U. S., under a mistaken supposition that such aid was in the nature of pauper supplies: — *Held*, that the money thus paid cannot be recovered back.

ON REPORT.

ASSUMPSIT, for money had and received. The last item in the first bill of supplies was dated March 18, 1862.

The Court to render such judgment as the legal rights of the parties required.

The case is fully stated in the opinion.

Bolster & Richardson, for the defendants.

Reuel Washburn, and with him *E. T. Luce*, for the plaintiffs, contended that, —

1. That one of the children, being an illegitimate, had her settlement in Mexico, of which fact the plaintiffs were ignorant when the bill for supplies was paid.

2. That, by reason of c. 63, § 6, of the Public Laws of 1861, and c. 127, § 7, of the Public Laws of 1862, (the latter approved the day of the delivery of the last item in the first bill, March 18, 1862,) the aid furnished created no pauper disabilities and was not recoverable. *Veazie* v. *China*, 50 Maine, 518; *Milford* v. *Orono*, 50 Maine, 529.

3. The rules that *ignorantia legis meminem excusat* and *volenti non fit injuria* are subject to many exceptions. *Northrup* v. *Graves*, 19 Conn., 547; *Sanford* v. *Lyon*, 21

Conn., 609; *Steadwell* v. *Anderson*, 21 Conn., 144; *Norton* v. *Marden*, 15 Maine, 45; *Hunt* v. *Rousmanier*, 8 Wheat., 174; *Silliman* v. *Wing*, 7 Hill, 159; *Freeman* v. *Curtis*, 51 Maine, 140.

BARROWS, J.—Edward W. Haines, having a derivative settlement in Livermore, moved into Peru from Mexico, in September, 1857, with his family, consisting of his wife, whom he married Nov. 1, 1853, and —— children, one of whom, Angeline, was ante-nuptial, having been born Oct. 9, 1853. He continued to reside there till Nov. 15, 1861, at which time he had four children by his wife, born in wedlock. On that day he enlisted in the 12th Regiment Maine Volunteers. His wife and family remained in Peru and, in February and March, 1862, while he was in the service of the United States as a soldier, stood in need of assistance from the town, which was furnished by Peru to the amount of $11,31. Seasonable notice was given to Livermore, naming the wife and each of the five children, (with the customary averments that they had fallen into distress and become chargeable as paupers, and that their lawful settlement was in Livermore,) and requesting their removal and the payment of the bill. The overseers of Livermore replied, denying the settlement, but subsequently, in September, 1863, after eighteen months deliberation, paid the bill, supposing that all Haines' children were born in wedlock, and that the furnishing of the supplies by Peru created pauper disabilities, and that their town was legally bound to pay. Haines' wife and family continued to live in Peru. Haines deserted the military service of the United States, May 27, 1864, and never returned to it, and, while he was absent in Canada, in the fall of 1864, his family again fell into distress. They had received State aid, at the rate of $10 per month, from the passage of the Act of March 18, 1862, up to the time of his desertion. Being again relieved as paupers by Peru, in October, November and December, 1864, to the amount of $151,62, (a part of which was for the sickness and funeral expenses of Angeline, though the whole amount furnish-

ed to the family before her death, together with her funeral expenses, did not exceed $40,) that town duly called upon Livermore for payment of $51,62, being the balance of the bill after crediting $100 for 20 acres of land conveyed by Mrs. Haines to Peru. Livermore made no denial upon this notice, but paid the balance claimed January 30, 1865, and now seeks to recover both sums thus paid by them as having been paid under a mistake of both law and fact.

The matter relied upon by the plaintiffs as mistake of fact is the want of knowledge, on the part of their overseers and agents at the time they paid these bills, that Angeline Haines was born before the marriage of the parents. They claim that she is to be considered as illegitimate, and as having the settlement of her mother at the time of her birth, which was in Peru, and that therefore so much of the sums paid by Livermore as accrued for her support, is, at all events, recoverable in this suit, as having been paid, not only under a mistake of law, but under a mistake of fact also.

And it is undoubtedly well settled, that where money has been erroneously paid or allowed under mutual ignorance, or mistake as to material facts affecting either the liability of the party paying or the amount to be paid, the sum thus erroneously paid may be recovered back. *Union Bank* v. *U. S. Bank*, 3 Mass., 74; *Pearson* v. *Lord*, 6 Mass., 81. So money paid by reason of a mistaken computation arising from a wrong date, was held recoverable. *White* v. *Leggett*, 8 Cowen, 197.

And where, in a sale of wheat by the lot, at a certain rate per bushel, both parties estimated the number of bushels from the size of another pile which both supposed contained a certain number of bushels, but which actually contained but that number of half bushels, and settled accordingly, the excess was recovered by the party paying under that mutual mistake. *Wheadon* v. *Olds*, 20 Wend., 175.

And, where an indorser of a note paid it, being ignorant of the fact that no demand had been made upon the maker

when it fell due, he was allowed to reclaim the payment thus made. *Garland* v. *Salem Bank*, 9 Mass., 408.

But it is plain that mistake or ignorance, to produce this effect, must relate to some fact that is essential upon the question of liability or amount, and that ignorance or mistake respecting immaterial circumstances cannot avail.

Now, in the case at bar, Angeline Haines, though illegitimate by birth, in consequence of the subsequent intermarriage of her parents, the birth of other children, and her own adoption into the family, is to be deemed legitimate. R. S., c. 75, § 3.

Although this doctrine of legitimation, by subsequent intermarriage of the parents, was no part of the common law, it was fully declared in the civil and canon laws, and prevails with various modifications in France, Germany, Holland and Scotland.

It is mentioned, in a note to Kent's Commentaries, vol. 2, p. 209, as a remarkable fact, that the rule of the civil law, that ante-nuptial children are legitimated by the father's marriage to the mother and recognition of the children, prevails in opposition to the common law in so many of the United States; though why it should be considered remarkable that a rule which Barrington, in his Observations on the Statutes, speaks of as "a very humane provision in favor of the innocent" should be adopted into our codes is not readily seen, unless it be supposed that our legislation is controlled by a blind preference of the common to the civil law.

There is no ground whatever for subjecting this child to a separate settlement from that of both her parents and every other member of the family, in face of an explicit statute declaration that she and others similarly situated "are deemed legitimate." Being deemed legitimate, she has the settlement of her legitimate brothers and sisters, as well as equal privileges with them in other respects, such as that of inheritance by representation of her father and mother, from kindred both lineal and collateral. The amount paid by the plaintiffs for supplies furnished to Angeline cannot be re-

covered unless all which they paid is recoverable as having been paid upon a demand on which they were not legally liable, and under a mistake of both parties as to their legal rights and liabilities.

Conceding what the plaintiffs claim as to the effect of § 7, c. 127, Laws of 1862, extending the provisions of the Act passed April 25, 1861, in relation to the relief of the families of soldiers, "to all the regiments which have been or may be raised in this State," and that the town of Peru could not have maintained a suit against Livermore for the supplies furnished to the family of Haines in February and March, 1862, under the law as it stood when the notice and denial were made, we have presented to us the naked question, whether a party who has voluntarily paid a claim asserted against him in good faith, under a mistaken supposition that he was legally liable to pay it, can reclaim in a suit at law the money thus paid by reason of his mistake as to the law, when he had full knowledge of the facts?

That there have been repeated cases where apparent equities have gone far towards inducing Courts of unquestioned learning and respectability to swerve from what must, nevertheless, be considered as the well settled doctrine of the common law in this matter, cannot be denied.

But it is worthy of observation, that the *dicta* have greatly outrun the adjudicated cases, in this direction, (as in the case of *The City of Covington* v. *Powell*, 2 Metcalf's (Kentucky) Reports, 228;) and that, whenever there has been a decision apparently in conflict with the general current of authorities in this respect, there has been (almost, if not quite, invariably) some peculiarity in the position or acts of one or both of the parties that seemed to call loudly for the intervention of the Court to set aside the transaction,— some element of fraud, oppression or extortion on the part of the party receiving the payment, or of peculiar liability to imposition on the part of the party making it, that seemed to justify viewing the case as an exception to the general rule.

Thus, in the case of the *Duc de Cadaval* v. *Collins*, 4 A. & E., 858, the Duke, who was ignorant of the English language, having been arrested at the suit of one Collins, an insolvent, for an alleged debt of large amount, which was purely fictitious, to procure his release, gave a written agreement for the payment of £500, and to give bail for the remainder of the sum claimed, and, in accordance with his agreement, paid the £500; and, in his suit to reclaim the payment, the jury found that Collins knew he had no claim against the plaintiff.

In *Pitcher* v. *Turin Plank Road Co.*, 10 Barb., 438, the plaintiff, an infant, being threatened with a suit for a penalty which both parties supposed to be given by statute, paid a certain sum on a compromise, and, on coming of age, brought suit to recover it back. The Court sustained the claim, remarking among other things:—"This is not a case of pure mistake of law. It was a compromise of a claim for a penalty which the law did not give." * * * * "The decision may well rest upon the ground that this is a case where the acts of the infant may be inquired into for the purpose of seeing whether they are beneficial to his interest or not."

Other cases, ancient and recent, establish the right to recover money paid with full knowledge of the facts, where there has been imposition, extortion, or an undue advantage taken of the party's situation; e. g., as against a carrier who had refused to deliver goods without payment of an exorbitant remuneration. *Ashmole* v. *Wainwright*, 2 Q. B., 846; where money was paid by a mortgager in order to obtain possession of his title deeds, withheld by the mortgagee's attorney, under an unfounded claim of lien. *Wakefield* v. *Newton*, 6 Q. B., 276; where the plaintiff, a simple minded man, being alarmed by threats of exposure, and taken into a room by himself, agreed to refer the matter to arbitrators, but afterwards declined taking any further part. *Sartwell* v. *Horton*, 28 Vt., 373; where an illegal fee was paid to one of the parties who was a sheriff, by the

clerk of the other, who, on being informed of it, disapproved of it and said it was an imposition. *Dew* v. *Parsons*, 2 B. & A., 562; where money was paid to liberate a raft of lumber detained in order to exact an illegal toll. *Chase* v. *Dwinal*, 7 Maine, 134; in which it is said by WESTON, J., that the general "rule applies where the party has a freedom in the exercise of his will and is under no such duress or necessity as may give his payments the character of having been made upon compulsion."

But these cases do not impeach, they rather confirm the general rule which is thus well expressed by Mr. Justice PATTERSON, in the case of the *Duc de Cadaval* v. *Collins*, *ubi supra*, "where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." *Exceptio probat regulam.* Chancellor KENT says, in *Lyon* v. *Richmond*, 2 Johns. Ch. Rep., 51; — "Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law; there is no other principle which is safe or practicable in the common intercourse of mankind."

In *Clarke* v. *Dutcher*, 9 Cowen, 674, the Court review the various *dicta* and decisions which have given rise to the doubt, that has sometimes been expressed, whether *ignorantia legis* may not furnish a ground of repetition as well as ignorance or mistake of fact, and SUTHERLAND, J., in rendering the judgment, declares that "the principle upon which courts refuse to relieve against mistakes in law, is that in judgment of law there is no mistake;" every man being held for the wisest reason to be cognizant of the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it." In that case, the plaintiff's rent was reserved in sterling money, the value of which, in currency, was fixed by statute, but the plaintiff, acting under an erroneous impression that £4,14s currency was the legal value of £2,10s sterling, settled his rent at that

rate, and was held not entitled to recover the excess above the true rate.

In *Peterborough* v. *Lancaster*, 14 N. H., 383, a sum of money had been paid by one town to another for the support of a pauper, and it turned out that the town making the payment was not legally liable to the town receiving it, and the attempt was to recover it, with other sums confessedly due from the town to which the pauper belonged, on the ground that it might be reclaimed from the plaintiffs by the town which made the payment. Held, not recoverable, GILCHRIST, J., remarking in the outset, that the maxim "*ignorantia legis neminem excusat* is a fundamental one, and has always been received as an elementary principle of the common law, with some few exceptions, for many years; it is an illustration of the tendency of the common law to aim at practical good rather than theoretical perfection, and to furnish a rule for the guidance of men in the common business of life."

Touching the cases cited for the plaintiffs from Connecticut, it would, perhaps, be sufficient to remark that the same Court in a later decision thus fully recognizes the rule which must govern the case at bar, as follows:—"Now the rule is perfectly well settled that a person who voluntarily pays money upon a claim of right with full knowledge of all the facts in the case, and in the absence of all fraud and all duress, cannot recover it, although there was no sufficient consideration, and the money was paid under protest." *Sheldon* v. *School District*, 24 Conn., 88.

But besides this, in *Northrup* v. *Graves*, 19 Conn., 547, (the case specially relied on by the plaintiffs' counsel in support of his views,) while some of the *dicta* go far to sustain his position, the Court expressly say, "we do not decide that money paid by a mere mistake in point of law can be recovered back;" and it appeared, by the admissions of the defendant there, that he was cognizant of the mistake into which the plaintiffs were falling when they paid the

money, and so ought not to have received and could not conscientiously retain it.

A simple reference to some of the numerous cases where the general rule has been recognized or enforced, and the grounds of it stated, will answer all the purposes of further discussion. *Lowry* v. *Bourdieu*, 4 Doug., 471; *Bilbie* v. *Lumley*, 2 East, 469; *Knibbs* v. *Hall*, 1 Esp., 84; *Brown* v. *McKinally*, 1 Esp., 279; *Stevens* v. *Lynch*, 12 East, 38; *Brisbane* v. *Dacres*, 5 Taunt., 144; *Mowatt* v. *Wright*, 1 Wend., 355; *Martin* v. *Morgan*, 1 Brod. & Bing.,·289; *Directors of the Midland, &c., Rail Co. of Ireland* v. *Johnson*, 6 H. of Lords Cases, 798; *Benson* v. *Monroe*, 7 Cush., 131; *Norton* v. *Marden*, 15 Maine, 45; *Fellows* v. *School District*, 39 Maine, 559.

The most that can be said for the town of Livermore, is that they paid these bills under a mistake as to the legal consequences of facts which were within their knowledge. There was no fraud nor extortion practiced by the defendants. The plaintiffs, after mature deliberation, admitted the claim which was presented in unquestioned good faith, and they cannot now be relieved from the consequences of their own voluntary acts.

Judgment for defendants.

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

STATE *versus* CHARLES E. COOMBS.

If a person, without any present intention of stealing it, obtain possession of the team of another by falsely and fraudulently pretending that he wanted to drive it to a certain place and that he would return within a specified time, when in fact he intended not to go to such place but to a more distant one, and to be absent a longer time; and if, while thus in possession, he, without the consent of the owner, convert the team to his own use by selling it, with a felonious intent, he will be guilty of larceny.

On Exceptions.

Indictment for the larceny of a horse, sleigh, harness, and three robes. The complainant testified that the defendant hired the team to go to Minot Corner, and promised to return it within four or five hours; that, instead of going to the place to which he hired it to go, the defendant went to other places, and finally sold the property without the complainant's consent.

The defendant testified that when he hired the team he did not intend to steal it and that his subsequent sale and disposition of the property was while he was in a state of intoxication; and his counsel invoked in his behalf the rule of law that where a party comes lawfully into possession of property by a contract of hiring, a subsequent sale and conversion of it does not constitute larceny.

The presiding Judge gave the requested instruction, but added, that if the defendant obtained possession of the property by artifice and fraud,—that is, if he went to the owner of it with a falsehood in his mouth, fraudulently pretending that he wanted the team to go to one place, and to be gone only four or five hours, when he had it in his mind not to go to the place named, but to another and a more distant place, and not to return it within the time specified,—while using the team for such other purpose for which it had not been hired, it was not lawfully in his possession; that hiring a team to go to one place, was not a hiring to go to another and a more distant place; and if the pretence that he was going to the one place was intentionally false, and was used only as a means for obtaining possession of the team, he all the time having it in his mind from the beginning to use the team for another and a different purpose, although he then had no intention of stealing it, possession thus obtained was fraudulent and unlawful, and a subsequent conversion of it to his own use by selling it, with a felonious intent, would authorize the jury to find him guilty of larceny.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

A. M. Pulsifer, for the defendant.

To be felonious, a taking must be with intent to deprive the owner of his entire interest in the property, against his will. Davis' Crim. Justice, 527; Roscoe's Crim. Ev., 587, 590, 595.

When the team was delivered to the defendant, the character of the taking was fixed and could not be changed by any subsequent disposition of it. Roscoe's Crim Ev., 609.

Frye, Att'y General, for the State, cited Davis' Crim. Jus., 531; *Regina* v. *Riley*, 14 E. & L. R., 544; *Com.* v. *White*, 11 Cush., 483.

DICKERSON, J.—Exceptions. The prisoner was indicted for the larceny of a horse, sleigh and buffalo robes. The jury were instructed that, if the prisoner obtained possession of the team by falsely and fraudulently pretending that he wanted it to drive to a certain place, and to be gone a specified time, when in fact he did not intend to go to such place, but to a more distant one, and to be absent a longer time, without intending at the time to steal the property, the team was not lawfully in his possession, and that a subsequent conversion of it to his own use, with a felonious intent while thus using it, would be larceny.

It is well settled that where one comes lawfully into possession of the goods of another, with his consent, a subsequent felonious conversion of them to his own use, without the owner's consent, does not constitute larceny, because the felonious intent is wanting at the time of the taking.

But how is it when the taking is fraudulent or tortious, and the property is subsequently converted to the use of the taker with a felonious intent? Suppose one takes his neighbor's horse from the stable, without consent, to ride him to a neighboring town, with the intention to return him, but subsequently sells him and converts the money to his own use, without his neighbor's consent, is he a mere trespasser, or is he guilty of larceny? In other words, must the felo-

nious intent exist at the time of the original taking, when that is fraudulent or tortious, to constitute larceny?

When property is thus obtained, the taking or trespass is continuous. The wrongdoer holds it all the while without right, and against the right and without the consent of the owner. If at this point no other element is added, there is no larceny. But, if to such taking there be subsequently superadded a felonious intent, that is, an intent to deprive the owner of his property permanently without color of right, or excuse, and to make it the property of the taker without the owner's consent, the crime of larceny is complete. "A felonious intent," observes Baron PARKE, in *Regina* v. *Holloway*, 2 Cor. & Kir., 61 E. C. L., 944, "means to deprive the owner, not temporarily, but permanently of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner."

The case of *Regina* v. *Steer*, 61 E. C. L., 988, is in harmony with this doctrine. The prosecutor let the prisoner have his horse to sell for him; he did not sell it, but put it at a livery stable. The prosecutor directed the keeper of the stable not to give up the horse to the prisoner, and told the prisoner he must not have the horse again, to which the prisoner replied, "well." The prisoner got possession of the horse by telling a false story to the servant of the keeper of the stable, and made off with him. The case was reserved, and the Court held the prisoner guilty of larceny. *Commonwealth* v. *White*, 11 Cush., 483.

In the case at bar, the prisoner obtained possession of the property by fraud. This negatives the idea of a contract, or that the possession of the prisoner was a lawful one, when he sold the horse. He was not the bailee of the owner, but was a wrongdoer from the beginning; and the owner had a right to reclaim his property at any time. It has been decided that when a person hires a horse to go to a certain place, and goes beyond that place, that the subsequent act is tortious and that trover may be maintained,

on the ground of a wrongful taking and conversion. *Morton* v. *Gloster*, 46 Maine, 520.

In contemplation of law, the wrongful act was continuous, and, when to that act the prisoner subsequently added the felonious intent, that is, the purpose to deprive the owner of his property permanently, without color of right or excuse, and to convert it to his own use without the consent of the owner, the larceny became complete from that moment. The color of consent to the possession obtained by fraud, does not change the character of the offence from larceny to trespass or other wrongful act. In such case it is not necessary that the felonious intent should exist at the time of the original taking to constitute larceny, the wrongful taking being all the while continuous.

It is to be observed that this principle does not apply in cases where the owner parted with his property and not the possession merely, as in the case of a sale procured by fraud or false pretences. In such instances there is no larceny, however gross the fraud by which the property was obtained. *Mawrey* v. *Walsh*, 8 Cowen, 238; *Ross* v. *The People*, 5 Hill, 294. "It is difficult to distinguish such a case from larceny," remarks Mr. Justice COWEN, in *Ross* v. *The People;* "and were the question *res nova* in this Court, I, for one, would follow the decision in *Rex* v. *Campbell*, 1 Mood. Cr. Cases, 179. The decisions, however, are the other way, even in England, with the single exception of that case, and they have long been followed here. There is nothing so palpably absurd in this as to warrant our overruling them."

We are unable to discover any error in the instructions of the presiding Judge. *Exceptions overruled.*

Judgment for the State.

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

ABBY R. BEAL *versus* JAMES GORDON *& al.*

Prior to R. S. of 1841, actual, visible possession of land by a grantee thereof under his unrecorded deed, was constructive notice to all subsequent purchasers, equivalent to a registry of such deed; and this rule is still in force as to deeds made prior, even against conveyances made since those statutes went into effect.

What is sufficient evidence that land was conveyed by a deed never recorded, and subsequently lost.

Proof that the defendant in *trespass quare clausum*, and his predecessors in title, possessed, occupied and improved the land openly, notoriously and in a manner comporting with the ordinary management of a farm for more than twenty years, uninterrupted except by counter verbal assertion of title, constitutes sufficient evidence of such disseizin as will carry title.

In the description of land in a deed, monuments govern courses.

Repugnant calls in a deed may be rejected, when the remaining calls are sufficient and consistent with the intention of the parties to uphold the deed.

ON REPORT.

TRESPASS QUARE CLAUSUM. Writ dated Aug. 26, 1865.

The remaining facts are sufficiently stated in the opinion. The Court with jury powers to render such judgment as the legal rights of the parties require.

E. Kempton, for the plaintiff.

No sufficient proof that the mutilated instrument lost was a deed. *Kimball* v. *Merrill*, 4 Maine, 368; *Emery* v. *Vinal*, 26 Maine, 295; *Dunlap* v. *Glidden*, 31 Maine, 510.

Deed from Walton to Fellows is certain and definite, and does not embrace the *locus in quo*. It cannot be explained by parol proof. *Linscott* v. *Fernald*, 5 Maine, 496; *Lincoln* v. *Avery*, 10 Maine, 418.

Plaintiff's recorded deed from Littlefield and Merryman is paramount. *Knox* v. *Silloway*, 10 Maine, 201; *Curtis* v. *Deering*, 12 Maine, 499.

Constructive notice was abrogated by R. S. of 1841. The grantee in a subsequent deed must now have actual notice of a prior deed. *Spofford* v. *Weston*, 29 Maine, 140; *Han-*

ley v. *Morse*, 32 Maine 287; *Richardson* v. *Smith*, 11 Allen, 134.

S. Belcher, for the defendants.

BARROWS, J. — The action is trespass *quare clausum*, and the *locus*, a piece of meadow land containing from three to five acres, being the easterly end of lot No. 18, according to Adams' plan of the Linscott purchase, in the town of Chesterville. The defendants justify under the inhabitants of Chesterville, who claim title to the premises. It is conceded that Joseph French owned the land in 1831, and conveyed this lot No. 18, with other lands, Dec. 3d, by deed of warranty recorded Dec. 16, 1831, to Ivory Littlefield and Timothy Merryman, under whom both parties claim. The plaintiff presents a quitclaim deed, executed by Littlefield and Merryman, dated March 12, 1855, and recorded Feb. 2, 1858, having been acknowledged by Merryman in Illinois, Nov. 16, 1857, releasing lot No. 18, containing 40 acres, more or less, in consideration of $25 paid by the plaintiff. The action is maintained, unless the defendants can show a better title in the inhabitants of Chesterville, whose servants they are.

On the part of the defendants, it appears that Abner T. Walton, in August, 1834, made a warranty deed to one Jonathan Fellows, (who is the father of the plaintiff, and her principal witness, and acted as her agent in the procurement of the quitclaim deed from Littlefield and Merryman, and in the prosecution of this suit,) of "a piece of land situated," &c., * * * * "being part of lot No. 18 of the Linscott purchase, and bounded as follows: — beginning at the north-east corner of said lot, thence westerly to the cedar land, thence southerly, by the edge of the cedar land, to the southerly line of said lot, thence westerly, on the lot line, to McGurdy's stream, thence northerly, on said stream, to the first mentioned bounds; said piece of land to contain five acres, be the same more or less."

The statement of the course on the southerly line of the

lot, from the cedar land to McGurdy's stream, is manifestly erroneous, and must be rejected as repugnant to the remainder of the description, which contains sufficient that is intelligible and consistent to enable us to give effect to the evident intention of the parties. McGurdy's stream, a natural monument forming the easterly boundary of the lot, must control the course erroneously laid down, in conformity with a familiar rule of construction. Thus construed, the deed covers the meadow land in dispute and conveys whatever title Walton had to the same. On the 6th of April, 1835, Jonathan Fellows made and duly acknowledged his deed of the same parcel, (correcting the previous erroneous description, and further describing it as "being the meadow land on lot No. 18,") to William Whittier, in consideration of fifty dollars, limiting his covenant of warranty, however, to those "claiming from or under" him. Sept. 8, 1835, William Whittier quitclaimed the same, by deed, to Joseph Clough, who, on the 4th of October, 1836, quitclaims the same, by deed, to Lyman Whittier. Neither of these deeds was placed on record prior to October 22, 1866, and, up to the time of Lyman Whittier's purchase, the land would seem to have been in an unimproved state. But, in the spring of 1837, it appears that Whittier set to work upon it,—cut off the white maples and black cherry trees, cleared up and burned the brush, and thereafterwards cut the grass every year, thus having an open and visible possession of the parcel, and giving constructive notice to purchasers and all the world, of a change of title for four years prior to the time when the Revised Statutes of 1841 took effect, requiring actual notice of an unrecorded deed. July 26, 1842, Whittier made a warranty deed of the premises to Stephen K. Couillard, who was then in possession under him, and this deed was duly recorded April 2, 1844. Couillard continued in possession until May 18, 1848, when he made a warranty deed of the land to the town, (recorded May 19, 1848,) and thereafterwards the inhabitants of Chesterville, by their servants and agents, had uninterrupted

possession of the land, cutting the grass every year until 1863, when Jonathan Fellows, the plaintiff's agent, in the language of the witness, "dodged in ahead and cut the grass;" but the hay was damaged and not hauled away.

It appears, then, that the inhabitants of Chesterville and their predecessors and grantors, Whittier and Couillard, had possession, occupation and improvement, open, notorious and comporting with the ordinary management of a farm, for more than a quarter of a century prior to the commencement of this action, uninterrupted except by the verbal assertions of title in his daughter, made from time to time by Jonathan Fellows, which only serve to show the possession, which Whittier, Couillard and the town continued to maintain, all the more distinctly exclusive and adverse.

