REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By WM. WIRT VIRGIN,
REPORTER TO THE STATE.

MAINE REPORTS,

VOLUME LVI.

HALLOWELL:
MASTERS, SMITH & CO.
1870.

ERRATA.

Page 192, 6th line, for "defendant," read plaintiff.
" 489, 16th line, for "creditors," read debtors.
" 490, last line, for "1868," read 1869.

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.

LEONARD F. E. JARVIS *versus* JOSEPH A. DEANE.

In the trial of a real action, brought after foreclosure, by a mortgagee of lands against the mortgager, to recover possession of the mortgaged premises, the defendant is estopped to set up a lease from the assignee of a senior mortgage of the premises, given by the defendant.

ON REPORT.

WRIT OF ENTRY to recover possession of certain land in Ellsworth.

Plaintiff claimed by mortgage deed, dated Nov. 7, 1849, from the defendant to the plaintiff, and foreclosure of the same, dated July 28, 1859.

The defendant claimed to occupy the premises by permission of Amory Otis, who had authority as agent of one Charles Albro, of Taunton, Mass., who was the owner of a mortgage given by the defendant to one Cyrus Lothrop, dated March 4, 1844, which mortgage covers a portion of the property mortgaged by the defendant to the plaintiff. That Lothrop died more than twenty years since, and that Albro is his devisee and legatee. The defendant offered a lease from Charles Albro, by his attorney, Amory Otis, to the defendant, dated July 4, 1865, and a power of attorney from Albro to Otis, to which the plaintiff objected.

The case was reported to the full Court, with an agreement that, if the defendant can set up the alleged defence,

the case was to stand for trial; otherwise the plaintiff to have such judgment as the law entitled him to.

E. & F. Hale, for the plaintiff.

Wiswell, for the defendant.

DANFORTH, J. — The plaintiff's title to the premises claimed in his writ is founded upon a mortgage from the defendant to himself, dated Nov. 7, 1849, containing the usual covenants of warranty, with a foreclosure of that mortgage, which seems to have been in strict conformity to the statute and duly recorded.

This entitles the plaintiff to recover unless the defendant can show a better title in himself. This he undertakes to do by producing a lease from Charles Albro, executed by an attorney, and dated July 4, 1865, and a mortgage from himself to Cyrus Lothrop, dated March 4, 1844, of which Albro claims to be the owner. The tenant does not disclaim any title to the premises and rely upon that of another, but claims title in himself by virtue of his lease. This, bearing date subsequent to the plaintiff's mortgage, is not of itself sufficient, nor can it derive any vitality from the mortgage to Lothrop, for the tenant having, in his deed to the plaintiff, not only covenanted that no such incumbrance upon the land existed, but that he would "warrant and defend the same to the said Jarvis * * against the lawful claims and demands of all persons," is now, by a familiar principle of law, estopped by his covenants from setting up that deed. Hence, his title fails and there must be an unconditional

Judgment for the plaintiff.

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

INHABITANTS OF VERONA *versus* INHABITANTS OF PENOBSCOT.

One town cannot give such a "written notice" as will charge another town for pauper supplies furnished subsequent to such notice, unless actual pauper supplies had been furnished prior thereto.

By the Public Laws of 1864, c. 257, no aid furnished to a soldier's family within one year next after he was killed in battle could be recovered by the town in which such family resided, against the town in which he had his settlement.

A notice of such aid furnished within the year after the death of the soldier, and before April 1, 1865, (when c. 331 of the Public Laws of 1865 took effect,) is not sufficient to charge the town in which he had his settlement at the time of his death, for supplies furnished his family subsequent to such notice.

ON FACTS AGREED.

ASSUMPSIT for alleged pauper supplies furnished by the plaintiffs to the widow and children of Littlefield Bowden, whose legal settlement, at the time the supplies were furnished, was in the defendant town.

On the 29th day of January, 1864, Bowden, (his family then residing in Verona,) enlisted in the military service of the United States, in Co. A, first regiment of Vet. Infantry of Maine Volunteers, and was killed in battle, on May 17, 1864. Prior to his enlistment he had supported himself and family without aid from the town.

On or about Feb. 22, 1865, the overseers of the poor of Verona sent to the overseers of the poor of Penobscot a written notice, therein declaring that the "family of Littlefield Bowden, an inhabitant of Penobscot, having fallen into distress and in need of immediate relief in the town of Verona," the same had been furnished by the town of Verona, on the account and at the charge of Penobscot, and requesting the removal of said family and the payment of the expense of their support, amounting to $22.

In March, 1865, in consequence of said notice, two of the overseers of the poor of Penobscot, called upon one of the overseers of the poor of Verona, and agreed with him

that, if said family required further supplies exceeding ten dollars, the overseers of Penobscot should be notified, and they would remove the family to Penobscot. No other notice was given. The articles charged in the plaintiffs' account were furnished to said family. The plaintiffs received from the State $36,75 for aid to the family.

Two items of the plaintiffs' account were furnished prior to the notice, and all the others subsequently. For the purpose of presenting the questions of law to the full Court, it was admitted that the supplies furnished were necessary.

If the action could not be maintained, the plaintiffs were to become nonsuit.

E. Hale, for the plaintiffs, contended

That plaintiffs are entitled to recover for all the items furnished after April 1, 1865. Pub. Laws of 1865, c. 331, § 6. After May 17, 1865, one year after Bowden's death in battle, Verona had no claim upon the State for reimbursement for any supplies to his family. During that year, plaintiffs could claim reimbursement from the State to a certain extent, but no longer. Pub. Laws of 1864, c. 257, § 1.

The defect in the notice of Feb. 22, was cured by the defendants' board of overseers. *York* v. *Penobscot*, 2 Maine, 1; *Northfield* v. *Taunton*, 4 Met., 433.

The special agreement made by one of plaintiffs' overseers, could not bind them. *Boothby* v. *Troy*, 48 Maine, 560.

No new notice necessary. *Veazie* v. *Howland*, 53 Maine, 38; Pub. Laws of 1865, c. 331, § 6.

C. J. Abbott, for the defendants.

KENT, J. — The only notice by the plaintiffs to the defendants, was dated Feb. 22, 1865, and given on or about that day. Before that day certain supplies had been furnished to the family of a soldier who was killed in battle, May 17, 1864. As the law then stood, under the decisions of this Court, these could not be regarded as pauper sup-

plies, and the town furnishing them could make no legal claim for them on the town in which the family had a legal settlement. *Milford* v. *Orono*, 50 Maine, 529; *Veazie* v. *China*, *ibid*, 518.

It was then the case of a notice of supplies furnished to a family, when no such supplies as would give a right of action had then been furnished, because furnished to a soldier's family within one year after his death in the service. The plaintiff town continued to furnish the family with needed supplies from time to time to the end of the year 1865, continuously.

According to the decision in the case of *Veazie* v. *Howland*, 53 Maine, 38, the notice was sufficient to cover supplies furnished three months before the notice and for two years after the cause of action accrued, although they might have been supplied, not continuously, but occasionally.

But a question here arises, — whether to make a notice thus operative and extensive, it must not be of supplies to an actual pauper, — and such as the town giving the notice can legally recover in a suit of the town notified?

It has been repeatedly decided that there are exceptions to this general rule, one of which is that, after a suit brought, a new notice must be given for subsequent supplies, — so where payment has been made of the amount, claimed as due, to a certain date. It is said, in the case above cited, (53 Maine,) that, "we must not be understood as determining that one notice will be sufficient in all cases."

This notice was given in February, 1865. At that time two of the items in the account now sued had been furnished. A new law on this subject went into operation on the second of April following, which gave a right of action for such supplies to the families of soldiers against the town in which was their legal settlement. But can the notice given, when the former law was in operation, and when no legal claim existed, and no pauper supplies had been furnished, be sufficient to cover the supplies furnished under the new law? Suppose that the overseers of a town, anticipating

that they must soon relieve a family — send a notice to the town where their settlement is — that they have fallen into distress and have been supplied; although in fact no supplies were actually furnished until after such notice, but are so furnished soon after, and continuously for a year, would the notice be sufficient to charge the defendant town for all such supplies?

We think that a notice, to charge a town for subsequent supplies, must be of supplies actually furnished as pauper supplies, and for which the town giving the notice can recover. In other words, that if there is no legal liability to pay for the supplies furnished up to the time of notice and referred to in it, because no pauperism existed, no recovery can be had under that notice for subsequent supplies, although furnished under such circumstances, or under such a new law as made them pauper supplies for which the town, if notified, would be liable.

The notice itself is clearly defective and insufficient for any purpose. It was not answered, — but two of the selectmen of Penobscot went in consequence of the notice to Verona, and had a conversation with one of the overseers of that town in regard to that family, and made an arrangement with him that if any new supplies were needed, exceeding ten dollars, the overseers of Penobscot should be notified. We do not think that this action and agreement by the overseers waived all defects in the notice so that it could operate on future supplies. *Plaintiffs nonsuit.*

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

Stephen D. Holt *versus* Inhabitants of Penobscot.

In an action on the case for an injury occasioned by a defect in a highway in the defendant town, the plaintiff's declaration alleged, *inter alia*, that said "highway was so defective and out of repair and amendment, by reason of an insufficient and defective causeway, — said causeway having broken down near the end, — thereby obstructing the flow of the water, causing a large accumulation of ice on and near said causeway, and the earth to be gullied out on one side thereof, that in passing upon said road and around said defect and causeway, the wheel of the plaintiff's wagon broke through the ice," and the plaintiff was thrown from his wagon and injured, and that the defendants had notice "of said defect, obstruction and want of amendment as aforesaid." The proof as to the obstruction of the water was, not a breaking down, but a depression of one end of the causeway occasioned by the inadequate capacity of the culvert to discharge the water flowing there, and the consequent accumulation of ice under and upon it; *Held*,

1. That there was no variance as to the obstruction;
2. That the parenthetical clause might be rejected as surplusage;
3. That, as matter of description, it is not essential in ascertaining the identity of the cause of action; and
4. That, not the insufficient and defective causeway only, but the accumulation of ice through which he broke and the condition of the road, both in and out of the travelled path, are complained of as the defect causing the injury, and of which it is alleged the defendants had notice.

Notice of a defect in a highway may be inferred from the length of time during which the defect has existed.

And the state of the weather and its natural effect upon the ice over which the public have travelled, are proper matters for the consideration of the jury upon the question of notice.

On Exceptions.

Case, for an injury caused by an alleged defect in a highway in the defendant town.

So much of the declaration and evidence supporting the same as is essential is recited in the opinion.

The presiding Judge instructed the jury, *inter alia*, that they were to consider whether there was any defect in the culvert; that the plaintiff was not confined to his allegations as to the obstruction being caused by the breaking down at one end; that the essential allegation was that the way was unsafe and inconvenient, and made so by a defective and in-

57 Me 187

sufficient culvert; that plaintiff was not precluded from proving the allegation, if he did not show that the defect in the culvert was caused by the breaking down of the covering; but that he must prove the essential allegations.

On the question of notice, the presiding Judge instructed the jury that the *onus* was upon the plaintiff; that they might infer it from circumstances and facts proved, if sufficient; and that the state of the weather might be considered in this connection by them. That they must determine whether there was such a defect in the way as is alleged, and which caused the injury, and if so, whether the town had notice of it. If the town had reasonable notice before the injury of the defect in the culvert or causeway which prevented the water from flowing and caused it to overflow and form ice, then the town must be held to have notice of what immediately and naturally followed and resulted from such defect in the culvert by way of ice and water; and if the ice and gully, and the ice where the accident happened, were such immediate and natural result, the town must be held to have notice of the actual condition of the highway at these points in those particulars.

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

Rowe and *C. J. Abbott*, for the defendants.

Wiswell, for the plaintiff.

Barrows, J. — The plaintiff, in his writ, after alleging the existence of a public highway in the defendant town, leading from the house of John Hutchings to Mark's corner, and the duty of the town to repair the same, and keep it safe and convenient, in the usual form, goes on to aver that "on the 4th day of April, 1866, as his wagon, drawn by three horses, was passing along upon said road, at a point about one-third of the distance from said John Hutchings' house to said Mark's corner, and near a causeway, being carefully and prudently driven and directed by one Kilborn

Blaisdell, said highway or travelled road was so defective and out of repair and amendment, by reason of an insufficient and defective causeway, — said causeway having broken down near the end, — thereby obstructing the flow of the water, causing a large quantity of ice to accumulate on and near said causeway, and causing the earth to be gullied out on one side of the said causeway, that, in passing along upon said road as aforesaid, and around said defect and causeway, there being no other passage-way, the near forward wheel of the wagon broke through the ice, throwing the plaintiff out," &c. He here describes the injuries received and then avers that "said defect, obstruction and want of amendment as aforesaid, were known to the inhabitants of the town of Penobscot," and that the defendants "had due notice that said obstruction and defect had existed in said highway or travelled road for a long time."

The testimony shows that, at the place indicated, where the highway running east and west crosses a low and flat piece of land lying between two ledges, the wrought part of the road had not been built up, but a causeway was laid with a culvert constructed of poles and not high nor wide enough to discharge the water which flowed there, and there was no ditch to drain the water off at the sides of the road which was consequently overflowed at the causeway, — that a hole had been cut at the south end of the culvert which was used as a watering place for cattle and horses, — that, for nearly a hundred feet, the road had been covered with ice, and the winter travel, after the first of January, had mostly gone to the south of the culvert and the summer travelled track, and between it and the fence, a few only passing on the north side and none over the culvert itself. The reason for this deviation was the condition of the causeway and culvert, as affected by the accumulation of ice there.

One witness, whose testimony seems to have been fairly and intelligently given, says, "the ice near the culvert had bulged up for five or six feet across it and two or three feet

high," — "the ends of the logs of the culvert were lifted up and the culvert was somewhat depressed; the water was stopped and could not flow through; it had been so for three or four months."

Other witnesses describe the causeway and culvert as impassable by reason of being so icy and "sideling," and "slewy." At the time of the accident, added to these difficulties, some ten or twelve feet beyond the culvert, eastwardly, there was a channel or gully in the ice eighteen inches wide and as many deep, with water in it "extending two-thirds or three-fourths across the causeway."

It is quite manifest that such a dangerous pass as this is not to be reckoned in the category of ordinary bad roads "in the spring when the snow and ice are disappearing," in which the counsel for defence are so desirous to place it, nor was it strange that wayfarers should betake themselves to the flat lands at the sides of the causeway, between it and the fences which bounded the road. This the plaintiff did, following the track then usually travelled, the horses proceeding at a walk. But it would seem that the water which should not have been allowed to accumulate there had been working a passage for itself beneath the ice, and while the wagon was thus off the causeway, one wheel broke through the ice, the wagon-stake which supported the plaintiff gave way and he fell off sidewise and suffered bodily injury.

It will be noticed that what is said in the declaration about the causeway "having broken down near the end, thereby obstructing the flow of the water," is not sustained by the proof. It was not a breaking down of one end of the culvert, but a depression consequent upon the tilting up of the other end by the accumulation of ice arising from the welling out of the water from the hole cut for a watering place, and the inadequate dimensions of the culvert which "obstructed the flow of the water."

Upon this point the instructions of the presiding Judge to the jury substantially were that, as to the defect, the plaintiff was bound to prove his essential allegations and that

these were, that the way was unsafe and inconvenient, and made so by a defective and insufficient culvert, but that he was not confined to proof that the obstruction was caused by a breaking down of the poles or covering at one end. To this the defendants except.

But we think that the parenthetical statement of a supposed cause of the obstruction of the water in the culvert is so far immaterial that it may be rejected as surplusage, leaving untouched the essential allegation of "an insufficient and defective causeway * * * causing a large quantity of ice to accumulate," &c.

The statement is certainly no more descriptive than that in *Dukes* v. *Gostling*, 27 E. C. L. R., 499, where the charge was the wrongfully depriving the plaintiff of the water in his pond by digging a sewer through the defendant's close used as a road. The defendant's close was not used as a road at the time of the wrongful act complained of, and his counsel objected that the injury proved, did not correspond with the one described; but the objection was overruled, TINDAL, C. J., remarking as follows: — "What has it to do with the wrongful act of the defendant or the measure of damages which the plaintiff is entitled to claim whether the defendant used his close as a road, an orchard, or a garden?"

What does it matter here, if the road was unsafe and inconvenient at the place indicated in the declaration by reason of an insufficient and defective culvert causing an accumulation of ice, whether one end of the culvert was broken down or only depressed by tilting the other end up? Where immaterial allegations are required to be proved as laid, it is because they are of such a character as to be important in ascertaining the identity of the thing which is the cause of action. Manifestly the allegation under consideration is not of that class. The defendants could not be misled in the preparation of their defence by any such statement, nor can it be truly said that the record does not show the specific thing which was in controversy. What the defendants were required to meet, so far as this point

was concerned, was the charge that the road was unsafe by reason of an extraordinary accumulation of ice caused by a defective and insufficient culvert. This charge might well be and actually was established without proof of the breaking down at one end, and consequent obstruction of the flow of water.

The requirement of the law, that the matter offered in evidence shall be legally identical with that alleged in the pleadings, was fulfilled. The proof offered had the same legal force and effect as if it had appeared that the flow of water had been impeded in the precise manner suggested. See, on this point, *Ware* v. *Gay*, 11 Pick., 106.

That the insufficiency of the culvert was the primary cause of the obstruction and difficulty, is abundantly established by the testimony of the district road surveyor called by the defendants, in which it appears that there had been much complaint before this time, that the culvert was too low, — "the teamsters wanted it raised years before, — and that he made it higher and wider, and ploughed a channel through the adjacent field to drain the water off a month or two after the accident, since which repairs it was proved that there had been no accumulation of ice or water there. The immediate cause of the accident, however, was the accumulation of ice, which (while it drove the traveller off from the "sidling," "slewy" culvert,) having been weakened by the warm weather made the passage-way over which the winter travel had gone equally unsafe. And hereupon defendants' counsel complain that plaintiff did not allege and prove the defect which was the direct and immediate cause of the injury, and notice to the town of its existence, and that he was not required to do so, but was suffered, as they assert, to recover his verdict upon allegation and proof only of the existence of the primary and indirect cause of the accident, the insufficient culvert and notice to the town of its condition. If it were really so, we should, perhaps, be slow to disturb the verdict for the sake of any such subtle refinement. See *Tuttle* v. *Inhabitants of Holyoke*,

6 Gray, 447; *Worster* v. *Proprietors of the Canal Bridge*, 16 Pick., 541.

But this complaint has for its sole basis a division, more ingenious than just, of what is designed to be, and in fact is, simply a description of one wretchedly defective piece of road and its causes and consequences, into distinct averments of separate defects in and out of the travelled path which perhaps might have been, logically speaking, more correct, but practically no more intelligible than the form adopted. It is not indispensable that the plaintiff should state his cause of action with syllogistic accuracy. If bad grammar does not vitiate a declaration, other faults of style ought not to have that effect, unless they produce such a degree of obscurity as to give rise to the belief that the tribunal before whom the cause is heard might be misled as to the true issue.