It appears that Jonathan Fellows, besides giving this deed of the meadow land in dispute, (which deed he now, in the capacity of agent for his daughter, seeks to avoid,) some seven years before procuring the quitclaim deed from Littlefield and Merryman to the plaintiff, gave a warranty deed to his daughter of the rest of lot No. 18, bounding the parcel thus conveyed "easterly by the easterly edge of the cedar swamp,"—so as not to include the meadow land which, as we have seen, he had previously deeded to Whittier. All the acts of possession done by the plaintiff, or under her authority, upon lot No. 18, after she received the deed from Littlefield and Merryman and prior to 1863, appear to have been done, not upon the meadow land, but upon the other and larger portion of the lot which Fellows testifies he had of his father, who had it of Walton.

Were it necessary for the town, in order to maintain their title and justify the defendants, their servants, to rely upon the doctrine of disseizin and adverse possession, they might safely do so upon the evidence here.

But they claim title under Littlefield and Merryman by deed prior to the release given to the plaintiff. The only link thus far wanting in their chain is the deed from Littlefield and Merryman to Walton. As to this, Jonathan Fel-

lows, the plaintiff's agent and witness, testifies as follows: — "I once had in my possession the remnants of a deed from Ivory Littlefield and Timothy Merryman, to A. T. Walton. The description was of the meadow land on lot No. 18. Littlefield's name could be read; but there were no seals, — no witnesses, — no certificate of acknowledgment. They are all now burnt." And again, — "Prior to 1855, I heard, in Lowell, Mass., that there was no deed on record from Littlefield and Merryman to A. T. Walton, — searched the records and could find none, — then went to Massachusetts to see Walton to ascertain whether he ever had a deed. I took from Walton, then in his possession, the fragments of a deed, — no top nor bottom, — only the middle of a deed. Littlefield's name was on it. In the body was the description of the meadow, — carried the paper to Littlefield, — told him Walton had no deed, — none on record to Walton; that I had given my daughter a warranty deed and wanted to uphold the title, — asked him to give another deed." Elsewhere he says, — "This remnant was on a printed blank. The names of Littlefield and Merryman were in the body of the deed, if it was a deed."

Ivory Littlefield testifies as follows: — "Timothy Merryman and myself gave a deed — a warranty — of the land in dispute, to Abner T. Walton, Oct. 3, 1832. This note was the consideration. He cut lumber on the land. At the time I gave quitclaim to Abby R. Beals, (the plaintiff,) Fellows showed skeleton of a deed, — said it was not fit to be recorded; said most of deed was lost. I saw my signature, — wanted me to deed to his daughter. He did not give up deed." There is no cross-examination of Littlefield, — nothing in the case tending to show that he was ignorant of the requisites to the due and legal execution of the deed, as to the making and contents of which he testifies so unequivocally; and the whole evidence on this point, coming in part as it does from the plaintiff's agent and principal witness, leaves no room for doubt that the land in dispute was legally conveyed by Littlefield and Merryman to Walton, Oct. 3, 1832,

by a deed never recorded, existing only partially and in a fragmentary condition when it fell into the hands of the plaintiff's agent, and now wholly lost.

It is unnecessary to consider the effect, if any, of actual notice of its existence to the plaintiff's agent, not communicated to her.

The actual, visible possession of the land by Lyman Whittier for years previous to 1841, was constructive notice to all and sundry, equivalent to a registry of the unrecorded deeds under which the defendants justify, even as against the conveyance to the plaintiff, made since the passage of the statute requiring either registration or actual notice. *Hanley* v. *Morse*, 32 Maine, 287; *Clark* v. *Bosworth*, 51 Maine, 528.

The attempt of Jonathan Fellows to obtain a title to this land for his daughter, to the exclusion of his own grantees, cannot prevail. *Judgment for defendants.*

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

JOSEPH E. GRAY *& al. versus* AARON FARMER.

The plaintiffs, being about to purchase grass seed for themselves, received money from the defendant, with a request to purchase seed for him at a certain rate. They bought for themselves and the defendant, and sent it together in bags marked in the names of the plaintiffs. Upon its arrival at the place where the parties resided, the defendant took all the seed and sold it: — *Held*, that the facts would not sustain a count upon an account annexed by the plaintiffs against the defendant, but it would support a count for money had and received.

ON REPORT.

INDEBITATUS ASSUMPSIT on account annexed for seven and $\frac{2}{4}\frac{3}{5}$ths bushels of herdsgrass seed, and money counts.

It appeared that one of the plaintiffs (co-partners and

merchants,) being about to go to Boston in the winter of 1866–7, to purchase grass seed, was asked by the defendant to invest $200 of the latter's money in herdsgrass seed, at not exceeding $4,50 per bushel, and clover seed, at not exceeding one shilling per pound. Said plaintiff received defendant's $200, went to Boston, purchased for plaintiffs and defendant 75$\frac{24}{45}$ bushels of herdsgrass seed, at 4,12$\frac{1}{2}$ per bushels and 276lbs of clover seed, at 15$\frac{1}{2}$ cents per pound, put it all together in bags marked "Gray & Hilton, Farmington," and had it forwarded by rail. Defendant took all the seed to his store. While in Boston, said plaintiff arranged for future purchases at same rate. Defendant sold all the clover seed at a large profit, and requested said plaintiff to make another purchase for him, mostly clover seed, same quality and at same rate. Accordingly, said plaintiff received from said defendant $300, and, putting $100 of the plaintiffs' money with it, sent to same parties in Boston, of whom the former purchase was made, who, in due time, sent the seed directed as before. It was divided by bags, by plaintiffs and defendant, at depot in Farmington, the parties taking their portion thus divided to their respective stores. Each party sold such of their seed, and at such prices, as they deemed best.

The parties not being able to settle, the plaintiffs sued the defendant for the difference between the amount of seed their money paid for and the amount they had received.

After the testimony was all in, the case was withdrawn from the jury, and continued "law on report," with the agreement that the action should stand for trial if it could be maintained.

S. C. Belcher, for the plaintiffs.

H. L. Whitcomb, for the defendant.

DANFORTH, J. — The evidence reported in this case does not show any sale of grass seed by the plaintiffs to the defendant, nor any facts from which the law will raise an implied promise on the part of the defendant to pay for the

same, but on the other hand negatives any such proposition. There is, then, nothing on which the account annexed to the writ can stand, and for that the suit must fail. The count for money had and received stands upon a different ground. Such a count may be sustained, not only without an express promise, but even against the defendant's denial of his liability, when it appears that the defendant has received money which in equity belongs to the plaintiff; as where he rightfully or wrongfully sells the plaintiff's property and receives the money for it.

In this case, it appears that the plaintiffs purchased seed for themselves and, at the same time, bought a quantity for the defendant, he furnishing the money for that purpose. All the seed was mixed together, and this was done without any objection on the part of the defendant, and it may be presumed with his consent, as he afterwards took the whole of the first lot into his possession, and divided the second lot. It follows that the parties were owners of the seed as tenants in common, each owning in proportion to the money he put in. The defendant sold a part or all of the first lot and has received the money therefor. He has, therefore, money which he received for plaintiffs' property. It is true that a bill in equity may be the proper remedy to adjust differences between part-owners growing out of the case, or in some cases, the income of the property; but, it is equally true, that, where one part-owner, with or without the consent of the other, sells his co-tenant's interest and receives the money for it, he is liable in a suit at law for that money. Whether he did thus sell the plaintiffs' interest in the seed, and to what amount, are questions for the jury, and, to settle them, according to the agreement of the parties, the action must stand for trial.

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

CALVIN BUCKNAM *versus* ALEXANDER PERKINS.

So much of R. S., c. 82, § 79, as provided that "parties shall not be witnesses in suits where the cause of action implied an offence against the criminal law on the part of the defendant, unless the defendant first offered himself as a witness, was repealed by Public Laws of 1864, c. 272.

By Public Laws of 1859, c. 102, in the trial of civil actions, the husband and wife of either party shall be deemed competent witnesses, when the wife is called to testify by or with the consent of her husband, and the husband by or with the consent of his wife.

ON EXCEPTIONS.

TRESPASS QUARE CLAUSUM, alleging that the defendant broke and entered the plaintiff's close and set fire to and destroyed his barn and its contents. Trial was in March, 1867.

The testimony of the plaintiff and his wife was admitted against the seasonable objections of the defendant; and the latter thereupon alleged exceptions.

David Dunn, for the defendant.

A. Black, for the plaintiff.

WALTON, J.—The defendant contends that the plaintiff and his wife were improperly admitted as witnesses, because the plaintiff's declaration charges the defendant with an offence against the criminal law.

That portion of section 79, chapter 82, of the Revised Statutes of 1857, which provides that parties shall not be witnesses when the cause of action implies an offence against the criminal law, unless the defendant first offers himself as a witness, was not in force at the time of the trial of this case. It was repealed in 1864, (chapter 272.)

The plaintiff's wife was properly admitted to testify by force of the Act of 1859, c. 102, which provides that, in the trial of civil actions, the husband and wife of either party shall be deemed competent witnesses, when the wife

is called to testify by or with the consent of her husband, and the husband by or with the consent of his wife.

Exceptions overruled.

Judgment on the verdict.

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

JOHN LEE *versus* ZEPHANIAH STARBIRD *& als.*

If the payee of a note payable "on demand and interest" adds to it the words "at nine per cent.," after its execution and delivery, and without the consent of the maker, it thereby becomes materially altered as an instrument of evidence, and therefore void.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note, brought by the payee against the makers, payable "on demand and interest at nine per cent."

The action was referred to the Court, reserving the right to except.

It was admitted by the plaintiff that the words "at nine per cent." were written by him upon the note after it had been executed and delivered to him by the defendants, and without their consent.

The defendants contended that the altering of the note above stated was material, and that by reason thereof the plaintiff was not entitled to maintain his action; but the Court ruled that the alteration was not material, and that the plaintiff recover the amount of the note by computing the interest at six per cent. To which the defendant alleged exceptions.

W. W. Virgin, for the defendants, cited

Warrington v. *Early*, 22 Eng. L. & Eq., 208; *Haskell* v. *Champion*, 30 Miss., 136; *Chadwick* v. *Eastman*, 53 Maine, 12.

C. C. Sanderson & H. M. Bearce, for the plaintiff, contended that the alteration was not fraudulently made, and that it was not material, because it did not change the legal liability of the defendants; citing *Moye* v. *Herndon*, 30 Miss., 110, 121; *Gardner* v. *Walsh*, 32 Eng. L. & Eq., 162.

APPLETON, C. J.—This is an action on a promissory note, dated Feb. 6, 1861, for one hundred dollars on demand, and interest at nine per cent. It was admitted that the words "at nine per cent." on said note, were written thereon by the plaintiff after the execution of the note by the defendants, and without their consent. The Court ruled that this alteration was not material and did not invalidate the note, because the plaintiff could not maintain an action for the extra interest.

In *Waterman* v. *Vose*, 43 Maine, 504, it was held that the alteration of the note by the payee, by adding "with interest," without the consent of the maker, rendered the note void. Such was held to be the law in *Fay* v. *Smith*, 1 Allen, 477. In *Warrington* v. *Early*, 2 Elles & Blackb., 75, (E. C. L., 764,) a promissory note was made payable six months after date, "with lawful interest." After it had been signed, without the assent of the maker, but with the assent of the holder, there was added in the corner of the note "interest at six per cent. per annum." Held, that this addition materially altered the contract, and the owner could not recover on the note against the maker. The legal rate in that case was five per cent. The rule undoubtedly is that a material alteration of a note discharges the maker. To this rule, "the exception," remarks Lord CAMPBELL, in *Gardner* v. *Walsh*, 32 Eng. Law & Eq., 162, "is *Calton* v. *Simpson*, 8 Ad. & El., 136. In that case, the defendant had, as surety, signed a joint and several promissory note with the principal debtor, having no reason to suppose any one else would sign it. Afterwards the payee, without the knowledge of the defendant, induced another person to sign it, with a view to strengthen the security, and the Court

held the defendant was still liable upon it. But the decision took place merely on a rule to show cause why there should not be a new trial. It seems to have proceeded on the ground that, as the new surety could not be liable on the note, by reason of the stamp laws, the alteration operated nothing, although the counsel urged that 'a note with an altered date does not bind any one to the new contract, yet the old contract is void.' The judgment of the Court was, without further reasons, in these words:—'In the absence of all authority we shall hold that this was not an alteration of the note, but merely an addition which had no effect.' With sincere respect for the learned Judges who concurred in this decision, we feel bound to say that, in our opinion, it is contrary to the authorities and that it is not law." The Court there held that an addition to a note, affecting its construction, but of no legal effect, avoided it. A bill of exchange was, without the privity of the acceptor, altered by inserting the words "payable at A," and afterwards indorsed to the plaintiff for value, who took it *bona fide* and without knowledge of the alteration; it was held that this was a material alteration which discharged the acceptor. "The negotiation of bills," remarked Lord CAMPBELL, "is to be favored; but, with this view, it is material that their purity should be preserved." In *Ivory* v. *Michael*, 33 Missouri, 398, and in *Presbury* v. *Michael*, *ib.*, 542, the adding at the end of a note, "bearing ten per cent. interest from maturity," was held a material alteration and to avoid the note.

It is an alteration in a material part of the note,—affecting its meaning and construction. If the interest had been at four per cent., altering it to five per cent. would have been fatal to the action. *Exceptions sustained.*

CUTTING, WALTON, BARROWS and TAPLEY, JJ., concurred.
DICKERSON, J., dissented.

DAVID KIMBALL *versus* LEWISTON STEAM MILL CO.

The purchaser of stumpage from a mortgager in possession is liable therefor to the mortgager, when the rights of the mortgagee to the timber severed have been waived or extinguished.

When the mortgagee, as the agent and at the request of the mortgager, undertakes to collect the pay for such stumpage, he thereby ratifies the act of the mortgager in disposing of the timber, and waives his own right to pursue it as mortgagee of the land on which it grew.

When the mortgagee has received the full amount of the mortgage debt, and assigned the mortgage, making no mention of any right of action on account of what had been previously severed from the realty, his rights thereto have thereby become extinguished; and no legal claim therefor can be subsequently asserted under the mortgage.

ON REPORT.

ASSUMPSIT.

When the testimony was all in, the case was withdrawn from the jury and submitted to the full Court who were to draw such inferences as a jury might, and render such judgment thereon as the legal rights of the parties required.

The case is sufficiently stated in the opinion.

A. Black, for the plaintiff, cited Hilliard on Mort., 519; *Baker* v. *Page*, 11 Maine, 381; *Clark* v. *Wills*, 5 Gray, 69; *Brown* v. *Gammon*, 14 Maine, 276; *Winslow* v. *Copeland*, 15 Maine, 276.

D. Hammons, for defendants.

1. Bond is out of the case.

2. Kimball's permission to cut conferred no authority. The legal estate was in the mortgagee. He had no more right to diminish the security than a stranger. *Groton* v. *Boxborough*, 6 Mass., 51; *Erskine* v. *Townsend*, 2 Mass., 493; *Fay* v. *Cheney*, 14 Pick., 399; *Fay* v. *Brown*, 3 Pick., 204.

The mortgagees divested Kimball of all right to maintain this action. He could make them account only by redemption.

Lynch became assignee of all the mortgagee's right to the "premises conveyed by the mortgage." At the date of the assignment, but a small portion of the timber sued for was cut, and was part of the mortgaged property, and in October, 1863, Lynch became owner of Kimball's rights and interests in the premises. All the rights of the mortgagees enured to Lynch's benefit.

On the question of damages, the operations were judicious. They enured to the benefit of the lands. The timber cost more than it was worth. All the facts should be considered in fixing the damages.

BARROWS, J. — The plaintiff brings this action of assumpsit to recover of the defendants an amount of money which he says is due him for stumpage of timber, cut on his land in pursuance of an arrangement between the parties in the winter of 1861 – 2.

The condition of the title to the land, on which the timber was cut, is as follows: — Hosea Austin, in consideration of $10,500, by deed dated October 28, 1854, and duly acknowledged and recorded, conveyed to the plaintiff the wild lands in Byron, including the lots on which this timber was cut, and took a mortgage back from him, of the same date, duly acknowledged and recorded, to secure the payment of $8000 of the purchase money. Austin subsequently assigned half his interest in the mortgage, and one-third of the debt thereby secured, being the last instalment, to Freeman Griffiths. After a partial performance the conditions of the mortgage were broken, but the mortgager, the plaintiff here, still remained in possession, and on December 16, 1861, gave a bond to James Wood, the defendant's agent, conditioned for the conveyance to said Wood in that capacity, by good and sufficient deed, of fifteen lots of timber land in the north-west corner of Byron, specifying three lots, the remainder to be selected by Wood within certain limits, and within six months from date of bond, provided Wood should pay $1500 as follows: — $500 April 16, 1862,

and the balance in equal payments in one and two years from that date. It was proved that the defendants during that winter cut and hauled from the three lots thus specified in the bond and other lots in the north-west corner of Byron, 500 M. of spruce timber and 80 M. of pine, the stumpage of which was worth $1 per M. for the spruce and $5 for the pine. They hauled this timber to Black brook, which they dammed and cleared at a somewhat heavy expense, and the spring of 1862 being a bad one for want of a freshet, the winter operation proved altogether unprofitable, their expenditures, without reckoning anything for the stumpage, exceeding the value of the timber as it lay in Androscoggin river, and this the defendants claim to have considered in determining the amount which the plaintiff is entitled to recover if they are held liable to him in this action for anything.

There is a contradiction between the plaintiff and Wood as to plaintiff's informing Wood of the Austin mortgage at the time when the bond was given, but, however this may be, there seems to be no doubt that Austin himself informed Wood of the existence of the mortgage in November or December, 1861, (the bond was given Dec. 16,) and forbade his cutting. The timber was cut, however, notwithstanding the mortgagee's prohibition.

At the March term, 1862, Austin and Griffiths got judgment against the plaintiff for possession of the whole mortgaged territory, and in October, 1862, took possession of it under a pluries writ of possession. In June, 1863, at the request of the plaintiff, (and in pursuance of an agreement between them, that Austin should collect this stumpage either in his own name or in plaintiff's, as might be necessary, and allow it on such claims against Kimball as Kimball might designate,) Austin went to Lewiston and left word at defendant's office that the timber had been taken without a permit from any person who was authorized to give one, — that it had never been paid for, and that he, (Austin,) should claim pay for it of the defendants. But

he never made any further claim, and defendants never paid either him or the mortgager for the stumpage.

They claim to be exonerated from paying the plaintiff in this suit, on the ground that his permission gave them no right to the timber as against the mortgagee, — and because John Lynch, one of the principal stockholders in the defendant corporation, at the suggestion of their agent Wood, has since these transactions acquired the titles, both of the mortgager and mortgagee, to the wild lands in Byron, from a portion of which, as we have seen, this timber was cut. And they offer in evidence a quitclaim deed from the plaintiff to S. C. Gleason and V. D. Kimball, dated September 18, 1863, by which, in consideration of $2000, he conveys all his right, title and interest in and to the land bought of Austin, excepting certain parcels before sold; also a quitclaim deed of the same from said Gleason and Kimball to John Lynch, dated Oct. 2, 1863, and finally an assignment from Austin and Griffiths to said Lynch, under date of Dec. 11, 1863, of their interest in the mortgage and the debt thereby secured, with proof that Lynch paid to Austin the balance of the mortgage debt remaining due when he took the assignment, being something over $2700.

If a conveyance of timber lands transferred to the purchaser all the rights of action which the former owner has on account of growth previously severed from the realty with or without his consent, or if a mortgager in possession has no right in the mortgaged property, the grant of which may be a legitimate consideration for a purchaser's promise, this defence might be sustained.

The case would wear a very different aspect from that which it now presents, if the defendants had fulfilled the conditions of the bond from plaintiff to their agent Wood, so as to be entitled to claim a conveyance of the lots upon which the timber was cut.

But they made none of the payments stipulated for in the bond, — they did not even select the lots to be conveyed as therein provided. They simply cut the timber under the

plaintiff's permission, and paid neither him nor the mortgagee for it. To entitle their position, as bargainees of the lots, to any consideration in this case, it was incumbent upon them to make good the right to a conveyance by performance, or unconditional tender of performance, of their own duties under the bond. *Non constat* but that performance on their part would have enabled the obligor to fulfil his agreement. But, however this may have been, they cannot allege that agreement in defence of this suit, without showing performance, or offer to perform, on their own part. It is scarcely necessary to remark, that this conversation between Wood and the plaintiff, which the defendants offer in evidence, shows nothing of the sort. There must be an actual tender of performance, unless that is waived by the other party, or excused by proof of absolute and complete disability. A mere allegation of readiness to perform is not sufficient. And, indeed, the defendants' counsel claims only that the bond should be laid out of the case, as not affecting the rights of either party.

Conceding this, the naked question is whether the purchaser of stumpage, from a mortgager in possession, can rightfully refuse payment, when the rights of the mortgagee to that which has been severed from the realty have been either waived or extinguished.

In the present case the evidence shows both a waiver and an extinguishment.

Mr. Austin, the mortgagee, undertook to collect the pay for the stumpage, as agent of the plaintiff and at his request, and thereby fully ratified the act of the plaintiff in disposing of the timber, and waived his own right to pursue it as mortgagee of the land on which it grew. The amount, when collected, was to have been appropriated under the direction of the plaintiff, and would have enhanced the value of his existing right of redemption, which was subsequently purchased by Lynch. It is immaterial whether the defendants knew in what capacity Austin claimed. They knew

that a payment to him would discharge them, but they made no such payment.

Now a mortgage is designed simply to secure the payment of a debt, and, as between himself and all third parties, the mortgager is the owner of the estate so long as he remains in possesssion of it, and may lawfully dispose of it or the products of it, subject only to the superior rights of the mortgagee, who may and frequently does waive those rights, if satisfied that his ultimate security is not thereby impaired.

When the mortgagee's rights are thus waived, the title conveyed by the mortgager is as perfect as though no mortgage existed. It is not competent for a purchaser from the mortgager to set up the mortgage against him, when the mortgagee has waived the rights which he alone in all the world could assert.

Moreover, apart from any question of waiver, there was a complete extinguishment of any right of the mortgagee to pursue the proceeds of this sale of timber from the mortgaged premises, when they received the full amount of the balance due on the mortgage and assigned the mortgage to Lynch, making no mention of any right of action on account of what had been previously severed from the realty.

A mortgagee's assignment, while it passes his title to the land as security for the debt, transfers no rent due at the time of the assignment, without express words to that effect, and it is equally powerless to transfer any right of action growing out of any use or appropriation of the products of the land which the mortgager may have previously made.

Touching this idea of the transfer of bygone rents in this mode, Lord TRURO remarks:—(*Salmon* v. *Dean*, 5 Eng. Rep., 107,) "Men are in the habit of conveying estates day by day, conveying the fee. Well, what passes by that? Do the bygone rents in arrear pass by such conveyance? If they do not, what is the rule of law that makes a difference that the conveyance of the mortgage shall transfer bygone

rents, when the conveyance of the whole estate would not do that, but leave them perfectly unaffected?"

The only parties, then, who ever had any right to this stumpage as mortgagee, having received the full amount of the mortgage debt and transferred the mortgage, making no mention of this claim, there is no possibility that any legal claim to the amount due from the defendants can be asserted under the mortgage. By this transaction the right of the mortgagee (had it not been waived) would have been extinguished, and the mortgager would still have remained entitled to recover.

It is hardly necessary to say that it is to the testimony respecting the fair value of the stumpage alone, that we are to look in order to ascertain the amount for which the plaintiff should have judgment. Whether the defendants so conducted their operation as to make it profitable or the reverse, cannot affect the rights of the plaintiff. It is in proof, and there is no contradictory or controlling testimony, that the stumpage of the pine was worth $5 per M. and of the spruce $1. *Defendants defaulted.*

Judgment for plaintiff for $900, *and interest from date of writ.*

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

WALTON, J., did not sit on account of relationship between him and the plaintiff.

INHABITANTS OF BETHEL *versus* MIGHILL MASON *& als.*

One having given bond and acted in the capacity of collector of taxes, is estopped to contest the legality of his election.

It is no defence to a suit on a collector's bond, that the assessment preparatory to issuing the tax list, was not signed by the assessors.

A collector is protected by tax bills, accompanied with the collector's warrant prescribed by the statute, and signed by the assessors having jurisdiction.

ON REPORT.

DEBT on a collector's bond.

The principal defendant, at the annual meeting, bid off the collection of taxes for 1863, at four mills on the dollar. The town having neglected to choose him collector, he contended that his bid was not binding upon him, and claimed five per cent. The remaining facts are sufficiently stated in the opinion.

W. W. Virgin, for the plaintiffs, cited *Kellar* v. *Savage*, 20 Maine, 199; R. S., c. 6, § 56; *Lowe* v. *Weld*, 52 Maine, 588; *Trescott* v. *Moan*, 50 Maine, 347; *Scarborough* v. *Parker*, 53 Maine, 252.

D. Hammons, for the defendants, cited R. S., c. 6, §§ 86 and 56; *Foxcroft* v. *Nevins*, 4 Maine, 72; *Johnson* v. *Coolidge*, 15 Maine, 29; *Colby* v. *Russell*, 3 Maine, 227.

CUTTING, J. — Debt on a collector's bond, dated June 1, 1863, the condition of which is, — "That Mighill Mason is appointed collector of taxes for the town of Bethel for the year A. D. 1863. Now if said Mighill Mason performs all the duties of said collector, and pays to the treasurer of the State, county and town, according to the commitment of said selectmen, then this obligation is void, otherwise, to remain in full force and virtue."

It appears that, after the plaintiffs had introduced their record evidence, tending to show a legal assessment and a

commitment to the principal defendant as collector, they introduced one David F. Brown, who testified that "he was treasurer of Bethel in 1863. Mighill Mason accounted to me, as treasurer, for $5295,33. He settled with me, March 2, 1864. I asked him why he did not pay the balance. He said the balance, amounting to $396,33, he claimed for collecting."

Thereupon Mighill Mason was introduced in defence, when he disclosed on oath as follows: viz., — "That when he paid said Brown, March 2, 1864, said sum of $5295,33, he paid over to him a sum much larger than he had collected; that there still remained upon said tax lists uncollected between $1300 and $1400; that, at the time of the date or service of the writ, he had not in his hands one cent collected on said list, — had no authority to collect any tax except what is contained in the tax list now produced, — was never sworn as collector, — never received any appointment as collector, except what is contained in the bond, — made no agreement as to what compensation I was to have, — claimed 5-100 for collecting, — told Brown I would pay all but 5-100, — claimed to owe the town nothing." On cross-examination he further testified: — "I bid off the collection for four mills per dollar in 1863. I have collected taxes in Bethel for ten years. I collected taxes in 1864 for three mills per dollar. Also, I wrote the bond in suit. The assessors came to my shop and delivered me the tax bills in five minutes after they took the bond, in the fore part of June, 1863."

Upon the foregoing evidence, it is manifest, that on March 2, 1864, when Mighill Mason settled with, and paid the treasurer the amount of the tax list committed to him, except for the sum of $396,33, he claimed that sum as the percentage for his collections. Whereas, the treasurer contended, as the plaintiffs now insist, that he was entitled only to four-tenths of one per cent. Section 82 of c. 6, of R. S., of 1857, provides that, —

"The voters of a town, when they choose constables, may choose a collector or collectors of taxes, and agree what sum

shall be allowed as a compensation for the performance of their duties; but if those chosen refuse to serve, or none are chosen, the constable or constables shall collect the taxes."

Now, the principal defendant admits and the town records show, that he bid off the collection for four mills on a dollar and produced the names of his bondsmen, the other defendants, who, as such, were accepted by the town. Here then was an offer made by Mighill Mason and accepted by the town, which proceeding constituted an express contract.

But the defendant contends that he was not chosen collector and was not qualified by an oath, as required by the statute, faithfully to perform the duties of that office. However that may be, it sufficiently appears that he was armed with the tax bills accompanied with a warrant prescribed by the statute, signed by the assessors having jurisdiction over the subject matter. Those were a sufficient protection to him, especially since no evidence has been offered that any tax payer has ever objected to pay an assessment, upon the ground of any pretended illegality. This principle is enunciated in *Kellar* v. *Savage*, 20 Maine, 199, and *Tremont* v. *Clark*, 33 Maine, 482, to which cases we refer as an answer to the defendants' objections.

Defendants defaulted.

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

TAPLEY, J., concurred in the result.

BARNABAS BRACKETT *versus* AARON MCKENNEY.
SAME *versus* JOSEPH BENNETT *& al.*

A levy upon real estate will be sustained so far as the return of the officer upon the back of the execution is concerned, if it import by necessary intendment the actual performance of all the statute requisites.

A certificate, that the appraisers "made oath in due form of law that they would faithfully and impartially appraise such real estate of the within named" debtor "as should be shown them to satisfy the within execution and all fees, shows a sufficient compliance with the oath required in R. S. of 1841, c. 94, § 4.

To "set off," as used in R. S. of 1841, c. 94, § 24, simply means to separate or assign for the purpose of satisfying the execution and officer's fees so far as the appraised value of the land will go.

The return of appraisers, duly signed and indorsed upon an execution extended upon land, minutely described by metes and bounds the various parcels of land which they had examined, and specified their estimate of its value to each, concluding: "all of the above mentioned lots, amounting to the sum" named, "the same having been shown to us by the within named" creditor, "to satisfy the within execution in full and all fees for levying same." The officer's return thereon, adopted that of the appraisers, and alleged that he had seized, on this execution, the real estate above described;" that, after being duly sworn, the appraisers, "upon oath appraised the same as above appears and each lot separately, the whole amounting to the sum" named, "in full satisfaction of the within execution and all fees;" that "the premises are correctly described;" that "I have this day agreeably to law delivered seizin and possession of the same premises to the within named" creditor, "to have and to hold the same to the said" creditor, "his heirs and assigns forever;" and that "I therefore return this execution fully satisfied:" — *Held*, that the officer's return substantially states that the appraisers "appraised and set off the premises, after viewing the same, at the price specified," as required by R. S., c. 94, § 24, clause 4.

ON EXCEPTIONS.

REAL ACTIONS.

The only question is as to the validity of a levy made Dec. 26, 1855. The cases are sufficiently stated in the opinion.

Howard & Cleaves, for the plaintiff.

N. S. & F. J. Littlefield, for McKenney.

D. R. Hastings, for Bennett.

BARROWS, J. — REAL ACTIONS, presented on exceptions to the ruling of the Judge at *nisi prius* ordering judgment for the tenants, the cases having been submitted to him for decision, reserving the right to either party to except.

The only question is as to the sufficiency of a levy which is the foundation of the tenants' title.

The demandant owns the land, unless his title was divested by a levy made Dec. 26, 1855, on an execution against him in favor of one Sewall Fly, whose title thus acquired has vested in the tenants.

It is hardly necessary to reiterate what has been so often and so uniformly held by the Courts, that the levy of an execution, being a statute conveyance of the debtor's property, *in invitum*, must always be perfect; i. e., everything made necessary by the statute to pass the property must appear by the record to have been done.

But while it is necessary that the language of the return should be explicit to a common intent and understanding, leaving nothing that is essential to mere argument or probable inference, strict verbal conformity to the language of the statute has never been required. While it may be desirable, for the avoidance of controversies like the present, to adhere carefully to the phraseology of the governing statute, the levy will be sustained if the return imports by necessary intendment the actual performance of all the statute requisites. "The letter of the statute is not solely to be regarded," says WHITMAN, C. J., in *Roop* v. *Johnson*, 23 Maine, 335.

It is necessary that certain facts shall be "substantially" stated in the return, says the statute. R. S., 1841, c. 94, § 24; R. S., 1857, c. 76, § 5.

This levy, having been made previous to the revision of 1857, must be examined in view of the statutes which were then in force.

The first objection urged against it is, that it does not appear in the language of the statute that the appraisers were sworn "to appraise such real estate as shall be shown to

them to be taken by said execution." The language of the certificate is that they "made oath in due form of law that they would faithfully and impartially appraise such real estate of the within named Barnabas Brackett as should be shown them to satisfy the within execution and all fees."

The essential thing required here, is that the appraisers should be duly sworn beforehand, faithfully and impartially to appraise the debtor's land which is to be the subject of the levy. "Such real estate of the within named Barnabas Brackett as should be shown them to satisfy the within execution," — "such real estate as shall be shown to them to be taken by said execution." There is no room for conjecture or mistake here as to what land was to be appraised, nor for what purpose it was to be appraised. In a levy, land cannot be said to "satisfy" an execution unless it is "taken" on it. The objection is futile.

The only other objection alleged, is that the return does not state in direct terms that the land taken was "set off" to the execution creditor.

The phrase "set off" does not appear either in the return itself or in the certificate of the appraisers which is "adopted and made part of the return."

Among the facts which must be "substantially" stated in the return, we find the following: — "that they," (the appraisers,) "appraised and set off the premises after viewing the same at the price specified." 4th specification, § 24, c. 94.

If there was any magic in the words "set off" which made the use of them indispensable to the validity of a levy, it is reasonable to suppose that we should have found them in § 6, which prescribes the duties of the appraisers as follows: "The appraisers shall proceed with the officer to view and examine the land so far as may be necessary to a just estimate of its value; and the description and appraisement of the land shall be indorsed on the execution and signed by them." This is what the appraisers are to do, and thereupon the officer is to return substantially their doings as we

have just seen, i. e., that they appraised and set off the premises, &c. To "set off," in this connection, simply means to separate or assign for a particular purpose, which purpose, in case of a levy on real estate, is to satisfy the execution and officer's fees as far as the appraised value of the land will go.

Let us see what appears by the return to have been done here.

First, the appraisers were sworn, as we have seen, "faithfully and impartially to appraise such real estate of the within named Barnabas Brackett as should be shown them, to satisfy the within execution and all fees." Then they indorse upon the execution a certificate signed by them, minutely describing by metes and bounds, (thus virtually setting off and separating them from the adjoining lands,) the various parcels of land which they have examined, and affixing their estimate of its value to each parcel, and they conclude their certificate as follows: — "All of the above mentioned lots and pieces of lands, amounting to the sum of twenty-eight hundred and seventy-three dollars and sixty-two cents, the same having been shown to us by Sewall Fly, the within named creditor, to satisfy the within execution in full, and all fees for levying the same." Then the officer, premising as follows: — "The within named creditor, Sewall Fly, having thought proper to have the within execution levied on the real estate of the within named Barnabas Brackett, I have this day, by virtue of the same, seized on this execution the real estate above described," — besides making the appraisers' certificate indorsed thereon, a part of his return, and stating that they went with him and examined the premises, &c., further returns as to this part of the proceedings, — "they there, upon their oaths, appraised the same as above appears, each lot separately, the whole amounting to the sum of twenty-eight hundred and seventy-three dollars and sixty-two cents, in full satisfaction of the within execution and all fees." * * * * * "The premises are correctly described in the certificate," * * * * "and I

have this day, agreeably to law, delivered seizin and possession of the said premises to Sewall Fly, the within named creditor, to have and to hold the same to the said Fly, his heirs and assigns forever, in full satisfaction and discharge of this execution and charges of levying the same." * * * "I therefore return this execution fully satisfied."

It cannot be maintained that the officer does not "substantially" state that the appraisers "appraised and set off the premises, after viewing the same, at the price specified." The act of separation from the adjoining lots by them, and the purpose for which it was done, sufficiently appear.

All that the statute requires for the protection of the debtor's rights and interests was substantially performed. His title in the premises levied upon passed to the creditor, and has now vested in the tenants.

Exceptions in each case overruled.

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

BENJAMIN FREEMAN *& als. versus* MOSES C. FOSTER *& al.*

An outstanding mortgage of premises described in a deed of warranty, is not such an incumbrance as will constitute a breach of the covenant of freedom from incumbrances, when the premises in the deed, described by metes and bounds, are declared therein to be "subject to the mortgage."

ON FACTS AGREED.

Action for a breach of the covenant of freedom from incumbrances, contained in a deed of warranty from the defendants to the plaintiffs, dated March 23, 1856. Writ dated October 31, 1866.

Immediately succeeding the description of the premises by metes and bounds are the following words,—"saving and reserving the building thereon situate, and the right to

enter and remove said building from the above described premises, subject to a mortgage given to Moses Pattee by said Foster and Buck, dated Feb. 15, 1856, and recorded in Oxford records, book 104, pages 409 & 410." Then follows the *habendum*, together with the covenants of seizin, freedom from incumbrances, &c.

The consideration of the deed was $300, and that of the mortgage the same amount, which had never been paid by either party. The plaintiffs sold the premises by deed of warranty, dated April 10, 1857, to one Partridge, and the title to the equity of redemption came through several mesne conveyances to the defendant Foster, his immediate grantor's deed bearing date June 27, 1861.

Pattee published notice of foreclosure of his mortgage, Sept. 30, 1858, last publication Oct. 15, 1858.

If the action was not maintainable, the plaintiffs were to become nonsuit.

S. F. Gibson, for the plaintiffs, contended

That the covenant of freedom from incumbrances was broken by the existence of the outstanding mortgage to Pattee, notwithstanding the reference to it in the deed; and cited *Bemis* v. *Smith*, 10 Met., 194; *Estabrook* v. *Smith*, 6 Gray, 572; 2 Washb. on Real Property, (2d ed.,) 725, § 35, a, and cases therein cited, especially *Stebbins* v. *Hall*, 29 Barb., 524.

D. Hammons, for the defendants.

DANFORTH, J.—This is an action for a breach of the covenant against incumbrances, contained in a deed from the defendants to the plaintiffs, dated March 22, 1856. In the same deed the premises conveyed are described as "subject to a mortgage given to Moses Pattee by said Foster and Buck, dated Feb. 15, 1856." It is evident that the covenants in a deed are applicable to, and coëxtensive with, the premises conveyed. In this deed, the interest in the premises covered by the mortgage was not conveyed, and it must

necessarily follow that the covenant did not apply to that incumbrance. As the case finds no other incumbrance, there is no breach of the covenant. The doctrine of *Kinsman* v. *Lowell*, 34 Maine, 299, is decisive of this case.

Plaintiffs nonsuit.

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

The following opinion was drawn by

KENT, J.—I concur in the opinion. The case cited from our own Reports seems to establish the doctrine contended for by the defendants. The case of *Estabrook* v. *Smith*, 6 Gray, 572, cited by plaintiffs, at first view, seems to favor the proposition contended for by them. But, on examination, it will be seen that the words,—"except a mortgage to Spenser Field," are annexed to one of the covenants only, the covenant of freedom from incumbrances, followed by the general covenant of warranty of the premises against the lawful claims and demands of all persons. The question in that case was how far words of restriction or qualification, annexed to one covenant in a deed conveying real estate, are to be extended to other covenants. It was held that the covenant for quiet enjoyment is of materially different import and directed to a distinct object from the covenant for title, and therefore the qualifying language annexed to that covenant could not be transferred to and qualify the general covenant for title.

But, in the case at bar, the qualifying words are part of the description of the premises granted. The deed says, I "do hereby give, grant, bargain, sell and convey the following described parcel of land,"—then follows a description by metes and bounds,—then follows a reservation of a building thereon, with a right to enter and remove it from the above described premises, "subject to a mortgage to Moses Pattee, recorded in Oxford records, book 104, pages 409 & 410." Then follow the four usual covenants.

In this case, therefore, if the allegation in the deed in

reference to this mortgage, is of any importance, or can affect any covenant, it is clear that it must apply to all the covenants. The words were used for some purpose. They do not refer to the mortgage deed for the purpose of identifying the land, or its boundaries. They evidently were intended to qualify the estate granted and were used as a part of the description of the estate granted, and to that estate, thus qualified, the covenants apply.

BARTLETT GOULD *versus* JASON M. CARLTON, *Adm'r.*

In the trial of an appeal from the decision of commissioners of an insolvent estate, the creditor cannot testify in his own behalf, as matter of right, but the statute leaves it discretionary with the Court to require him to do so on motion of the defendant, when the discovery of the truth seems to render it necessary.

In the trial of such an action, the plaintiff cannot recover in his own name upon an unindorsed negotiable promissory note signed by the intestate, and made payable to a person other than the plaintiff, in the absence of any proof of a promise by the maker to pay it to the plaintiff.

Such appeal may be brought in the county where the administrator resides, although administration was granted and all proceedings in probate were had in another county.

A husband may recover in his own name for the personal services of his wife.

ON EXCEPTIONS.

The defendant, in his capacity of administrator of the estate of Samuel R. Cottle, late of Windsor, in the county of Kennebec, on the fourth Monday of June, A. D., 1865, appealed from the decision of the commissioners of insolvency on said estate, allowing certain claims presented to them by the plaintiff against the estate. The commissioners were appointed by the Judge of Probate for the county of Kennebec, where administration was granted, and where all proceedings in probate relating thereto have been had, except that the commissioners were, and still are, inhabitants of Whitefield, in this county, in which latter named town the commissioners held all their official meetings.

On September 1, 1865, the plaintiff sued out the writ in this action, from the clerk's office for this county, declaring for money had and received, claiming $1118,80, with interest thereon from the 26th (Monday) of June, 1865, and annexing thereto the following specification of his claims: —

"Schedule of the plaintiff's claims sued in this action and allowed by the commissioners of insolvency June 26, 1865, viz.: —"For five promissory notes, each dated Oct. 8, 1849, signed by Samuel R. Cottle, and payable to one John Cottle, or his order, as follows: — One for $113, payable in one year from date with interest; one other for $105, payable in six months; one other for $100, payable in one year with interest; one other for $77, payable in ten months with interest; one other for $70, and payable in three months; on which there was due on said 26th of June, the sum of $888,54."

"Also an account which is as follows: —

"Samuel R. Cottle to Bartlett Gould, Dr.

1860. Dec. 23.	To 240 lbs. of beef at 5 cts. per lb.,	$12	00
Dec. 27.	To 2½ months labor of my son at $15 per month,	37	50
1861. Mar. 28.	To cash paid you, ten dollars,	10	00
April 9.	To 48 lbs. of corned beef at 6 cts. per lb.,	2	88
"	To 11½ lbs. of tallow at 12 cts. per lb.,	1	32
April 15 to June 28, 1862.	To 2½ months labor of my son,	40	00
	To eleven months and ten days labor of my son, from April 5th, to July 28th, and Aug. 9th, to March 28th,	170	70
June 30, 1862.	To labor done by my wife, to Dec. 6,	46	00
Dec. 20, 1862.	To labor done by my wife, to March 5, 1863,	25	00
	To service of my horse and wagon conveying my wife from my house to John Cottle's,	28	50

"On which account was allowed the plaintiff, by said commissioners of insolvency, on said 26th day of June, the sum of $230,26."

The defendant pleaded the general issue; but before pleading, he objected, that the action should not have been brought and prosecuted in the county of Lincoln, but in the county of Kennebec, where administration on said estate was granted. The Court ruled that the action was rightly commenced and prosecuted, the administrator being an inhabitant of this county; and overruled the defendant's objection.

There was evidence tending to show that the five notes, which are specified in the plaintiff's schedule of claims, and which are not indorsed by the payee of them, were given to the plaintiff by the payee, on July 21, 1862, the promissor being then alive, in discharge of an account which plaintiff claimed he then had against said payee. The defendant contended that there being no indorsement of the notes, and no evidence of any express promise on the part of defendant's intestate to pay either of them to the plaintiff, the mere delivery of them to the plaintiff by the payee, under such circumstances, would not authorize this action upon them, in the plaintiff's name; but the Court ruled otherwise, and so instructed the jury.

It appeared that defendant's intestate died in the month of February, 1864, and said John Cottle, his father and sole heir at law, in March following.

The defendant neither testified in the case nor was he offered as a witness; but, against the defendant's objection, the plaintiff was admitted as a witness generally, and, *inter alia*, testified (defendant objecting) as to the settlement of his account with John Cottle, the giving of the notes to him by said John, in discharge of an account of about $200,00, which he claimed was due to him from said John Cottle; and as to the services of his son and of his wife, as specified in his account, and as to the value of their services.

The plaintiff's wife, who is a daughter of said John Cot-

tle, was admitted to testify and did testify generally in the case, against the defendant's objection, seasonably made.

The defendant further contended that, for the personal services of the plaintiff's wife, the plaintiff was not entitled to recover in this action, but for such services the action should be in the name of his wife. — The Court ruled and instructed the jury otherwise.

The verdict was for the plaintiff for $1118,80, and the defendant alleged exceptions.

Wales Hubbard and S. Lancaster, for the defendant.

A. P. Gould, for the plaintiff.

DANFORTH, J. — On appeals from the decision of commissioners of insolvent estates, the statutes provide what shall be the form of the action to be commenced, and that, on the trial of such action, the creditor may be examined on oath. R. S., c. 66, §§ 13 & 15. In all other respects, the course of proceedings and the principles upon which testimony is to be received or rejected, are the same as those applicable to ordinary actions at law. The statute gives no cause of action where none exists without it. In the case at bar, the notes were not indorsed by the payee, nor was there any proof of a promise by the maker to pay either of them to the plaintiff. In the absence of any statutory provision, we are aware of no principle of law by which such notes are, or ought to be sufficient to maintain the action. As the presiding Justice ruled otherwise, the exceptions upon this point must be sustained.

The plaintiff was admitted to testify generally, the defendant not having been offered as a witness. The statute provides that "the creditor may be examined on oath," &c. This does not give him the privilege of testifying in his own behalf as matter of right, but leaves it discretionary with the Court to require him to do so, on motion of the defendant, when the discovery of the truth seems to make it necessary. *Morse* v. *Page*, 25 Maine, 496; *Moore* v. *Taylor*, 44 N. H., 370.

In other respects we see no objections to the ruling of the Court. *Exceptions sustained.*

New trial granted.

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

WALTON and TAPLEY, JJ., concurred in the opinion, except that portion of it which pertains to the maintenance of the action upon the notes.

NATHANIEL BRYANT, JR., *Adm'r, versus* WARREN MERRILL, *& al.*

Chapter 52* of the Public Laws of 1866, providing that the "contracts of any married woman, made for any lawful purpose, shall be valid and binding," is prospective and does not apply to promissory notes made before its enactment.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note, dated May 17, 1862, signed by a Warren Merrill and his wife Martha M. A. Merrill. The writ was dated May 21, 1866.

It appeared that, at the time of the making of the note, Martha M. A. Merrill was and is still the wife of Warren Merrill, then and now living with her husband in this State. The presiding Judge ruled, *pro forma*, that the above facts do not constitute a defence; whereupon a default was entered, which, by agreement, was to be taken off and the action to stand for trial, if the ruling was erroneous.

J. Ruggles, for the plaintiff.

A. P. Gould, for the defendants.

DICKERSON, J.—The female defendant was a married woman when the note in suit was given, and the action was

* See opinion.

brought. By the common law, she could not make a valid contract; nor was it competent for her, under the then existing statutes of this State, to make a valid promissory note. If she is liable in this action, it is by reason of c. 52 of the statutes of 1866, passed since the note was given.

After making the contracts of married women "valid and binding," when made for any lawful purpose, that Act provides that it shall not be construed to affect any pending suit.

A retroactive effect will not be given to a statute, unless it clearly appears that such was the intention of the Legislature. Without the proviso, the statute would have been exclusively prospective in its character. The language of the Act is, such "contracts shall be valid and binding." At least, it cannot be said that this phraseology indicates the purpose of the Legislature to make the statute applicable to then existing contracts.

Is it to be inferred from the exclusion of pending suits from the operation of the statute, that it was the intention of the Legislature to make it applicable to the same class of existing contracts which had not been sued? Is the denial of the applicability of the statute in the one case, the assertion of its applicability in the other? Though it is a maxim of the law in certain cases, that the expression of one thing is the exclusion of the other, we are not aware that the converse of this proposition has ever obtained as a rule in construing statutes. Besides, it is not from inference alone that a statute of such grave character should be held to have a retroactive effect.

If it had been the intention of the Legislature to legalize existing contracts not then valid, would it have made a distinction between contracts sued, and those not sued, discriminating against the one and in favor of the other, still holding the former under the ban of illegality, while legalizing the latter, rewarding the dilatory and punishing the vigilant creditor? No reason is perceived for such distinction,

if the statute was designed to have a retrospective effect. On the contrary, such invidious discrimination would seem to be inconsistent with that degree of intelligence, wisdom and sense of justice which the Legislature is presumed to possess.

Though the proviso is somewhat limited in its terms, yet, taken in connection with the language of the body of the Act, both together clearly indicate the purpose of the Legislature to make valid the future contracts of married women, without changing the legal character of preëxisting contracts made by them.

According to the agreement of the parties, the default is to be taken off and the case stand for trial.

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

WALTON, J., concurred in the result.

MOSES CALL *& al. versus* WILLIAM J. PERKINS.

One part-owner of a vessel, who has given the bond provided in R. S. of 1841, c. 114, §§ 65 & 66, (R. S., c. 81, §§ 59 & 60,) and taken possession of the vessel for the purpose of dissolving an attachment thereof, made in a suit against another part-owner, and subsequently paid the judgment recovered in such suit, — holds the share of the vessel so attached as security for the amount of the judgment so paid, and is entitled to such share's earnings during such holding; and he may recover the same of the master who has adjusted the accounts with the ship's husband, paid other part-owners their share of the earnings, and promised him to pay his.

ON FACTS AGREED.

The plaintiffs, Moses Call and B. D. Metcalf, claimed, as joint owners of one-fourth part of brig Galena, to recover from the defendant one-fourth of the net earnings of the brig, from March, 1855, to June, 1856, while the defendant was master thereof, to wit, the sum of $337,24, the defendant

having made up his accounts to the latter date, which show $1348,96, due in all.

The defendant did not admit the plaintiffs to be owners, unless they became such previous to the time when he became master, by reason of the following facts:—

On Jan. 22, 1850, the brig was attached on several writs, duly sued out by his creditors, against one Isaac Taylor, of Boston, Call then owning one-half, Metcalf one-fourth, and Taylor the remaining one-fourth of the brig. The attaching officer took possession of the brig, and Taylor, though requested by the plaintiffs, neglected to relieve the brig from the attachments; whereupon the plaintiffs, then part-owners, gave the bond provided by R. S. of 1841, c. 114, §§ 65 & 66, in the sum of $1200, and took possession of the brig. The suits against Taylor went to judgment, and, on demand by the officer holding the executions thereon, the plaintiffs paid equally, in satisfaction of the judgments, the sum of $1200.

Subsequently, and before the defendant became master, the plaintiffs sold their original shares, to wit, one-half and one-fourth, to Chamberlain & Foster, Miller & Hatch, and William A. Keagan. From that time to the time when the defendant left the brig, the ownership was as follows:— Chamberlain & Foster four-eighths, Miller & Hatch one-eighth, William A. Keagan one-eighth; and, by the custom house records, one-fourth remained, during this time, as at the time of the attachments, in the name of Taylor; and, after the defendant left the brig, the plaintiffs sold said one-fourth for $1000.

From the date of the bond to the time of the last sale by the plaintiffs, they claimed property in said one-fourth, under and by virtue of the bond, claiming to hold that share as security for the amount paid by them in satisfaction of the judgments against Taylor, never having any other title thereto. Their names were never in the papers as owners, nor was there any record in the custom house showing them to be such, prior to the sale of the Taylor one-fourth.

Chamberlain & Foster were ship's husband in 1855 and

1856, and the defendant rendered to them his account with the brig by him stated, in June 1856, in which he made due to the owners $1348,96.

In the summer of 1856, the defendant told Call that $337,24 were due to the one-fourth claimed by the plaintiffs, that he had adjusted the whole account with Chamberlain & Foster, and promised Call to pay it soon. The defendant told his father, James Perkins, to tell Call that he had done nothing with the brig, and was unable to pay him, but that he would pay him when he got able; that he settled with Miller & Hatch, paying Hatch what money he had and giving his note for the remainder.

If the plaintiffs were entitled to recover, the defendant was to be defaulted.

Ingalls & Smith, for the plaintiffs.

J. H. Converse, for the defendant.

DANFORTH, J.—The case finds that the plaintiffs took possession of one-fourth of the brig Galena by virtue of the provisions of the R. S. of 1841, c. 114, §§ 65 & 66, and subsequently paid the judgment recovered in the suit in which the brig was attached. They then held that share of the vessel by virtue of § 67 of the same chapter, as security for the amount so paid, and, while so holding, would be entitled to its earnings. Under this state of facts, the defendant run the vessel as master, and, before the commencement of this suit, viz., in June, 1856, adjusted the accounts with the ship's husband and found due the owners the sum of $1348,96, one-fourth of which belonged to the plaintiffs. After this he paid one of the owners his share and promised the plaintiffs to pay theirs. He then held the plaintiffs' share in trust for them, and is liable in this action. *Williams* v. *Williams*, 23 Maine, 17; *Taylor* v. *Richards*, 3 Gray, 326.

Judgment for plaintiffs for $337,24, *and interest from June*, 1856.

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

SAMUEL BROWN *versus* JOSIAH F. BATES.

The interest of a mortgagee of lands cannot, before foreclosure, be attached or sold on execution.

A conveyance in mortgage to two or more persons to secure their several debts creates an estate in common, and renders the mortgagees tenants in common, and not joint tenants.

The assignee of three out of four such mortgagees may maintain a writ of entry for the possession of the mortgaged premises, against the mortgager and all claiming under him, if the interest of the fourth mortgagee has not been legally assigned to the party defendant, but remains vested in some third party.

Judgment rendered in such case.

ON REPORT.

WRIT OF ENTRY, to recover possession of a certain parcel of land in Richmond village, described in the writ as bounded "on the west by a town way, on the north by land in possession of Richard F. Farrin, on the east by land of the Portland & Kennebec Railroad Company, and on the south by land of said Brown."

On July 28, 1849, Jonathan Bryant conveyed in mortgage the demanded premises, together with certain other lands, to William Wilson, Amherst Whitmore, Thomas J. Southard and James M. Hagar, with the provision, — "that if the said Jonathan, his heirs, executors, or administrators, shall pay to the said Wilson and Whitmore, Southard and Hagar, five notes of hand by said Bryant, signed as follows, viz.: Two notes dated July 28, 1849, payable to said Southard or order; one of them for $100, payable on demand, the other for $400, payable in one, two, three and four years from date, interest annually; one other note dated July 28, 1849, for $400, payable to said Wilson and Whitmore or order, in one, two, three, and four years from date, and interest annually; one other note given to said Hagar or order, for $400, payable in one, two, and three years from date, and interest annually; also one other note signed by said Bryant and W. C. Hall, for $200, dated July 17, 1849

payable in three months, with interest, then this deed and said notes shall be void."