But, on recurring to the declaration in this case, it is plain that, while the pleader speaks of the road as being "so defective and out of repair and amendment, by reason of an insufficient and defective causeway," * * "causing a large quantity of ice to accumulate on and near said causeway," and "the earth to be gullied out on one side of said causeway," and of the plaintiff's "passing around said defect and causeway," it is not the cause alone, but the consequence, — not the insufficient and defective causeway only, but the accumulation of ice through which he broke and the condition of the road there, both in and out of the travelled path, that he complains of as the defect causing his hurt, and that this is the "defect, obstruction and want of amendment" of which he says the inhabitants of the town had notice. No jury could have failed to understand that, in order to justify a verdict against the town, they were to find not only an insufficient and defective culvert, and knowledge of its condition by the inhabitants of the town, but also an obstructed and unsafe way, made so by the defect in the culvert, with notice to the town of the obstruction and of the condition of things which was the direct cause of the injury.

We do not perceive any error in the instructions touching this part of the case. Notice may be inferred from the length of time during which a defect has existed, and the state of the weather, and its natural effect upon the ice over which the winter travel had gone, were proper matters for the consideration of the jury.

And we are not prepared to say that the jury erred in finding notice of a defect in the way there, when warm weather for several days had been weakening and gullying the unwonted and dangerous accumulation of ice caused by the defective culvert.

Stover testifies that he broke the ice down the day after the accident in about ten minutes time, and after he had done this there was no trouble in getting along if one was careful.

The town is properly held responsible for the negligence of those who should have done this ten minutes work before.

The case does not differ in its essential features from *Savage & ux.* v. *Bangor*, 40 Maine, 176.

Motion and exceptions overruled.

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

INHABITANTS OF BUCKSPORT *versus* INHABITANTS OF ROCKLAND.

The marriage of a minor daughter with her father's consent constitutes one mode of emancipation.

From what circumstances such consent may be implied.

ON REPORT.

ASSUMPSIT for pauper supplies.

CUTTING, J. — It is admitted that John Salter, the husband of Martha E., the pauper, never had a legal settlement

in this State, and that the father of the pauper, at the time of his daughter's marriage, had his settlement in the defendant town, which was transferred to the plaintiff town before the supplies were furnished, — that the pauper was married at the age of sixteen, and the only question presented is whether she was emancipated so as not to follow the settlement of her father.

It is contended that a minor cannot be emancipated even by marriage without the consent of the father either express or implied, and the case of *White* v. *Henry & al.*, 24 Maine, 531, is relied upon, where it was held that a minor son is not emancipated by a marriage without the consent and contrary to the directions of his father.

That case differs materially from the one now under consideration; there the marriage was consummated out of the State, here within the State, and within the vicinity of the parent, and it may fairly be presumed that the statute of the State was complied with, requiring the publication of the intentions of marriage a specified time before such intentions could be solemnized. During that period the parent could object if he had cause, and the proceeding be arrested. But here, for aught that appears, no objection was made, or ever has been made by the parent. Nor is that all. The pauper and her husband, for the year after the marriage, lived in the house of her father, as the evidence tends to show, where they were married. The father, too, speaks of the marriage without disapproval. Hence, an implied consent is clearly manifest, which, by all the authorities under the circumstances would constitute emancipation. Consequently, according to the agreement of the parties the defendants are to be defaulted, and damages assessed for the sum of $44,62, with interest from the date of the writ.

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

T. C. Woodman, for the plaintiffs.

L. W. Howes, for the defendants.

GEORGE CURTIS, JR., *versus* HENRY R. DOWNES *& als.*

When a case is referred to the presiding Judge, with the right to except in matters of law reserved, no exceptions lie to his finding of any matter of fact.

It is irregular for the full Court, under a bill of exceptions, to determine controverted matters of fact.

Where a town voted a bounty to certain individuals, and authorized and directed its selectmen to draw orders for such persons as came within the conditions of the vote; and the plaintiff presented to the selectmen satisfactory evidence that he was one of the persons named, and demanded his order; and the selectmen, without assigning any reason therefor, refused to give the order; and in ten days thereafterwards the plaintiff brought case against the selectmen for such refusal: — *Held*, that, upon the foregoing facts alone, this Court cannot pronounce, as matter of law, such refusal to be wilful and malicious; or that it must necessarily be inferred as a fact that it was so.

ON EXCEPTIONS.

CASE against the defendants, as selectmen of Presque Isle, for "unlawfully, wilfully, purposely and maliciously refusing to issue and deliver to plaintiff an order of the town for the sum of three hundred dollars," pursuant to a vote of the town, passed March 18, 1865.

The writ was dated March 28, 1865. The case was referred to the presiding Judge with the right to except.

It appeared from the facts agreed, that, at a town-meeting legally called, and held March 18, 1865, the town, pursuant to an article in the warrant, voted, — "That the selectmen be authorized and instructed to issue a town scrip or order to each and every person, who, having been drafted, has entered the military service of the United States on the past quotas of this town, or who, having put into the army a substitute, either before or after draft, has thereby helped to fill the past quotas of this town; said scrip or order to be for three hundred dollars each, and be made payable in five years with interest;" that the plaintiff was enrolled in the town, and, on the 6th of October, 1864, was duly drafted as a part of its quota, under the call of the President, and then

and there put in a substitute (named) who was accepted and mustered into the service for the term of three years, and was credited to the town's quota; that he presented to the defendants satisfactory evidence that he was then and there lawfully entitled to receive such scrip or order, and made a demand of them therefor; but that the defendants, without asking for any delay, or assigning any reason therefor, refused to deliver the order.

The presiding Judge ruled, *pro forma*, that judgment be entered for the defendants; and thereupon the plaintiff alleged exceptions.

C. M. Herrin, for the plaintiff.

J. Granger, for the defendants.

KENT, J. — This is a special action on the case against these defendants, selectmen of the town of Presque Isle, for not executing and delivering to the plaintiff a town order, according to the vote of the town.

The counsel for the plaintiff admits that he cannot recover unless it is established that the defendants acted wilfully and purposely, and therefore (legally) with malice.

There are several difficulties in the way of recovery by the plaintiff. The case was referred to the presiding Judge with the right to except in matters of law. It comes up on exceptions to the ruling of the Judge, (*pro forma*, as it is stated,) that "judgment be for the defendants."

There is no statement of any ruling on any question of law. Certain facts are set forth as admitted before the Judge. According to the view of the counsel, before stated, the question of fact, on which the case turned, was whether the selectmen acted wilfully and maliciously. Now the Judge must have either decided this question in favor of the defendants, or he must have intended to refer this question of fact to us, as a law Court. If the former, no exceptions to such finding of facts can be allowed. If the latter, it is, to say the least, irregular; for we are not usually, under

a bill of exceptions, to determine controverted matters of fact.

We see no question arising from any rulings as matter of law.

If we were called upon to determine whether, upon the facts agreed, the plaintiff had proved a wilful and malicious act or refusal on the part of the defendants, we should find great difficulty in establishing that proposition.

The town voted a bounty or gratuity to certain persons; authorized and directed the selectmen to draw orders. The plaintiff presented to defendants *prima facie* evidence that he was one of the persons named in the vote, and made demand for the order; the selectmen, without asking for delay, and without assigning any reason, refused to give the order; and within ten days after, this suit was instituted. We could hardly pronounce, without other facts, that, as matter of law, the refusal and delay was wilful and malicious, or that it must necessarily be inferred as a fact that it was so. *Exceptions overruled.*

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

JAMES DOYLE *versus* JAMES DONNELLY *& al.*

There was a controversy between the parties as to the right to the possession of a certain lot of land, and the dwellinghouse thereon, which one of the defendants helped to erect, and in which he had some personal effects. The plaintiff declared that the defendants broke and entered his dwellinghouse, destroyed his stove, assaulted and expelled him from the premises. The defendants asserted a previous trespass by the plaintiff, as well as the first assault in this case, and a subsequent mutual compromise and adjustment of the whole matter. Upon this last issue there was conflicting testimony, but the jury found it for the defendants. On a motion to set aside the verdict as being against the weight of testimony: — *Held*, that the verdict in such a case will not be disturbed when it affirms nothing that is positively incredible.

The jury were instructed, that, if the matter was all settled up by the parties and they so understood it, each party presenting a claim against the other, and the asserted settlement was not a myth, but a reality, it constituted a defence. To this the plaintiff excepted, upon the ground that the instruction did not require the jury to find that the specific matters embraced in the declaration were settled: — *Held*, that where it appeared that the "matter was all settled up" in good faith, this Court will not inquire whether every matter of mutual aggravation in a personal conflict was canvassed in the adjustment.

Where a controversy has been adjusted by the parties to it, by an offset, mutually agreed upon, of the claims which each sets up against the other, and there is a reciprocal agreement not to sue on either side, courts should give effect to the agreement, unless the case shows bad faith in the assertion of any claim at all on the part of one of the parties, or that the claim is so destitute of foundation as to savor of imposition and extortion.

On Motion and Exceptions.

The facts are stated in the opinion.

J. Granger and *Downes*, in support of the exceptions, cited Hammond's N. Pri., 71; 1 Par. on Con., 439, 440, and cases cited; *White* v. *Bluett*, 24 E. L. & Eq., 434; *Wade* v. *Simeon*, 2 C. B., 548; *Jennison* v. *Stafford*, 1 Cush., 168; *Wilbur* v. *Crane*, 13 Pick., 284; Story on Cont., 359; Chit. on Con., 9; 2 Stark. on Ev., 25.

Llewellyn Powers, for the defendants.

Barrows, J. — Whatever defects there may be in the defendants' specifications, the accord and satisfaction is well specified, and if the instructions of the presiding Judge, and the finding of the jury relative to that adjustment are sustained, it is of no consequence whether all the aggravations of the trespass alleged were specifically denied or not.

The defendants, father and son, are charged in an action of trespass, *q. c.*, with breaking and entering the plaintiff's dwellinghouse, breaking his stove in pieces, and assaulting the plaintiff with a pistol, expelling him from the possession of the premises and keeping him out some three or four weeks. There was a controversy as to the right to the possession of the lot of land on which the house stood. It belonged to the State, and, while one or both of the defend-

ants had been in possession, the legal right to the possession at the time of this quarrel would seem to have been in the plaintiff, who had the permission of the local land agent, subsequently ratified by the land agent of the State. One of the defendants helped build the house and had some articles of personal property in it when the plaintiff took possession. The defendants assert that a previous trespass and the first assault on this occasion were committed by the plaintiff against them, and they offer testimony to prove that, some days after this affair, plaintiff came to the house of the elder Donnelly to settle it up, and it was there agreed that no suits should be commenced by either party against the other. In the language of one of the defendants, "Doyle wanted to drop all, and we not sue him, or he us. We agreed to it and shook hands on it, — parted good friends, and the whole matter was settled." The plaintiff denies that any such adjustment ever took place.

Hereupon the presiding Judge instructed the jury, that, "if they found that the parties met and this matter was all settled up, and was so understood by the parties, each party presenting a claim against the other, and the pretended settlement was not a myth, but a reality, that constitutes a good defence to this action, and the verdict must be for the defendants." And they did so find. As to the fact of this compromise and mutual agreement, the evidence being contradictory, it was for the jury who saw and heard the witnesses to determine which of the conflicting statements ought to be accepted as true, and this Court will not disturb their finding in such case, when it affirms nothing that is positively incredible. The verdict must stand if the instruction upon which it seems to have been based is correct.

It is objected that the instruction does not require the jury to find that the specific matters embraced in the declaration were settled. But the whole embraces all the parts, and, "if this matter was all settled up" in good faith, we will not trouble ourselves to inquire whether every matter

of mutual aggravation in a personal conflict was canvassed in the adjustment. But the objections most relied on seem to be, that the instruction does not require the jury to find that defendants had a valid claim against the plaintiff which they surrendered in consideration of the plaintiff's promise not to sue them, and that the Judge refused to instruct the jury, as requested by the plaintiff's counsel, that, "if they found such an agreement of settlement and discharge as testified to by the defendants, it was not binding on the plaintiff for want of a sufficient consideration."

Where a controversy has been adjusted by the parties to it by an offset mutually agreed upon of the claims which each sets up against the other, and there is a reciprocal agreement not to sue on either side, courts should give effect to the agreement, unless the case shows bad faith in the assertion of any claim at all on the part of one of the parties, or that the claim is so destitute of foundation as to savor of imposition and extortion.

While the controversy is fresh, the parties themselves know more completely than any one else can what justice requires at their hands, and their agreements made in good faith for the avoidance of litigation and expense should find favor in the courts. As fraud is not to be presumed, a mutual concession and remission of claims will be deemed, in ordinary cases, to have been made upon sufficient consideration. Such a remission would seem to be eminently suitable and likely to be founded on altogether adequate and prudent, as well as sufficient considerations, in a case like the one at bar of personal broil and conflict.

Where there has been an adjustment of this sort, it is not incumbent upon the party asserting it to come into Court prepared to establish the validity of his original claim, but only that it was presented in good faith, and, without any imposition or foul practice on his part, was understandingly acceded to by the other party. Such admission of the other party is like the acknowledgment of value received in a

promissory note. It dispenses with further proof of consideration until the admission is impeached.

The tendency of the best considered decisions is to sustain these compromises when fairly made. See *Thornton* v. *Fairlie*, 8 Taunton, 354; *Hoge* v. *Hoge*, 1 Watts, 216; *Covode* v. *McKelvey*, Addison, 56; *Longridge* v. *Dorrille*, 5 B. & A., 117; *Barlow v. Ocean Ins. Co.*, 4 Met., 270.

Motion and exceptions overruled.

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

WILLIAM SMALL & *als. versus* NATHAN S. LUFKIN & *als.*, *Appellants.*

The assessors of organized plantations are subject to the performance of the duties devolving on the municipal officers of towns in relation to perambulation.

ON EXCEPTIONS.

DEBT, by the municipal officers of the town of Fort Fairfield, against the assessors of an organized plantation called Eaton Grant, for neglecting, after due notice, to perambulate the line between the said town and plantation. The action was returnable before a trial justice, and went by appeal to the S. J. Court. At the trial at *nisi prius*, the presiding Judge ruled, *pro forma*, that the action was not maintainable against the assessors of plantations, and the plaintiffs thereupon alleged exceptions.

C. M. Herrin, for the plaintiffs.

Charles Hamlin & John B. Trafton, for the defendants.

APPLETON, C. J., — This is an action brought by the plaintiffs, municipal officers of the town of Fort Fairfield, against the defendants, assessors of the plantation of Eaton

Grant, under the provisions of R. S., c. 3, § 28, for neglecting their duty in reference to the perambulation of Fort Fairfield.

By R. S., c. 3, § 28, provision is made for the perambulation of towns, and a penalty is imposed upon the officers of a town neglecting, after due notice, to perform the duties imposed by this section upon them.

By R. S., c. 1, § 4, Rule 17, "the word town includes cities and plantations, unless otherwise expressed or implied." By Rule 23, "the term municipal officers shall be construed to include the mayor and aldermen of cities, the selectmen of towns and the assessors of plantations.

By the Act of 1862, c. 113, § 1, the county commissioners are to determine what townships have not less than two hundred and fifty inhabitants, and make return of the same to the Secretary of State.

By § 3, — "Immediately after making the return required in the preceding section, said county commissioners shall cause such plantations to be organized in the manner prescribed in section seventy-five of chapter six of the Revised Statutes, and thereupon all the general laws of this State, applicable to organized plantations, shall be in force and apply to the plantations to which this Act relates."

In 1865, by c. 320, the Act of 1862, c. 113, § 3, just cited, was amended by the following words: — "And any prior organization of any such plantation for election purposes shall cease to have any legal effects; and the officers chosen, under the organization provided for in this section, shall, as soon as may be, be qualified to discharge the duties of their respective offices; and, for failure to do so, shall be subject to the penalties provided in such case in chapter three of the Revised Statutes, for town officers."

The general rule is that "the word town includes cities and plantations, unless otherwise expressed or implied." There is nothing from which it can reasonably be implied, that plantations are not included in the general provision requiring the perambulation of towns. There is no express

statute to the contrary. Cities are unquestionably within the purview of c. 3, § 28. But the rule equally applies to cities and plantations. If the former are embraced, so are the latter. The importance of perambulation is as great when lines of plantations as when lines of towns or cities are to be run. The necessity is as great in the one case as in the other. The duties and obligations of plantations are almost identical with those of towns. It is as desirable that the boundaries of plantations should be defined and ascertained as those of towns, and we think the Legislature intended that both should be governed by the same law. It follows that the municipal officers of organized plantations are subject to the performance of the duties devolving on the municipal officers of towns in relation to perambulation.

Exceptions sustained.

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

RALPH C. JOHNSON *& als., in Eq., versus* TIMOTHY THORNDIKE *& als.*

The general equity jurisdiction of this Court does not extend to the enjoining of a city treasurer from negotiating loans and otherwise carrying into effect the votes of his city government.

And § 1, c. 239, of the Pub. Laws of 1864, contains within its provisions only two classes of cases in which the Court can thus intervene; (1,) when any city votes to pledge its credit, raise or pay money "for any purpose" not authorized by law; and, (2,) when "any agent or officer thereof attempts to pay out the money of" his city "without authority."

If the money to be raised is voted in good faith to pay any liability or contract within the contemplation of law, this process will not lie, but the city will be left to its legal remedies.