At the December term, 1855, the mortgagees recovered a judgment against Bryant, (the mortgager,) and others in possession, for the possession of the mortgaged premises. On April 14, 1862, a writ of possession issued upon this judgment, reciting the amount due upon the mortgage, Dec. 29, 1855, as being, $1285,44, and the costs as $13,90. On May 7, 1862, service of the writ of possession was made, and possession of the premises therein mentioned was given to the mortgagees.

On Oct. 23, 1860, Thomas J. Southard assigned his interest in the mortgage to the plaintiff.

On Oct. 17, 1862, William Wilson and Amherst Whitmore assigned their interest to the plaintiff.

On the part of the defendant, it appeared that Jonathan Bryant, on Feb. 2, 1852, conveyed the premises to Alfred Beals. On May 17, 1852, James M. Hagar released "all interest, right, title and claim whatsoever that he then had in the premises under" the mortgage, to Alfred Beals. On March 28, 1853, Daniel Witham, as deputy sheriff, attached on a writ against Alfred Beals, and in favor of one Rines, all the right in equity which the said Beals had to redeem the mortgage; the writ was duly entered and a judgment rendered thereon in May, 1853; by virtue of the execution issued thereon in June following, Witham sold and conveyed by sheriff's deed, to Charles B. Foster, said Beal's said right of redemption; and, on Nov. 21, 1853, Foster conveyed the premises by deed of warranty to the defendant.

After the evidence was all in, the case was withdrawn from the jury and submitted to the full Court.

A. P. Gould, for the plaintiff.

Tallman & Larrabee, for the defendant.

WALTON, J. — Jonathan Bryant mortgaged the demanded premises (with other lands) to William Wilson, Amherst Whitmore, Thomas J. Southard, and James M. Hagar. Three of these mortgagees (Wilson, Whitmore and Southard) have assigned their interests to the plaintiff, and the only ground taken in defence is that the interest of Hagar, the fourth mortgagee, has been assigned to the defendant, and that he is a co-mortgagee with the plaintiff; and the question is then very pertinently asked, if one co-mortgagee can maintain an action for possession against another. We do not find it necessary to answer this question, for the reason that the evidence fails to establish the fact that the defendant is a co-mortgagee with the plaintiff.

The defendant does not appear to have any other title than what he obtained from Foster, and Foster had none except what he derived through the sheriff's deed, and the sheriff's deed conveyed only an equity of redemption. The parties may have supposed that the sheriff's deed conveyed not only the equity but also the interest of one of the mortgagees (Hagar) which had been assigned to the judgment debtor. But this was impossible. The interest of a mortgagee cannot be attached, or sold on execution. *Smith* v. *People's Bank*, 24 Maine, 185. And the sheriff's deed does not purport to convey anything but the equity of redemption. How then, can the proposition be maintained that the defendant is a co-mortgagee with the plaintiff? We think it cannot. It is neither proved nor admitted.

But the question here arises whether the action can be maintained in the name of the plaintiff alone, if he is the assignee of three only of the mortgagees, and the interest of the fourth is in some third party. We have no doubt it can be. When a mortgage is given to two or more persons to secure debts due to them severally, it creates a tenancy in common, and not a joint tenancy. *Burnett* v. *Pratt*, 22 Pick., 556. And tenants in common may all, or any two or more, join in the suit to recover the land, or any one may sue alone. R. S., c. 104, § 9. The mortgage in this

case was given to secure debts due to the mortgagees severally; namely, $400 to Wilson and Whitmore, $500 to Southard, and $600 to Hagar. The plaintiff, being assignee of Wilson, Whitmore, and Southard, is entitled to maintain a writ of entry for the possession against the mortgager, and all claiming under him, if the interest of Hager, the fourth mortgagee, has not been legally assigned to him, but is to be regarded as still vested in some third party.

The plaintiff, therefore, is entitled to judgment. Shall it be absolute or conditional? We think it must be absolute. The action is not brought to foreclose a mortgage, and no motion appears to have been made in the Court below for a conditional judgment, and we have no means of ascertaining the amount due upon the mortgage, —$1285,44 appears to have been due in 1855. And as the defendant is said to be in possession of only a small part of the mortgaged premises, and as he will be obliged to pay the whole amount due with interest in order to redeem such part, (*Rangely* v. *Spring*, 21 Maine, 130,) we presume a conditional judgment would be of no service to either party.

Judgment for plaintiff.

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

WILLIAM WYMAN *versus* HENRY L. FOX *& al.*

Sections 13 & 43 of c. 76 of the R. S., contain no exception in favor of insolvent estates.

Hence, if an administrator of an estate represented insolvent assume the defence of an action pending against his intestate, and neglect to suggest the insolvency upon the record, the execution issued upon the judgment recovered against the administrator may be legally levied on the real estate of the intestate fraudulently conveyed by him.

BILL IN EQUITY, heard on demurrer.

The bill substantially alleges that, on the 13th of May,

1856, long before and ever since, the complainant was a creditor of one Amos Wyman, deceased, and whose estate was rendered insolvent; that, at the March term of this Court, in and for this county, he recovered judgment and execution against the estate of the deceased for $772,83, debt, and $94,32, costs; that, on May 25, 1865, he caused the execution to be duly satisfied by a levy on two pieces of land [described] in Hallowell, which were duly set off to complainant and possession thereof duly given to him.

It further alleges that, on May 13, 1856, Amos Wyman was the owner of said pieces of land, and, on that day, conveyed them to his wife, Charlotte Wyman, one of the respondents, without any consideration, and with intent to defraud his creditors, and especially the complainant, all which was fully known to said Charlotte at the time; that, on June 15, 1858, said Amos and Charlotte joined in a conveyance of the same premises to Henry L. Fox, brother of said Charlotte, the other respondent, without any consideration paid by said Fox, and with the intent on the part of all three of the parties to defraud the creditors of the said Amos, said Fox having full knowledge of the fraudulent character of the conveyance from said Amos to his wife.

The prayer of the bill was for a decree that the respondents release all their right to said premises to the complainant, and for other relief.

The respondents demurred generally.

A. G. Stinchfield, in support of the demurrer.

J. Baker, contra.

KENT, J.—The material facts, as we gather them from the bill, although stated somewhat indefinitely, are these,—that the complainant recovered judgment against the estate of Amos Wyman, after his death, and after a representation of insolvency, and after the appearance of the administrator in the suit; that afterwards, the execution was levied on the real estate, which, as alleged, had been conveyed by

said Amos in fraud of his creditors, the complainant at the time being one; that the subsequent grantee had knowledge and joined in the fraudulent intent.

This bill is brought to set aside that conveyance and compel a release of all right in the land to the complainant.

By c. 76, § 43, R. S., it is provided that "the real estate of a deceased person may be taken for the payment of his debts, by an execution issued on a judgment recovered against his executor or administrator, and levied on, sold and redeemed, as if taken in his lifetime." By § 13 of c. 76, it is provided that a levy may be made on land fraudulently conveyed by a debtor. This right to levy seems to be the same, and to be enforced by levy, in the same manner as if no conveyance had been made. The theory of the law is, that the fraudulent conveyance is no transfer of the title against creditors.

There is no exception, in the language of these sections, in favor of an insolvent estate. The right to levy is given whenever an execution has been issued on a judgment against an executor or administrator. This, at first view, seems at variance with the other provisions of the law in relation to distribution of insolvent estates. The intent of those provisions is plain — to make an equal distribution of all the estate among the creditors not preferred. It would seem to be inconsistent with this purpose to authorize a levy by a creditor, on an execution recovered against an administrator, after a representation of insolvency.

But, upon a careful comparison of all the provisions in the various statutes on the subject, we shall find that there is no conflict. After reading c. 66, which provides the mode of ascertaining the claims against an insolvent estate, in suit or otherwise, we at once ask in this case, why did this execution issue? It is expressly provided that, after a representation of insolvency, and appointment of commissioners, no execution (except for costs) shall issue in any case against the executor or administrator, but the claim allowed by commissioners, or by a verdict, or judgment of

court, shall be certified among the list of claims allowed, for a dividend.

In this case, for some reason, an execution did issue for the debt and costs. It was the duty of the administrator to have prevented this, by a suggestion on the record of the insolvency. If he did not, and no such suggestion was made to the Court, there was no legal reason why execution should not issue as it did. The statute says such an execution may be levied on the real estate of the deceased. It may be waste or misfeasance on the part of the administrator, for which he may be answerable on his bond. But, as the record stood, the execution was properly issued. It is the plain duty of the personal representative, after he has appeared in the action, to see that all the rights of the estate and of other creditors are protected, by interposing the fact of insolvency. The lawmakers presumed he always would do this, and therefore made no exception, in the provision first quoted, in favor of an insolvent estate.

The execution having thus regularly issued, could it be levied on the land so as to give title, irrespective of the insolvency? This question was raised and decided in *Sturgis* v. *Reed*, 2 Greenl., 109.

In that case, the administrator, after a representation of insolvency, and after appearance in the suit, allowed judgment to be rendered without interposing the fact of insolvency, — but afterwards obtained an adjudication of the Court that the execution be set aside, as having been improvidently issued. Yet, on *scire facias*, on suggestion of waste for an execution *de bonis propriis*, it was granted on the ground that the administrator had neglected his duty, in not preventing the issue of the execution, — as he might have done. In giving the opinion of the Court, C. J. MELLEN, in illustrating the proposition, says: — "Suppose that in this case the execution had been in due form extended on the real estate of the deceased intestate, and regularly recorded in the registry of deeds; and that instead of this *scire facias* the plaintiff had brought a writ of entry to obtain the pos-

session, would the present plea, stating that the Court had set aside the execution, for the above reasons, long after the extent was completed, be a bar to such action? The question admits of but one answer. For the same reason we think the plea is bad when offered in bar of this action."

The same principle governed the decision in *Clark* v. *May*, 11 Mass., 233.

It seems therefore clear that a levy, if properly made, on an execution thus issued, is legal and effectual. It can be made as if taken in the lifetime of the debtor. c. 76, § 43. And, by § 13 of same chapter, it is provided that a levy may be made on land fraudulently conveyed by a debtor, and the momentary seizin obtained by the levy is sufficient to enable the creditor to maintain his claim for its recovery from a fraudulent grantee.

This result is sustained by the cases before cited, and by *Ramsdell* v. *Creasy*, 10 Mass., 170, and *Frost* v. *Ilsley*, 54 Maine, 348. In the latter case it is said that, if the administrator neglects to make the representation of insolvency on the record of the court, in the action, 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.

The bill does not disclose any attachment, and therefore the question does not arise whether an attachment of real estate is dissolved by a representation of insolvency, under existing statutes. The rights of the parties, as presented, depend upon the levy. *Demurrer overruled.*

Defendants to answer.

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

GEORGE MEARS *versus* CROWELL BICKFORD.

Upon a contract, made with his father's consent, between a minor and the defendant, to enlist as a substitute, the father cannot maintain an action in his own name.

Money paid as a bounty for enlistment into the military or naval service of the United States, is a gift to the person enlisting, and not wages.

Bounty money, to which a minor becomes entitled upon his enlistment as a soldier, belongs to him and not to his father or master.

ON REPORT.

ASSUMPSIT to recover money paid to the defendant by the town of Waterville, as bounty, for having put in a substitute.

After the evidence was all put in, the case was reported to the full Court, which was to render such judgment as the law and evidence required.

S. H. Willard, for the plaintiff.

Reuben Foster, for the defendant.

APPLETON, C. J. — The plaintiff testified that the defendant agreed with his minor son, if he would enlist as his substitute, to give him "two hundred dollars, and all the bounties that the town had raised or should raise towards filling that quota, and every thing accruing from that service."

George Mears, jr., the minor son, enlisted as a substitute for the defendant, with the consent of the plaintiff, and was counted on the quota of the town of Waterville, where the defendant resided.

The defendant paid two hundred dollars according to his agreement, and this suit is to recover of the defendant the sums received by him from Waterville.

It is not necessary to determine the validity or the effect of the votes of the town of Waterville relating to bounties, or what was the agreement between the son and the defendant as to the money received by him of the defendant town, inasmuch as we are satisfied that the plaintiff cannot maintain this suit.

The bounty, by the statutes on this subject, is to the person enlisting and mustered into the service of the United States. It is not for the benefit of the father or master of such person. It is a gift and not wages. It is not for services rendered, but a present for the act of enlistment, followed by mustering into the service of the United States and an allowance on the quota of the town promising the bounty. The father has no right to enlist the son. The enlistment is the act of the son. The contract is by him with the government. He assumes the duties and incurs the risks incident to the service. The perils are his and the rewards and prizes should belong to him. Enlisting, as in this case, by the consent of the father, the son ceases for the time of enlistment to be under the control of the father.

Referring to enlistments under the laws of the United States, STORY, J., in *U. S.* v. *Bainbridge*, 1 Mason, 84, uses the following language:—"The laws manifestly contemplate that it is a personal contract made by the infants themselves, for their own benefit. They are entitled to the pay, the bounties, and the prize money earned and acquired in the service. This is not denied in the argument. And, if the laws be so, then they must, by necessary implication, give a capacity to the infants to make such a contract; and, when made, assert its legal validity." This doctrine has repeatedly been held applicable to bounties promised by towns to persons enlisting.

It was held in *Banks* v. *Conant*, 14 Allen, 497, that a bounty paid by the national government, or by a State, city or town, to a child or apprentice upon his enlisting into the military service of the United States, belongs to him and not to his father or master. In *Kelley* v. *Sproul*, 97 Mass., 169, it was decided that the bounty money to which a minor becomes entitled upon his enlistment as a soldier, belongs to him and not to his master; and that an agreement by him, to give his military bounty to his master for

permitting him to enlist, was voidable by the apprentice on the ground of infancy. So, too, money paid to the minor, for his enlistment as a substitute, is to be regarded as of the nature of bounty money and belongs to the minor. *Taylor* v. *Mechanic's Savings Bank*, 97 Mass., 345. In England, the prize money gained by an apprentice is held to belong to him and not to his master. *Carson* v. *Watts*, 3 Doug., 350.

The plaintiff cannot maintain a suit in his own name upon a contract made with his minor son with his consent to enlist as a substitute. *Judgment for defendant.*

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

JAMES ABBOTT *versus* WILLIAM BRADSTREET *& als.*

The owners of a steamboat are not liable for money stolen from the pocket of a passenger thereon, where it does not appear that the robbery was perpetrated by one of the employees of the boat.

ON REPORT.

ASSUMPSIT against the owners of the steamboat "Star of the East," to recover money alleged to have been stolen from the pocket of the plaintiff while he was a passenger.

It appeared that the plaintiff took passage on the defendants' boat on June 29, 1866; and during the night $197,56 were stolen from his pocket by some person unknown. He paid the usual fare for one passenger and did not deliver his money into the custody of the defendants or their agent, nor give them any notice that he had it on his person. The defendants were common carriers of persons and freight by steamboat from Boston to Gardiner. After the loss, the captain was requested to stop the boat and search the passengers, but declined to do so.

N. M. Whitmore, 2*d*, for the plaintiff.

Carriers are answerable for losses of money of their passengers, to the extent that is necessary for their travelling expenses. *Johnson* v. *Stone*, 11 Humph., 420; *Illinois* v. *Copeland*, 24 Ill., 336; *Weed* v. *Sar. & Schen. Railroad*, 19 Wend., 534; *Jordan* v. *Fall River Railroad*, 5 Cush., 73; *Woods* v. *Devin*, 13 Ill., 750.

The boat run in the night and furnished meals and lodgings to its passengers. The defendants are liable same as innkeepers.

While the plaintiff was asleep in the bed assigned to him by defendants, he and the money in his pocket was in their custody and control. There was no need of special deposit with the agent of the boat. *Johnson* v. *Richardson*, 17 Ill., 302.

A. Libbey, for the defendants, cited

Story's Bailm., §§ 532, 533, and cases *infra*, and § 499; *Jordan* v. *Fall River Railroad*, 5 Cush., 69; *Collins* v. *Boston & Maine Railroad*, 10 Cush., 506; *East India Co.* v. *Pullen*, 2 Stra., 690; *Tower* v. *Utica & S. Railroad*, 7 Hill, 47.

CUTTING, J. —This is an action of *assumpsit* against the defendants as common carriers. The plaintiff alleges that, on the 29th day of June, 1866, he was a passenger on board the steamboat "Star of the East," on her passage from Boston to Gardiner; that, during her passage, his wallet, containing $197,56, was stolen from his pocket, and claims that the defendants are liable for the loss.

It is admitted that the sum, before mentioned, was stolen from the plaintiff's pocket by some person unknown — that he paid the usual fare for one passenger, and did not deliver his money into the custody of the defendants or their agent, nor give them any notice that he had the money on his person — that the defendants were the owners of the boat, and common carriers of persons and freight from Boston to Gardiner.

While the rule of law applicable to common carriers has been most stringently construed against them, yet the plaintiff's counsel, with all his research and great industry, has found no case charging them for the loss of property not within their custody and control, such as baggage and merchandise actually delivered. Even in the case of *Jordan* v. *Fall River Railroad Co.*, 5 Cush., 69, the trunk was delivered to the baggage master, containing a large sum of money, which was subsequently stolen; yet the Court held that the defendants, having no notice that the trunk contained anything more than the common luggage of a traveller, were not responsible for more of the money than sufficent for ordinary travelling expenses. It is a familiar remark, that "hard cases make shipwreck of law," and this may have been one of that description.

But it is contended, and evidence was introduced tending to show, that the money was stolen by one of the employees of the boat. If satisfied that such was the case, we might, perhaps, hold the defendants responsible. While the testimony may excite a suspicion, yet it fails to prove the fact.

Plaintiff nonsuit.

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

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

JOHN F. WOODCOCK *& al. versus* JOHN MCCORMICK.

When a defendant offers to be defaulted in accordance with R. S., c. 82, § 21, and the plaintiff, either at the same or any subsequent term, accepts the offer, the defendant is entitled to costs from the time when the offer was made, whether any time was fixed for the acceptance, or not.

ON EXCEPTIONS.

ASSUMPSIT. On the first day of the return term, the defendant, in writing entered of record with its date, offered

to be defaulted for a specified sum, but had no time fixed for its acceptance. On the 12th day of the term, the plaintiff accepted the sum offered and caused the defendant to be defaulted therefor. Thereupon the defendant claimed costs from and after the time of making the offer; but the presiding Judge ruled that the defendant was not entitled to any costs, and ordered judgment for the plaintiffs with costs up to the time of the offer; and the defendant alleged exceptions.

N. M. Whitmore, 2d, for the defendant.

W. Benjamin, for the plaintiffs.

WALTON, J.,—This is an action of assumpsit. On the first day of the return term, the defendant offered to be defaulted for a specified sum. On the twelfth day of the term the plaintiffs accepted the offer. The defendant moved to be allowed his costs from the time of making the offer. The presiding Judge declined to allow any costs to the defendant, and allowed costs for the plaintiffs to the time when the offer was made. To this ruling the defendant excepts. The ruling with respect to the amount of costs, which the plaintiffs were entitled to recover, was correct. But the ruling disallowing the defendant's costs was erroneous. When a defendant offers to be defaulted, and the plaintiff subsequently accepts the offer, the defendant is entitled to costs from the time when the offer was made. This result is not affected by the fact that no time was fixed by the Court for the acceptance of the offer. Nor is it affected by the fact that the offer was accepted during the term when it was made, and before the call of the new docket. The argument that the plaintiff ought in such cases to be allowed the whole of the first term, or at least till the call of the new docket, to determine whether he will or will not accept the defendant's offer, without being liable for costs, is met by the imperative language of the statute,—"If the plaintiff fails to recover a sum as due at the time of the offer

greater than the sum offered, he recovers for costs such only as accrued before the offer, and the defendant recovers costs accrued since that time." R. S., c. 82, § 21. When the plaintiff accepts the defendant's offer, he recovers judgment for the precise sum offered, and of course fails to recover a sum as then due greater than the one offered; and, by the express language of the statute, the defendant recovers such costs as have accrued since the offer was made. *Hartshorn* v. *Phinney*, 48 Maine, 300. In this case, the acceptance was at a subsequent term, but we see no ground for distinguishing between such an acceptance and one made during the same term of the offer. The defendant is entitled to costs from the time when he offered to be defaulted.

Exceptions sustained.

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

WILLIAM WYMAN *versus* ABNER HAMMOND.

To be conclusive upon the parties to it, an award must contain in express terms a clear and distinct determination of the exact point submitted.

A line being in dispute, the owners of the land submitted to the arbitrator "to run said line, according to his best judgment, agreeable to the decision of" a former arbitrator, who had, under a former submission, made a survey and established the line. The award under the latter submission was, that "the line should be according to an old and well marked line traced by" the latter arbitrator, — then followed a description of the line by courses, distances and monuments. In the trial of a writ of entry, claiming to the line made by the latter award, — *Held*,

1. That the single question in the last submission was to ascertain where, upon the face of the earth, was the line established by the former arbitrator; and,

2. That the award, not having followed the submission, was not conclusive.

ON REPORT.

WRIT OF ENTRY for a lot of land in Sidney.

It appeared that the parties, owning adjoining lots, having

disputed about the dividing line, referred the settlement of the dispute, in 1860, to one M. B. Bliss, a surveyor, who made a survey and an award establishing the line. Afterwards, the parties disagreeing about the line, entered into a submission, declaring that,—"not being able to agree as to the dividing line, * * they submit the question of the said dividing line to John A. Pettingill, and agree to meet on the premises on August 2, 1864, and submit the whole question to the said Pettingill, and to furnish such assistance as the said Pettingill may require. And it is agreed by the parties that the said Pettingill is to run said line agreeable to Moses B. Bliss' decision in 1860, according to said Pettingill's best judgment." In August, 1864, Pettingill made an award, (omitting formal parts,) that, "upon due consideration," &c., he is "of the opinion that the line in dispute between the contending parties should be according to an old and well marked line, traced by me, Aug. 9, 1864, which line runs from," &c. Here follows a description of the line established by Pettingill, by courses, distances and monuments.

The plaintiff offered to prove that, when Pettingill heard the parties and made the survey, the plaintiff did not know where the Bliss line was and had no one to point it out to him; that it was not shown to Pettingill; that the line established by Pettingill is thirty rods from the Bliss line; that Bliss subsequently pointed it out to him; that he called upon Pettingill, before he made his award, made known the facts and requested a rehearing; but that Pettingill refused to grant it; and that the line established by Pettingill was not the true line. But the defendant contended, and the presiding Judge ruled, that the award was conclusive. Thereupon the case was reported to the full Court, with an agreement that, if the award was not conclusive, the action to stand for trial.

A. Libbey, for the plaintiff, cited

Clement v. *Craigin*, 1 Maine, 300; *Hayes* v. *Trask*, 31 Maine, 112; *Sawyer* v. *Freeman*, 35 Maine, 542; *Merrill*

v. *Gold*, 1 Cush., 457; *Bean* v. *Farnham*, 6 Pick., 269; *Strong* v. *Strong*, 9 Cush., 561.

S. Titcomb, for the defendant, cited

Sweeney v. *Miller*, 34 Maine, 390; *Randall* v. *LaFleur*, 6 Allen, 482; *Cushing* v. *Babcock*, 38 Maine, 456; *North Yarmouth* v. *Cumberland*, 6 Maine, 21; *Drane* v. *Coffin*, 17 Maine, 52; Watson on Awards, 161; *Tyler* v. *Dyer*, 13 Maine, 47; *Munday* v. *Black*, 9 Com. B., N. S., 557.

KENT, J. — The question is whether the award is conclusive, and a bar to the prosecution of this writ of entry. It appears, from the report, that the only question in dispute between the parties was the dividing line between their respective lots of land, — that some years ago the parties referred the settlement of the line to M. B. Bliss, who made a survey and made an award, establishing the line. Afterwards the parties disagreed about the line and entered into a new reference to J. A. Pettingill. This submission and the award made by Pettingill are made part of the case.

The first question is, what was submitted? The parties had a right to submit the whole question anew, disregarding the former adjudication, or they might submit any single question arising under that award first made. On inspection of the paper containing the last submission, it is evident that the question then in dispute was, where on the face of the earth was the line established by Bliss? It is true that the first part of the submission is general in its terms, but the conclusion is in these words, — "And it is hereby agreed by the parties that the said Pettingill is to run said line agreeable to Moses B. Bliss' decision of Aug. 18, 1860, according to said Pettingill's best judgment." This language limits and qualifies all that precedes it. It authorizes the referee to determine where the line established by Bliss is in fact to be found, according to his best judgment, after hearing the parties and their proof. Any other construction would render the words above quoted nugatory and idle. But they cannot be disregarded. They are dis-

tinct and absolute, and show that the parties intended to limit the power of the new arbitrator, to the single point above indicated.

It is undoubted law that the award must follow the agreement of submission. It must determine the question submitted. The arbitrator cannot assume to determine points not fairly included, expressly or by necessary implication, in the submission. If he does, his award, as to such points, is invalid and not binding on the parties. It is unnecessary to cite authorities on this point.

The award makes no reference to the Bliss line, but declares that, upon full consideration, he is of "opinion that the line in dispute between the contending parties should be according to an old and well marked line, traced by me, Aug. 9, 1864." He then proceeds to describe the courses, distances and monuments on that old line.

It is not pretended that this old line is the line established by Bliss. If parol evidence would be admissible, if offered by the defendant, to show their identity, none such was offered. On the contrary, the plaintiff offered to prove that it was not, and that the Bliss line was not examined or considered by Pettingill. The Judge ruled that the award was conclusive, and that the evidence offered would not authorize a jury to go behind it. But, to be thus conclusive, it must on its face be a clear and distinct determination, in express terms, of the exact point submitted. It is evident that this award was not in any part based on the former adjudication. It purports to determine the line on the whole case, as if it had been generally and unqualifiedly referred to his determination. The award does not follow the submission, and therefore is not binding or conclusive on the parties.

According to agreement of the parties,

The case must stand for trial.

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

HIRAM JEWETT *versus* THOMAS GAGE.

The owner or possessor of swine must take care at his peril that they do not run at large in the highway without a keeper.

Where the plaintiff's minor daughter, with a suitable horse and carriage, and in the exercise of ordinary care, was travelling along a highway, and the horse, by becoming frightened at the looks of a hog owned by the defendant, and by him permitted to be in the highway without a keeper, occasioned an injury to the daughter and carriage, — *Held*, that the owner, or he who had control of the hog, was liable for the injury, although he did not know the hog was in the highway at the time of the injury.

ON EXCEPTIONS.

CASE, for an injury to the plaintiff's wagon and minor daughter, by reason of his horse taking fright at the defendant's hog, which was lying by the side of the highway in Benton, without a keeper.

The plaintiff asked one of his witnesses if he had seen the hog at large in the road, before the day of the accident, to which the defendant's counsel objected. The plaintiff's counsel said he offered the evidence to meet the point set up in the specifications of defence, that the defendant did not know his hog was at large in the highway. Defendant's counsel thereupon withdrew the specification, and the evidence was waived.

The presiding Judge instructed the jury, *inter alia*, that, if the hog which frightened the horse was owned by the defendant, or was in his custody and under his control, and the defendant permitted him to be at large in the highway without a keeper, and the horse was frightened by the hog, although the looks of the hog alone occasioned the fright and the injury was occasioned thereby, the defendant would be liable, though he did not know that the hog was in the highway at the time of the accident; that it was immaterial whether or not the defendant knew that the hog was then, or had previously been at large; and that it was his duty to see at his peril that he was not at large without a keeper.

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

A. Libbey, for the defendant, cited

R. S., c. 23, § 2; *Keith* v. *Easton*, 2 Allen, 556; *Sutherland* v. *Jackson*, 32 Maine, 80; R. S., c. 235, § 4; *Davis* v. *Bangor*, 42 Maine, 522; *Cook* v. *Charlestown*, 13 Allen, 190, note; *Kingsbury* v. *Dedham*, 13 Allen, 186.

J. Baker, for the plaintiff.

CUTTING, J.—It appears, that, on August 29, 1865, the plaintiff's daughter, with a suitable horse and vehicle, and in the exercise of ordinary care, was travelling in and along a public highway in the vicinity of the defendant's house, when an animal, called by various names, such as hog, sow, swine, and, by the classical counsel for the plaintiff, "*monstrum horrendum*," aged, of large size, filthy, unclean by the Levitical, and prohibited from running at large in the streets by the statute law, suddenly arose from the gutter, frightened the horse, and caused the damage for the recovery of which this suit is brought.

It is contended, by the defendant's counsel, that such animals have the right to run in the highway when accompanied by a keeper. It may be so, but such is not this case. There was no keeper, and, besides, the hog was not *in transitu*. It is a mistaken idea that animals prohibited by statute from running at large without a keeper, if with a keeper, can be turned into the highway for the purpose of grazing, or swine *recubans* to wallow in the mire by the road-side. The case of *Stackpole* v. *Healey*, 16 Mass., 31, is full and conclusive upon this point.

The argument and authorities cited, that the defendant would not be liable, unless the town was liable for suffering a nuisance in the highway, have no application. The one is controlled by the common, and the other by statute law.

Exceptions overruled.

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

THOMAS J. MESERVEY *& als. versus* JOSEPH E. GRAY *& al.*

Generally the legality of contracts is to be determined by the law of the place where they are made.

But, by virtue of § 27, c. 33, Public Laws of 1858, if a person purchase intoxicating liquors out of the State, with intention to sell any part thereof in violation of said chapter, the seller cannot recover the price of the liquors here, although he had no knowledge of the purchaser's intention.

ON REPORT.

ASSUMPSIT on an account annexed, which was as follows:

1864, Dec. 2, J. E. & E. Gray to T. J. Meservey & Co., Dr.

To balance of acc't,	$224,00
Int. on same to date,	6,00
	230,00

The plaintiffs introduced the following order, signed by the defendants.

"Skowhegan, July 14, 1864.

"T. J. Meservey & Co. Please send us a Bbl. of Whiskey and 15 galls. Gin."

Also a bill as follows:—

"Messrs. J. E. & E. Gray bought of T. J. Meservey & Co.

1 Bbl. old Bourbon Whiskey,	41,	$3,	$123,00
25 Galls. Holland Gin,	½ Bbl.,	4,	100,50
Cartage,			50
			224,00"

It appeared that the order was sent by defendants to the plaintiffs in New York; that the liquors were sent as by the bill, the defendants to pay cartage and freight; that the defendants were hotel keepers in Skowhegan, and purchased the liquors to sell to their guests; that they had no license except a U. S. license; and that the plaintiffs had no knowledge of the plaintiffs' intention to sell the liquors in violation of law.

The case was withdrawn from the jury and reported to the full Court.

Coburn & Wyman, for the plaintiffs.

J. D. Brown, for the defendants.

WALTON, J. — It is generally true that the legality of contracts is to be determined by the law of the place where they are made; and, if legal there, they are usually enforced everywhere. It was upon this ground that contracts for the sale of intoxicating liquors made in other States, where such sales were legal, were enforced in the Courts of this State, although such contracts if made here, would have been held illegal. *Torrey* v. *Corliss*, 33 Maine, 333.

But this rule is not obligatory. When contracts made in other States are designed or calculated to aid in violating the laws of the State where they are attempted to be enforced, the Courts of the latter State are not obliged to furnish a remedy. And, when it was seen that the liquor dealers of other States were abusing the principles of comity extended to them, and by sending runners into the State soliciting orders, and by every species of artifice in packing, directing and forwarding their liquors, were aiding and promoting an illegal traffic in this State, it was not only competent, but wise in our Legislature to pass a law declaring that they should receive no aid from our Courts in collecting pay for their liquors.

This was done in 1851, c. 211, § 16. And our present liquor law, (Act of 1858, c. 33, § 27,) declares that no action shall be maintained for intoxicating liquors purchased out of the State with intention to sell the same or any part thereof in violation of said Act.

In the case now before us, the plaintiffs are endeavoring to recover a balance alleged to be due them for intoxicating liquors purchased by the defendants, with the intention of selling the same in this State in violation of the provisions of said Act. Their claim, therefore, would seem to be one which the Courts of this State are expressly forbidden to enforce.

But the plaintiffs contend that, inasmuch as the sale was

made in New York, and they had no knowledge of the purchasers' intention to sell the liquors in this State in violation of law, their case does not fall within the provisions of the statute. But we think this proposition cannot be maintained. The cases cited in support of it being based on statutes very unlike the one now in force in this State, do not apply. It will be noticed that our present statute makes the fact that the liquors were purchased with the intention of selling them in violation of law, and not the seller's knowledge of the fact, the criterion by which to determine whether the contract will support an action in this State or not. The purchaser's intention, and not the seller's knowledge, is the point of inquiry. When dealing with citizens of this State, the seller must ascertain at his peril that the purchaser does not intend to sell the liquors here in violation of law. If, therefore, the sale was made in New York, and the plaintiffs had no knowledge of the illegal purpose of the defendants to sell the liquors in this State in violation of law, yet, inasmuch as the evidence satisfies us, as matter of fact, that they were intended for such illegal sale, the plaintiffs cannot recover for them.

On the bill introduced in evidence by the plaintiffs is a charge of fifty cents for cartage. All the rest of the account is for intoxicating liquors. We do not understand that the plaintiffs claim to recover for this item as for a separate and independent claim. If we understand their argument, it is referred to only to show that the liquors were delivered and the sale completed in New York. Besides, as there is only a single count in the plaintiffs' writ, and that is for "balance of account," and no bill of items is annexed, they are in no condition to claim to recover for a single item of their account. But a single promise is averred, and that is to pay the balance due on their account. In such a case, if any portion of the account is illegal, the plaintiff cannot recover. In fact, if a promissory note had been given for the balance, no part of it could be recovered. *Deering* v. *Chapman*, 22 Maine, 488. If a party has an account made up of

items, some of which are legal, and some of which are illegal, and he would recover for such as are legal, he must not blend the legal with the illegal, and sue for the balance; if he does he cannot recover. In fact, if he sues upon an account annexed, some of the items of which are illegal, he cannot recover unless he amends his writ by striking out the illegal items before he goes to trial. *Cochrane* v. *Clough*, 38 Maine, 25. *Plaintiffs nonsuit.*

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

THOMAS F. CHASE *& ux., in Eq., versus* ELBRIDGE G. SAVAGE *& als.*

Immediately following the record of a notice for the foreclosure of a mortgage was the following certificate, signed by the register of deeds: — "Somerset, Feb. 15, 7 1-2 A. M., 1859. Received and copied the above notice of foreclosure from the Republican Clarion, a weekly newspaper printed at Skowhegan, in said county, bearing date Jan. 19, 1859, vol. 18, No. 32, having been published in said paper three weeks successively, as appears by papers shown at this office." In a bill in equity to redeem the mortgage: — *Held*, that the certificate of the register sufficiently indicated "the name and date of the newspaper in which" the notice "was last published."

The record of the notice of a foreclosure of a mortgage is the only proper evidence of the time when the "right of redemption will be forever foreclosed;" and a person seeking to redeem a mortgage trusts to other sources for such information at his peril.

CUTTING, J. — BILL IN EQUITY to redeem a mortgage from one John Dinsmore and Chase, dated Oct. 2d, 1857, to Nicholas Smith, to secure a note to Smith of that date, payable in one year with interest, for the sum of $159.

In this suit, the principal question upon its merits is, whether or not the mortgage has been legally foreclosed. If so foreclosed, then the complainants have no equities,

and all other questions raised and discussed by the parties become immaterial.

It appears, that a process for foreclosure was instituted under the provisions of R. S., c. 90, § 5, which provides, that the mortgagee, after a breach of the condition, may give public notice in a newspaper printed in the county where the premises are situated, if any, or if not, in the State paper, three weeks successively, of his claim by mortgage on such real estate, describing the premises intelligibly, and naming the date of the mortgage, and that the condition in it is broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry of deeds in which the mortgage deed is, or by law ought to be recorded, within thirty days after such last publication, — the certificate of the register of deeds shall be *prima facie* evidence of the fact of such publication of foreclosure. Section 6. The mortgager, or person claiming under him, may redeem the mortgaged premises within three years next after the first publication.

No objection has been made as to the legality of the notice for foreclosure, dated Jan. 3, 1859, but has been made as to the effect of the register of deeds' certificate, who certifies as follows, to wit: —

"Somerset, Feb. 15, 7½ A. M., 1859. Received and copied the above notice of foreclosure from the Republican Clarion, a weekly newspaper printed at Skowhegan, in said county, bearing date Jan. 19, 1859, vol. 18, No. 32, having been published in said paper three weeks successively as appears by papers shown at this office.

"M. R. Hopkins, *Register.*"

The only objection taken to this certificate of the register is that he does not certify in so many words "the name and date of the newspaper in which it was last published."

But it sufficiently appears that the name and date was given, and that the notice had been published three weeks

successively; the conclusion, therefore, is irresistible, that the certificate was made from the paper last published. *Certum est quod certum reddi potest.*

The antecedent of a weekly paper published on the 19th, must have been published on the 12th and the one next prior to that on the 5th of January, 1859, from which time the foreclosure commenced, and became absolute on January 5th, 1862, the three years for the redemption having then terminated.

Still, assuming the foregoing construction to be correct, the complainants contend, and have alleged in their bill, that "said Thomas F. Chase applied to said Smith for information as to the time when the mortgage would be foreclosed, and said Smith, with the design to defraud your orators, informed said Chase that it would foreclose on the fifteenth day of January, A. D. 1862, when he well knew that the same would be foreclosed on the fifth day of January, 1862." Whereby, in consequence of such fraudulent information, the party interested was induced to delay payment until after foreclosure.

The answer is an indignant denial of that allegation, and the allegation is not sustained by the evidence. Besides, the record was the only fountain from which such information could flow. To that place all parties interested could and must resort. Otherwise, the record, designed to protect the interests of all, becomes a nullity, since it might be avoided by parol testimony, or the weight of testimony as judicially decided, based upon the imperfection of human memory, rather than the recorded certainty.

Thus we have disposed of the bill upon its merits, which relieves us of the consideration of the various grounds taken by the respondent's counsel as to its multifariousness and

misjoinder of the opposing parties, both of which are well sustained by his authorities.

Bill dismissed, with costs for respondents.

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

J. H. Webster, for the complainants.

D. D. Stewart, for the respondents.

OREN CLARK *versus* SAMUEL PRATT.

Under R. S. of 1841, c. 104, § 21, a levy upon land was valid if the sheriff simply seized the land while in office, and completed it after his official term had expired.

By the levy of an execution upon the land of a judgment debtor and the delivery of seizin to the creditor, the possession of the tenant, even if adverse to the creditor, thereby became interrupted.

The seizin of the creditor, thus obtained, will be presumed to continue in him until proof to the contrary is shown.

Under the general issue, the defendant, in a real action, cannot give in evidence an outstanding title acquired by him from a third person since the date of the writ.

ON REPORT.

WRIT OF ENTRY, to recover lot No. 13, on Treat and Webster island in Oldtown.

The writ is dated March 15, 1862. Plea, general issue, with claim for betterments.

The plaintiff claimed title under a quitclaim deed from T. A. Hill to him, dated March 23, 1857, duly executed, acknowledged and recorded. Hill's title was derived from the levy of an execution, issued Dec. 18, 1841, upon a judgment in his favor against one Samuel Smith, recovered Dec. 8, 1841. Under this levy, one-half undivided of lot No. 13 was set off as the property of said Smith, whose title was admitted. The levy was commenced January 3,

1842, by a seizure of the land, and suspended (as certified by J. Wingate Carr, the officer making the seizure,) by reason of a subsisting prior attachment in favor of the People's Bank.

On March 17, 1842, the appraisers were duly selected and sworn, and the levy completed.

The return of the officer, after stating that the prior attachment, referred to in his certificate of January 3, 1842, had been disposed of by a levy on a part of the property attached, continued as follows: — "I, J. Wingate Carr, late sheriff of said county of Penobscot, still holding this execution, the same having been placed in my hands for service while exercising the office of sheriff of said county, and having, on the 16th day of March inst., taken the real estate described in the foregoing certificate of the appraisers, being a part of the same which was seized by me as aforesaid, on the 3d day of January last, and having continued said seizure up to the present time, I caused," &c. Seizin was delivered same day.

The defendant claimed title by adverse possession, and introduced *George P. Sewall*, who testified that, sometime in the spring of 1837, the defendant took possession of said lot 13 and occupied the same until 1863.

He also introduced a copy of a judgment, *Wheelwright & al.* v. *Owen Clark & al.*, recovered January, 1862; a copy of the execution duly issued thereon, dated Feb. 8, 1862; a copy of a levy of said execution upon said lot 13, as the property of the plaintiff, dated Feb. 11, 1862; and also a quitclaim of said premises, from *Wheelwright & al.* to the defendant, dated April 15, 1862.

After the evidence was all in, the case was continued on report, the full Court to render such judgment as the law, and so much of the evidence as was admissible, required.

Hilliard, for the plaintiff.

Sewall, for the defendant.

If anything, Hill took by his levy but one-half undivided of lot 13.

The defendant's possession of 1837 was not disturbed by the officer making the alleged levy on Smith, unless he was authorized to deliver seizin to Hill. Execution, *Hill* v. *Smith*, was delivered to the officer while sheriff. He seized under R. S. of 1841, c. 117, § 33, but did not take the land on execution. His return shows he "took" the land on March 16, and that then he was not an officer. R. S., 1841, c. 104, § 21, authorized officers to execute all precepts in their hands at the time of their removal; but c. 94, § 5, limits this authority in cases of a levy upon land. The taking and appraisal must be had while the officer is in commission. These acts are conditions precedent to valid subsequent proceedings.

Defendant's possession cannot be disturbed except by one having title. *Webster* v. *Hill*, 38 Maine, 78.

The levy of *Wheelwright & al.* divested plaintiff of all title; although defendant did not claim under them at the date of the writ, that title was admissible to rebut plaintiff's evidence of seizin. *Walcott* v. *Knight*, 6 Mass., 419.

APPLETON, C. J. — It is in proof that, on 17th March, 1842, Thomas A. Hill levied on an undivided half of lot 13, on Treat & Webster's island, in Oldtown, by virtue of an execution in his favor against one Samuel Smith.

It is objected that this levy is void, because, at the time of its completion, the officer by whom the proceedings were commenced had ceased to be a sheriff. The levy was under R. S., 1841, c. 117, §§ 33 & 34. But, by c. 104, § 21, "all sheriffs and their deputies may execute all precepts in their hands at the time of their removal from office." The officer, therefore, having the execution and commencing its service, before the termination of his office, might proceed afterwards to complete such service.

It is objected that the tenant, who was in possession at the time of the levy, acquired a title to the premises in controversy by adverse possession. But such is not the case. The tenant had been in possession but five years before the

levy. By the levy and delivery of seizin, the possession, if adverse, which may well be doubted, was interrupted. The seizin passed to the judgment creditor, and will be presumed to continue in him till proof to the contrary is shown. *Woodman* v. *Bodfish*, 25 Maine, 317. Sufficient time has not elapsed, since the levy and before the date of the writ, for the acquisition of a title by disseisin on the part of the tenant.

The plea is the general issue. Under that plea the tenant cannot take advantage of a conveyance of the title acquired since the date of the demandant's writ. If the tenant in a writ of entry, after action brought, purchase of a third person an outstanding title derived from the demandant himself, this cannot be pleaded in bar of the action. *Parlin* v. *Haynes*, 5 Greenl., 178; *Jewett* v. *Felker*, 2 Greenl., 339. It is otherwise, if the title was purchased from the demandant.

The plaintiff is entitled to recover for an undivided half of the demanded premises.

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

LAURETTA MARCO, *in Eq.*, *versus* JOSEPH W. LOW.

This Court, sitting as a court of equity, may, upon a proper bill duly served, enjoin the respondent from further prosecuting, in this Court as a court of law, a writ of entry in favor of the respondent against the complainant, notwithstanding the respondent may not have resided, or personally been within this State, since the commencement of the bill.

When such bill is inserted in a writ of attachment, and the respondent's property situated within this State has been attached thereon, service of the bill made upon the person who appears and prosecutes the respondent's real action is sufficient.

BILL IN EQUITY, heard on demurrer.

The bill was inserted in a writ of attachment, dated Dec.

18, 1865, and served by copy and summons, Dec. 19, 1865, on Charles P. Stetson, Esq., the alleged attorney of the respondent. The bill was entered at the January term, 1866, for this county. At the succeeding April term, the Court ordered that service be made on the respondent, in California, by giving him an attested copy of the bill. At the succeeding January term, the notice as ordered was proved; and there being no appearance for the respondent, the Court ordered that said Low be enjoined from prosecuting his suit at law against the complainant then in said Court, for this county, and from conveying the premises described in said bill until further order. At the succeeding October term, 1867, the complainant's counsel moved that the injunction be made perpetual, whereupon said Stetson suggested as *amicus curiæ*, the want of jurisdiction. The presiding Judge suggested that the suit would be defaulted and the bill taken *pro confesso*, unless an appearance was entered for the respondent, and thereupon the said Stetson appeared to object to the jurisdiction, and filed a demurrer, therein alleging that it appeared by the complainant's bill that the respondent is not, and, at the time of filing said bill, was not within the jurisdiction of this Court, but then was and now is a citizen of the State of California, and that no process had been served on the respondent within the jurisdiction of this Court.

It was admitted that, in the fall of 1864, six months after the commencement of the action at law, (*Low* v. *Marco*,) the respondent moved from this State to the State of California, and has ever since resided in and been a citizen of California, and at the date of the bill or writ in this suit had no property in this State except the premises described in this bill and in controversy in *Low* v. *Marco*.

C. P. Stetson, for the respondent.

A bill in equity must be dismissed when persons who are necessary parties refuse to appear and the Court has no power to reach them. Adam's Eq., § 323; *Picquet* v. *Swan*, 5 Mason, C. C. R., 561; *Mallon* v. *Hinde*, 12 Wheat., 193;

Æquitas agit in personam, Story's Eq. Pl., § 489; *Spurr* v. *Scoville*, 3 Cush., 578. In all suits in equity, the primary decree is *in personam*, 2 Story's Eq. Juris., §§ 743, 744. Jurisdiction of equity in granting injunctions either to restrain proceedings at law, or for any other purpose, is necessarily subject to the rules defining and restraining its general jurisdiction. 3 Lead'g Cases in Eq., 201. An injunction to restrain a judgment acts on the parties. 2 Story's Eq. Juris., § 875; 3 Lead'g Cases in Eq., 201; *Porter* v. *Vaughan*, 24 Vermont, 211, 216; *Dehon* v. *Foster*, 4 Allen, 550. Service in California was not valid. *Spurr* v. *Scoville*, *ubi sup.*

Service upon the attorney is valid only so far as to make good a judgment against the property attached. It has no effect *in personam*. *Lovejoy* v. *Albee*, 33 Maine, 414; *Spurr* v. *Scoville*, *supra.*

The attorney in a suit at law is not necessarily attorney for the same party in a suit in equity. The bill in equity should have been brought when levy was made, *vigilantibus et non dormientibus*, &c. *Cartwright* v. *Clark*, 4 Met., 105. Complainant may enforce his equitable rights in California. *Dehon* v. *Foster*, *ubi supra*. It is no farther from here to California than from California here. Counsel also cited *Beals* v. *Cobb*, 51 Maine, 348.

A. W. Paine, for the complainant.

Barrows, J.—The single question presented on this demurrer is whether a citizen of another State, who has not, since the filing of the bill, personally been within this jurisdiction, but who is engaged in prosecuting before this Court, sitting as a court of law, a claim against the complainants for land lying in this county, is so far within the jurisdiction of this Court, sitting in equity, as to be liable upon service made on his attorney in the suit at law, and notice to himself in the State where he resides, to an injunction against the further prosecution of his suit, when it appears,

by the bill and demurrer, that his claim to the land is founded upon fraud in which he is a partaker.

If he is so liable, this demurrer must be overruled, whether other relief prayed for in the bill can or cannot be granted.

The bill contains distinct prayers that Low may be ordered to convey the premises in controversy to the complainants, — that he may be enjoined from conveying them to any one else, and that he may be enjoined from the further prosecution of his suit at law against the complainants for the possession. The facts in the case are as disclosed in *Low* v. *Marco & al.*, 53 Maine, 45, and need not be here further particularly recited.

In support of the demurrer, Mr. Stetson, Low's attorney in the suit at law, appearing here only to object to the jurisdiction, places his main reliance upon the maxim *Æquitas agit in personam*, contending that neither the service made upon him, as attorney of Low in the real action, nor the personal notice to Low in California, where he resides, could give this Court jurisdiction in the premises, and that, inasmuch as Low is not and has not been since the filing of the bill personally within the jurisdiction of the Court, it has no power to enforce any decree that might be made against him, and will therefore make none, but dismiss the bill.

1. As to the mode and sufficiency of the service. R. S., c. 77, § 9, provides for the insertion of a bill in equity in a writ of attachment, in such case "to be served as other writs." By R. S., c. 81, § 17, if the defendant was never an inhabitant of the State or has removed therefrom, where (as here) goods and estate are attached, service may be made on his tenant, agent or attorney.

That Mr. Stetson, though not specifically instructed to attend to this process in equity, is to be considered the attorney of Low in this behalf, does not admit of a doubt. The process grows out of and is directly connected with the suit at law in which Low employed him. In the faithful prosecution of his duty under that employment, it is incumbent on him to look after his client's interests in this suit.

The original employment of an attorney to collect a demand authorizes him to receive the money paid in redemption of land taken on the execution which he sues out; *Gray* v. *Wass*, 1 Greenl., 257; and to control the remedy and all proceedings arising out of or connected with it; *Jenney* v. *Delesdernier*, 20 Maine, 183. That employment makes it his duty to follow up the original suit with such further proceedings as may be necessary to charge bail taken therein and to collect of them in default of the principal; *Dearborn* v. *Dearborn*, 15 Mass., 315; and even to institute process for the reversal of an erroneous judgment rendered against his client in the original suit; *Grosvenor* v. *Danforth*, 16 Mass., 74. It would be strange doctrine to hold that he was not authorized to attend to a counter process issuing out of the same Court and striking directly at the foundation of his right to maintain the suit in which he was employed.

We hold the service upon Mr. Stetson a sufficient service of this bill, so far at least as the prayer for an injunction against the prosecution of the action, *Low* v. *Marco & ux.* is concerned. Perhaps, if other relief is sought, it may be found that the personal notice to Low, given out of abundant precaution, was requisite.

2. But it is strenuously urged in support of the demurrer that, although Low's real estate is attached, yet, since his person is not within reach of our process, no decree in equity can pass against him. To compel him, where he is, to do what equity requires, — perhaps not, — but to prevent him from doing within our own jurisdiction what equity forbids, assuredly there is power. To hold otherwise would be as disgraceful as it is absurd on its face. He who brings suit in the courts of a State must be considered as submitting all that pertains to the maintenance of that suit to the jurisdiction of those courts which have cognizance of the matter in controversy where the remedy is sought.

The doctrine that a citizen of another State can seek and

compel the aid of this Court to enforce at common law, a claim, which in equity we should forbid one of our own citizens to prosecute for a day, is simply monstrous. The maxim relied upon can have no application in such case.

Spurr & al. v. *Scoville*, 3 Cush., 578, was totally different. The whole object of the bill there, as stated by the Court, was to compel the defendant to execute a conveyance of land lying in Massachusetts, according to his contract. The Court declined, for want of jurisdiction, to decree a specific performance, the defendant, a citizen of Connecticut, never having been served with process in Massachusetts. The defendant was pressing no claims as a plaintiff in the courts of Massachusetts. Nothing in the decision can be construed as disclaiming the power to prohibit him from doing, either personally or by attorney, in that Commonwealth, that which might be found contrary to equity.

In *Chalmers* v. *Hack*, 19 Maine, 124, WHITMAN, C. J., alludes to the power of this Court to enjoin a non-resident plaintiff at law, upon service made on his attorney at law, as too manifest to require even a positive assertion, while, for want of jurisdiction of the person, or of estate within this State subject to a distringas, he says that, independent of that object no bill could be sustained. The remedy there was refused only because the complainant was deemed to have a sufficient remedy at law. That such is not the case here sufficiently appears in the opinion of the Court in *Low* v. *Marco & ux.*, 53 Maine, 45.

The defendant here can prosecute his suit against the complainants only by the intervention of an attorney, who would be personally present in Court in this State. An injunction in its ordinary form runs not against the principal party only, but against his servants, agents and attorneys, also. The Court would easily find means to enforce obedience to their decree in this respect.

Whether the other and further relief sought can be afforded, or what effect our statute authorizing the attachment of property on a bill in equity inserted in a writ, may have

upon that question, need not now be determined or discussed. *Demurrer overruled.*

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

JOHN BENSON *versus* FRANCIS DRAKE *& al.*

The indorsee of a negotiable promissory note, who procured it to be indorsed by the payee on the Lord's day, cannot maintain an action thereon in his own name against the maker.

ON REPORT.

ASSUMPSIT, brought in the name of one other than the payee or owner, but for the benefit of the owner and indorsee of a negotiable promissory note, dated Nov. 7, 1865, payable "within three months," and indorsed by the payee "without recourse."

When the action was commenced, the note was the property of one Chase, and brought in the plaintiff's name by his special permission.

A few days after its date, the payee sold and delivered the note to one Hall for the full amount due thereon, but did not then indorse it. Still, subsequently, but before maturity, Hall sold and delivered the note to said Chase for the amount due on it. A short time after its maturity, Chase then being the owner of the note, called at the office of the payee, on Sunday afternoon, about four o'clock, and requested him to indorse the note; and thereupon the payee wrote his name upon its back, adding thereto the words "without recourse." Neither of the sales or deliveries was made on Sunday.