BILL IN EQUITY, brought by Ralph C. Johnson and twelve other "taxable inhabitants" of the city of Belfast, against Timothy Thorndike, as treasurer, and Axel Hayford, as

mayor of said city. The Belfast & Moosehead Lake Railroad Company, certain persons named as directors of said railroad company and the city of Belfast, defendants. The case was heard on bill, answer and proofs.

The bill alleged substantially, that, by the charter of the Belfast & Moosehead Railroad Company, enacted by the Legislature of 1867, it is provided that certain cities and towns may subscribe for any amount of stock therein, by a vote of two-thirds of the legal voters of any such city or town, present at any meeting legally called therefor, not to exceed twenty per cent. of the amount of the valuation of such city or town, that such vote shall be obligatory, and such city or town may issue their bonds therefor, with interest payable semi-annually at six per cent., and for a period not exceeding thirty years, and all stock so subscribed for to be represented in said corporation by the municipal authorities; that, in 1868, the Legislature passed an amendatory Act wherein it is provided that the city of Belfast, may, by a vote of three-fourths of the legal voters of said city, present and voting, at any legal meeting called therefor, subscribe $140,000 to the stock of said company, in addition to the amount specified in the original Act, and may issue its bonds therefor, payable in thirty years, with interest semi-annually, for a sum sufficient to raise that amount in cash.

That, on the 5th Aug., 1867, the city council of Belfast passed an order declaring that, — whereas the legal voters of the city, on April 6, 1867, by legal vote authorized the city government to subscribe for 3,604 shares of the non-preferred stock of the B. & M. L. R. R. Co., therefore, ordered, that the municipal officers of the city are authorized and instructed to subscribe in the name and for the city, for 3,604 shares of $100 each of such stock, provided it can be done without subjecting the city to the payment of any sum not duly and legally assessed by the company; that, in pursuance thereof, the subscription was duly entered upon the books of the company, Dec. 2, 1867.

That, on April 6, 1867, the city council duly passed another order, declaring that, whereas the legal voters of the city, on the 28th March, 1868, by legal vote, authorized and empowered the city government to subscribe for 1,396 shares of said railroad stock, — therefore ordered, that the municipal officers are authorized and instructed to subscribe for that number of shares of the preferred stock of the company, upon the same terms and conditions as the former subscription was made.

That, on Aug. 12, 1868, the city council duly passed another order, embracing substantially all the provisions of the preceding ones, excepting the conditions therein mentioned, and in lieu thereof declaring that the subscription is subject to all assessments made or to be made by the company, and annulling all inconsistent orders; that the city council further ordered, that the city treasurer be authorized to make a loan in behalf of the city for a sum sufficient to pay the subscription, and to issue city bonds therefor, to be approved by the mayor; that the bonds be negotiated, and the proceeds arising therefrom be set aside for the payment of the company's assessment upon the city stock subscribed for; that the city council passed another order authorizing the city treasurer to make a temporary loan for a sum sufficient to cover the first assessment upon said stock, and to secure the same by pledging the said bonds as collateral security; that, on September 2, 1868, the city council passed another order, appointing the mayor, with such other person to assist him as he may choose, a committee to negotiate the sale of said bonds, and authorizing the committee to assist the city treasurer in effecting the temporary loan.

That said railroad company was duly organized under its charter, and in April, 1868, Axel Hayford, then and since mayor of the city, was elected president of the directors of the company; that, at its annual meeting held July 1, 1867, the corporation established certain by-laws providing for the mode [described] of calling its meetings, and also providing that no assessment whatever shall be made upon any

portion of the shares until the full amount of the estimated cost of the road from Belfast to Newport, exclusive of rolling stock, shall have been first subscribed for by responsible parties in accordance with the rules of the directors, and in pursuance of the vote of the city, except for a survey and location.

That the subscription contained a stipulation that no assessment whatever, except for a preliminary survey and location, shall be made upon the shares subscribed for, nor shall the work be commenced until the full amount be raised by the subscription, and thus the completion of the road be secured without mortgage or incumbrance; that the subscriptions of certain towns named contain certain conditions not annexed to the subscriptions of other parties.

That, on 8th July, 1868, the acting directors of the corporation contracted for the building of said railroad, and voted an assessment of fifteen per cent. on all the stock, in violation of its by-laws and the terms of subscription; and that no notice of the meeting, or of the object of the meeting at which said assessments was ordered, was given to three of the directors, and that they were not present.

That the meeting of the stockholders for the purpose of choosing directors, holden on July 1, 1868, was not called in compliance with the by-laws, for the reasons named; that the assessments ordered by said persons claiming to act as directors being unauthorized, the votes of the municipal authorities providing for its payment by the issue of bonds, or by temporary loan, were unauthorized and illegal; that the object is not one for which the city can borrow money, and that the purpose for which the city voted to pledge its credit, and pay from its treasury the money to be raised as aforesaid, is other than those for which it has the legal power.

That the conditions of the by-law before mentioned, providing when assessments may be made, have not been complied with, because, (1,) the subscriptions of the city of Belfast, and of the towns of Newport, Troy, Thorndike and

Brooks, were conditional, and made upon terms different from those of individual subscribers, (2,) the subscriptions of the city of Belfast, made in Dec., 1867, and May, 1868, were based upon the vote of the municipal authorities, providing that the city was to be subjected to the payment of any sums not duly and legally assessed by the directors; (3,) when such assessment was ordered a portion of the route between Belfast and Newport had not been located or surveyed, no estimate of the cost between said points made, and the acting director did not act in good faith toward the stockholders, and (4,) a large portion of the stock subscribed for has not been taken by "responsible parties," and that the acting directors did not act in good faith in receiving certain subscriptions named, as made by responsible parties.

The prayer of the bill was, *inter alia*, that Thorndike, the city treasurer, and the persons named as committee, be enjoined from making a loan for and in behalf of the city for a sum sufficient to pay the city's subscription, or a temporary loan to cover the first assessment; and for general relief.

Thorndike and Hayford, jointly and severally answered to the bill, admitting the provisions of the charter, and Act amendatory, as alleged, the passage of the several orders mentioned, the organization of the corporation and the establishment of the by-laws alleged; denying the terms of the city subscription; alleging that the meeting for choosing directors was called in compliance with the by-laws; that the whole route from Belfast to Newport had been located and surveyed sufficiently to enable the directors to make a suitable estimate of the cost of the road between the points named, and that sufficient stock had been subscribed by responsible parties to cover the cost as estimated by the directors, and that their adjudication on said two points was conclusive; and that said directors acted in good faith, &c.

The view taken by the Court renders the report of the proofs unnecessary.

Bion Bradbury and *Joseph Williamson*, for the complainants.

A. W. Paine, for the respondents.

DANFORTH, J. — This is a bill in equity asking an injunction against the city of Belfast and certain of its officers, in regard to certain proposed acts therein set forth. It is clear that it cannot be sustained unless it comes within the provisions of the Act of 1864, c. 239. *Hale & als.* v. *Cushman & als.*, 6 Met., 425.

It therefore becomes necessary to ascertain the true intent and meaning of that statute. So far as it has any bearing upon the question now before us, it is in the following words: — "When any * * city * * * votes to pledge its credit, or to raise by taxation, or to pay from its treasury, any money, for any purpose other than that for which it has the legal right and power, or any agent or officer thereof attempts to pay out the money of such city * * * 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." This language appears to be clear and free from ambiguity. There are two classes of cases, and only two, where the Court is authorized to interfere; where the city or town attempts to raise or pay money, or pledge its credit for a "purpose" not authorized by law, and where any "agent or officer thereof attempts to pay out the money of such city or town without authority." There are no words in the statute, indicating in the slightest degree an intention on the part of the Legislature, to require or to authorize the Court to interfere with towns, so long as they keep within their legitimate sphere and make such contracts as the law authorizes, and raise money or loan their credit for the "purpose" of carrying out such contracts, whether in so do-

ing they act with prudence and wisdom, or otherwise. The "purpose," the object to be accomplished, is the test by which we are to judge of the right of the Court to interfere, and not the results of that "purpose" when accomplished, nor the ways and means by which it is to be accomplished. It is not a matter of inquiry with the Court whether the town may, or may not have a good defence in law to an action brought against it, founded upon the subject matter in regard to which complaint is made. If the money to be raised is voted in good faith to pay any liability or contract within the contemplation of law, this process will not lie, but the town will be left to its legal remedies and defences.

If a town were thus to vote money to pay a contract for the repair of highways, or to pay damages arising from an alleged defect in its ways, it would hardly be contended that, in a process of this kind, the Court would or could enquire whether there was in either case a good cause of action against the town, or grant the injunction if there were not. The subject matter being within the legal rights and obligations of the towns and their officers, they must be left free to act as their interest may require, according to the dictates of their judgment, under their legal liabilities and the sanction of their oaths. So, too, when the allegation is that the agent or officer is about to pay out money without authority, the only inquiry which the Court can properly make, is whether the "purpose" for which the money is to be paid is within the legal sphere of the town, and the officer has been duly authorized by law or by the proper vote.

It only remains to apply these principles to the case before us.

By the charter of the Belfast & Moosehead Lake Railroad Company, — Private Laws of 1867, c. 380, § 19, — the city of Belfast is authorized by a vote of two-thirds of its legal voters present at any meeting duly called therefor, to subscribe for stock of that company to any amount not

exceeding twenty per cent. of the amount of its valuation. By an amendatory Act, Private Laws of 1868, c. 626, § 5, the same city was authorized, "by a vote of three-fourths of the legal voters of said city, present and voting at any meeting legally called therefor," to subscribe for additional stock to the amount of one hundred and forty thousand dollars.

It will be observed that, by either of these Acts, no conditions or limitations are attached to the right of Belfast to subscribe for stock, except as to the amount, and the number of votes required. Both of these conditions have been complied with, and it is conceded that the Acts are within the constitutional power of the Legislature. It necessarily follows that the subscription for stock by the city is a contract within its "legal right and power." The votes of the city to raise money, or to issue bonds, and the acts in pursuance thereof, complained of and sought to be enjoined, were passed at legal meetings, and are for the "purpose" of fulfilling this contract. The "purpose," then, is a legal and not an illegal one. In the plaintiffs' bill there is no allegation asserting the illegality of the contract; nothing of the kind is suggested in the arguments of counsel.

It is, however, suggested that there are certain conditions in the contract itself which have not been complied with, and certain malfeasances or non-feasances on the part of the corporation, by which the city is released from the performance of its part of the contract. This may all be true, and yet it does not follow that, because there are illegalities on the part of the corporation, the same or any others exist on the part of the city. It is the alleged wrongdoing of the city and not of the corporation we are called upon to remedy. If the city has a legal defence to their contract, it is at their option to make it. The law makes it the judge of its own interest in this respect. It having been authorized to make the contract, it may insist upon such terms and conditions as its interest may seem to require. If subsequently it should appear to the city that its interests re-

quire a waiver of any of these terms or conditions not required by law, there is no legal objection to that waiver. The Court has no power to interfere to control the judgment or discretion of the city when exercised within the limits prescribed by law.

Besides, whether the conditions and terms of the contract have, or have not been complied with by either party, involves questions of fact which the parties have a right to submit to a jury, — a right which the statute does not contemplate shall be taken from them by this summary process; and which the courts, or any third party have no power to interfere with.

So far as the proposed acts of the officers complained of are concerned, the case does not show that they are "without authority," but supported by the votes of the city, legally passed, in regard to a matter upon which the law has authorized the city to act. Our conclusion, therefore, is, that the acts of the city, and the proposed acts of its officers set out in the plaintiffs' bill, and sought to be enjoined, are not such as are contemplated in the statute, and not within the jurisdiction of this Court.

Bill dismissed with costs.

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

ALVIN THOMAS *versus* ALBERT B. MAYO.

Chapter 152 of the Public Laws of 1868, providing that waivers of demand and notice, by an indorser of notes and bills, shall be in writing and signed, in order to be valid, is prospective in its operation.

ON REPORT.

KENT, J. — The defendant promised to pay the note on which he was indorser, in a short time, if the plaintiff

would wait upon him. Plaintiff did wait several years before instituting this suit. At the time of the promise, in 1863, the defendant knew that no notice of a demand and refusal had been given, and that, therefore, he was not legally bound to pay.

"A promise to pay, with full knowledge of all the facts, would bind the indorsers, although there had been no legal demand or notice." *McPhetres* v. *Halley*, 32 Maine, 77; *Byram* v. *Hunter*, 36 Maine, 217; Story on Bills, § 274.

That this is the doctrine of the common law does not seem to be disputed by the counsel for the defendant. But he invokes the recent statute of the State Laws of 1868, c. 152, which enacts that "hereafter, no waiver of demand and notice within this State, by an indorser of any promissory note, or bill of exchange, shall be valid, unless the same shall be in writing, signed by such indorser or lawful agent."

It is unnecessary to consider the question, whether the above provision applies to a case of a subsequent promise to pay after knowledge of a legal release. The statute, in express terms is made prospective and cannot affect the rights of parties under antecedent agreements, amounting to a legal promise to pay. *Defendant defaulted.*

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

N. H. Hubbard, for the plaintiff.

C. H. Pierce, for the defendant.

JOHN FAHY *versus* WILLIAM S. BRANNAGAN.

The pendency of a statute submission of all demands between the parties, duly pleaded in a subsequent suit between them, founded on a cause of action included in the submission, will abate the suit.

Such a plea in abatement must not only set out the name of the referee, but allege his acceptance; and conclude with "praying judgment of the writ."

ON EXCEPTIONS.

The defendant seasonably filed the following plea:—

And now the said Brannagan comes and defends, &c., when, &c., and says that he ought not to be held to answer to the said writ and declaration of the plaintiff against him, but the said writ ought to abate, because, he says, that previous to the time of the purchase of said writ, and the plaintiff's declaring therein, to wit, on the 12th day of March, A. D. 1868, the parties signed and acknowledged an agreement before a justice of the peace, pursuant to the statutes of this State, to submit all demands between them to the determination of a referee, in which agreement the demand now sued for in said writ was included, as will appear by said agreement; that the parties to said agreement, and the said Fahy, the now plaintiff, and the said Brannagan are the same persons and not others or different; that the matters so submitted, as aforesaid, yet remain undetermined; and that the time specified for said referee to make his report has not yet elapsed; all which the said Brannagan is ready to verify. Wherefore, he prays judgment if he ought to be held to answer to the writ and declaration aforesaid, and that said writ may abate and for his costs. (Duly signed and sworn to.) To this plea the defendant filed a general demurrer which was joined. The presiding Judge sustained the demurrer and adjudged the plea bad; and the defendant alleged exceptions.

J. Williamson, for the defendant.

A. L. Simpson, for the plaintiff.

A plea in abatement of the pendency of prior suit must clearly show jurisdiction over the parties and the subject matter. To do this, the submission and acknowledgment should be set out. The Court could then determine whether or not, "submission is pursuant to the statute." Such matters only as "may be the subject of a personal action" can be submitted. R. S., c. 108, § 1; *Henderson* v. *Adams*, 5 Cush., 610; *Carpenter* v. *Spencer*, 2 Gray, 407; *Fowler* v. *Biglow*, 8 Mass., 1; *McNeal* v. *Bailey*, 18 Maine, 251; *Hubbell* v. *Bissell*, 13 Gray, 298. See also *Burghardt* v. *Owen*, 13 Gray, 300; *Monosiet* v. *Post*, 4 Mass., 532; *Mansfield* v. *Doughty*, 3 Mass., 398. The plea should name the referee and allege that he consented to act as such, and should pray judgment of the writ. *Hazard* v. *Haskell*, 27 Maine, 549.

APPLETON, C. J. — The defendant pleads in abatement the pendency of a submission by these parties, under the statutes of the State, of all demands between them to a referee.

The plea of the pendency of a prior suit, between the same parties for the same cause of action, will undoubtedly, if duly pleaded, abate the suit in which it is filed. In *Smith* v. *Atlantic M. F. Ins. Co.*, 2 Foster, 21, PERLEY, J., says: — "If the prior action was pending in another Court, to furnish the means of determining the truth of the plea by inspection, the rule of pleading requires that the plea should set out the record in the prior action literally, *sub pede sigilli*." The defendant, who relies on the record or process of any court, should set out or enroll in or with his plea the record or process on which he relies. "Even if the record is in the same Court, as in case of a writ returned, he craves oyer and sets out the record. If it is the process of the Court not returnable, like the summons left with the defendant, when his goods are attached, he makes profert of the process, and enrolls it with his plea. When

he pleads the record of another Court, he brings in a copy or exemplification and enrolls it in like manner. In all these cases, the record or process enrolled becomes part of the plea. * * * The plaintiff may show, by a true enrolment of the record, that it was not correctly and exactly enrolled in the plea, and an incorrect enrolment or the omission to enroll, is cause of demurrer." *Ib.*

Now, in the present case, the plea does not set out the agreement to refer, nor the name of the referee, nor whether he has accepted the trust or not. A plea in abatement of another action pending, without giving the name and style of the Court before which it is pending, would unquestionably be bad. An agreement to refer to "a referee" without giving the name of a referee would not be within the statutes of this State. Yet, the plea sets forth just such a reference and none other. It is bad, because the submission is to a nameless referee, who can have no jurisdiction. Nobody can tell who he is, nor where to find him.

It should further appear that the referee named has accepted the trust, for he is not obliged to act unless he chooses. In suits pending before a Court of law having jurisdiction, where the previous proceedings are regular and the cause is properly in Court, the Court cannot refuse to take cognizance. The referee may decline to act. A plea in abatement of a reference to one declining to act would be bad.

The plea concludes as follows: — "Wherefore, he prays judgment, if he ought to be held to answer to the writ and declaration aforesaid, and that said writ may abate and for his costs." In *Hazard* v. *Haskell*, 27 Maine, 549, SHEPLEY, J., says, "that a plea in abatement to the writ must conclude with 'a prayer of judgment of the writ,' and the prayer that it may be quashed, without praying judgment, is bad." In *Yelverton* v. *Conant*, 18 N. H., 123, the conclusion of the plea was in the precise words of the one under consideration, and the Court held it bad because it did not

pray judgment of the writ. To the same effect is the decision in *Clark* v. *Brown*, 6 N. H., 434.