If the action could not be maintained, a nonsuit was to be entered.

Geo. W. Whitney, for the plaintiff.

It does not follow that everything done on the Lord's day, in contravention of the statute, is void. Money paid and accepted on Sunday discharges the debt. *Johnson* v. *Willis*, 7 Gray, 164. Personal property sold and delivered on Sunday, will vest in the purchaser. *Ellis* v. *Higgins*, 32 Maine, 34; *Richardson* v. *Kimball*, 28 Maine, 463. The indorsement was a clerical act and related back to the time of sale and delivery to Hall. *Ranger* v. *Cary*, 1 Met., 369; *Breen* v. *Seward*, 11 Gray, 121. If the note had been indorsed on Sunday, and the note sold and delivered on the next Monday, the action would be maintainable. *Hilton* v. *Houghton*, 35 Maine, 145. The contract of indorsement, if a contract, was executed not executory and not rescindable, unless *malum in se*. *Ellsworth* v. *Mitchell*, 31 Maine, 251. It was but a direction to the maker. Indorsement "without recourse" simply transfers the property in the note. *Waite* v. *Foster*, 33 Maine, 424. If a contract between payee and indorsee, the maker is not in a position to avail himself of any defence which the payee might have in a suit against him as indorser. The maker is not prejudiced. He was a stranger to the transaction, and has no interest in it so long as it does not affect him. *Richardson* v. *Kimball*, *ubi sup.*

A. G. Lebroke, for the defendants, cited

Sproule v. *Merrill*, 29 Maine, 260; R. S., c. 124, § 20; *Towle* v. *Larrabee*, 26 Maine, 464; *Ladd* v. *Rogers*, 11 Allen, 210; *Day* v. *McAllister*, 15 Gray, 433; *State* v. *Suhur*, 33 Maine, 539; *Gregg* v. *Wyman*, 4 Cush., 329; *Woodman* v. *Hubbard*, 5 Foster, 67; *Morton* v. *Gloster*, 46 Maine, 521; *Wheeler* v. *Russell*, 17 Mass., 258; *Pattee* v. *Greely*, 13 Met., 286; *Holman* v. *Johnson*, 1 Cowp., ——; *Babcock* v. *Thompson*, 3 Pick., 449; *Worcester* v. *Eaton*, 11 Mass., 281; *Dwight* v. *Brewster*, 1 Pick., 50; *Springfield Bank* v. *Merrick*, 14 Mass., 322; 2 Parsons on Notes and Bills, 5; *Rand* v. *Hubbard*, 4 Met., 252; *Malbon* v.

Southard, 36 Maine, 147; *Peaslee* v. *Robbins*, 3 Met., 164; 2 Pars. on Notes and Bills, 485; *Blakely* v. *Grant*, 6 Mass., 386; *Cabot* v. *Given*, 45 Maine, 144.

DANFORTH, J.—The plaintiff in interest in this case is one Joseph Chase, and the result must be the same as though he were the plaintiff of record. In order to a correct understanding of the case, it is necessary to bear in mind that no question as to the title to, or ownership of the note is raised. That Chase is the owner of the note is not denied. If it were not so, it would not be material, as title is not necessary to the maintenance of the action. Nor does any question arise as to a contract, or whether there was any between the indorser and indorsee. It may be conceded that the defendant, being a stranger to such a contract, could not interfere with, or avail himself of, any rights or obligations growing out of it. Nor is it material as to whether the indorsement related back to the time of the sale of the note, and became a part of that transaction, or otherwise. No set-off has been filed, no question raised as to the rights or liabilities of the parties, making it necessary to fix the time of the transfer. It is admitted that the indorsement was made upon the Lord's day, and by the procurement of the plaintiff in interest, and whether these facts, and these alone, are fatal to the maintenance of the action, is the only question raised.

In this view of the case, it will be seen that the several authorities cited by the plaintiff's counsel are not applicable, though the principles of law therein enunciated are sound and well established.

That the indorsement of a note is an act within the statute prohibiting secular business on the Sabbath cannot be seriously doubted. It is a business matter, not of necessity or charity. Although it had no effect upon the title to the note, it did very materially affect the rights and liabilities of the maker, as well as the contract itself. The act, then, was void, the indorsement a nullity. It would seem as

though this should settle the question, for how can the suit be sustained if there has been no valid indorsement by the payee.

But it is said that this is not available to the defendant, as he is not in any sense a party to the transaction. But is this so? As already seen, it very materially affects his rights and liabilities. It is an element, and a very important one, in the contract which he has made. Before the indorsement there was no contract between the parties to this suit. Before it, the contract was with, and the promise to, the payee and to him alone. He, and only he, could maintain an action upon the note. But with a valid indorsement, although there may be no change of property in the note there is of parties to the contract, and, of course, in the contract itself. The indorsee may not only maintain an action in his own name, but he may, as in this case, allege the promise as made directly to, and the contract with himself. The condition upon which the defendant consented that his promise might be transferred to the plaintiff has been complied with, and the same privity of contract exists between the parties as though the plaintiff was the original payee of the note. We find, then, a contract claimed as existing between the parties to this action, an important element in which is the result of an act done in violation of the statute prohibiting secular business on the Lord's day. Without this element the contract could not exist and the plaintiff must necessarily fail.

Another view of this will lead to the same result. In *Gregg* v. *Wyman & al.*, 4 Cush., 322, it is clearly established, by a review of the authorities, as well as from principle, "that, if the plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover." The same principle is fully maintained in *Woodman* v. *Hubbard*, 5 Foster, (N. H.,) 67, although upon another point, one not involved in this case, the two courts came to different conclusions. This Court, in *Morton* v. *Gloster*, 46 Maine, 520, has recognized the same doctrine, and treated it as well

settled law. In the case at bar, the plaintiff must rely upon the indorsement of the note in order to sustain his action, and unless that indorsement is a valid one he must fail. He must equally fail, according to the doctrine of the cases above cited, if that indorsement is an illegal transaction, — and it is just as competent for the defendant to avail himself of that defect or illegality, whether it is made to appear by his own testimony, or by that of the plaintiff.

In *Peaslee* v. *Robbins*, 3 Met., 164, WILDE, J., says, — "The plaintiff is bound to show a legal transfer of the note, by proof of the handwriting of the indorser; and it follows, as a necessary consequence, that the defendant must be allowed to impeach the plaintiff's title to the note, by showing that the indorsement was void." See also *Sproule* v. *Merrill*, 29 Maine, 260. It is clear that the plaintiff in the prosecution of this suit is relying upon an indorsement, which is an "illegal transaction," to sustain his cause. He must therefore fail. *Plaintiff nonsuit.*

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

BARROWS, J., did not concur.

JOSEPH M. HODGKINS *& al. versus* CHARLES H. DENNETT.

The bargainee agreed to pay a specified price for certain chattels then in his possession, belonging to the bargainor, and also to pay for certain supplies to be furnished in a lumbering operation, by cutting and hauling logs from certain lands of the bargainor at a stated price per M. feet, the bargainor "to retain entire ownership of the chattels until he received entire payment of the same." Upon a settlement of the lumbering operation, made by deducting the aggregate price of the chattels and supplies from that for cutting and hauling the lumber, a balance of $634 was found against the bargainor, which he paid. Subsequently it was discovered that the balance thus found and paid was $250 too much. In an action of replevin for the chattels brought by the bargainee's vendees against the bargainor's agent who had taken possession of them: — *Held*, that the

bargainor could not apply the amount of the error to the non-payment of the price of the chattels, and thereby retain ownership of them.

On Exceptions.

Replevin for certain horses, harnesses and other chattels, prior to Oct. 1862.

One Dwinel became the owner of the chattels replevied. When he acquired the title to them, they were in the possession of one Ingalls, where they remained until Dec. 30, 1864, when they were taken from his possession by the defendant as agent for Dwinel.

It appeared that, after the settlement of the lumbering operation, Dwinel attached the property replevied as Ingall's property; that Dwinel then told Ingalls he had paid for the property and it was his, in which Ingalls acquiesced; that Ingalls paid the debt sued, and the attachment was dissolved, and that subsequently the error was discovered.

It also appeared that Ingalls sold the property, Dec. 29, 1864, for a valuable consideration, to the plaintiff, who knew that Dwinel and Ingalls both claimed it.

The presiding Judge instructed the jury that, if before the sale to the plaintiffs, the mistake in scale of the logs had come to the knowledge of all the parties, and the plaintiffs knew of Dwinel's claim by reason of such mistake, they would be in no better condition than their vendor, Ingalls; and that Dwinel, under such circumstances, could apply the mistake toward the non-payment of the sum stipulated to be paid for the property.

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

The remaining facts appear in the opinion.

W. H. McCrillis, for the plaintiffs.

J. A. Peters, for the defendant.

Kent, J.—Rufus Dwinel sold to Ingalls certain horses and harnesses and other articles, for six hundred dollars, "Dwinel to retain entire ownership of the same till he shall

receive entire payment for the same." The question was whether he had received his pay.

It appears that Dwinel had agreed with Ingalls to employ him to cut and haul logs and to pay him two dollars and fifty cents per M., and to furnish him with supplies. There was evidence tending to show that Ingalls was to pay for the supplies and the above property conditionally sold, by the cutting and hauling. The case further finds that the cutting and hauling did amount to more than the supplies, and that the parties settled and found, after charging Ingalls with the supplies, and the six hundred dollars for the horses and other property, that there was a balance of $634 due from Dwinel to Ingalls, which Dwinel paid to him.

There can be no possible question that, if there had been no mistake as to the amount cut and hauled, the property in question was fully paid for and the title became perfect in Ingalls. But, it appears that subsequently, after the property had been once attached as Ingalls', and his title recognized by Dwinel, it was discovered that a mistake had been made by the scaler, by whose return the settlement had been made, in adding his columns, and that just 100 M. feet too much had been credited to Ingalls. This amount, at the contract price, was $250. This deducted from the balance as settled and paid, ($634,) leaves $384 as the sum which should have been paid by Dwinel. He therefore paid $250 more than the true amount required.

But, in any view, the property had been paid for. For if the first account, as settled, had contained the correct credit of 17 — instead of 1800 M., there would still have been more than enough to pay for all the supplies and this personal property.

It is, however, contended that Dwinel, having paid not merely the $384, — which it is admitted he owed, but also $250 covered by the error in addition, he may apply the mistake as the non-payment of part of the sum stipulated to

be paid for the property, and that his lien, or rather his title to the property would remain. If this might have been so, provided the balance of the whole account, after correcting the error, would have been in Dwinel's favor, we cannot well see how this error of $250, can be carried back over the $384 and the settlement, and be applied specifically to the sale of the horses.

The property was to be vested in Ingalls at once and fully, when the cutting and hauling had been performed, and when on settlement it appeared that the work, at the price named, balanced or overpaid the bill for supplies and the six hundred dollars.

Whenever this state of things existed, and the balance was in favor of Ingalls, the relation of the parties changed. Dwinel became debtor to Ingalls to the amount of the balance, after paying for the supplies and this property. Every thing was adjusted and paid, except this balance. If Dwinel had never paid it, the property in the horses, &c., would of course have passed, for they had been paid for. Now how can the fact, that Dwinel, by mistake, then undiscovered, paid to Ingalls a larger balance than he owed him, affect the title to this property. It was the case of a man's paying his debt, and, in addition, a sum not legally due. This sum he may recover back from his creditor on proper proof of the mistake. But can he, in addition to this, revive a title to property, which had been paid for long before, or claim a lien on such property to secure this debt for money paid by mistake? Suppose that, instead of this mistake in addition, Dwinel had paid Ingalls in bank bills, and had given him two one hundred dollar bills, instead of one such bill as he intended. Could he have set up a continuing title in the horses, because he had made this mistake in paying his own debt?

The property having been once paid for, and this fact existing in full force, after all mistakes were corrected, we cannot see why the title was not perfected, or how this over-

payment by Dwinel, of his own debt, can divest the title thus acquired. *Exceptions sustained.*

New trial granted.

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

EDWARD HEFFRON *versus* WILLIAM GALLUPE.

After the evidence was closed, but before argument and during a temporary adjournment of the Court, one of the jurors called upon the defendant, asked for, received and read in part, a printed copy of the evidence adduced at a former trial of the cause, and formed a conclusion therefrom that the testimony of some of the witnesses at the former trial varied somewhat from that given by them at the latter. The verdict was for the plaintiff for nominal damages, and, on motion of the plaintiff:— *Held*, that the verdict be set aside and a new trial granted, whatever the defendant's motives may have been.

As a general rule, the testimony of a juror as to any irregularity or misconduct of the jury when acting or deliberating as an organized body in the performance of their official duty, is inadmissible on a motion to set aside a verdict.

Aliter, as to facts touching his own conduct while separated from his fellows, or as to the acts or declarations of a party to or with him.

ON MOTION.

The verdict having been for the plaintiff, for nominal damages only, the plaintiff filed a motion to set it aside, alleging substantially, that, after the evidence was closed but before argument, and during an adjournment of the Court from evening to morning, the defendant delivered to H. W. Briggs, a member of the jury before which the trial was had, a printed pamphlet purporting to be a report of all the evidence given at a former trial of the cause, for the purpose of influencing the juror; that Briggs received the pamphlet without the authority of the Court, and, without disclosing the fact to the Court, read a portion of it, and disclosed

the contents thereof before the finding of the verdict to the other members of the jury, for the purpose of improperly influencing them in their decision.

In support of the motion, the plaintiff filed the depositions of Briggs and six other jurors.

The defendant's counsel admitted that, without the previous knowledge or solicitation of the defendant, Briggs called at his door in the evening and requested the loan of the printed copy; that the defendant did not at the time recognize him as a juror, and went to his office and got a copy, and on returning to the door did recognize him as such, and hesitating to give it to him, the juror remarked that it was nothing wrong, or something to that effect, when the defendant delivered the printed testimony to him. The printed document had been constantly referred to in the progress of the trial; the testimony of several witnesses had been read from it by agreement, as testimony in the latter trial.

The juror Briggs deposed that he received the printed pamphlet from the defendant during the trial, in the evening after the evidence was closed, at the defendant's house; that he read it in part, and noticed that the testimony of Drs. Brown and Coe, as printed, was somewhat different from their testimony on the stand; and so stated in the jury room; that one other juror saw the pamphlet, but did not read it.

Rowe and Appleton, for the plaintiff, cited

Benson v. *Fish*, 6 Maine, 141; *Whitney* v. *Whitman*, 4 Mass., 405; *Sargent* v. *Roberts*, 1 Pick., 337; *Alger* v. *Thompson*, 1 Allen, 403; *Hix* v. *Drury*, 5 Pick., 302; *Commonwealth* v. *Robie*, 12 Pick., 519; *State* v. *Hascall*, 6 N. H., 352, 363; *Perkins* v. *Knight*, 2 N. H., 474; *Knight* v. *Freeport*, 13 Mass., 218, 220; Co. Litt., 227; *Durfee* v. *Eveland*, 8 Barb., 46; R. S., c. 122, § 8.

A. W. Paine, for the defendant, contended that

It must appear that the misconduct has influenced the jury so as to render it very probable that it affected their verdict;

and that they have been influenced corruptly. *Shea* v. *Lawrence*, 1 Allen, 167.

If no injury is caused thereby, no interference with the verdict will be allowed. *Tripp* v. *Co. Com's*, 2 Allen, 557; *Parsons* v. *Huff*, 38 Maine, 137; *Newell* v. *Ayer*, 32 Maine, 334.

When it does not affect the impartiality of the jury, the motion will not avail. The *onus* is upon the mover to show the effect affirmatively. *Com.* v. *Roby*, 12 Pick., 520.

It must appear to have been fraudulently done or with a design to influence the jury improperly. *Harriman* v. *Wilkins*, 20 Maine, 93.

Juror's testimony not admissible to sustain the motion. *Chadbourne* v. *Franklin*, 5 Gray, 315; *Hannum* v. *Belchertown*, 19 Pick., 313; *Murdoch* v. *Sumner*, 22 Pick., 156; *Cook* v. *Castner*, 9 Cush., 278; *Folsom* v. *Manchester*, 11 Cush., 337; Graham on New Trials, 111; *Clossin* v. *Smith*, 5 Hill, 560; *B. & W. R. R. Co.* v. *Dana*, 1 Gray, 105; *Dorr* v. *Fenno*, 12 Pick., 525; *Little* v. *Larrabee*, 2 Greenl., 40; 1 Greenl. on Ev., § 252; *State* v. *Freeman*, 5 Conn., 348; *Meade* v. *Smith*, 16 Conn., 346; *Dana* v. *Tucker*, 4 Johns., 487.

KENT, J.—The motion for a new trial, now before us, is based on the following facts, which are undisputed. In the evening after all the evidence, in the trial of the cause between these parties, had been given, and before the arguments commenced, a juryman called at the defendant's house and asked him if he had one of the pamphlets containing the evidence given at a former trial. The defendant said he had one, and gave it to the juryman. The defendant did not at first recognize the applicant as a juror in the case, but did so before he gave him the pamphlet. Defendant hesitated, but the juror remarked that there was nothing wrong, and thereupon the copy was delivered by defendant to the juryman. This document had been used by the counsel, during the trial, for reference, and the testimony given

at the former trial by several witnesses was read by consent therefrom, as testimony in the case on trial. The juryman read and examined it in part, before the verdict was rendered, and formed the conclusion that the testimony of some of the witnesses varied from that given at a former trial as there recorded. He named Dr. Brown and Dr. Coe as two of such witnesses.

The proof of these facts is the testimony of the juror himself. The plaintiff also presents the depositions of several other jurors as to what transpired in the jury room, in reference to this pamphlet, and the statements and discussions thereon. The defendant interposes the objection that all this testimony is inadmissible. We concur with him so far as the testimony of the jurymen, as to what transpired in their deliberations, when acting as a jury, and exclude it from our consideration.

But we know of no rule of law that excludes the testimony of a juror as to facts touching his own conduct or proceedings, when separated from his fellows, or the acts or declarations of a party to or with him, touching the question pending. The rule which excludes the testimony of jurors, as to any irregularity or misconduct of the jury, applies to such acts when the jury is acting or deliberating as an organized body, presided over by their foreman, and performing their official duty. When in that condition, even the misconduct of a single juror, although not participated in by any of his fellows, but entirely disapproved of by them, is protected from investigation or exposure by a litigant seeking to set aside the verdict. We do not intend to say that there may not be cases of such gross misconduct in a jury room that the Court may properly investigate and deal with it as an offence against the pure administration of justice.

The rule, to the extent we have indicated, may be illustrated by the case of an approach made by a party towards a juryman, to influence his decision by direct bribery, or by artful appeals to his interest, passions, or prejudices. Clear-

ly such facts may be proved by a juryman, even if they to some extent implicate himself.

The facts before us show that the evidence had been closed in Court, and neither party could introduce any more, without special leave of the Court. Yet one juryman, out of Court, has placed before him, what was in effect to him, testimony of facts, bearing on the case, not given in open Court.

The theory of our jury trials is, that all parties and witnesses are to be heard in open Court, in the presence and under the direction of the presiding Judge. The law is extremely tenacious of this cardinal doctrine, and looks with distrust and aversion upon any departure in practice from its strictness. The oath of the juror is to decide according to the law and the evidence given to him — given to him according to the rules of evidence in open Court and with the parties face to face. It surely cannot mean evidence given to a juryman by a party outside of the court room, to be read and pondered upon in secret, before joining his fellows in deliberation on the verdict.

This pamphlet had been legitimately used on the trial. The testimony of witnesses at former trial had been read by consent, but not the testimony of either of the two surgeons named by the juror. His purpose in seeking the possession of this printed document was to compare the testimony given at this trial with the testimony of the same witnesses, contained in the volume given to him.

The legitimate way to show this is by the testimony of a witness who heard him testify. But it is often proved, by consent, by reading the minutes of testimony taken at the time by the Court or counsel.

It is a species of evidence which particularly requires explanation and elucidation by the Court, — aided by the arguments of counsel. It is not in itself evidence of the facts testified to in a former trial, but simply evidence to be considered only as it affects the credibility of the witness, in his, then, present testimony. But often facts are stated

as true in the former testimony, which are ignored or not remembered in the subsequent examination. But the jury, in the second trial, cannot legitimately consider such facts as established by the first testimony. It often requires great care and effort on the part of the Judge to make the jury understand this distinction.

It may be assumed that the report of evidence in the pamphlet was substantially correct. But the essential wrong or injury is, that illegal testimony, calculated to affect the juror's mind, has been read and considered by him, as facts proved in the case. They might be true and legitimate testimony, if offered in the regular course. But the juryman had no right to know them, when obtained or communicated in this manner. The other party had a right to object to the admission of the testimony, if regularly offered. The printed document in itself was not evidence. If admitted, the counsel had a right to comment, and to show, if he could, in his argument, that there was no material discrepancy between the evidence before given and that then given by the witness. But here the juryman was left to form his conclusions from a source unknown to one party, and of course without any explanation or argument from that side.

It was a violation of the juryman's obligations to seek for the document. It was as clearly an unjustifiable act for the defendant to furnish it to him, knowing him to be a juror.

We are not prepared to say that the same result would not have followed, if the defendant had been ignorant of the fact that the applicant was a juror in the case, and the juror unconscious of any impropriety in making the request. The mischief is the same, whatever the motives. Illegal testimony has been brought before the juror's mind improperly. If the juror was acting in the honest belief that it was proper to seek for evidence outside of the court-house, it was as probable that it would illegally affect his mind and judgment, as if he was consciously acting wrong

So, if the defendant saw nothing improper and intended no wrong, yet he did in fact put evidence into the case which certainly, so far as one juryman was concerned, was entirely illegal and improper. The motives and intentions are of less consequence in this matter, than the result of their actions.

The manifest result here was, that the juror's mind had received and accepted for legitimate evidence, what was not such, and had acted upon the belief that certain witnesses had varied in their testimony. The defendant had voluntarily furnished the document which had produced this effect illegitimately.

There are cases where the Court will not stop to inquire whether the juryman was actually influenced or not, but will set aside the verdict upon evidence of any tampering or attempted tampering with the members of the jury. There are cases, and we wish there were more of them, where conscientious jurors have informed the Court of improper advances made, directly or indirectly, by interested parties; expressing their own indignation at the insult and their contempt of the authors. In these cases, and in others like them, the Court, in its discretion, will deprive a party of his verdict as a punishment for the attempt to corrupt the fountain of justice. We wish it to be understood that the Court is not insensible to its duty in this behalf, but will hold parties strictly accountable for their misconduct towards jurors. And we deem it such misconduct, not merely when direct bribery is attempted, but when jurors are approached with the design to forestall their judgments, by statements of what are alleged to be facts, although not testified to, or with appeals calculated to awaken prejudice, partiality or favor. We fear that many verdicts have been influenced by such artful appeals to unsuspecting and unconscious jurors. The statute, R. S., c. 122, §§ 6, 7, 8, expresses the views of the Legislature as in accordance with this opinion.

The evidence in this case does not disclose any seeking out of the jurors by the defendant. The juror applied to him, and he gave him, at his request, the pamphlet. He, through his counsel, now admits that it was an improper act, and one which, if he had taken a moment's time to reflect, he would not have then done. But he did it, and he must abide the consequences of his hasty act.

Motion sustained. — New trial granted.

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

CHARLES E. PHILLIPS *versus* WILLIAM T. PEARSON.

Prior to July 1, 1857, when c. 11* of the Pub. Laws of 1857 went into effect, "the right to cut and carry away timber or grass from land sold by the State of Maine or Massachusetts, in which the soil was not sold," was not subject to attachment.

And then such right can only be attached as an interest in real estate.

An attachment of real estate, made upon a writ containing a count upon a note, and a count for money had and received, without any specification of the claim to be proved under it, is void.

ON REPORT.

TROVER for timber cut on certain public lots.

The State of Maine conveyed certain public lots of land which were located, to one Charles Crosby, who conveyed them to Horace Jenness. While Jenness owned them, the plaintiff sued out a writ against Jenness upon a promissory note, which writ contained a count upon the note and also a general money count, without any specification of the

**Pub. Laws of* 1857, *c.* 11, § 1. The right to cut and carry away timber or grass from land sold by the State of Maine or Massachusetts, in which the soil was not sold, may be attached as an interest in real estate, and set off on execution in the same manner as other real estate, and the conveyances of such right shall be recorded in the registry of deeds in the county where the land lies.

nature of the demand under the latter count. Upon this writ, the officer attached the said Jenness' real estate, and also the trees and grass growing upon the lots as personal property. Subsequent to the attachment, Jenness conveyed the lots to the defendant. After the last conveyance, the plaintiff having recovered a judgment on his writ, levied his execution on the lots.

If the action could not be maintained, plaintiff was to be nonsuit.

McCrillis, for the plaintiff.

J. A. Peters, for the defendant.

DANFORTH, J. — An action of trover for a quantity of logs, and the rights of the parties depend upon the title to the land upon which they were cut. Both claim under Horace Jenness; the defendant by a deed and the plaintiff by a prior attachment followed by a subsequent levy. It follows that the right of the plantiff to recover depends upon the validity of his attachment, upon a writ in his favor against Jenness, dated January 9, 1857, which is made a part of the case. Upon that writ, the interest of Jenness in the trees and grass growing upon the lot was attached as personal property; and also his interest in the land.

The former attachment is invalid, because, at the time it was made, January 10, 1857, such an interest was not attachable, the statute making it so not having been passed till March, 1857; and, if it were so, it should have been attached as real estate. Statute of 1857, c. 11.

The latter attachment was void against subsequent purchasers, because the writ contained a count on a note and a general money count without any specification of the nature of the plaintiff's demand under that count. Hence the plaintiff's title can only date from his levy, while the defendant claims under a prior deed. *Plaintiff nonsuit.*

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

GEORGE L. HART *versus* INHABITANTS OF HOLDEN.

On Jan. 6, 1865, the plaintiff, relying upon the promise of the defendants, made to him that day, through their selectmen, that, if he would enlist upon their quota under the then existing call, he should receive the same town bounty as others, subsequently enlisting upon the same quota, and under the same call, might be entitled to under a vote of the town, at a meeting thereof already called and to be holden eight days thereafterwards, enlisted and was duly mustered, credited upon the town's quota, assigned to the coast guard, and served there until July following, when he was honorably discharged. At the meeting, the town voted "to raise $300 for each man who volunteers for one year to fill the town's quota under the present call." On the 15th of the following Feb., one of the selectmen delivered to the plaintiff a town order for $300. At a townmeeting duly called, and held on the 13th of the following March, in pursuance of an article in the warrant, the town voted "to pay men who have gone into the coast guard $100 bounty. In an action upon the town order: — *Held*,

1. That the former vote of the town included the plaintiff;
2. That the town order was made valid by Pub. Laws of 1865, c. 298, § 1;
3. That after the town order had been given, and confirmed by the Legislature, the town could not revoke it either in whole or in part; and,
4. That the contract was ratified by Pub. Laws of 1865 and 1866, chapters 298 and 59 respectively.