Exceptions overruled.

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

THOMAS N. EGERY *versus* ANTHONY WOODARD.

The date of delivery of a deed is the time when it first becomes effectual as an instrument of conveyance.

Evidence that a deed, bearing date March 20, but acknowledged and delivered April 25, of the same year, was thus dated for the purpose of rendering the grantee liable for the taxes of that year, is inadmissible in an action of covenant to recover the amount paid for taxes.

The liability of an estate to taxation relates back to April 1, of each year.

ON REPORT.

ACTION for breach of covenant. Plea, general issue.

The plaintiff introduced a deed to himself, signed by the defendant, bearing date March 20, 1865, acknowledged April 25, 1865, and proof *aliunde* of its actual delivery on the day of the acknowledgment. He also proved payment by him, May 19, 1866, of the city, county and State taxes assessed upon the property described in the deed and writ, for the year 1865, to the amount of $157,50. It also appeared that the warrant of commitment, to the collector of taxes of the city of Bangor, bore date Sept. 7, 1865.

The defendant offered to prove that the deed was dated prior to April 1, 1865, in order to cover the question of taxes, and make them payable by the grantee. Whereupon the case was reported to the full Court, with an agreement that if the evidence offered by the defendant is not admissible, and the incumbrance attached April 1, instead of Sept. 7, 1865, the defendant was to be defaulted for the amount

66 Me. 343

paid by the plaintiff, with interest from date of such payment.

J. A. Peters and *F. A. Wilson*, for the plaintiff.

T. H. Garnsey, for the defendant.

APPLETON, C. J. — Taxes on real estate are to be assessed in the town, where the estate lies, to the person who is the owner, or in possession thereof, on the first day of April, of each year. R. S., 1857, c. 6, § 8.

The assessment must necessarily be made, the warrant for collection issued and the taxes collected, after that date. The liability of the estate to taxation relates back to that time.

No exception is taken to the legality of the assessment of the taxes, which the plaintiff has paid and now seeks to recover back.

A deed, though duly executed while under the dominion of the grantor, and before its delivery, transfers no title. It takes effect from and by delivery, and not from its date. The defendant's deed was first effectual after the land conveyed became liable for taxes assessed or to be assessed thereon for the then current year.

Parol evidence is not admissible to vary or control the effect of a deed. If it were, the evidence offered, that a false date was inserted for the purpose of affecting the legal construction of the deed and changing the rights of the parties, could not have such effect, as the date of the delivery is the time when the deed first becomes effectual as an instrument of conveyance.

Defendant defaulted for $157,50,
with interest from May 19, 1866.

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

Inhabitants of Orland *versus* Inhabitants of Ellsworth.

Section 6, of c. 63, of the Public Laws of 1861, requiring towns to make proper provision for the support of soldiers' families residing therein, and prohibiting any disabilities therefrom, was applicable only to the first ten regiments.

Chapter 127, of the Public Laws of 1862, approved March 18, was prospective in its operation.

Supplies furnished the families of soldiers of any other than the first ten regiments before March 18, 1862, must be deemed pauper supplies.

On Report.

Assumpsit for supplies furnished to one Moore, wife and children, from Jan. 1, 1866, to Dec. 1, 1867, they having fallen into distress in the plaintiff town where they were then living and in need of support. The plaintiff introduced evidence tending to show that the alleged paupers had their settlement in the defendant town at the time the supplies were furnished, and that the defendants were duly notified.

The defendants offered evidence tending to show that Moore enlisted Nov. 4, 1861, in the 11th Maine Regiment, and was duly mustered into the U. S. service.

The plaintiffs then proved that supplies were furnished to Moore's family, (which had then fallen into distress,) on Feb. 19, 1862, up to which time said Moore continued in the military service.

The case was then withdrawn from the jury, and reported to the full Court, with the agreement, if the furnishing of the supplies on Feb. 19, 1862, subjected Moore and family to the disabilities of paupers, the defendants should be defaulted, and damages assessed by a person to be appointed by the Court.

T. C. Woodman, for the plaintiffs.

A. Wiswell and *Eugene Hale*, for the defendants.

APPLETON, C. J. — The R. S., 1857, c. 24, is the general law determining the duties, obligations and liabilities of towns in relation to paupers, except where it may have been changed or modified by subsequent enactments.

The pauper law was modified in relation to the soldiers of ten regiments, raised by virtue of the Act approved April 25, 1861, c. 63. By § 6, it is made the duty of cities and towns to provide aid for the families of soldiers enlisted in those regiments, and they were required so to do. *Milford* v. *Orono*, 50 Maine, 529; *Veazie* v. *China*, 50 Maine, 518. But it is provided that, "no disabilities o any kind whatever shall be created by reason of aid so furnished and received.

Joseph D. Moore, the alleged pauper, enlisted in the 11th Maine Regiment, on Nov. 4, 1861, and his family, having fallen into distress, received aid from the plaintiffs on the 19th of February, 1862, at which time said Moore was in the service of the United States.

It is conceded that the pauper, having enlisted in the 11th regiment, is not within the provisions of the Act of 1861, c. 63, as that Act by its terms is made applicable only to the first ten regiments raised. The supplies then were furnished under and by virtue of the general pauper law of the State, R. S., 1857, c. 24, and subjected the recipients to the disabilities created by and arising under that law.

The Act of 1862, c. 127, does not alter the previously existing rights of towns, or remove the disabilities already created by the general pauper law of the State. It was enacted and became a law on 18th March, 1862. This was after the enlistment of Moore, and after the supplies to his family had been received. The law is prospective in its operation. It makes provision for the future, and leaves the past as it found it. The towns, cities and plantations "are hereby severally empowered" to raise money to aid the families of volunteer soldiers. Provision is made for the reimbursement of "the money so applied" from the State treasury, but none for money so applied previous to the

passage of the Act to aid the families of soldiers of regiments raised after the first ten.

It is enacted, by § 5, that "no pauper disabilities shall be created by reason of receiving the aid provided for in this Act." But the aid received by the family of Moore was before the passage of this Act, and therefore it would not be within its provisions.

The seventh section of c. 127 is in these words: — "Section sixth, of chapter sixty-three of the Public Laws of 1861, is *hereby* repealed, and the provisions of the Act passed April 25, 1861, in relation to the relief of families of soldiers, sailors or marines, is *hereby* extended to all the regiments which have been or may be raised in this State." That is, it is henceforth made the duty of towns, cities and plantations to aid the families of all soldiers in the service of the United States, no matter when nor in what regiment they might have enlisted. The families of all soldiers and sailors are thenceforth alike entitled to relief.

But no provision is here made for the case of supplies furnished the families of those who enlisted after the first ten regiments were raised, and before the passage of the Act of 1862, c. 127. Disabilities arising in the intervening time are not removed. Existing rights remain unaffected. All legislation is presumably prospective. Nothing indicates a legislative intention to act retrospectively. It probably did not occur to the Legislature that supplies might have been furnished to soldiers who could derive no benefit from the Act of 1861, c. 63, because they did not enlist in the ten regiments to which that Act applied, and who were not within the Act of 1862, c. 127, because they enlisted before its passage. Whether, if they had attempted to change rights previously acquired under then existing laws, they could constitutionally have done so, is a question which it is unnecessary to consider or discuss.

Defendants defaulted, and C. J. Abbott, Esq., is appointed to assess damages.

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

ABNER PAINE *versus* HENRY J. McGLINCHY.

The lessor of a shop verbally agreed with the lessee that the latter might have the use of certain chattels belonging to the former, in the shop, during the continuance of the lease. When the lease expired, the lessee carried away the chattels, claiming them as his own, whereupon the lessor sued him in *indebitatus assumpsit* for goods sold and delivered; — *Held*, that the action was not maintainable.

ON EXCEPTIONS to the ruling of GODDARD, J., in the superior Court.

ASSUMPSIT on an account annexed.

On April 12, 1867, the plaintiff leased a shop with certain fixtures to the defendant, and on the same day sold him certain articles, (then in the shop, but not mentioned in the lease,) for $180. The defendant paid to the plaintiff one year's rent, and moved out June 2, 1868, taking with him certain articles, (named among others in the account annexed,) which were in the shop when the lease was executed. These latter named articles were never returned by the defendant, but were claimed by him as being of the articles sold for the $180. The plaintiff contended that they were not included in the sale, but that he verbally agreed, at or about the time of the execution of the lease, that the defendant might use them in the shop until the expiration of the lease.

The presiding Justice found, as matter of fact, that the articles in controversy were, at the time of executing the lease, the property of the plaintiff; and that they were not sold, but the use of them loaned to the plaintiff until the expiration of the lease. And, as matter of law, the presiding Justice ruled, *pro forma*, that the plaintiff may recover in this action the value of the articles so received and retained by the defendant. To this ruling the plaintiff alleged exceptions.

J. W. Symonds, for the plaintiff, cited 2 Greenl. on Ev., § 108, and cases cited; 1 Hill. on Torts, 47, 48; 3 Phill.

on Ev., (C. H. & E's notes,) 404; *Howe* v. *Clancey*, 53 Maine, 132; *Balch* v. *Patten*, 45 Maine, 41, unlike case at bar; *Hill* v. *Davis*, 3 N. H., 384.

W. L. Putnam, for the defendant.

APPLETON, C. J.—The defendant is sued for goods sold and delivered. The case finds that the defendant purchased certain articles of the plaintiff and borrowed certain others, which, after the termination of the bailment, he retained. In other words, he borrowed certain articles which he did not return, as he expressly or impliedly promised to do. The presiding Justice ruled, *pro forma*, that the defendant having retained the goods loaned beyond the period for which they were thus loaned, might be treated as their purchaser, and gave judgment for their value. In this we think he erred. The defendant was liable upon his contract of bailment. There was no occasion to imply one which did not exist, when there was one which did. It does not appear that the defendant appropriated the articles loaned to his own use, or that he sold them or otherwise disposed of them. If he has violated the rights of the plaintiff, resulting from the contract of bailment, he is responsible upon such contract for its breach. If he has been guilty of a tort, he may be held to answer in the appropriate form of action, but there is nothing in the facts proved from which a sale of the articles loaned can be implied.

It was held in *Hopkins* v. *Megquire*, 35 Maine, 78, where goods and chattels have been tortiously converted and sold, and the money received from such sale, that the party injured might recover the proceeds. But when nothing more than a wrongful conversion is shown, the owner of the goods converted cannot recover as for their sale. Such has ever been the result of the authorities in this State. Such, too, have been the decisions in Massachusetts, in *Jones* v. *Hoar*, 5 Pick., 285; *Ladd* v. *Rogers*, 11 Allen, 209; and in *Glass Co.* v. *Walcott*, 2 Allen, 227. So, too, in New Hampshire, it is held, that when goods are wrongfully taken

or detained, the former owner cannot waive the tort and maintain assumpsit for the goods. *Smith* v. *Smith*, 43 N. H., 236; *Woodbury* v. *Woodbury*, 47 N. H., 11.

Exceptions sustained.

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

JOHN A. WATERMAN, *Judge of Probate, versus* JAMES R. DOCKRAY *& al.*

If, in debt on a probate bond, the plaintiff alleges the accidental destruction of the bond, he must set out the substance of its condition in his declaration.

ON EXCEPTIONS.

DEBT, against James R. Dockray and John Farrington, for that defendants and one Eben McLellan, since deceased, and whom defendants have survived, on July 6, 1861, at said Portland, by their writing obligatory of that date, the same being a probate bond, then and there given by said Dockray, Farrington and McLellan, for the benefit of the estate of one Thomas McLellan, then deceased, and which said writing obligatory has been destroyed by fire, and therefore cannot here in Court be produced, acknowledged themselves indebted in the sum of ten thousand dollars to the said William G. Barrows, Esq., then Judge of Probate of wills, and for granting administration within said county, to be paid to the said Barrows or his successors in said office. And the said Waterman being then and there the successor of said Barrows, in said office, and Judge of Probate, as aforesaid, at a term of the Court of Probate, held at Portland, within and for said county of Cumberland, on the third Tuesday of March current and instant, by his decree and order of that date, did expressly authorize William L. Putnam, of said Portland, administrator *de bonis non*, with the

68 Me. 484

will annexed of said Thomas McLellan, deceased, said Putnam being then and there a party in said estate, and said bond, to commence this suit for the benefit of said estate, and this writ is sued out by said Putnam in the name of said Waterman, Judge of Probate of Cumberland county.

The defendant Dockray pleaded *non est factum*, which was joined, and also performance as follows: —

And for further plea, by leave of Court, pleaded, the said Dockray says, that the plaintiff his action aforesaid against him, ought not to have and maintain, because, he says, that the said Eben McLellan, from the time of the making of said writing obligatory, well and truly kept and performed all the covenants and conditions therein on his part to be kept and performed, according to the form and effect of said writing obligatory. And this he is ready to verify, wherefore he prays judgment, if the plaintiff his action aforesaid against him ought to have or maintain, and for his costs.

To which the plaintiff replied: —

And the said John A. Waterman, as to the said plea of said Dockray, by him secondly above pleaded, says that he, said Waterman, by reason of anything in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against said defendant, because, he says, that said Eben McLellan, from the time of the making of said writing obligatory, did not well and truly keep and perform all the conditions thereof according to the form and effect of said writing obligatory, in that, though on divers days and times between the making of said writing obligatory, and the day of the purchase of this said writ, said Eben McLellan did receive into the possession of him, said Eben McLellan, in his said capacity as executor, large amounts of goods, chattels, rights and credits of said testator, which ought by law to have been administered before the purchase of this writ by him, said Eben McLellan, in his said capacity, to wit, of the value of ten thousand dollars; yet the said Eben did not administer the same according to law and

to the will of said testator. And this he is ready to verify. Wherefore he prays judgment for his debt aforesaid and his writ.

To which the defendant demurred; and for causes of demurrer in law to the said replication, the said Dockray states and shows to the Court here, that the said plaintiff has not and does not in and by his said replication set forth and state with particularity and precision the breach of condition by said Eben McLellan, in their said writing obligatory, and the particular items thereof, and the assignment of a breach of said writing obligatory, and the condition thereof in the plaintiff's said replication is insufficient and defective in law, in particularity and precision, and also that the said replication is in other respects uncertain, informal and insufficient.

And the plaintiff joined the demurrer.

The presiding Judge sustained the demurrer, and the plaintiff alleged exceptions.

W. L. Putnam, for the plaintiff, cited *P. M. Gen.* v. *Cochrane*, 2 Johns., 413; *U. S.* v. *Arthur*, 5 Cranch, 257; 1 Saunders, 9, n. 1; 2 Saunders, 409, n. 2; *Bailey* v. *Rogers*, 1 Maine, 194; 1 Chit. Pl., 326; *Cornwallis* v. *Savory*, 2 Bar., 772; Story's Pl., 230 and note; 6 Chit. Pl., 330, 624, 657-8 and 671; *People* v. *Dunlap*, 13 Johns., 437.

J. & E. M. Rand, for the defendants, cited 1 Chit. Pl., 585, and cases cited.

KENT, J. — One thing is certain, — the pleadings, including the declaration, do not present any intelligible or distinct issue, except the general issue, which denies the execution of the bond declared upon.

The declaration sets forth that the defendants executed a probate bond to the Judge of Probate, in the sum of ten thousand dollars, but makes no profert of the same, and sets out none of the conditions. It, however, gives an excuse or reason for not making profert in Court of the whole instrument, — that it has been destroyed by fire. To this

declaration one of the defendants pleads *non est factum*, and, by leave of Court, a special plea in bar, setting forth that one of the signers has kept and performed "all the covenants and conditions therein on his part to be kept and performed, according to the form and effect of the said writing obligatory." He does not, in this plea, set out any of the conditions and covenants of the bond, but speaks of it inferentially as containing such conditions. He does not allege performance by all, or performance by either, of all the conditions, but only that one of the obligees, McLellan, has kept and performed the conditions on his part to be kept and performed. This is pleaded by Dockray. It is not alleged in the writ or declaration that this one was principal and the others sureties, or that he was executor. To this plea the plaintiff replies, that the said McLellan did not keep and perform all the conditions according to the form and effect of said writing obligatory, — and then assigns for breach, that McLellan had received into his hands, in his capacity of executor, large amounts of goods, chattels, rights and credits, of said testator, which ought to have been administered in his "said capacity, to wit, to the value of ten thousand dollars. Yet he did not administer the same according to law and to the will of the testator."

In this replication we do not find any statement of the conditions of the bond, nor that it was given by any one as executor of the will of any person deceased, naming him. The breach is stated generally, without specification of the particular breach or breaches. To this replication the defendant Dockray demurs, and for special cause says, that the breach of condition by McLellan is not stated with particularity and precision. The plaintiff joins in the demurrer.

On this review of the pleadings, it is manifest that the Court has nothing from which it can determine the questions apparently intended to be raised. The great defect is, that neither party has stated or set forth in substance, the conditions of the bond. It is said in the declaration,

that it is a "probate bond" given for the benefit of the estate of Thomas McLellan, deceased. It is not stated for what particular "benefit" it was given, nor even that it was the bond of an executor or administrator. That it was a bond on condition is undoubted, as it was given to the Judge in his official capacity, — and all such bonds are with a condition, — as provided by statute. But what is the condition, or matters to be done or performed? How can there be intelligent action by Court or jury, in determining the rights of the parties under these pleadings?

The real controversy seems to be, on which party is the duty of setting out the condition? Both parties refer in the plea and replication to "conditions," but neither tells us what they are.

Usually, there is no difficulty in such actions on bonds. The plaintiff declares on the penal part of the bond and makes profert of the whole instrument. The defendant prays oyer of the condition and has it set out to him, and he then pleads performance, or any other admissible plea. If he pleads performance, the plaintiff replies, assigning and setting forth the particular breach or breaches, and thus a distinct issue is made.