ON REPORT.

The case is stated in the opinion.

A. W. Paine, for the plaintiff.

The vote of the town ratified the promise made by the selectmen. *Lowell* v. *Oliver*, 8 Allen, 247; *Freeland* v. *Hastings*, 10 Allen, 570; *Pottle* v. *Maidstone*, 39 Vt., 70; *Blodgett* v. *Holbrook*, 39 Vt., 336.

The vote was justified by the warrant. R. S., c. 3, § 5; *Cornish* v. *Pease*, 19 Maine, 184; *Ford* v. *Clough*, 8 Greenl., 334; *Davis* v. *Hilliard*, 1 Fairf., 317; *Spear* v. *Robinson*, 29 Maine, 531; *Avery* v. *Stewart*, 1 Cush., 496; *Blackburne* v. *Walpole*, 9 Pick., 101; *Haven* v. *Lowell*, 5 Met., 35; *Hudwell* v. *Hancock*, 3 Gray, 526; *Grover* v. *Pembroke*, 11 Allen, 89; *Black* v. *Colchester*, 39 Vt., 193; *Pottle* v. *Maidstone*, 39 Vt., 70. The vote embraced the plaintiff. *Pottle* v. *Maidstone*, *ubi sup.* The town counted him by filling the remainder of the quota. *Tarbell* v. *Ply-*

mouth, 39 Vt., 429. The "purpose, occasion and circumstances of the proceedings," indicate such to have been the intention. Upon the construction of the vote, counsel also cited *Green* v. *Kemp*, 13 Mass., 518; *Com.* v. *Weiher*, 3 Met., 448; *Pierce* v. *Atwood*, 13 Mass., 324; *Shackfield* v. *Newington*, 46 N. H., 420; *Holbrook* v. *Holbrook*, 1 Pick., 250; *Staniels* v. *Raymond*, 4 Cush., 316; *Winslow* v. *Kimball*, 25 Maine, 493; *Cushing* v. *Worrich*, 9 Gray, 382; *Atwood* v. *Cobb*, 16 Pick., 227; *Barney* v. *Newcomb*, 9 Cush., 56. The language of the vote "who volunteers" is in the present tense, not in the future more than past form. Common use of language allows the present tense to express both past and future action. So used by best authors. See also Bible, Revised Statutes. "Has been, is now and ever shall be" is not found outside of the Episcopal altar.

J. A. Peters, for the defendants.

1. The vote is prospective.

2. Service of warrant not sufficient.

3. The latter vote was without consideration. It was to raise money. No contract implied.

Counsel cited, *Fowler* v. *Danvers*, 8 Allen, 80; *Lowell* v. *Oliver*, 8 Allen, 247; *Alley* v. *Edgecomb*, 53 Maine, 446.

BARROWS, J.—The plaintiff seeks to recover in this action the sum of three hundred dollars, to which he says he is entitled by virtue of a vote of the town, passed January 14, 1865, and of his enlistment to fill the town's quota under the call for troops, made by the President of the United States, December 19, 1864, for which sum he received from the selectmen a town order dated Feb. 15, 1865, which is offered in evidence in support of a count for money had and received, and a special count upon the order itself.

The vote relied upon is as follows:—"Voted to raise three hundred dollars for each man who volunteers for one year, to fill the town's quota under the present call for men."

Testimony was offered by the plaintiff to prove that, after the town had been notified to fill their quota under this call, the selectmen, who were acting for the town in that matter, on the 6th of January, 1865, being the day on which they issued the warrant for the meeting of Jan. 14, urged the plaintiff to enlist upon the quota, assuring him, and, in behalf of the town, promising him, that, if he would do so, he should receive the same bounty from the town which those subsequently enlisting might be entitled to, under the vote of the town at the approaching meeting; that, relying upon this promise of the selectmen, he enlisted on the same day, January 6, and was duly accepted and credited on the town's quota, which was filled by subsequent enlistments, the plaintiff being counted as one; that he was assigned to the coast guard service, and actually served as a soldier in the army until honorably discharged in July, 1865.

On the 15th Feb., 1865, the town clerk who recorded the vote above recited, being also one of the selectmen at whose solicitation the plaintiff had enlisted, made to the plaintiff the town order for $300.

At a subsequent meeting of the town, held March 13, 1865, in pursuance of an article inserted in the warrant "to see if the town will so amend the vote passed at their meeting January 14, for paying bounties to volunteers, as to exclude those men who have enlisted in the coast guards from this town from receiving the bounty then voted, or pass any vote relating to paying bounties to volunteers for the coast guards," it was "voted to pay men who have gone into the coast guard from this town the sum of one hundred dollars bounty if they remain in this State; if they are called out to the front, a bounty of three hundred dollars."

On the part of the defendants, it is objected that there was no legal notice of the townmeeting. But there is nothing before us in this report upon which this objection can properly be sustained. The returns upon the warrants are not made part of the case. Copies of only so much of the warrants and of such votes as relate to the claim in suit

are called for. These portions of the record seem to have been put in at *nisi prius* without objection, or notice to plaintiff that any question was made as to the legality of the meeting. Under such circumstances, the defendants are not at liberty upon this hearing to dispute the legality of the meeting. The report professedly embraces only portions of the record, and these portions having been received without objection, the presumption is that the transactions therein recited occurred at a legal meeting of the town.

It is further objected that the plaintiff, having enlisted previous to the meeting, is not comprehended within the terms of the vote, and the case of *Alley* v. *Edgecomb*, 53 Maine, 446, is cited. There are radical distinctions between that case and the present which must not be overlooked. There, the claimant of the bounty had enlisted months previous to the issuing of the call — in the navy, where he might gain prize money, and while his name, in conformity with the regulations of the service, was credited to the town, thus reducing the number of men they were called upon to furnish on that quota, the vote of the town passed long afterwards to raise money "sufficient to fill the town's quota provided they can be procured for $300 per man," manifestly contemplated a prospective procurement only, and could not, by any reasonable construction, be made to include the plaintiff in that suit. But where, as here, the vote is "to raise three hundred dollars for each man who volunteers to fill the town's quota, under the present call for men," there is nothing in the terms of the vote to exclude, from a participation in its benefits, one who did thus volunteer upon that quota under that call, although he enlisted a few days previous to the actual passage of the vote.

Throughout the rebellion, as soon as the calls for more troops were issued, efforts were made to procure recruits, anticipating the action of the towns and a future legislative ratification and confirmation of their acts and doings; and very many promptly and cheerfully responded to the call, renouncing profitable employments in civil life, relying upon

the patriotic liberality of their townsmen, whose votes were commonly so framed as to place on equal footing all who volunteered on the same quota, under the same call, without regard to the precise date of their enlistment, or whether it was before or after the day of the meeting.

Such, we think, is the true intent and construction of this vote. Like construction and effect were given to a vote not materially different in *Gale* v. *Jamaica*, 39 Vt., 611.

Grammatical precision and verbal accuracy are not to be expected in the records of the proceedings of townmeetings; and the want of them vitiates nothing, provided the true intent can be fairly ascertained, looking at the record in the light afforded by a knowledge of "the purpose, occasion and circumstances of the proceedings." See remarks of BARRETT, J., in *Pottle* v. *Maidstone*, 39 Vt., 72.

But it is further urged in defence that the vote constituted no contract, — implied none, — that there was no consideration, an essential element in a valid contract. It can hardly be necessary to remark that these cases differ in various respects from ordinary cases of contract.

Towns were under no obligation to provide for the public defence, had no power to take measures for that purpose, or to bind themselves by any promises or undertakings relating thereto. So that in the outset there was but one party capable of making a contract relative to that subject matter, and, from the very nature of the case, there was no possibility of a consideration moving from the volunteer or drafted man to the corporation whose promises he seeks to enforce. For, as corporations, they had neither rights nor duties in the premises. The mass of our citizens, being individually sensible of the duty which they owed to the country, made use of their municipal organizations to assure to those who took the field, either as volunteers or drafted men, or as substitutes for drafted or enrolled men, something beyond and above the low rate of pay which was felt to be altogether inadequate considering the hardships and hazards of the service. In most cases, the assurance when made was with-

out legal force or effect, for want of existing authority in the towns to bind themselves for any such purpose, but, when these unauthorized acts and doings of the towns were ratified and confirmed by the Legislature of the State, they became valid and binding to all intents and purposes, and thenceforward it is unnecessary for the drafted man, (who has simply acted in obedience to law,) or for the volunteer, who has enlisted previous to the vote granting the bounty, to show anything more than that he is within the scope and intent of the vote under which he claims. He need not prove such a consideration as would be required to sustain an ordinary contract. The desire of the community to share the burdens which the law imposed upon that class of our citizens who were capable of bearing arms, stands instead of a stipulated consideration. The drafted man, who contracted with nobody, the substitute, who contracted with his principal, and the volunteer, whether he enlisted upon the quota before or after the passage of the vote, are all placed upon the same footing by the ratifying Acts. Laws of 1865, c. 298, § 1; Laws of 1866, c. 59, § 1.

But aside from the obvious view that the rights of the parties must depend in these cases upon the construction of the votes and the ratifying Acts, and not upon proof of a previous agreement for *quid pro quo*, the plaintiff in the case at bar offers testimony of previous assurances received from the selectmen, then acting in behalf of the town, that if he would enlist he should receive the same bounty which might be voted to others enlisting on the same quota; and this would seem to bring his case within the purview of §§ 2 and 3 of the chapters above referred to, and to present more of the features and incidents of ordinary contracts than are commonly found in cases of this description.

The vote of the town of Holden was passed January 14th. The plaintiff was one of those who volunteered "for one year to fill the town's quota under the present call for men." He was within the terms of the vote. On the 15th of Feb-

ruary, in pursuance of the vote, he received a town order for the three hundred dollars voted to each man who thus volunteered. On the 17th of February, by legislative enactment, "the past Acts and doings of cities, towns and plantations, in offering, paying, agreeing to pay, and in raising and providing the means to pay bounties to, and notes and town orders given by the municipal officers of any city, town or plantation in pursuance of a previous vote for the benefit of volunteers, drafted men, or substitutes for drafted or enrolled men," &c., were made valid. Upon this showing, the rights of the plaintiff to maintain his action for the three hundred dollars is established, unless something further appears to defeat it.

The action of the town at the meeting of March 13, when an attempt was made to limit the sum to be paid to those of their volunteers who had been assigned to the coast guard, to one hundred dollars, cannot have that effect. After the promise of the town had been given and their act in making it had been confirmed by legislative enactment, it was not competent for them to revoke the promised bounty, either in whole or in part. The good or bad fortune of the plaintiff, (whichever it may be called,) in being assigned to a post of comparatively less danger and less honor in the service, cannot affect his rights here. It was a matter over which he had no control.

According to the stipulations of the parties in this report,

The case must stand for trial.

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

JOHN GODDARD *versus* HARRISON HALL.

Assumpsit for use and occupation can only be maintained by proof of a promise, express or implied.

It cannot be maintained against a disseizor.

A judgment upon a writ of entry negatives the existence of the relation of landlord and tenant between the parties.

ON REPORT.

APPLETON, C. J. — This is an action of assumpsit for the use and occupation of certain premises belonging to the plaintiff. It can only be maintained by proof of a promise express or implied.

It appears that the plaintiff, on Jan. 24, 1863, brought a writ of entry against the defendant for the lot in question, upon which judgment was rendered in his favor at the October term of the Supreme Judicial Court, 1864, and a writ of possession issued thereon the first day of November following. It does not appear that the writ of possession has ever been served, that the plaintiff has entered on the demanded premises, or that, since the judgment, the defendant has ever promised payment.

The writ embraces a claim for rent accruing prior and subsequent to the date of the writ of entry.

The plaintiff might have recovered in his writ of entry the rents and profits up to the date of his writ, had he seen fit so to declare.

As the plaintiff elected to consider the defendant a disseizor and recovered judgment against him as such, we must so regard him. The relation of a disseizor negatives that of landlord and tenant. The plaintiff has never entered under his writ of possession. There is no express promise proved since the date of the writ of entry. The facts negative an implied one. The plaintiff should have inserted in his writ of entry a claim for mesne profits, accruing before its date, and for those arising since an action of trespass

for mesne profits is the appropriate remedy after possession has been regained. *Larrabee* v. *Lumbert*, 34 Maine, 79; *Larrabee* v. *Lumbert*, 36 Maine, 440.

Plaintiff nonsuit.

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

S. E. Benjamin and S. F. Humphrey, for the plaintiff.

A. Sanborn, for the defendant.

CHARLES J. ABBOTT, *Adm'r, Pet'r in Eq. for the appointment of a Trustee.*

On June 20, 1825, Theodore Jones, by deed of warranty, duly executed and recorded, conveyed to Leonard Jarvis certain real estate situated in Ellsworth, in trust, and subject to certain mutual covenants and agreements contained in a written declaration of trust, of even date with the deed, signed by the parties and recorded. In accordance with one of the covenants, Leonard Jarvis, five days thereafterwards, by his will, appointed Charles Jarvis to be his successor as trustee, and devised to him, in trust, the premises specifically described in the abovenamed deed. On Sept. 11, 1840, Theo. Jones, by deed of warranty, duly executed and recorded, conveyed to Leonard Jarvis, "in trust, for the purposes mentioned in the" former deed, certain other described premises, in Ellsworth, "to have and to hold in trust as aforesaid, with all the privileges and appurtenances thereof to the said Leonard, his heirs and assigns forever." On Aug. 29, 1854, Leonard Jarvis, by deed of warranty, in consideration of one dollar, conveyed to Charles Jarvis, "all his [my] right, title and interest in and unto any lands in Ellsworth," and several other towns mentioned. On Nov. 14, 1863, Leonard Jarvis having deceased, Charles Jarvis, "in his own right and as executor of and trustee under the will of Leonard Jarvis," conveyed the premises mentioned in the deed of June, 1825, to Munroe Young. On Feb. 1, 1864, Charles Jarvis, by deed of release, conveyed to said Young "all the right, title and interest he [I] may have in his [my] own right, or as devisee, trustee or heir under the will of Leonard Jarvis, to the" premises described in the deed of Sept. 11, 1840, "not meaning to prejudice any right or interest which the heirs of Leonard Jarvis, or the heirs of Theo. Jones may have in the premises," "meaning to convey all the right, * * if any, I may have in my own right, as trustee as aforesaid:"—*Held*,

Abbott, Adm'r, Pet'r.

1. That, by accepting the deed of Sept. 11, 1840, Leonard Jarvis held the estate therein described as trustee;
2. That, neither by the will of Leonard Jarvis, nor by the deed of Aug. 29, 1854, did Charles Jarvis receive any title to the trust estate described in the deed of Sept. 11, 1840;
3. That the trust estate described in the deed of Sept. 11, 1840, remained in Leonard Jarvis until his death, when it descended to his heirs at law, subject to the same trusts as when the fee was in their ancestor;
4. That if the heirs holding the fee neglect or refuse to execute the trusts, they may, *it seems*, with the assent of the *cestuis que trust* and others interested, convey the trust estate to a new trustee mutually agreed upon, subject to the original trusts; and,
5. That the estate of Leonard Jarvis would be entitled to all its rights under the declaration of trust; and,
6. That all the persons interested must be made parties to a petition for the appointment of a new trustee.

After describing in his will the trust estate, and the covenants and agreements of the trust, one of which stipulated that the said Leonard may retain, out of the sales of the trust estate, a reasonable compensation for services and for all advances, Leonard Jarvis devised to Charles Jarvis, his successor, the trust property "as it may be at my decease, upon the aforesaid terms and conditions, and for the aforesaid purposes, — he paying or causing to be paid unto my heirs * * the sum, if any, due my estate from the" trust estate: — *Held*, that by accepting the trust under the will, Charles Jarvis was not bound to pay whatever sum the trust estate owed the estate of the testate; but that he should see that such of the trust funds as came into his possession should be appropriated to the payment of such sum.

PETITION IN EQUITY, brought by the administrator *de bonis non* of the estate of Leonard Jarvis, praying for the appointment of a trustee of a certain trust estate therein described.

The petition alleged substantially, that on June 20, 1825, Theodore Jones, late of Ellsworth, deceased, by his certain deed of trust of that date, duly executed and recorded, coupled with a certain instrument of trust, of same date, duly executed by Theodore Jones and Leonard Jarvis, and forming a part of the deed, for the purposes mentioned therein, conveyed to the said Leonard a lot of land in Ellsworth, in this county, (described); that, by the terms of the trust, said Leonard Jarvis should retain from the proceeds of the sales of said land a reasonable compensation for

his services as trustee and for all his advances with interest; that said Jarvis should immediately make a will and therein appoint some person to succeed him as trustee at said Jarvis' decease, and devise to him the remaining trust; that Jarvis, on June 25, 1825, accordingly made and executed his will, therein appointed Charles Jarvis his successor, and devised to him the portion of such trust estate as should remain at said Leonard's decease; that Leonard deceased in 1855, when his will was duly probated, and Charles Jarvis accepted and executed said trust so far as related to the estate before mentioned.

That, after the execution of the trust deed and will, to wit, on Sept. 11, 1840, Jones acquired title to another lot of land in Ellsworth, and adjoining the former (described;) which, on the same day, he conveyed by deed of warranty to said Leonard, to be held subject to the same provisions and trusts in all respects as the former lot; that said Leonard made no devise of the latter lot, nor did he appoint any trustee for its management and sale, and at his decease, a large portion of it, now of great value, remained undisposed of, and the purposes of said trust as to that remain unperformed.

That there is a large balance due the estate of said Leonard for advances and disbursements made pursuant to the trust; that said Leonard left as heirs at his decease certain persons (named); that said heirs decline to act as trustees under the provisions of the declaration of trust.

Munroe Young, one of the persons interested, filed his answer, alleging substantially, — that all the trust estate of said Jones was fully administered by said Leonard and Charles; that money enough was received from the proceeds of said estate to meet all proper charges in the execution of the trust; that Leonard accepted the deed of Sept. 11, 1840, managed, and from time to time sold and conveyed portions of the land therein described until Aug. 29, 1854, when he conveyed the remainder to Charles Jarvis as by deed annexed; that after the decease of Leonard, Charles

managed and controlled both lots and sold portions of both, appropriating the proceeds to the liquidation of Leonard's account against the trust estate; that in 1863, expressing a desire to close up the trust estate in his lifetime, with this view, Charles Jarvis, in Sept. 1863, gave a bond to one Daniel P. Lake, to convey to him all the unsold land of the Theodore Jones estate for $6,685, if paid within thirty days; that Lake shew the land to this respondent; that Lake having refused to pay the money within the time named, the said Charles thereupon agreed by parol to sell said lands to this respondent for the same price, if paid within twenty days; that an extension of one week was subsequently given, during which time said Charles and this respondent went together, upon and over all the land in both lots then unsold, when said Charles pointed out the boundaries of the unsold estate, comprising the second lot above mentioned; that subsequently and before Nov. 14, 1863, the parties again went upon the premises, when the said Charles repeated such representations, and caused a plan to be made, and exhibited it to this respondent, on which said second lot was laid down as included within the boundaries of the land bargained by the said Charles to this respondent; that relying upon said representations, he, on Nov. 14, 1863, paid said Charles $6,685, and received from the latter the deed hereunto annexed, as and for a deed of all the lands which he by parol had agreed to convey.

That then he had never heard of more than one conveyance from Jones to Leonard; that, three weeks thereafter, he heard for the first time of the deed of Sept. 11, 1840, and thereby learned that Charles' deed of Nov. 14, 1863, did not cover any portion of said second lot, whereupon he called upon said Charles for an explanation, who declared he supposed he was selling all said Jones' lands, but had learned otherwise; that, on Feb. 1, 1864, the said Charles executed and delivered to this respondent the deed of release annexed.

That, immediately after receiving the deed of Nov. 14,

1863, this respondent laid out the second lot into nine different parcels, and, prior to Dec. 6, 1863, he sold and conveyed, by deed of warranty, each of said parcels to *bona fide* purchasers; that, by virtue of the deed of release of Feb., 1864, the title has vested in this respondent's grantees above named, and that the heirs of Leonard Jarvis have no interest or claim in or to any part or parcel thereof.

That said Leonard conveyed to said Charles said second lot in execution of his trust, with the intent and mutual understanding that said Charles should take, hold, manage and dispose of the same in execution of said trust; that said Charles always managed said second lot as part of said trust, and, when he sold it, he accounted for the proceeds thereof as trust property; that said Leonard's estate has received the full benefit thereof, and that they were sufficient to pay all just claims against said trust estate.

All the essential parts of the several instruments set forth in the petition and answer appear in the opinion.

C. J. Abbott, pro se.

Rowe & Appleton, for the respondents.

APPLETON, C. J.—On 20th June, 1825, Theodore Jones conveyed to Leonard Jarvis certain premises therein described in trust, "and subject to the covenants and agreements contained in certain articles of agreement between the said Theodore and Leonard bearing even date with these presents." This deed was signed by Catherine W. Jones, his wife. The declaration of trust, signed by both parties, describes the purposes and objects of the trust, confers upon said Jarvis entire control in the management of the trust estate, and provides that he shall appoint by will immediately a trustee, who shall succeed in case of his death, and shall manage and dispose of the trust estate then remaining, in accordance with such declaration. But no authority is given to said Jarvis to appoint a successor by deed during his life. It provides that he may make advances upon the credit of the trust estate for its improvement as

well as for the support of the *cestui que trust*, that he shall keep a regular and distinct account of his doings and sales with said trust estate, to the end that it may not be blended with his own estate," and that "in case of the death of said Jones he will divide and distribute what he may have of the estate, whether it be *land*, *buildings*, money or securities, or the value thereof as he shall deem proper, among said Jones' heirs in proportion as said Jones shall direct in writing, whether it be by will or otherwise. But, should said Jones leave no written direction or will," said Jarvis is to "distribute and divide the aforesaid estate among said Jones' heirs, according to the law of descents of the State of Maine, &c., * * it being understood that the heirs are not to receive their shares in either of the above mentioned events until they marry or arrive at the age of twenty-one years, excepting so much as may be necessary for their maintenance and education," &c.

On 25th June, 1825, Leonard Jarvis made his will accordingly, and by it appointed Charles Jarvis his successor as trustee, and devised to him in trust the land specifically described in the deed of June 20, 1825.

On 11th September, 1840, said Jones conveyed to Leonard Jarvis, "in trust for the purposes mentioned in a certain deed made by me and Catherine Winthrop Jones, my wife, to said Jarvis, and bearing date June 20, 1825," * * a certain tract of land, the boundaries of which are given, "to have and to hold the aforegranted premises *in trust*, as aforesaid, with all the privileges and appurtenances thereof to the said Leonard Jarvis, his heirs and assigns forever."

By accepting this deed and acting under it, he became a trustee and held the estate as such, and not in his own right.

The deeds of June 2, 1825, and of Sept. 11, 1840, were immediately recorded.

On 29th Aug., 1854, Leonard Jarvis, by deed of warranty, and for the consideration of one dollar, conveyed to Charles Jarvis certain lands described as follows: — "All *my* right,

title and interest in and unto any lands lying in the towns of Dedham and Ellsworth, in the county of Hancock, and also in the several towns in which Jarvis gore, so called, in the county of Penobscot, has been subdivided, to have and to hold the aforementioned premises, with all the privileges and appurtenances thereunto belonging, to the said Charles Jarvis, his heirs and assigns, to his and their use and behoof forever," with the usual covenants contained in a deed of warranty.

The trust estates described in the deed of June 20, 1825, and in that of Sept. 11, 1840, from Jones to Jarvis, were situated in Ellsworth. It is insisted that, as the will of Leonard Jarvis, dated June 25, 1825, does not confer any title upon Charles Jarvis to the premises conveyed to him on Sept. 11, 1840, that the deed of Aug. 29, 1854, conveys to said Charles the trust estate which Leonard had by virtue of the deed of Jones to him of Sept. 11, 1840.

But, is it so? Undoubtedly a trustee, in violation of his trust, may convey the trust estate and thus transfer the mere legal title. But, before he can be convicted of such a gross breach of duty, it must appear that he intended thus fraudulently to convey. In the case at bar, it is apparent, we think, that there was no such intention and no such conveyance. The grantor does not describe himself as trustee nor the premises conveyed as trust estate. The trust estate is not described by metes and bounds nor by any language specifically referring to it. The estate conveyed is, — "all my right, title and interest," &c., but, in the ordinary use of words, these would not be held to relate to lands in trust. They include all held in his own right. They exclude all held in trust. The "right, title and interest" was to "any lands lying in the towns of Dedham and Ellsworth, in the county of Hancock, and also in the several towns in which Jarvis gore, so called, in the county of Penobscot, has been subdivided." But the land held in trust was situated in Ellsworth, and not in the other places to which the deed refers. The deed would seem to refer to what he might right-

fully convey, ("my right, title and interest,") and not to what he could only wrongfully as trustee. By the deed of trust he was to see that the trust estate was not "blended with his own estate." But, if this deed conveyed the trust estate, then, in the conveyance, his own and the trust estate were blended together. Further, the consideration expressed for this large estate is but one dollar, and the conveyance of so much property for so trifling a sum would be a gross breach of trust, which is not to be presumed. As the deeds of trust were on record, the taking of such a deed, if it conveyed the trust estate, would be a fraud on the part of the grantee. Undoubtedly a court of equity would hold such fraudulent grantee as holding in trust, but that would not lessen the fraud, if such was the intention of the parties and is the true construction of the instrument. The description in the deed is fully and better satisfied by excluding from its operation all trust property, and holding it to convey his (my) estate only, and not that belonging beneficially to others.

It is obvious that Leonard Jarvis did not intend to convey this land *in trust*, because he does not so say. If he did, the deed of trust to him gave him no authority to appoint a trustee by deed.

Further, if this language were held to convey the lands conveyed by the deed of trust of Sept. 11, 1840, from Theodore Jones to Leonard Jarvis, it must be regarded as equally conveying those in the trust deed of June 20, 1825, between the same parties. The land first conveyed to Leonard Jarvis by Jones was as much his as that to which he acquired a title by his second conveyance. In other words, if Charles Jarvis, by the deed of Aug. 29, 1854, acquired a title to any of the trust estates, he did to the whole. If so, then nothing was acquired by the will, for he had the whole by this deed. So that Leonard Jarvis, without right, in violation of his duty as trustee, conveyed the whole estate in fraud of the *cestui que trusts*, or for the purpose of

making a new trustee, — either of which would have been a gross wrong.

But this is not pretended. The position is, that the first estate in trust passed to Charles Jarvis by will, and the second by deed, under the clause "all *my* right, title and interest." But the word "*my*" just as much embraces the first estate conveyed in trust as it does the second.