As a general rule, the plaintiff is bound to make a *profert in curia*. It is the right of the defendant to have the condition read to him, and made part of the record and really of the plaintiff's writ. But the law, from necessity, has qualified this rule in a few cases. It was determined in *Lyfield's* case, 10 Co. 92, A, that where a deed is lost by fire, *profert* of the deed pleaded may be dispensed with. Otherwise, a party might lose his bond or his debt by the destruction of the paper on which the deed or contract was written. It is well settled, in this State and elsewhere, that the destruction of a title deed does not divest the grantee of his title. The existence of a deed, accidentally destroyed, may be proved by parol, or by copy identified. Now, what is the meaning of a profert? It means that the original deed or bond, with the parchment or paper on

which it is was written, must be produced or offered. But, if destroyed, that identical paper cannot be produced. If accidentally destroyed by fire, the rule is relaxed, and the profert or offer to bring that original paper is dispensed with. This is an exception in favor of the holder that he may not lose his rights by his misfortune. But it is not to be extended beyond the necessity. He is not bound to make profert of the paper itself, but he cannot therefore insist upon the penal part of the bond alone, and prevent the obligor from availing himself of the conditions. When the obligee has the bond, and can and does make a profert of it, the obligor can, by craving oyer, have the whole set out. But if the plaintiff, for a good reason, says he cannot produce it, how do the parties stand? The actual controversy is whether the conditions have been performed. How shall that issue be made before the Court? Common sense would say that, as the bond itself cannot be produced, the plaintiff should do the next best thing, and, in lieu of the profert, should set out in his declaration the substance of the condition, which, if he had made profert, he would have been bound to read to the defendant and spread upon the record. He surely cannot be in a better condition by the burning up of his deed or bond than he would have been in had he produced the whole instrument. He cannot describe a bond, which he identifies as necessarily one with a condition, and excuse a profert, and then declare only on the penal part, and call upon the other party to set forth the condition, and, if he cannot do so, recover on the penal part alone. The *onus probandi* is upon a plaintiff to prove his contract or bond, as he has set it out. The law of pleading has another general rule, that it is necessary to set out in a declaration, in covenant, any and all conditions and qualifications, and any exceptions in assumpsit. *Horsefall* v. *Testar*, 7 Taunt., 388; *Harvey* v. *Richards*, 1 H. Bl., 644; *Latham* v. *Rutley*, 2 B. & C., 20.

The same would be required in an action on a bond, with a defeasance or condition, except that by a technical rule of

pleading, the same thing is reached by a profert of the whole instrument. In the latter case a different mode is adopted, but with no design to relieve the plaintiff from presenting and proving his whole case. When he cannot make profert, he cannot avail himself of the benefit of a profert, but must substitute for it a statement of what he would otherwise have read upon oyer, and thus place the defendant, in substance, in the same condition as if he made a profert. This seems to be a reasonable and just and practical rule.

In looking at the authorities, we find one case, *Read* v. *Brookman*, 3 T. R., 150, which seems to have been understood by some as sanctioning the doctrine, that where a profert is dispensed with, the party pleading need offer no substitute. That was a case where the instrument lost and pleaded was not the foundation or ground of action, but introduced in defence. This case has been doubted, if not denied, by the subsequent decision. *Hendy* v. *Stephenson*, 10 East, 55. It is there said, that *Read* v. *Brookman*, "went a step beyond any before it, and without saying it should be retraced, we ought not to go a step further." The rule as stated in *Hendy* v. *Stephenson*, is, "if the deed itself cannot be produced, it may be equitable to permit the substance of it to be substituted in place of it in pleading, but still it must be substantiated in the material terms of it, so that the Court may see what the grant really was. If not thus allowed no issue can be taken." GROSE, J., said he never agreed to the decision in *Read* v. *Brookman*. See also 6 Ves., 12, n. 6. In *Cady* v. *Eggleston*, 11 Mass., 282, the declaration contained the whole bond, and the pleadings were conformed to it. No question was made as to the point now in controversy.

The Court in New Hampshire had the precise question before it in *Rand* v. *Rand*, 4 N. H., 267. It was held, after very full and able arguments, that in debt on bond, with a condition, if the plaintiff alleges that the bond is lost by time and accident, he must set out the substance of

the condition in his declaration. This is a direct authority on the point, and seems to be sustained by reason and authority. We concur in this view.

The pleadings before us conclude with a demurrer to the replication. Where there are errors on both sides in the pleadings, we are inclined to adopt the old rule of seeking for the first fault. We find it in the declaration. We therefore sustain the demurrer by defendant, with leave to the plaintiff to move to amend his declaration, and to the defendant to amend his pleadings. In short, to replead, including the declaration.

We are not called upon to determine finally upon the proper form of pleading to be adopted, beyond what we have indicated. When the issues are made up we must pass upon them. As the parties, however, have argued various points and desire some intimations from the Court for their guidance, we will say that our present impression is, that, when the conditions of a lost bond are set forth in the declaration, under the general issue the defendant may require evidence of the execution of the bond, and also that the contents or condition are correctly set forth. They must be proved, if denied, substantially as alleged. Both are issuable facts. After this, we see no reason why the usual rules of pleading as to the breaches do not apply. Whether the same fire that destroyed the bond also destroyed papers, accounts or vouchers, or other matters essential to enable the plaintiff to set forth the breaches with the particularity and precision usually required, we are not informed. How far any such facts, or any peculiar circumstances in this case, can avail, if pleaded and duly set forth, to excuse omissions or be held sufficient assignment of breaches, we can only determine when presented to us. The general doctrines set forth in this opinion, may, perhaps, have some bearing as to the requirements where papers or evidence are accidentally lost or destroyed.

The entry in this case must be — Exceptions overruled.

Demurrer by defendant sustained, with leave to plaintiff

to move to amend his declaration, and with leave to defendant to move to amend his pleadings, after such amendment.

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

ELLEN WILSON *versus* THE GRAND TRUNK RAILWAY OF CANADA.

The fare paid by a passenger over a railroad is the compensation for his carriage and for the transportation, at the same time, of such baggage as he may require and have for his personal convenience and necessity, during his journey.

Baggage subsequently forwarded by his direction, in the absence of any special agreement with, or negligence on the part of the carrier, is liable like any article of merchandise to the payment of the usual freight.

ON EXCEPTIONS to the ruling of GODDARD, J., of the Superior Court.

The verdict was for the plaintiff, and the defendants alleged exceptions to the rulings, which appear in the opinion, together with a sufficient statement of the material facts in the case.

P. Barnes, for the defendants.

Shepley & Strout, for the plaintiff, cited *Logan* v. *Pontchartrain Railroad Co.*, 11 Rob., (La.,) 24; Redfield on Railways, 244.

APPLETON, C. J.—The plaintiff was a passenger on board the defendants' cars, having seasonably paid her fare. Her baggage was not with her, it having been left behind, without fault of the defendants. Some two or three days afterwards it was left in charge of their servants, to be transported to the Empire station on their line, but it never reached its place of destination. This suit is brought to recover the value of the baggage lost.

57 Me. 139-141
67 " 234

The presiding Justice instructed the jury, "that, if they should find that the plaintiff went on board the defendants' road as a passenger, on Tuesday preceding, without baggage, and that the trunk and its contents were ordinary personal baggage, such as a passenger would be entitled to take with himself without extra charge, it was not necessary that there should be proof that anything was paid for carrying the trunk between the same points; that the price paid by the plaintiff, for her own passage, and the evidence in the case, if found to be true, were sufficient consideration for the promise alleged in the writ."

As the plaintiff's trunk was taken for transportation some days after she had passed over the defendants' road, the substance of the charge of the presiding Judge was, that the price paid for the plaintiff's ticket included the compensation due to the defendants for their subsequent transportation of her trunk, the trunk being personal baggage. In other words, it was not necessary that the baggage of the passenger should go with the passenger, but, it might be afterwards subsequently and without any additional charge for its freight.

The fare for the passenger includes compensation for the carriage of his baggage, as to which the carriers of passengers are to be regarded as common carriers. There need be no distinct contract for the carriage of the baggage. The fare covers the compensation for the freight of the baggage. The baggage must be ordinary baggage, such as a traveller takes with him for his personal comfort, convenience or pleasure for the journey. It must be the "ordinary luggage" of a traveller, regard being had to the journey proposed.

It is implied in the contract that the baggage and the passenger go together. "The general habits and wants of mankind," observes ERLE, C. J., in *Phelps* v. *L. & N. W. Railway Co.*, 115 E. C. L., 327, "must be taken to be in the mind of a carrier when he receives a passenger for conveyance; and the law makes him responsible for all such

things as may be fairly carried by the passenger for his personal use." In *Cahill* v. *L. & N. W. Railway Co.*, 100 E. C. L., 172, WILLES, J., says, "When a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only; and that he can no more extend the contract to the conveyance of a single package of merchandize than of his entire worldly possessions." In *Smith* v. *Railroad*, 44 N. H., 330, BELLOWS, J., uses the following language:—"Until a comparatively recent period the English courts were inclined to hold that carriers of passengers by stage coaches, and otherwise, were not liable for injuries to their baggage, unless a distinct price was paid for its transportation. But it is now well settled that the price paid for the passenger includes also the personal baggage required for his personal accommodation; the custody of the baggage being regarded as accessary to the principal contract. * * In general terms it may include, not only his personal apparel, but other conveniences for the journey, such as a passenger usually has with him for his personal accommodation." "The baggage," observes MULLIN, J., in *Merrill* v. *Grinnell*, 30 N. Y., 619, "must be such as is necessary for the particular journey that the passenger is, at the time of the employment of the carrier, actually making."

It follows from the nature and object of the contract, that the right of the passenger is limited to the baggage required for his pleasure, convenience and necessity during the journey. As it is for his use and convenience, it must necessarily be with him, as it is for him. He may reasonably be expected to exercise some supervision over it during, and be ready to receive it, at the termination of his journey. In the present case the baggage was forwarded two days after the plaintiff had passed over the road. If its transmission may be delayed two days and the carrier is required to take it without any compensation save the fare paid by the passenger, who had preceded it, it may equally be de-

layed weeks or months and the carrier be required to forward it without any additional pay. It presents a different question if the delay is caused by the fault of the carrier, or there is a special agreement with him or his authorized agent for the subsequent transportation of the passenger's baggage.

The fare paid by a passenger over a railroad, is the compensation for his carriage, for the transportation at the same time of such baggage as he may require for his personal convenience and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement with the carrier, or of negligence on his part, is liable, like any other article of merchandize, to the payment of the usual freight.

The declaration is in the usual form against carriers. It is well settled that the carrier need not be paid in advance, unless he specially demand it, and that he has a lien on the goods carried for his freight. It is not necessary to determine whether or not the defendants would be liable for the trunk as common carriers of merchandize for compensation. The case, as presented to the jury and as argued before us, raises the single question of the obligation of the carrier of passengers to take their baggage at a time subsequent to that of the carriage of the passenger, without additional compensation. *Exceptions sustained.*

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

ST. JOHN SMITH, *in Eq.*, *versus* RALPH KELLEY *& al.*

By the "rules in chancery cases" in this State, defendants may severally demur and answer to the merits of the bill at the same time.

In such cases, the complainant need not answer until the demurrer is disposed of.

One Goddard conveyed a certain lot of land to defendant Kelley, reserving to himself, heirs and assigns, the "free and perpetual right of way over such part of the premises as shall be occupied by a passage-way" and cross-passage-way to be completed as described. The next day, by a bond duly executed to Goddard, Kelley obligated himself, his heirs and assigns, to "finish or cause to be finished" on demand, after a certain time, the passage-ways described by courses, distances and widths. Subsequently, Goddard conveyed the adjacent lot and all the right of way and passage across the Kelley lot reserved in the first named deed, and derived from the bond of Kelley to the plaintiff, and assigned to him the bond. Afterwards, the Kelley lot, through sundry mesne conveyances subject to the reservation, became the property of the defendant Hamblen, who, together with Kelley, was requested but neglected to finish the passage-ways. In a bill in equity, praying for a decree of specific performance of the obligation in the bond; *Held*,

1. That Kelley, having sold the land, could not comply with a decree for specific performance; and hence no such decree would be made against him; and,

2. That the bond was a personal obligation on the part of Kelley, and not a covenant running with the land and binding upon the grantees of Kelley.

BILL IN EQUITY, heard on demurrer.

The respondents severally demurred and answered to the merits of the bill.

The material allegations in the bill are stated in the opinion.

J. & E. M. Rand, for the complainant, contended that putting in severally a demurrer and answer to the whole bill, was in violation of the rules of pleading, and cited, on this point, Story's Eq. Plead., §§ 442, 458, 463 and 465; 1 Daniell's Chan. Plead., 659, (2,) and cases cited; *Clark* v. *Phelps*, 6 Johns. Chan., 214.

That the contract is ancillary to, or part of a contract for sale of the land by the obligee to the obligor. Land was conveyed subject to the contract and reservation, and

with express notice of the same to the other defendant. Case is not based (as defendants seem to suppose) upon reservations in deeds, but upon Kelley's contract or bond, of which Hamblen had full knowledge and notice when he took his conveyance. Having notice, the bill is maintainable against both the original contractor and those holding under him. Upon the principles laid down in Hare's note to Spencer's case, 1 Smith's Leading Cases, (Am. Ed.,) the bond would be considered in equity as running with the land as against assignees with notice.

P. Barnes, for the defendants.

KENT, J. — A question is raised, which it seems proper to consider, not merely as it affects this case, but as it may settle the rule for future practice. The defendants each put in a demurrer, and at the same time answered to the whole bill. The plaintiff objects to this as improper, and as in direct violation of the settled rules of pleading in equity cases, and he insists that, for this cause, the demurrers should be overruled.

The course adopted, manifestly, is not in accordance with the rules on this subject to be found in the English Chancery, or in those of many of our American courts. But it is in accordance with the rule of this Court. *Rules in Chancery Cases*, 37 Maine, 582, Rule 6. "Demurrers, pleas and answers, will be determined on their own merits, and one will not be regarded as overruling another." Under this rule, the Court, in *Hartshorn* v. *Eames*, 31 Maine, 97, recognized the right of the defendant to demur and answer to the merits at the same time if he sees fit. Ordinarily, the plaintiff has no cause to complain of this, as it gives progress to the case, and enables him to proceed at once, if the demurrer is overruled, to a hearing on the merits, by filing a replication. He has the benefit of knowing what his opponent sets up, both in law and in fact, as his defence. He can at once, (as the plaintiff in fact did in this case,) set the case down for argument on the points

raised by the demurrer. If the demurrer is sustained, and the bill dismissed, the answer becomes immaterial. If overruled, the answer is ready for a replication. The plaintiff, of course, is not bound to reply to the answer until the demurrer is disposed of.

We will therefore consider the questions arising under the demurrers.

The bill sets out a conveyance by Henry Goddard of a lot of land to Kelley, one of the respondents, in which Goddard reserved to himself, his heirs and assigns, and personal representatives, "the free and perpetual right of way over such part of the premises as is or shall be occupied by a passage-way, to be completed from York street, along the dividing line of Sawyer's bank and flats, and also by a cross-passage-way running from the aforesaid passage-way, to be constructed parallel with York street, across the aforesaid premises for the passage of horses, carriages, and such other purposes as said Goddard, his heirs, executors, administrators or assigns may or shall deem proper, — granting to said Kelley, his heirs, &c., the privilege of arching over the cross-passage-way, on condition of his leaving a clear height of twelve feet."

The bill then alleges that, on the next day, in connection with said conveyance, and as part of the same transaction, Kelley gave to Goddard a bond, a copy of which is annexed. The condition of the bond is, that Kelley "shall well and truly finish or cause to be finished in a good and substantial manner, after the expiration of the year eighteen hundred and forty-seven, as said Goddard shall direct, a certain passage-way 33 feet wide, on the south-easterly side of York street, beginning at the center or middle of High street," — then giving courses and distances to another passage-way at a point Goddard may direct, — the last named passage-way to be built in a firm and substantial manner by the said Kelley, his heirs or assigns, at such time after 1847, as Goddard may direct, to be 25 feet in width, parallel with York street, across the flats bought by Kelley of Goddard, to the line of Goddard's flats.

This bond has been assigned to the plaintiff, to whom the said Goddard conveyed the lot adjacent to the one he conveyed as above to Kelley, and, it is alleged in the bill, that, by that conveyance and one subsequent, Goddard conveyed to the plaintiff all the right of way and passage across Kelley's land reserved in the deed, and derived from the bond and obligation aforesaid of said Kelley.

It also appears that the Kelley lot has, through sundry mesne conveyances, become the property of Hamblen, the other respondent, subject to the reservation.

It is important to ascertain what the precise object of this bill is, and what the prayer seeks. The bill does not set out any interference with the right of the plaintiff to use a way or ways over the land, as reserved in the deed. But the complaint is—that, on request, neither of the defendants has made, laid out or built the passage-ways reserved in and derived from the deed and obligation. The prayer is "that the said defendants may be compelled, by a decree of this Honorable Court, to make, lay out and build the passage-ways, pursuant to their agreement and the reservation aforesaid." The prayer also is for a joint decree against both defendants.

As to Kelley, it is clear that he cannot do it, for he has sold the land, and has no power or control over it. Where a party is disabled from performing a decree, no decree for a specific performance can be of any use. Where a party gave an agreement to procure a deed, and failed, the Court would not decree specific performance, and compel a conveyance of the premises, because the defendant could not possibly comply. *Hill* v. *Fiske*, 38 Maine, 520. In some cases equity will give compensation in damages. But that is not asked in this case. The plaintiff, as against Kelley, has his bond, and may resort to that. But, after parting with his whole title, (and this fact was known to the plaintiff when he brought his bill, as he states it in the bill,) he is disabled, and a court of equity will not make a nugatory

and useless decree which cannot be complied with, but leave the party to any other remedy he may have.

As to the other defendant, (Hamblen,) it appears that he holds the title under the deed, but is not a party to the bond. He therefore holds, undoubtedly, subject to the right reserved in the deed to Kelley. But this bill is not brought to enforce the right reserved in the deed alone. The counsel for the plaintiff, in his argument, says, that "the bill is not based (as defendants seem to suppose) upon reservations in deeds, but upon Kelley's contract in the bond, of which Hamblen had full notice when he took conveyance."

By the deed, the reservation is of a right in Goddard, his heirs and assigns, to pass with teams, &c., over such part of the premises as is or shall be occupied by a passage-way to be completed, from York street, &c., and also by a cross-passage-way to be constructed, &c. The *deed* does not specify how and by whom the ways are to be laid out, constructed or completed. The rights of the parties and their privies in estate, by the deed, are those arising from a right in one person to have a free passage over the lands of another. If interrupted in the enjoyment of the right the common law gives a remedy by action for damages, for each instance of such violation.

But this bill asks a decree against a grantee, to enforce the conditions of a bond given the succeeding day. That bond was in the usual form, conditioned that Kelley should finish or cause to be finished, in a good and substantial manner, after a certain time, a passage-way on S. E. side of York street, to meet another passage-way, and that other way to be built in a firm and substantial manner by Kelley at such time as Goddard should direct. There is no reference in this bond to any deed or any reservation in any deed. The only reference to the lot is in the description of the cross-way, to wit, that it is "to run parallel with York street across the flats bought by the said Kelley of said Goddard, to the line of said Goddard's flats."

The object of this bond seems to have been to obtain from

Kelley an obligation, not to be found in the deed, to build and finish in a good and substantial manner, the ways referred to in the deed. It is a personal obligation on its face. But the plaintiff says that it is in fact a covenant, running with the land and binding on the grantees, and that the defendants may be compelled, as prayed for in this bill, to make, lay out and build the passage-ways, pursuant to their agreement and the reservation.

But, is the bond a covenant running with the land? It is not a part of the deed, and is not referred to in it. It was made subsequently, after the title had passed out of Goddard, and when there was in fact no privity of estate between the parties to the deed, except so far as a prior grant made a privity. It was a personal obligation to make, finish, build certain ways in a substantial manner.

The case of *Plymouth* v. *Carver*, 16 Pick., 183, is much in point. In that case the town had granted to two persons certain land, on condition they should become bound by sufficient bonds to make and maintain a portion of the highway which passed by such land. The bond was given six days after the deed. The action was brought on that bond against the subsequent grantees of the land. The Court say,—"The plaintiffs must maintain that the land which was granted, was originally charged with the performance of this bond, and that it continued to be charged in the hands of the defendants. But it is perfectly clear that the town of Plymouth had no interest whatsoever in the land granted, after the conveyance of the same by them. The town might have conveyed on condition that the grantees should make or maintain the highway, and have reserved a right of entry for a breach. The only condition was that the grantees should give a bond to maintain the highway. The plaintiffs claim to recover on the writing declared upon, as a covenant which runs with the land. But, with what land is this covenant running? No right or estate in any land is conveyed by the covenantors to the inhabitants of the town. * * * We think it very clear that the bond

was a personal obligation, not binding the land which the town had conveyed to them. There was no privity of estate between the covenanting parties, which would be necessary to exist, in order to the creation of a covenant to run with the land."

To the same effect is the case of *Parish* v. *Whitney*, 3 Gray, 516; *Spencer's case and notes*, 1 Smith's Leading Cases; *Hurd* v. *Curtis*, 19 Pick., 459.

In view of the facts before us, we are of opinion that the bond did not create any covenant running with the land, and therefore that defendant Hamblen cannot be compelled to perform, by a decree in equity, what Kelley had given his personal bond to do when requested.

Demurrer by each defendant sustained.

Bill dismissed with costs.

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

NATHAN HILTON, JR., *versus* BENJAMIN WALKER.

To assumpsit on account annexed, amounting to $122,99, the defendant duly filed in set-off an account amounting to $361,20. At the trial the jury returned a verdict "that there is a balance due the plaintiff of eighteen cents, that the defendant did promise," * * and that they "assess damages for the plaintiff in the sum of eighteen cents;" — *Held*, that the plaintiff is entitled to recover for costs no more than one-quarter of his damages.

ON EXCEPTIONS.

INDEBITATUS ASSUMPSIT on account annexed, amounting to $122,99. The defendant seasonably filed in set-off an account amounting to $361,20. The case had been heard by an auditor, who reported a balance due the plaintiff of thirty-two dollars. At the trial at *Nisi Prius*, testimony

was introduced tending to prove the items in both accounts. The jury returned the following verdict, to wit: —

"The jury find that there is a balance due the plaintiff of eighteen cents, and that the defendant did promise in manner and form as the plaintiff has declared against him, and assess damages for the plaintiff in the sum of eighteen cents."

Whereupon the plaintiff claimed full costs, to which the defendant objected. The presiding Judge directed judgment to be entered for the plaintiff for eighteen cents damages, and for costs no more than one-quarter of his damages; to which ruling the plaintiff alleged exceptions.

S. M. Harmon, in support of the exceptions, cited *Lawrence* v. *Ford*, 44 Maine, 427.

N. S. & F. J. Littlefield, for the defendant, cited R. S., c. 151, § 13; *Lawrence* v. *Ford*, 44 Maine, 427; *Thompson* v. *Thompson*, 31 Maine, 130; R. S., c. 82, § 98.

DANFORTH, J. — It is evident that the plaintiff, having obtained a verdict for less than twenty dollars, can recover only quarter costs, unless his case comes within the R. S., c. 82, § 98. The action is assumpsit. An account in set-off is filed, and the amount recovered is less than twenty dollars. In such cases, by the provisions of the statute, the plaintiff is entitled to full costs if the jury certify in their verdict that the damages were reduced as low as that sum "by reason of the amount allowed in set-off." The inference is inevitable that, without such certificate, he can recover only quarter costs. No such certificate is found in this case; but it is claimed that there is an equivalent, as the verdict shows that the sum found is for a balance due. It is somewhat difficult to see how this follows. The amount of the verdict may as well be a balance between two sums under twenty dollars, as if they, or either of them were over that sum. And by this verdict, we have no means by which we can determine whether the sum found due was reduced as low as twenty dollars "by reason of the amount

allowed in set-off." Nor do we get any additional light if we look into the other papers in the case, if we were legally permitted to do so. We have nothing from which we can form any conclusion as to the amount allowed either party, and hence we are entirely unable to say whether the plaintiff was allowed over or under twenty dollars.

But the statute requires that the verdict of the jury, where, as in this case, there is one, should make the fact of the reduction certain, and it is to appear from that and that alone. We are under no obligation, nor have we any authority, to reason upon the circumstances of the case and draw inferences as to what a jury might or might not do. The statute is peremptory. It is plain and easily followed, and we see no reason for departing from its provisions. In this case the verdict may be entirely true and yet the damages not reduced below twenty dollars "by reason of the amount allowed in set-off."

Thompson v. *Thompson*, 31 Maine, 130, settles the question involved in this case. *Exceptions overruled.**

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

BARROWS and TAPLEY, JJ., did not concur.

* The following case was argued at the same term.

ASAHEL W. FULLERTON *versus* PAULINA T. GRANT.

ON EXCEPTIONS.

INDEBITATUS ASSUMPSIT on account annexed, amounting to $205,58. The defendant seasonably filed in set-off an account amounting to $190,99. The jury returned a verdict in favor of the plaintiff, like the one in *Hilton* v. *Walker*, excepting the amount was $8,50. The Judge presiding at the trial of this case allowed full costs and the defendant alleged exceptions.

A. Merrill, in support of the exceptions.

Smith & Reed, for the plaintiff, contended that,

I. Full costs are always allowed "unless otherwise specially provided." R. S., c. 82, § 94; *Ellis* v. *Whittier*, 37 Maine, 548. It does not appear that this action should have been brought before a justice; so R. S., c. 82, § 97, is not applicable. *Hathorn* v. *Cate*, 5 Greenl., 74. If the jury have not certified in their verdict, § 98 does not. Statute has been changed since *Thompson* v *Thompson*, 31 Maine, 130.

ALBERT STEPHENSON, *in Eq.*, *versus* CHAS. F. DAVIS *& als.*

A bill in equity alleging that three of the four defendants were not inhabitants of this State, will, on demurrer, be dismissed as to them, when no service has been made on them.

And where the bill was inserted in a writ, and the officer returned a general attachment of all the defendants' right in real estate in the county, and also attached a certain schooner as their property; and subsequently, a copy of the bill, with the order of Court thereon, was served upon the fourth defendant who had removed from the State since the filing of the bill; whereupon he pleaded to the jurisdiction, alleging his removal, and that, at the time of the alleged attachments, he did not own and has not since owned any right in real estate in the county, or any interest in the schooner: — *Held*, that the plea be adjudged good, and the bill dismissed as to him.

BILL IN EQUITY, inserted in a writ, ordering an attachment "of the goods and estate of Charles F. Davis, of Deer Isle, county of Hancock, Alfred Richards, Samuel P. Adams and Alexander Hodgdon, all of Massachusetts," &c.

The sheriff of Hancock county made a return upon the writ, dated April 22, 1867, declaring therein that he had attached "all the right, title," &c., "of the within named Charles F. Davis, Alfred Richards, Samuel P. Adams and Alexander Hodgdon, in and to all and any real estate in said county of Hancock." Following this return was the usual certificate of the filing of an attested copy of the above return, &c., with the register of deeds for the county. The writ also bore the return of the sheriff of Cumberland

II. Jury obviously intended by "balance due" the substance of the statute certificate, and their intention, thus expressed, should govern.

III. If the verdict does not exclude the possibility that the case might have been brought before a justice, it leaves no reasonable doubt that the action was properly commenced, and that the spirit and intention of the law has been satisfied. See also *Lawrence* v. *Ford*, 44 Maine, 430; *Chesley* v. *Brown*, 11 Maine, 149.

Per Curiam. — The question raised in this case is settled in the decision made in *Hilton* v. *Walker*.

BARROWS and TAPLEY, JJ., dissented.

county, dated May 7, 1867, declaring that he had that day attached the schooner S. B. Harris, as the property of the within named defendants.

At the October term of the S. J. Court for Cumberland county, the Court ordered the complainant to "give notice to Charles F. Davis to appear before the Justices of said Court, to be holden at Portland on the second Tuesday of January, 1868, by serving him with an attested copy of the writ, bill, and order of Court," &c., which order was duly complied with Dec. 14, 1867, as appeared by return thereon, signed by an officer of Boston.

The pleadings appear in the opinion.

S. Wells, jr., for the respondents, cited Story's Eq. Jurisp., § 473; *Dehon* v. *Foster*, 4 Allen, 551; Story's Eq. Plead., §§ 489, 466, 467, *et seq.; Mitchell* v. *Bunch*, 2 Paige's Ch. R., 616; Story's Eq. Pl., §§ 712, 745.

W. L. Putnam, for the complainant, contended that want of jurisdiction may be taken by demurrer only where the bill shows a want of jurisdiction by reason of a want of equity in the complainant. Complainant's points upon the merits omitted.

DICKERSON, J.—Three of the defendants, Richards, Adams and Hodgdon, filed a demurrer to the bill, alleging for cause of demurrer, that the bill discloses no ground for relief against them in a court of equity; and further, that they are not, and were not at the time of filing said bill, as appears therein, residents of this State, and are not therefore subject to the jurisdiction of this Court as a court of equity.

As this Court has not general but limited jurisdiction in equity, it is necessary that the bill should show upon its face, that the Court has jurisdiction of the subject matter complained of. Whether the Court has such jurisdiction in a case, may be inquired into under a general or a special demurrer. *May* v. *Parker*, 12 Pick., 35; *Boston Water Power Co.* v. *Boston & Worcester Railroad Co.*, 16 Pick., 516.

The question arises in the case at bar, whether this doctrine applies also when the objection is taken to the bill, that it shows upon its face that the defendants are residents of another State, and therefore not subject to the jurisdiction of this Court, as a court of equity. We see no material distinction between the two cases, and can find none made by the authorities. In both cases the requisite of a demurrer, that the matter must be apparent from the bill, is complied with, and the question is one of jurisdiction; the prayer, also, is for a dismissal of the bill, and the bill must be dismissed, if the objection is sustained, alike in both cases. There seems to be no adequate reason why a plea which is founded upon matter *dehors* the bill should be resorted to in the latter and not in the former case. This conclusion is in harmony with the well settled doctrine in equity, that a demurrer lies, when the case as presented, is not within the jurisdiction of a court of equity. Story's Eq. Pl., §§ 467, 472.

Moreover, it is to be observed that, in general, the fact that the property is not within the jurisdiction, constitutes no bar to a proceeding in a court of equity, if the person is within the jurisdiction; for a court of equity acts upon the person; *æquitas agit in personam.* Jurisdiction over the persons of the defendants is placed upon the same footing as jurisdiction over the subject matter of the bill; and, it would seem, that advantage may be taken of the want of either by the same mode of proceeding. Story's Eq. Pl., § 489.

It will not be claimed that this Court has equity jurisdiction over persons residents in another State, unless such service of the process in equity has been made as will give it jurisdiction, or the defendants have waived the want of such service. No personal service was ever made upon either of the persons who demurred to the bill; nor has any service whatever been made upon them by order of Court. The only service made, was an attachment of their real and personal property.

Sec. 9, ch. 77, R. S., provides that a bill in equity may be inserted in a writ to be served as other writs. The bill in this case was thus inserted, but the service required in such case by § 18, c. 81, R. S., was not made; and, if this was an action at law against the three defendants in question, this Court would have no right to render any judgment against these persons or their property. Such a judgment, if rendered, would be void for want of jurisdiction in the Court. The case, as presented, is the same in substance as if no service whatever had been made of the bill, and it must be dismissed with respect to the demurring defendants with costs for them, but without prejudice to the plaintiff. Whether this Court would have had jurisdiction in equity over their persons, under the particular circumstances of this case, if the service required by statute had been made, need not now be decided. It will be time to decide that question when it is properly presented.

The other defendant, Davis, properly took advantage of a want of jurisdiction, by plea, as the ground relied upon was *dehors* the bill. Though the officer returned that he attached Davis' real and personal property, yet it appeared from his plea that he did not own any property in this State, as the return sets forth, and, that when the statute service was made upon him, he was a resident of the Commonwealth of Massachusetts. If this Court has equity jurisdiction over him, a party plaintiff has only to procure an officer to make a nominal attachment of property, and then get the service completed by order of Court, to give this Court jurisdiction in equity of any person who has been a resident of this State, though at the time he should be a resident of another State. It is clear that his plea must be adjudged good, and that the bill must be dismissed as to him, also, with costs.

In this view of the case, it becomes unnecessary to determine whether this Court, sitting as a court of equity,

would have jurisdiction of the subject matter of the bill, in a case properly presented.

Bill dismissed, with costs for the defendants, and without prejudice to the plaintiff.

KENT, BARROWS, DANFORTH and TAPLEY, JJ., concurred in the result.

CUMBERLAND & OXFORD CANAL CORPORATION *versus* CITY OF PORTLAND.

A suit to recover the penalty provided in Special Laws of 1821, c. 74, § 7,* cannot be maintained against a corporation by whose servants the acts therein prohibited were done.

DEBT to recover the penalty provided in Special Laws of 1821, c. 74, § 7,* for filling up two hundred yards of plaintiffs' canal near Vaughan's bridge, in Portland, &c.

F. O. J. Smith & C. P. Mattocks, for the plaintiffs, cited *Thayer* v. *Boston*, 19 Pick., 511; 3 Robinson's Practice, 337; *Clark* v. *Mayor of Washington*, 12 Wheat., 40; 2 Hill. on Torts, 472, and cases *infra;* Angell & Ames on Corp., § 386, and cases *infra*. Counsel also cited Angell & Ames on Corp., § 396, and notes, as pointing out distinction between case at bar and *State* v. *G. W. M. & Manuf. Co.*, 20 Maine, 41; R. S., c. 1, § 13.

Davis & Drummond, for the defendants, contended that the action was not maintainable against a corporation, and cited *Thayer* v. *Boston*, 19 Pick., 511; *Lowell* v. *Boston, &c., Railroad*, 23 Pick., 24; *Moore* v. *Fitchburg Railroad*, 4 Gray, 465; *Buttrick* v. *City of Lowell*, 1 Allen, 172; *State* v. *G. W. M. & Manuf. Co.*, 20 Maine, 41; *Mitchell* v. *Rockland*, 52 Maine, 118, 123, and cases *infra; Small*

* See opinion.

v. *Danville*, 51 Maine, 359; *Davis* v. *Bangor*, 42 Maine, 522.

APPLETON, C. J. — This is an action of debt to recover a penalty against the city of Portland.

The plaintiff corporation was created by the special Act of 1821, c. 74, passed March 15, 1821.

By § 7, it is enacted, — "That, if any person or persons shall wilfully, maliciously, or contrary to law, take, remove, break down, dig under, or otherwise injure any part of said canal or canals, or any work or works connected with or appertaining to the same, or any part thereof, such person or persons shall forfeit and pay to such corporation a sum not less than fifty dollars, nor more than five thousand dollars, according to the nature of the injury done and committed. And, such offender or offenders shall be further liable to indictment for such trespass or trespasses, and on conviction thereof, shall be sentenced to pay a fine to the use of the State, not more than one hundred dollars, nor less than twenty-five dollars."

The question presented, is whether a suit for the penalty given by this section can be maintained against a corporation, by whose servants the acts prohibited have been done.

The language of the section manifestly refers only to individuals — persons — offenders, those who could "wilfully, maliciously, or contrary to law," do the several acts forbidden. But malice and wilfulness cannot be predicated of a corporation, though they may well be of its members.

By recurring to the plaintiffs' Act of incorporation it is apparent that the Legislature kept in view the distinction between individuals and corporations, — and that when they intended there should be corporate liability, they so provided — §§ 3, 4, 5. When they did not so intend, they omitted, accordingly, to make such provision.

The statute imposes, as part of the same section, in addition to a penalty, a further punishment of such offender or offenders by indictment. Towns are undoubtedly liable to in-

dictment for the neglect of duties imposed by statute, when the statute so prescribes. But a town could not be indicted for assault and battery, though committed by one of its officers in accordance with its express vote. Whether a town might or might not be liable in trespass in such a case like the present, is a question not now presented for determination.

The object of the statute was to protect the corporation against illegal acts done wilfully and maliciously. The penalty is to be imposed upon those who do wilful and malicious injury to the corporation, and upon those alone. But towns cannot do an act wilfully and maliciously. If the Legislature had intended to make corporations liable to a penal action or indictment, the language of the Act of incorporation would have been more clearly indicative of such intention. It indicates the reverse.

Judgment for defendant.