It is apparent that Charles Jarvis, neither at the date of the deed of Leonard Jarvis to him of Aug. 29, 1854, nor since, has claimed any portion of the trust estate conveyed to Leonard by the two deeds of trust, under and by virtue of the clause "my right, title and interest." His claim to the trust estate was under the will of Leonard Jarvis, and under that alone. To be sure, he undoubtedly supposed in the first instance, that both estates in trust were devised to him by the will of Leonard Jarvis, but, when he found he was mistaken as to this, he ceased to make any claim to the tract conveyed to Leonard Jarvis by the trust deed of Sept. 11, 1840. Accordingly we find, as trustee, he conveyed to Munroe Young by deed of warranty on Nov. 14, 1863, all the unsold portion of the trust estate to which he had title as trustee under the will of Leonard Jarvis, to which reference had been had. On the first day of February, 1864, he released and quitclaimed to said Young all his right, title or interest in his own right, or as devisee, trustee or heir, under the will of Leonard Jarvis, to the premises mentioned in the deed of trust of Sept. 11, 1840, "but not meaning or intending to prejudice or interfere with any right or interest which the heirs of Leonard Jarvis, or the heirs of the said Theodore Jones may have in and to the above described premises." It is thus apparent that Charles Jarvis disclaimed all intention of conveying the trust estate which was undevised, and that Munroe Young, by receiving the deed, was aware of such disclaimer. Indeed, there is no reference whatever to the deed of Aug. 29, 1854, by which "the right, title and interest" in certain lands was conveyed to the grantee therein, but, in the deed to Young, the grantor

expressly defines what he conveys, thus, "hereby meaning and intending to convey to said Young all the right, title and interest, if any, I may have in my own right as trustee as aforesaid,—thus making it manifest that the forced construction now attempted to be put upon the deed of Aug. 29th, was never sanctioned by the grantor.

The construction that the words, "all my right, title and interest," will not convey trust estate, when the grantor does not act as trustee in such conveyance, is not merely in accordance with the obvious meaning of the words used, and with the intention of the grantor in using them,—but it is equally in accordance with the decisions of the Courts.

An attachment of all the debtor's right, title and interest, in the absence of notice, holds the interest of the debtor in all lands of which he has record title. But, if he holds land as trustee and the trust is apparent of record, an attachment of his interest would be void and ineffectual, for the obvious reason that the estate attached is not his. *Warren* v. *Ireland*, 29 Maine, 62. An estate held only in trust will not be affected in equity by the judgment, or other debts or engagements, or by the bankruptcy or insolvency of the trustee. Hill on Trustees, 269.

A conveyance of "all my right, title and interest" passes, not what the grantor has of record, but what he has of right. It passes only the right, title and interest he has at the time of the conveyance. *Coe* v. *Persons unknown*, 43 Maine, 437. "The reasons," observes HATHAWAY, J., in the case last cited, "why the words, 'all the right, title and interest,' when used by an officer in his return of an attachment of real estate, have an effect different from and more enlarged than that which they have when used by a grantor in a deed of conveyance, are stated by the Court in *Roberts* v. *Bourne*, 23 Maine, 165."

As an attachment of the debtor's right, title and interest, would not hold the estate which the debtor held in trust, the trust being apparent of record, much more will it not pass trust estate in a deed, when the grantor does not de-

scribe himself as trustee, nor the estate as trust estate, and when such a construction would make him guilty of a violation of his trust.

In *Raikes* v. *Anderson*, 1 Starkies' R., 155, the premises, intended to be conveyed by a deed of mortgage, are described as the defendant's undivided moiety, and the deed afterwards professes to convey *all* the defendant's estate, &c., in the premises. This conveys the moiety only, to which the defendant was entitled in his own right, and not one-third part of the same premises in which he was interested as co-trustee with the lessors of the plaintiff. In *Merrill* v. *Wilson*, 28 Maine, 58, the general partner, in a special partnership, conducted in his name, made a general assignment of *his* property for the benefit of creditors, without using any words to show that partnership property was intended to be assigned. The Court held that the partnership property did not pass thereby. "When he makes a conveyance of property in his name and under his signature, how can it be known," asks SHEPLEY, J., in delivering the opinion, "that the partnership property is intended to be conveyed, unless there be something found in the instrument to determine that it was? * * When all the language used in the instrument of conveyance is appropriate for the conveyance of one's private property, and there is nothing in it by which it can be determined that he acted in any other than an individual capacity, that must be a conveyance of his own private property." The same principle is equally applicable when the grantor holds an estate in trust.

The conclusion is, that Leonard Jarvis by the deed of Aug. 29, 1854, neither conveyed nor intended to convey any estate held by him in trust, but only those lands held by himself in his own right and to which he could justly apply the possessive pronoun "my."

As the will of Leonard Jarvis, of June 25, 1825, refers to and specifically devises to Charles Jarvis only the land conveyed to him in trust by Theodore Jones by deed dated June 20, 1825, it is apparent that Charles Jarvis acquired

no right by deed nor by will to the trust estate conveyed to Leonard Jarvis by deed dated Sept. 11, 1840, but that the same remained in him undevised, and upon his death descended to his heirs at law.

The trust estate conveyed to Leonard Jarvis, on June 20, 1825, by Jones, was by him devised to Charles Jarvis, in trust, by whom the same was sold. This portion of the trust estate is no way involved in the present litigation.

As has been seen, the estate conveyed to Leonard Jarvis, Sept. 11, 1840, was held by him under the declaration of trust of June 20, 1825. He held it as trustee. He never sold it. He did not devise it. It descended to his heirs, who hold the legal title subject to the same trusts as when the fee was in their ancestor. As the trust was apparent upon the face of the deed to him and was upon record, whoever acquired the legal title would, having notice, be bound by the trusts referred to in the original conveyance from Theodore Jones. "If a devisor or settlor appoint a trustee, who either dies in the testator's lifetime, or disclaims, or is incapable of taking the estate, or if the trustee otherwise fail, the trust is not defeated, but fastens on the conscience of the person upon whom the real estate has descended." Levin on Trusts, 693. "I take it," said Lord Chief Justice WILMOT, "to be a fundamental principle in equity, that the trust follows the legal estate wheresoever it goes, except it come into the hands of a purchaser for a valuable consideration without notice." *Attorney General* v. *Lady Downing*, Wilm., 21. "Upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on continually to the last survivor. Upon the death of a sole or last survivor, who has made any disposition of the trust estate, it devolves, according to its legal quality, upon his heir at law, a personal representative. As a general rule, the surviving trustee, or trustees, or other personal representative of the sole or last surviving trustee, are as fully competent to act

in the administration and management of the trust estate as the trustees originally appointed." Hill on Trustees, 303.

The fee of the land conveyed to Leonard Jarvis, on Sept. 11, 1840, is in his legal heirs. The *cestui que trusts* are the heirs of Theodore Jones. The heirs of Jarvis hold the fee in trust. If they neglect or refuse to execute the trusts upon which they hold the legal estate, they may, it would seem, with the assent of the *cestui que trusts*, and any others interested, convey the trust estate to a new trustee, mutually agreed upon, subject to the same trusts as declared in the original deed from Theodore Jones to Leonard Jarvis. The estate of the latter would be entitled to all its rights under the declaration of trusts of June 20, 1825.

Leonard Jarvis, in his lifetime, made large advances for the purpose of carrying out the objects of the trust, and in pursuance of its provisions. Those advances were made upon the credit of the trust property and have never been paid, as the bill alleges, and are still outstanding against the same. The plaintiff is the administrator on the estate of Leonard Jarvis. The heirs of Jarvis, upon whom the legal estate has devolved, but clothed with the trust, decline or refuse to act. The administrator has accordingly filed this bill, seeking for the appointment of a new trustee. "A bill for the appointment of new trustees may be filed, either by the parties beneficially interested in the trust estate against the existing trustees, and this is the more usual course; or, if circumstances require it, by the existing or continuing trustees, against their *cestui que trusts;* or again, one or more of several trustees may join as co plaintiffs with the *cestui que trusts* in a suit for the removal of one of the trustees and the appointment of another in his place." Hill on Trustees, 194. "All the parties beneficially interested must be made parties to the suit for the appointment of a new trustee.', *Ib.*, 195.

The *cestui que trusts* are interested in the discreet management, as well as in the proceeds of the trust estate, and in the settlement of the claims of the estate of Leonard

Jarvis against the same. The heirs of Jarvis hold the legal estate. They have refused to act. They should be parties to a suit in which they may be decreed to convey the legal estate, for it would not pass to the new trustee upon his appointment, but would remain in his heirs until conveyed by them. *Greenleaf* v. *Queen*, 1 Pet., (U. S.) 139. The *cestui que trusts* should likewise be parties, as they are mainly interested in the judicious disposition of the property if sold, and that the same be conveyed to them, when the objects of the trust shall have been accomplished.

Leonard Jarvis, in his will, after describing the trust estate, and the covenants and agreement of the trust deed, devises the trust estate as follows: —"Now, to the end that future difficulties in the management of said estate to said Jones or his heirs, as well as in compliance with his covenants and agreements aforesaid, I, the said Leonard Jarvis, give, grant, bequeath, devise and convey the above described estate as it may be at the time of my decease, unto Charles Jarvis of Surry, in said county, Esquire, upon the aforesaid terms and conditions and for the aforesaid purposes, —he paying or causing to be paid unto my heirs, executors or administrators the sum, if any, due and owing my estate from the above described estate, held by me as aforesaid; in case the said Charles neglects or refuses to accept the trust within sixty days after my decease, I then give, grant, devise, bequeath and convey the same unto Edward S. Jarvis of Surry, in said county, upon the aforesaid terms and conditions, and for the aforesaid purposes," &c., &c.

It is insisted that Charles Jarvis, by accepting the trust, was bound to pay whatever sums the trust estate might owe the estate of Leonard Jarvis, irrespective of the value of the trust estate, or of the amount he might receive therefrom, and consequently that nothing is due from the trust estate, but that Charles is held to pay the entire indebtedness thus arising. We think not. The fair meaning is, that Charles

Jarvis shall see that the funds coming into his hands from the trust estate shall be appropriated to the payment of the charges upon the same, — not that he should pay above the value of the estate which should come into his hands. Nobody would accept a trust estate worth five thousand dollars upon condition of paying charges against such estate to the amount of double that sum. Nor would any one think of asking another to accept a trust upon such terms.

Whatever may be the equitable rights of Young and the other purchasers from Charles Jarvis of portions of the premises conveyed to Leonard Jarvis, by deed dated Sept. 11, 1840, as against the trustee to be appointed, they are not before us for adjudication and cannot now be determined.

The bill to be dismissed without costs and without prejudice, unless plaintiff move at *nisi prius* for its amendment.

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

APPENDIX.

EXECUTIVE DEPARTMENT,
Augusta, January 11, 1868.

To the Senate and House of Representatives:

I have the honor to transmit herewith a communication from the Chief Justice of the Supreme Judicial Court in relation to fees of litigation, with schedule accompanying, prepared in compliance with the Act of February 21st, 1867, and now submitted for such action as you may deem expedient.

J. L. CHAMBERLAIN.

BANGOR, JANUARY 6, 1868.

SIR:—By the Act of February 21, 1867, chapter 89, it is made the duty of the Justices of the Supreme Judicial Courts of this State, to prepare a schedule or tariff of legal taxable cost, *as provided by statute*, which can lawfully be included in an execution issued by the clerks of said Courts, and can be defined, naming *each item* in the chapters and several sections, on fees, &c.

By the general law of the State, the prevailing party is entitled to costs. There was no Act limiting the taxation of costs specially to the items as "provided by statute," and prohibiting the taxation of all else. The Court sends a case of mutual accounts to an auditor, or refers some matter in a bill in equity to a master; in real actions a survey may be required; on petitions for partition commissioners may be appointed; and, in cases of every description, parties may submit their rights to arbitration. In these and similar instances the reasonable charges of those thus acting in the service and under the order of the Court, have been included in the bill of costs of the prevailing party, for a period long anterior to the organization of the State.

By section 3, the clerk is required, "if requested by the judgment debtor or his attorney," upon the payment of fifteen cents, to "copy the several items of cost taxed in the execution, on a separate slip of paper, to be passed into the hands of the officer, creditor or attorney, as the case may be, with the execution when issued; which bill of costs shall be presented to the debtor with the execution, or kept with the execution to be furnished the debtor when called for.

By section 4, "if any clerk shall tax *other* or higher fee on any item of cost than that prescribed by the Court in the said schedule furnished, *or not authorized by statute*, he shall forfeit the sum of fifty dollars for each and every such offence," &c.

The Act seems to proceed upon the assumption that, for all items taxed in a bill of costs, fees have been established and are "authorized by statute." But such is not the case. There are very many services important and necessary in the administration of justice, and for which those rendering them are justly entitled to compensation, when no fees are established by statute, and where none can well be established in advance. When a surveyor is required, the costs and charges of the survey will depend upon the skill and accuracy of the survey, the time required for its completion, and the ability of the surveyor; for it is apparent that more accuracy will be required when the contest relates to a few feet in a populous city, than when it concerns the boundaries of a township in the remote forests. The surveyor is entitled to his usual rate of compensation, as charged for similar services, at the time and place where they are rendered. So, in cases of reference, the referees are the judges selected by the parties. The causes submitted will vary in magnitude and complexity, requiring different degrees of time, attention and ability for their full investigation and just decision. In these and similar cases, when no fees are established, or "authorized by statute," the Court claim and exercise the right of supervising charges, if objected to and found unreasonable, and of making suitable deductions.

When parties are absent from the State, as in libels

for divorce, or petitions for partition, or in suits at common law, the statute provides in certain cases for notice to absent defendants, by publication in a newspaper, and the costs of such service by publication are allowed, if not unreasonable, in the plaintiff's bill of cost, if he be the prevailing party.

There is no definite fee prescribed by statute for a libel or petition for partition, or complaint for flowage; but by analogy with similar services, the amount in the accompanying schedule has been taxed.

So no specific fees are provided for an officer for keeping the property attached. As his just compensation will depend on the amount and kind of the property attached, and the time during which it is held under attachment, it will be apparent that no definite fee can be established for such services.

I mention these instances by way of illustration, as cases where no fees are established by statute for services necessary, important and deserving compensation, and which should equitably be included in the costs taxed against the losing party, through whose fault, it is assumed, these costs have been incurred. If not allowed, the prevailing party would incur expenses for which he would remain without remuneration, if he were limited to items "authorized by statute."

The pressure of other official duties prevented the preparation of the schedule before the statute went into effect. It was not supposed to be the intention of the Legislature to make so radical a change as the peculiar phraseology of the statute might seem to indicate. As the Legislature was soon to be in session, it was deemed advisable, upon consultation, to delay the matter until that time, and then, through you, to transmit a schedule of the fees as usually taxed, including as well those established by statute as those allowed for similar services with those so established. The schedule has been prepared with great care by a very accurate clerk, and contains substantially a list of the items included in the bill of costs of the prevailing party. It

may not be amiss to remark that the items are moderate in amount, as compared with those for similar services in most of the States.

I have the honor to be, with great consideration,

Your obedient servant.

JOHN APPLETON.

Hon. J. L. Chamberlain, Governor of Maine.

SCHEDULE OF FEES.

Items of cost taxable for the plaintiff so far as the same are applicable.

Writ of attachment, (including power of attorney, declaration, attorney's fee and blank,) $3,54.

Libel, petition or complaint, $3,50.

Writ of replevin and bond, $4,58.

Service as taxed by the officer, subject to correction.

Entry, 60 cents in the county courts, $1 in the law courts.

Travel, 33 cents for every 10 miles to the court, and the same returning, (observing the rule prescribed in R. S., c. 116, § 14.)

Attendance, 33 cents for each day as noted upon the docket, not exceeding 10 days, (but actions under reference, under advisement in the law court, where a party has deceased and his administrator has not come in, and where the defendant is out of the State and the case is awaiting service or notice, only one day's attendance shall be taxed.)

Continuance at each term for the plaintiff or appellant, 5 cents.

Subpœnas, 10 cents each.

Jury fee $7.

Witness fees as per certificates and depositions as taxed by the magistrate, (subject to correction on hearing.)

Surveyors and auditors' fees as charged by them, (subject to correction.)

Costs of reference as reported by the referee.

Advertising notices, the amount charged by the publisher, (subject to objection and correction.)

Commission to an auditor as surveyor, 50 cents.

Writ of seizin of dower, $1, and the fees of the officer and commissioners are taxed thereon, (subject to correction on objection.)

Warrant to make partition, $1, and the fees of the commissioners as taxed thereon, (subject to correction if objected to.)

Copy of judgment in actions of debt on judgment, and in *scire facias* against a trustee, 50 cents.

Copy of writ, libel or other process, with order of notice thereon, and copy of libel with summons annexed, $1 each.

Order of notice annexed to an original libel or other process, returnable in another county, 50 cents.

Copy of order of notice, with abstract of the writ or other process, 50 cents.

When the register of probate, or register of deeds, by request brings his books or papers into Court, to be used on the trial of a cause instead of copies, the usual witness fee may be taxed for him.

Official copies, 12 cents per page of 224 words.

Rule of reference, 20 cents.

Acceptance, 30 cents.

Clerk for making up judgment, (casting damages and taxing costs,) 25 cents, and for a hearing in damages or costs such reasonable compensation as a justice of the Court may allow.

Filing depositions, or other papers, 5 cents each.

When a trustee is entitled to costs, they may be taxed as for any other party.

In actions transferred to the Law Court, the plaintiff, if he prevail, may tax one attorney's fee in addition to that embraced in his writ. If the defendant prevail, he may tax one attorney's fee for the issue in fact, and one for the issue in law.

The defendant, when he recovers cost, may tax the same fees and charges as mentioned in the plaintiff's schedule above, so far as they are appropriate, and for specifications of defence, $2, and 25 cents for the clerk for filing the same, bringing forward and renumbering at each term.

In cases brought up by appeal, the prevailing party will be allowed the legal costs below, as certified by the magistrate, subject to revision, if objected to.

Process to enforce a lien on personal property, $1.

Writ of execution, 15 cents.

Execution for possession, 25 cents.

Writ of restitution, 40 cents.

Printed copies of reports, exceptions, &c., furnished by the clerks to the law judges, may be taxed in the bill of cost, at the rates paid to the printers, with reasonable compensation to the clerks for preparing the manuscripts, correcting proof, &c.

FEES IN EQUITY CASES.

Attorneys.

Drawing and filing bill, $5.

Drawing and filing answer, $5.

Drawing interrogatories, each set, $1; but all in one case not to exceed $5.

Making abstract, when hearing is on bill, and answer, $2,50.

Making abstract, when on bill, answer and proof, $5.

Drawing and filing decree, when not requiring material alteration, $1.

Drawing and filing each rule, 25 cents.

Each notice given, not to be taxed also as copy, 25 cents.

Copies of abstracts and other copies at the rate of 10 cents for each page of 224 words.

The postage paid on notices and papers transmitted; no one postage to exceed 25 cents.

All papers transmitted to a member of the Court, to be free from charge to him.

For an amendment of the bill or answer, when such

amendment is occasioned by an amendment made by the opposing party, half the fee for drawing a bill or answer.

Clerk.

For filing each paper requiring to be filed on the back, and noting the same on the docket, and carrying it forward each term, 5 cents.

Commissioner or Magistrate.

For each jurat to bill, answer, or other paper requiring a like certificate, 20 cents.

For each deposition not exceeding one page of 224 words, $1, and for each additional page, 25 cents; but no deposition to exceed $5.

Fees of Deputy Sheriff and Constables.

ACT OF 1867, CHAP. 114.

To the service of an original summons or *scire facias*, either by reading or by copy, or for the service of a *capias* or attachment with summons on one defendant, 50 cents.

If served on more than one defendant, for each, 50 cents.

For attachment of property by the written direction of the plaintiff, his agent or attorney, 25 cents additional to the fees for service aforesaid.

For travel for the service of any civil warrant or other process, four cents a mile from the place of service to and from the place of return by the usual way; but, if the distance for which travel is charged as aforesaid, is more than fifty miles, only one cent a mile shall be allowed or charged for all travel exceeding that distance.

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COVENANT.

An outstanding mortgage of premises described in a deed of warranty, is not such an incumbrance as will constitute a breach of the covenant of freedom from incumbrances, when the premises in the deed, described by metes and bounds, are declared therein to be "subject to the mortgage."

Freeman v. *Foster*, 508.

DEED.

1. A deed of warranty duly executed and delivered, but unrecorded, of one undivided half of certain lands therein described, may, by consent of the parties thereto, be altered by erasing the words "one undivided half of;" and a re-delivery of such altered deed will render it effectual to convey the whole of the premises without a re-acknowledgment.

Bassett v. *Bassett*, 125.

2. Although a deed acknowledges the receipt of a consideration, the grantor may show that none was in fact received, when his purpose is to recover the consideration and not to defeat the operation of the deed.

Bassett v. *Bassett*, 127.

3. Where, as the consideration of a conveyance of land by the plaintiff to the defendant, the former relies upon the parol promise of the latter to convey certain other land to him, and the defendant refuses to execute such promise, the plaintiff may recover the value of his conveyance from the defendant upon an implied assumpsit. *Ib.*

4. And, in such case, the plaintiff may prove the special agreement, not as a basis of recovery, but as a declaration bearing upon the question of value. *Ib.*

5. And, if the plaintiff can show that the defendant agreed to give another piece of land for it, worth $2000, such agreement is a practical admission that the land conveyed by the plaintiff was worth that sum. *Ib.*

6. If a deed of one undivided half of certain premises therein described, once completed and delivered, is, years afterwards, surrendered for the purpose of striking out the words "one undivided half of," so that its terms will embrace the whole of the premises, and it be again delivered and accepted with intent that it shall take effect and become operative as an instrument of conveyance, the law will give it such effect, although not acknowledged. *Ib.*

7. If the plaintiff convey land to the defendant, in consideration of the latter's parol promise to convey certain other land to the former, and the defendant refuses to execute such promise, the plaintiff need not demand a deed from the defendant before commencing his suit for the value of the land thus conveyed, if the defendant had put it out of his power to comply with such demand, by conveying to another the land thus promised to be conveyed to the plaintiff. *Ib.*

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When a defendant offers to be defaulted in accordance with R. S., c. 82, § 21, and the plaintiff, either at the same or any subsequent term, accepts the offer, the defendant is entitled to costs from the time when the offer was made, whether any time was fixed for the acceptance, or not. *Woodcock* v. *McCormick*, 532.

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2. When the words themselves are not actionable, but require reference to some extrinsic fact to make them so, such fact must be averred in a traversable form with a proper *colloquium*. *Ib.*

3. The words that "Malvina, (meaning the plaintiff,) has been to swear a young one," fairly convey the idea that the plaintiff has committed the offence of fornication. *Ib.*

4. Various actionable words, spoken at different times, constitute distinct causes of action. *Ib.*

STATUTES CITED.

Public Laws of Maine.

SWINE.

1. The owner or possessor of swine must take care at his peril that they do not run at large in the highway without a keeper. *Jewett* v. *Gage*, 538.
2. Where the plaintiff's minor daughter, with a suitable horse and carriage and in the exercise of ordinary care, was travelling along a highway, and the horse, by becoming frightened at the looks of a hog owned by the defendant, and by him permitted to be in the highway without a keeper, occasioned an injury to the daughter and carriage, — *Held*, that the owner, or he who had control of the hog, was liable for the injury, although he did not know the hog was in the highway at the time of the injury. *Ib.*

TAX.

1. A collector can sell property distrained for the payment of taxes only by virtue of a legal warrant issued by the proper authorities.
   Sanfason v. *Martin*, 110.
2. A collector's warrant signed by only two assessors, without any evidence that a third was chosen and qualified, will not justify such sale. *Ib.*
3. The word "place," as used in the proviso in § 41, c. 106, of the Act of Congress of June 3, 1864, refers to the location of the bank and not to the State authority under which the tax is to be assessed.
   Packard v. *Lewiston*, 456.
4. Such part only of a statute, as is repugnant to an Act of Congress, will be adjudged void. *Ib.*
5. Section 2, c. 126, of the Public Laws of 1867, is consistent with § 41, c. 106, of the Act of Congress of June 3, 1864, and must govern in this State, so far as place is concerned, in the assessment of taxes on shares in National banks. *Ib.*
6. Sections 3, 4 and 5, being inconsistent therewith, are void. *Ib.*

TENANCY AT WILL.

TOWNS AND TOWN MEETINGS.

contained in a written declaration of trust, of even date with the deed, signed by the parties and recorded. In accordance with one of the covenants, Leonard Jarvis, five days thereafterwards, by his will, appointed Charles Jarvis to be his successor as trustee, and devised to him, in trust, the premises specifically described in the abovenamed deed. On Sept. 11, 1840, Theo. Jones, by deed of warranty, duly executed and recorded, conveyed to Leonard Jarvis, "in trust, for the purposes mentioned in the" former deed, certain other described premises, in Ellsworth, "to have and to hold in trust as aforesaid, with all the privileges and appurtenances thereof to the said Leonard, his heirs and assigns forever." On Aug. 29, 1854, Leonard Jarvis, by deed of warranty, in consideration of one dollar, conveyed to Charles Jarvis, "all his [my] right, title and interest in and unto any lands in Ellsworth," and several other towns mentioned. On Nov. 14, 1863, Leonard Jarvis having deceased, Charles Jarvis, "in his own right and as executor of and trustee under the will of Leonard Jarvis," conveyed the premises mentioned in the deed of June, 1825, to Munroe Young. On Feb. 1, 1864, Charles Jarvis, by deed of release, conveyed to said Young "all the right, title and interest he [I] may have in his [my] own right, or as devisee, trustee or heir under the will of Leonard Jarvis, to the" premises described in the deed of Sept. 11, 1840, "not meaning to prejudice any right or interest which the heirs of Leonard Jarvis, or the heirs of Theo. Jones may have in the premises," "meaning to convey all the right, * * if any, I may have in my own right, as trustee as aforesaid:"— *Held*,

1. That, by accepting the deed of Sept. 11, 1840, Leonard Jarvis held the estate therein described as trustee;

2. That, neither by the will of Leonard Jarvis, nor by the deed of Aug. 29, 1854, did Charles Jarvis receive any title to the trust estate described in the deed of Sept. 11, 1840;

3. That the trust estate described in the deed of Sept. 11, 1840, remained in Leonard Jarvis until his death, when it descended to his heirs at law, subject to the same trusts as when the fee was in their ancestor;

4. That if the heirs holding the fee neglect or refuse to execute the trusts, they may, *it seems*, with the assent of the *cestui que trusts* and others interested, convey the trust estate to a new trustee mutually agreed upon, subject to the original trusts; and,

5. That the estate of Leonard Jarvis would be entitled to all its rights under the declaration of trust; and,

6. That all the persons interested must be made parties to a petition for the appointment of a new trustee. *Abbott, Adm'r, Pet'r*, 580.

3. After describing in his will the trust estate, and the covenants and agreements of the trust, one of which stipulated that the said Leonard may retain, out of the sales of the trust estate, a reasonable compensation for services and for all advances, Leonard Jarvis devised to Charles Jarvis, his successor, the trust property "as it may be at my decease, upon the aforesaid terms and conditions, and for the aforesaid purposes,—he paying or causing to be paid unto my heirs * * the sum, if any, due my estate from the" trust estate:— *Held*, that by accepting the trust under the will, Charles Jarvis was not bound to pay whatever sum the trust estate owed the estate of the testate; but that he should see that such of the trust

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