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

ORLANDO LEIGHTON *versus* WILLIAM W. COLBY.

By virtue of R. S., c. 82, §§ 94 and 108, a plaintiff shall recover costs in an action of debt, by trustee process commenced in good faith, on a judgment on which an execution might have issued when such action was commenced, although the alleged trustee be discharged on motion, by reason of defective service on him.

ON EXCEPTIONS to the ruling of GODDARD, J., in the Superior Court.

DEBT, by trustee process, on a judgment recovered in the S. J. Court, Jan., 1868. The writ was dated July 13, 1868, on which the officer returned that he had "summoned the within named corporation as trustees, by leaving at the last and usual place of abode of H. P. Storer, treasurer of said corporation, a true and attested copy of this writ."

At the return term of the action, the alleged trustees appeared and seasonably moved to be discharged because H. P. Storer was not their treasurer when the writ was served upon him; whereupon they were discharged, and subsequently the defendant was defaulted, to be heard in costs.

At a hearing in costs, before the clerk, no costs were allowed the plaintiff, whereupon the plaintiff appealed to the Judge who overruled the decision of the clerk and allowed costs to the plaintiff; and to this ruling the defendant alleged exceptions.

Howard & Cleaves, for the defendant.

J. W. Symonds, for the plaintiff.

APPLETON, C. J. — By R. S., c. 82, § 94, "in all actions, the party prevailing shall recover costs, unless otherwise specially provided."

By § 108, "a plaintiff shall not be allowed costs in an action on a judgment of any tribunal, on which an execution could issue when such suit was commenced, except in trustee process." In other words, he shall recover costs in trustee process in an action on a judgment in which an execution might have issued when such suit was commenced. This was a trustee process, commenced in good faith and with no design to make unnecessary costs. The officer made a return of service on the trustee. The trustee appeared and was discharged. The general rule is to allow costs to the prevailing party. The defendant does not bring himself within the special exemption from cost. He certainly is not within the language, nor is he within the spirit of § 108. The exemption from costs is not made to depend upon whether the trustee is charged or not. The suit does not cease to be a trustee process, because the trustee is discharged. *Exceptions overruled.*

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

ZENAS PRATT *versus* JOHN DOW *& als.*

Where a judgment is recovered upon a negotiable promissory note after indorsement, in the name and with the consent of a nominal party without interest, the judgment creditor is merely the trustee of the equitable owner, and cannot control the judgment to the prejudice of his *cestui que trust* or to the oppression or injury of the debtor.

And payment of such a judgment to the satisfaction of the equitable owners thereof is a good defence to an action thereon, although some of the judgment debtors are the *cestuis que trust* for whose benefit the original suit was instituted.

ON EXCEPTIONS.

DEBT on a judgment recovered at the October term, 1862, of this Court for Cumberland county, in favor of the plaintiff against John Dow, Elisha Trowbridge, William Parker, Alvah Libbey and George Worcester, for $1068,67 debt, and $13,03 costs. The original action was upon a note dated Dec. 12, 1856, given by the defendants for the sum of $800 payable in four months to the order of John Dow, and by him indorsed in blank.

The defendants seasonably filed specifications of defence, pleaded *nil debet*, with a brief statement alleging substantially that the note upon which the judgment in suit was founded, was never the property of the plaintiff, and that he never had any legal interest therein, nor in the judgment; that the note was really the property of some of these defendants, and that suit was brought thereon in the name of the plaintiff, with his full knowledge and consent; and that said judgment has long since been paid and satisfied.

The plaintiff read an attested copy of the record of the judgment declared on.

The defendants Parker and Libbey, subject to the plaintiff's objection, testified substantially, — that the defendants were directors of the Cumberland Brick Manufacturing Company; that they made and sold the note in the market to raise money for the company; that when it became due

Dow and Worcester did not pay any part of it, but that Trowbridge paid $100, and the witnesses an equal proportion of the remainder of the note and took it up; that witnesses caused the original suit to be commenced and prosecuted to judgment, in order to make the other defendants contribute; that the plaintiff consented to have the suit brought in his name, but had no interest therein; and that since the rendition of the judgment it had been equalized and settled up between Libbey, Parker, Trowbridge and Worcester, Dow being unable to pay anything.

The testimony of the plaintiff, called as a witness, was somewhat in conflict with the foregoing.

It also appeared that another note, sued in the name of Pratt, against the C. B. M. Company and these defendants, was the property of one Carlisle; and that said Libbey, Parker, Trowbridge and Worcester satisfied the judgment.

The plaintiff requested the presiding Judge to give twelve instructions; all of which he gave except the following:—

3. That it is not competent for the defendants to prove, and the jury are not authorized to find that the note on which said judgment was founded was the property of said Parker, Libbey and Worcester, nor that said suit was brought for their benefit, nor that they were the owners of said judgment, because the record is conclusive evidence that each and all the defendants owed the whole amount of said judgment. This was not given.

4. That it is not competent for the defendants to prove, and the jury are not authorized to find, that the note upon which said judgment was founded was really the property of some of these defendants, because the record is conclusive evidence, that each and all the defendants owed the whole amount of said judgment at the time it was rendered. This was not given.

5. That it is not competent for these defendants to prove, and the jury are not authorized to find, that the note upon which said judgment was founded was never the property of said plaintiff, and that the plaintiff never had any inter-

est therein, nor in said judgment, unless they allege in their brief statement, and prove what person or persons did have the property in said note and in said judgment. This was not given.

7. That it is not competent for the defendants to prove, and the jury are not authorized to find, that in the prosecution of said suit, and in the recovery of said judgment, said plaintiff was a mere nominal party, because they have not set forth any other person or persons, as the real parties in interest in the prosecution of said suit and recovery of said judgment, except that some of the defendants were the parties in interest, which they are not permitted by law to do. This was not given.

11. That if the jury find that some of these defendants paid a portion or all of the amount of said judgment to some of the other defendants, such payment is not to be regarded as made in satisfaction of said judgment.

Upon the whole case the Judge instructed the jury as follows, and requested them to answer three questions, which he proposed to them in writing.

The Court instructed the jury that, if Pratt authorized the suit on the note to be brought in his name, he having no interest whatever in the same, and the judgment thereon had been settled and paid by the parties defendant to the parties interested in and owning the demand, and the same had been fully adjusted and paid, to find a verdict for the defendants.

Was the plaintiff the owner of the note upon which the judgment in suit was rendered, by purchase, assignment, or in any other mode?

Answer. No.

Has the judgment in suit been paid and satisfied by arrangement between those who were the owners of the same, and those who were the debtors?

Answer. Yes.

Did the plaintiff consent that the suit might be brought

in his name for the benefit of those of the defendants by whom the note had been paid?

Answer. Yes.

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

Jabez C. Woodman, for the plaintiff.

Shepley & Strout, and *J. D. & F. Fessenden,* for the defendants.

BARROWS, J.—It appears by the verdict and special findings in this case, taken in connection with the instructions upon which they were based, that the plaintiff was not the owner of the note upon which the judgment here sued was rendered; that he had no interest therein, but that he consented that the original suit might be brought upon it in his name for the benefit of some of the defendants, makers of the note, by whom it had been paid; and, that the judgment in suit here has since its rendition been fully adjusted, paid and satisfied by arrangement between those who were the equitable owners of it and those who were the debtors.

In other words, some of the makers of a note, having paid it, brought suit upon it in the plaintiff's name, with his consent, against all the makers, for the purpose of effecting an adjustment among themselves, and, since the rendition of the judgment, that object has been accomplished. Those who were the equitable owners of the judgment (if anybody could be) acknowledge and testify that it has been satisfied and paid; yet the nominal plaintiff insists that they are precluded upon sound legal principles from showing these facts in defence, and that he is entitled to recover against all of them for his own benefit.

It is not perceived that the assignment to William H. Baxter, which was made without consideration, can give to his notifications to the attorney of record in the original suit, and some of the defendants, any other or different effect than like notifications from this plaintiff would have.

It does not appear whether these notices were given before or after the adjustment between the parties in interest; nor is it material, for, if the plaintiff is entitled to recover at all, it must be by virtue of some principle of estoppel which would be equally effective if no such notices had been given.

The main positions relied upon by the plaintiff are, in brief, that the record of the judgment which he produces is, in and of itself, conclusive evidence that each and all of the defendants owed the whole amount thereof at the time of its rendition; that this cannot be now contradicted and the judgment impeached, by proof that some of them had previously thereto paid the note upon which it was rendered, as co-promisors thereon, and were in fact the equitable owners of the judgment, and though nominally debtors, were really the creditors in interest therein, — that such facts and proof would have defeated the original action, and that nothing can or ought to be permitted to defeat an action on a judgment which would have constituted a defence to the original suit in which that judgment was rendered.

These positions are elaborated, enlarged upon and fortified by the abundant research which is eminently characteristic of the plaintiff's counsel. It cannot be doubted that he has succeeded in demonstrating that, even though his client's cause is found utterly wanting in equitable merits and its successful maintenance would operate something very near akin to absolute fraud, the position of the defendants is, in view of the decided cases, a somewhat critical and equivocal one; made so by the ill-advised attempt of some of them to accomplish by an indirection what ought to have been sought by straight forward suits in their own names as plaintiffs.

We have no desire nor design to abate one iota from the validity and conclusiveness of judgments. We concur fully in the doctrine of the numerous cases cited for plaintiff, where it is held that, a domestic judgment of a court of record of general jurisdiction, proceeding according to the

course of the common law, cannot be impeached by the parties to it, where a want of jurisdiction is not apparent upon the record, while it remains not annulled nor reversed. *Granger, Adm'r*, v. *Clark*, 22 Maine, 128.

Is it consistent with this doctrine to permit a judgment debtor, upon his own motion, to prove that, instead of owing the amount of the judgment at the time of its rendition, he was, in fact, the equitable owner of it, and that he caused the judgment to be entered up against himself, with others, in the name of the judgment creditor, but for his own benefit and behoof?

Such a state of things is apparently in conflict with the idea that the record is conclusive evidence that each and all of the defendants owed the whole amount of the judgment at the time it was rendered, and that the record is to be considered as importing absolute verity.

Nor do we feel disposed to break down the well settled general rule, that, in an action of debt on a judgment, no defence shall be allowed to prevail which existed prior to the judgment and might have been made in the original suit. The rule is well grounded upon sound and sufficient reasons, and well supported by authority. *Mitchell* v. *Osgood* 4 Maine, 133; *Noble* v. *Merrill*, 48 Maine, 140.

But the defence in this case is not that the note in the original suit had been paid by some of those who were ultimately liable upon it and was therefore *functus officio*, and could not properly form the basis of a judgment. Were that the ground of this defence the case would fall within the rule last referred to. But the defence relied on here, is payment made since the rendition of the judgment in suit to the satisfaction of the equitable owners of it.

In view of the decisions which authorize the maintenance of a suit upon a negotiable promissory note, after it has been indorsed in the name of one who has no interest in it but consents that suit may be brought in his name for the benefit of the real party in interest whose rights in all these cases, (as well as those of the debtor,) have been sedu-

lously guarded, we cannot doubt that such a defence would be admissible and available in all cases where payment had been made to any third party who might be proved to be the equitable owner of the judgment. The nominal plaintiff or judgment creditor, in such cases, is merely the trustee of the real owner, and cannot be permitted to control the judgment to the prejudice of his *cestui que trust*, or to the oppression or injury of the debtor. Perhaps it might better have comported with the absolute verity of judgments if cases of this description had never been sustained; but they are now too numerous to be disregarded or to permit their propriety to be questioned. *Demuth* v. *Cutler*, 50 Maine, 298.

It remains to be determined whether the same defence shall be counted available where some of the judgment debtors are the *cestuis que trust*, for whose benefit the original suit was instituted.

It may be conceded that, if this suit were against Libbey and Parker only, (the parties who caused this judgment to be entered up against themselves and their co-promisors,) as surviving debtors, it would not be in their mouths to assert that they occupied the anomalous position of being both debtors and creditors in the same judgment. But, after careful consideration, we are not satisfied that there is any positive rule of law or evidence which requires us to deprive the other defendants of a defence which would have been valid beyond question, and subject to no imputation that it was an impeachment of a judgment, if their payments had been made to any equitable owner of the judgment who was not jointly liable with themselves thereon. It is not reasonable to suppose that they were cognizant of the misuse of legal process by Libbey and Parker; they probably knew of no possible defence which they could make to the original suit. Since the rendition of the judgment they have paid what they were required to pay by those who had the control of the execution.

The suit on the judgment is defeated, not because it is

made to appear that the judgment ought not to have been rendered and is thus impeached, but because it has been paid to the satisfaction of the real creditors.

If the incidental proof that some of the judgment debtors were the real creditors is to be deemed an impeachment of the judgment, the case must be set down as an exception to the general rule forbidding such impeachment.

A debt of record constitutes a contract of the highest nature, being established by the sentence of a court of judicature. 2 Blac. Com., b. 2, c. 30, p. 465. It follows that the plaintiff, in actions of this description, must recover against all or none of the defendants who are jointly sued. Hence, in this case, the defence which it is competent for some of the defendants to make, must enure to the benefit of Parker and Libbey. The instructions of the presiding Judge, as well as his refusals to instruct, were in accordance with the views herein before expressed.

Exceptions overruled.—Judgment on the verdict.

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

STATE OF MAINE *versus* WILLIAM H. KALER.

The substantive offence described in the Public Laws of 1858, c. 33, § 12, is complete whenever there is a keeping of intoxicating liquors with intent that an unlawful sale thereof shall be made in this State by any person.

Section 14 does not require that the complaint shall allege by whom the intended sale is to be made.

If a complaint does contain such an allegation and there be a variance between the allegation and the proof of the particular person by whom the defendant intended the sale to be made, it will be an immaterial one.

Section 14 of c. 33 of Public Laws of 1858, as amended by the last clause of § 1 of c. 131 of the Public Laws of 1867, added nothing to the offence described in § 12.

State *v.* Kaler.

On Exceptions.

Complaint for search and seizure, under c. 33 of the Public Laws of 1858, which came to this Court by appeal from the municipal court of the city of Portland.

So much of the complaint as is essential, was as follows: That, on the eighth day of August, in said year, at said Portland, intoxicating liquors were, and still are kept and deposited by Daniel A. Meehan and William H. Kaler, of Portland, in said county, in the store occupied by them on northerly side of Fore street, and is the second store easterly from Cross street, said Meehan and Kaler not being then and there authorized by law to sell said liquors within said Portland, and that said liquors then and there were, and now are intended for sale in this State, by said Meehan and Kaler, in violation of law, against the peace of the State, and contrary to the form of the statute in such case made and provided.

In behalf of the defendant it appeared, and it was not disputed by the State, that the liquors were placed by Meehan in the rear of Kaler's shop, where they were found, with Kaler's consent; that Meehan was the owner of the liquors, and that Kaler had no interest in them nor in the sale of them, nor were any of them sold on Kaler's premises. Kaler was in the crockery and old furniture business; and there was evidence that Kaler knew that Meehan intended the liquors for unlawful sale. The defendant testified that Meehan was in the business of selling, and that he used to come there occasionally and fill kegs, jugs and demijohns.

Thereupon, the presiding Judge instructed the jury, among other things, — that if defendant Kaler kept the liquors in his store, knowing that Meehan was making unlawful sale of them, and intending to facilitate such unlawful sale by Meehan, or to enable Meehan to conduct the business with greater security, he would be liable under this complaint, though he had no interest in the liquors and no intention of selling them himself.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

W. L. Putnam, for the defendant.

This case depends on statute 1858, c. 33, § 12, and § 14, clauses 1 and 3, and on statute 1867, c. 131, § 1.

Section 12 of the first statute prohibits keeping with the intent that the same shall be sold by any person; but that provision seems to have exhausted itself in the next section, where it is provided that liquors kept as in the 12th section shall be forfeited. Section 14 does not contain apt words to punish any person but the seller himself, or the expected seller; and so the Legislature considered when it passed the above statute of 1867.

But under the Law as amended in 1867, clearly, a person keeping liquors with the intent that they shall be sold by some other person or to facilitate such other person in the sale, is liable to punishment.

The only question is whether apt words have been used in the complaint to hold defendant, it appearing that he had no intention of selling himself.

In the clause of the complaint, "intended for sale by Meehan and Kaler," is the preposition "by" governed by the word "intended" purely and simply, or does the clause mean that Kaler and Meehan were the expected sellers of the liquors?

Sandwiching in the names of Meehan and Kaler between the word "sale" and the words "violation of the law," makes it evident that the sale was to be by them; otherwise their names would not have thus interposed between the word "sale" and those other words which were necessary to describe its unlawful character; and the expression would have been, "intended by said Meehan and Kaler for unlawful sale by some other person," &c., or "with the intent that they should be sold unlawfully by some other person," &c.

Keeping liquors with intent to sell one's self, and keeping

liquors with the intent that they shall be sold by some other person, may be *equivalent* offences and liable to the same punishment; but they are not the *same* offences, any more than principals and accessaries in murder are the same offenders. In either case appropriate language is requisite to express the different circumstances of the offences. The words used in this complaint are those usual and apt to express that the person complained against is the intended seller; and therefore can hardly be apt words to cover offences under the other branch of the statute.

The words used are nearly in the same order as those used in § 14, clause 3; to which the Legislature in 1867, before this complaint was made, deemed it necessary to supply other alternative words to express the offence proved here.

It is plain, then, that the words "by said Meehan and Kaler" cannot be referred to the word "intended" alone, but limit the word "sale." Possibly it is not necessary to allege in the complaint the name of the person by whom the liquors are to be sold; but it does not therefore follow that Meehan's and Kaler's names can be dropped from this allegation of the complaint, because dropping their names from this allegation would leave this complaint in the condition of that in *State* v. *Leonard*, 47 Maine, 462. Perhaps, too, this complaint would have been sufficient if the words had simply been transposed, so as to read "intended by said Meehan and Kaler for sale in this State in violation of law;" but I have shown that that is not the meaning of what is alleged.

By its proper and natural construction, the complaint charges Kaler as being the intended seller of the liquors seized; and this not being proved, the complaint falls.

Frye, Attorney Gen'l, contra.

Barrows, J. — In § 12, c. 33, Laws of 1858, the offence prohibited is the depositing or having in one's possession intoxicating liquors with the intent to sell them in this State

in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale thereof. It is not necessary that the keeper shall intend to make the unlawful sale himself. The offence is complete where there is a keeping with the intent that an unlawful sale shall be made in this State by any person, or with the intent to aid or assist in such unlawful sale. And this keeping is a substantive offence; not (as the ingenious counsel for defendant would have it,) a matter of principal and accessary depending upon the question whether there is a personal intention to sell or only a design to aid some one else in the unlawful sale. The keeper is a principal offender; and the offence of keeping with such intent is the same, whether the sale is to be made by the keeper or some one else. Accordingly, in § 14, which prescribes the course of proceeding and the essentials of the complaint, it is not required that the complaint shall state by whom the intended sale is to be made,—but only that they are kept and deposited in some place in this State by some person or persons "and that said liquors are intended for sale within the State in violation of law." The name of the person so keeping the liquors shall be stated in the complaint, and the officer serving the search warrant, if he find such liquors, shall arrest him and bring him before the magistrate for trial. The original section then proceeded as follows: —"if, upon trial, the Court, upon the evidence adduced, shall be of opinion that the liquors were so, as aforesaid, kept, deposited and intended for unlawful sale by the person or persons named in said complaint, he or they shall be found guilty thereof," &c.

It might be argued that this clause, on account of the collocation of the words, should be so construed as to authorize a conviction only when it appeared that the intended sale was to be made by the person or persons named in the complaint. Such a construction, however, would not fulfil the design of the statute, and out of abundant, and as it would seem needless precaution, it was therefore amended

in 1867, by inserting after the word "complaint," in the clause last quoted, the words "or by any other person or persons with his or their knowledge or consent." But this adds nothing to the definition of the offence as contained in § 12. It was complete without this. Now, in the case at bar, it did appear upon the trial, and the jury were required by the instructions to find, "upon the evidence adduced," that the respondent Kaler kept the liquors in his store, knowing that Meehan was making unlawful sale of them and intending to facilitate such unlawful sale by Meehan. This includes all the elements of the offence as described, not only in § 12, but in that clause of § 14, as amended in 1867, where the penalty is imposed.

But it is argued from the order in which the words stand, that the allegation "that said liquors then and there were, and now are intended for sale in this State by said Meehan and Kaler, in violation of law," conveys a charge that Meehan and Kaler were the expected sellers of the liquors. What if that idea is included? And what if, as to Kaler, the evidence does not sustain it? There is a direct and plain charge against Kaler as well as against the other defendant, of a keeping of intoxicating liquors and an intention that the same shall be unlawfully sold in this State by somebody, — (Meehan and Kaler, to wit,) — but by whom sale was to be made it was unnecessary to allege, nor if alleged, to prove as alleged; for that portion of the allegation is neither essential to nor descriptive of the offence. Kaler committed the offence if he had the liquors in his keeping, intending that the same should be sold within the State, in violation of law by anybody, — himself or another, — it mattered not which, — so that a variance in that respect between the allegation and the proof vitiates nothing. All the necessities of legal identity between the charge and the proof are fulfilled when the essential allegations are proved as laid. Thus, where an indictment alleged the commission of a robbery in a dwellinghouse of a person named, a variance as to the owner's name was held immaterial, be-

cause it was not essential to the crime of robbery that it should have been committed in a dwellinghouse. *Pye's case*, East's Pleas of the Crown, 785. See also *U. S.* v. *Howard*, 3 Sumner, 12.

It is sufficient, in cases of this sort, if there be allegation and proof against the defendant of a keeping of intoxicating liquors, with an intention that the same shall be sold within this State in violation of law; and a variance between the allegation and the proof, as to the particular person by whom the defendant intends the sale shall be made, is an immaterial variance. *Exceptions overruled.*

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

JOSEPH RUSSELL *& al. versus* JOHN B. BROWN.

Under our statute, in the trial upon a writ of entry, on the general issue, the rendition of a general verdict in favor of the demandant entitles him to judgment for such part of the demanded premises as has not been disclaimed.

ON MOTION to set aside a verdict as being against law, and against evidence and responsive to the issue.

WRIT OF ENTRY. Plea, general issue with a disclaimer of a portion of the demanded premises.

The verdict was that the defendant did disseize the plaintiffs in manner and form as the plaintiffs have declared against him.

The following questions were submitted to the jury:—

1. Is or not the line claimed by the defendant the same on the face of the earth, with the line of the old fence between the Dyer and Winslow lots?

No.

2. If not, how far westerly of said fence line does it lie?

Nine inches west.

Upon the affirmation of the verdict, one of the jurors, while assenting to the general verdict, and the answer to the first question, added: — I dissent from the finding on the second question, if it holds that Brown has come nine inches on to the plaintiffs, on the back of his line.

I find that he is nine inches on the plaintiffs, on the old line of Congress street.

J. & E. M. Rand, for the defendant, contended, *inter alia*, —

That the verdict was defective and not responsive to the issue presented by the pleadings. That the special findings were no part of the verdict, and, if they were, the most material answer was not concurred in; and that the defect could not be cured.

S. C. Strout & Gage, for the plaintiffs.

Barrows, J. — The parties own adjoining lots on Congress street; the tenant's lot lying next easterly of the demandants', which is on the north-easterly corner of Oak and Congress streets. The demandants in their writ set forth the boundaries of the demanded premises as follows: — "Beginning at the corner made by the intersection of Oak street with said Congress street, and on the easterly side of said Oak street, thence north-easterly by said Congress street twenty-three feet, thence north thirty-two and a half degrees west one hundred and six feet, thence south-westerly to Oak street, thence southerly by said Oak street to first mentioned bounds." The tenant disclaiming the residue, pleads "as to so much of the demanded premises as lies east of a line drawn four inches westerly of and parallel to defendant's westerly brick wall, he did not disseize," &c.

The pleadings thus made up, in conformity with the provisions of R. S., c. 104, § 6, present but one question, and that is, which party has the better title to the strip of land lying between the lines thus claimed by the demandants and the tenant respectively?

Under § 8 of the same chapter, if, in the trial on the general issue, the demandant proves that he is entitled to such estate in the premises as he has alleged, and had a right of entry therein when he commenced his action, he shall recover the premises unless the tenant proves a better title in himself. Where there is a statement of the part claimed, and a disclaimer of the residue under § 6, the demandant, if entitled, is to recover judgment for no more than such part.

In the trial upon a writ of entry, under our statute, on the general issue, the rendition of a general verdict in favor of the demandant entitles him (where no cause is found to disturb the verdict) to judgment for the demanded premises, as described in his writ when no part has been disclaimed; where some portion has been disclaimed, to judgment for the remainder.

It is not perceived wherein this verdict is defective or not responsive to the issue presented by the pleadings, or that there can be any difficulty in rendering judgment upon it for the precise parcel which the demandants are entitled to recover, unless the motion to set it aside as against evidence ought to prevail.

The questions proposed by the presiding Judge to the jury were apparently designed to draw their minds more directly to the matter in controversy, and to some portions of the testimony deemed important in ascertaining the rights of the parties—perhaps, also, to test the accuracy of their comprehension of the issue and the evidence; but, it is rightly claimed by counsel that their answers form no part of the verdict. The answer to the first question, however, which was fully assented to by all the jurors is perfectly and exactly consistent with the general verdict, for it affirms the title of the demandants to twenty-three feet on Congress street, which was a vital question in the case. The surveyor testifies that measuring twenty-three feet from the monument in the old line of the street, cuts into the stone column of defendant's building nine inches. It does not appear that the

final qualification made by one of the jurors to the second answer was of such a character as to affect, in any manner, the conclusions to be drawn as to the rights of either party upon the issue presented. It was not essential for the jury to ascertain how far the tenant had actually encroached on the demandants on the rear of the line. To render their general verdict, they must have agreed in finding the boundary line, as described by the demandants, to be the true division line between the lots. The pleadings then show what lands the demandants are entitled to recover if the verdict is sustained.

The answers to these questions were not necessary to cure any defect in the verdict, for, when applied to the pleadings, the general verdict determines the issue with sufficient accuracy, as we have already seen.

The right of the Court to submit special interrogatories to the jury is not questioned; the practice has long existed in this State, and its propriety is asserted in *Merriam* v. *Mitchell*, 13 Maine, 439, and *Gordon* v. *Wilkins*, 20 Maine, 138. It may, perhaps, be doubted whether they do not as often tend to embarrass as to elucidate a case, and the right should be carefully and sparingly exercised.

It remains to be determined whether the motion to set aside the verdict as against evidence and the weight of evidence is well founded. If the deeds and documentary evidence and surveys introduced by the parties were the only evidence tending to establish the line, perhaps it might fairly be said that the demandants had not proved themselves entitled to twenty-three feet front on Congress street, measuring from the corner of Oak street; though the fact that the tenant, conceding to the demandants the twenty-three feet which they claim, and giving to Tolman's court its precise width, would have a slight excess beyond what his deed calls for, is somewhat persuasive evidence that way. But it appears that, for more than forty years previous to the commencement of this suit, there has been standing on the demandants' lot a permanent wooden building, which, to this

day, occupies the same foundation which it has had during all that time, along side of and near to a division fence, which, from sometime prior to 1828 up to 1864 or 1865, was maintained upon what both parties claim to have been the true line. One of the deeds introduced by the defendant makes this fence the boundary. All the witnesses on both sides, who testify as to the condition of things there prior to the commencement of the excavation on the tenant's lot, testify that there was a space between that fence and Russell's building, stating its width by estimation and memory. There is testimony on the part of the demandants, that boards were put up between the building and the fence to prevent intrusion; that workmen went through there with their ladders when employed in painting the Russell building, and these witnesses make the distance from the building to the fence somewhere from eighteen inches to two feet. Hezekiah Winslow, who is the tenant's warrantor, being called as a witness by him, states the distance at the front, between Russell's building and fence post to have been from eight to fourteen inches, and post from four to eight inches through. The fence was boarded on the east side of the posts, which they seem to have mutually regarded as marking the line between the lots; and, accordingly, the tenant offered testimony tending to show that the general face of the westerly brick wall of his block was four inches easterly of a line drawn on the east side of these posts, his pilasters and projections only coming out to the line, and that, in blasting on his lot for the foundations of his westerly wall, care was taken to replace exactly such of the remains of the old posts as fell out, and that they could be seen at the time of trial. But it appears, from the testimony of defendant's witness Frost, that the pilaster on Brown's block comes against the Russell building at the front — that it could not be run up without cutting off the projection of the Russell building at the eaves, or building round it, which was accordingly done.

Measurements at various points, (the buildings not being

exactly parallel,) show that the space between the old building on the demandants' lot, and the division line, has disappeared in a manner that cannot be satisfactorily explained by the change of finish or inclination of the building.

The question was one of pure fact, and the testimony, to some extent, conflicting. The jury viewed the premises. The results of their observation are not and cannot be before us. They decided in favor of the demandants, under instructions of which the defendant makes no complaint. Upon such testimony, and under such circumstances, it is impossible for us to say that their decision was clearly erroneous. Indeed, upon a careful review of the case, we think the demandants may be said to have fairly established their right to recover in this action a narrow strip of land bounded as follows: — Beginning on the northerly side of Congress street, at a point twenty-three feet easterly from the easterly corner made by its intersection with Oak street, thence north thirty-two and a half degrees west one hundred and six feet, thence south-westerly to a point four inches westerly of the westerly brick wall of Brown's block, thence by a line four inches westerly of and parallel to said westerly brick wall to said Congress street, thence by said Congress street to the point begun at.

Motion overruled. — Judgment on the verdict.

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

J. N. TILLOCK *versus* JOHN WEBB.

The consideration of a note given for an injury done, on the "Lord's day," to a horse and carriage hired on that day for any purpose other than that of "necessity or charity," is unlawful.

Where the contract of hire of a horse and carriage on the "Lord's day" was indefinite as to time, distance and use, the carrying of a young lady home who had been attending a religious meeting during the day, will not render the contract legal.

ON EXCEPTIONS to the ruling of GODDARD, J., in the Superior Court.

ASSUMPSIT on a note for $48, given by the defendant to the plaintiff, dated April 13, 1867. Plea, general issue, with brief statement denying any consideration, and also alleging that the consideration was an unlawful one.

The case was tried by the Judge (without the intervention of a jury) whose decision was subject to exceptions in matters of law.

The Judge found, as matter of fact, that the defendant, at Bucksport, at 4½ o'clock on one Sunday afternoon in July, 1865, hired a horse and carriage of the plaintiff, who was a stable keeper, and took from the house where the defendant was living, two young ladies, one of whom had come from church about an hour previous, whither she had walked that day from her home, two or three miles distant; that he drove about one-half a mile beyond her house, and while in the act of turning the horse and carriage for the purpose of going back to leave her at her house, upset and badly injured the buggy, and frightened and more or less thereby injured the horse for stable use; that, after tying together the broken buggy, the defendant undertook to lead the horse back, but the horse got away from him and ran home with the buggy; that the plaintiff had the carriage repaired at an expense of $60; that the defendant paid the plaintiff $30, and gave the note in suit for the balance of damages claimed.

57 Me 424

The Judge ruled that the facts disclosed a sufficient consideration for the note and that the consideration was lawful. To which ruling the defendant alleged exceptions.

Thos. B. Reed, for the plaintiff, cited *Morton* v. *Gloster*, 46 Maine, 520; *Woodman* v. *Hubbard*, 5 Foster, 67.

J. O'Donnell, for the defendant.

APPLETON, C. J.—The defendant hired of the plaintiff and his partner a horse and wagon to ride on Sunday. The hiring was not for any purpose of necessity or charity. Being illegal between the parties, it is not made legal because the hirer did a kind act by conveying a young lady home, who had been "to meeting" during the day. The contract, so far as disclosed, was indefinite as to time, distance and use, and not being for any purpose of necessity or charity, was one which the law will not enforce, nor will it give compensation for its violation. *Way* v. *Foster*, 1 Allen, 408; *Morton* v. *Gloster*, 46 Maine, 520.

If the defendant injured the horse and wagon by his careless or negligent driving, the remedy for the bailors would be against him for breach of his duty as bailee, — that is, for a breach of the duties arising from and under the contract of bailment. But, as that contract was against the provisions of the statute, no action could have been maintained upon it.

The only consideration for the note is the liability of the defendant under a contract prohibited by law. But this cannot be regarded as a legal consideration. The rights of the parties remain as if no note had been given. The original contract being void was not susceptible of ratification. *Day* v. *McAllister*, 15 Gray, 433.

In *Morton* v. *Gloster*, 46 Maine, 520, and in *Woodman* v. *Hubbard*, 5 Foster, 520, the bailee was guilty of a conversion of the property bailed, and was held liable therefor in trover. Not so here. The defendant is not proved to have kept the horse and wagon longer or to have driven

further than he agreed to. He is not shown to have been guilty of any act of conversion. *Exceptions sustained.*

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

ELBRIDGE W. ROBINSON *versus* WARREN WEEKS.

The contracts of infants are,

1. Binding, when for necessaries at fair and just rates;
2. Void, when manifestly and necessarily prejudicial;
3. Voidable, including all their agreements, which may be beneficial and are not for necessaries, until fully executed on both sides; and all such executed contracts where the other party can be placed substantially *in statu quo*.

To enable him to recover back money paid under a voidable contract, a rescinding minor need not offer to return mere receipts taken therefor.

Voidable contracts may be rescinded by a minor, either during his minority, or within a reasonable time after he has attained his majority.

ON REPORT.

ASSUMPSIT to recover back the sum of $200, paid by the plaintiff to the defendant, for one share in the Mt. Vernon Land and Petroleum Company, together with the interest on the same.

It appeared in evidence that the plaintiff was born Oct. 31, 1845; that, on March 3, 1866, the defendant solicited and induced the plaintiff to purchase one share of the stock of the Mt. V. L. & P. Co., for the sum of $200; that he then paid the defendant $100 and took his receipt for the same, and, on the 18th day of the following April he, by the defendant's direction, paid the other $100 to eon Joshua Blake, and took Blake's receipt therefor; that he never received any certificate of stock; that the plaintiff's guardian died May 5, 1865; that, on Nov. 12, 1866, the plaintiff repudiated the contract, and demanded the money and interest of the defendant.

It also appeared that Blake paid the $100 received of the plaintiff to the wife of the defendant, who held the funds and transacted all the business of the company, and was then in Canada attending to its affairs.

The receipts taken for the money paid were as follows and were not surrendered before the commencement of this action.

"Mt. Vernon, March 3, 1866.—Rec'd of E. W. Robinson $100 for one-half of his share in the Mt. Vernon Land and Petroleum Company. Warren Weeks."

"Mt. Vernon, April 18, 1866.—Rec'd of E. W. Robinson $100 for the last half of his share in the Mt. Vernon Land and Petroleum Company.

Joshua Blake, *Treasurer of said company.*"

The case was submitted to the full Court for such decision as the law and evidence required.

E. Kempton, for the plaintiff.

S. Belcher, for the defendant.

BARROWS, J.—If the receipts which the defendant and his agent gave for the money, which the plaintiff seeks to recover in this action, could be considered as certificates of petroleum stock, the action could not be maintained; for, assuredly, if an infant has received anything which may have an intrinsic or a market value, by virtue of the contract which he claims to rescind, he must return it if it is in existence and within his control, after he becomes of age, before he can be permitted to reclaim the money paid for it. It is unnecessary in this case to define more carefully or precisely the limitations of this obligation on the part of a rescinding minor to return what he has received under the contract, or to consider further the effect of failure or inability to return anything which has such a value; for the plaintiff was of age and had the receipts in his possession when he claimed to rescind but did not offer to return them.

But these receipts were of no appreciable value to any one except to the plaintiff, as evidence of the fact that he

had paid his money for the defendant's promise of a share in the Mt. Vernon Land and Petroleum Company. He never received any certificate of stock. The receipts gave him no legal interest in the company property if there was any. At most, they gave him only a right to call upon the defendant for a share of the stock; and that right he renounced in writing as soon as he became of age, coupling with his renunciation an offer to assign over to defendant any interest which he might have in the company. The return of the scraps of paper on which the receipts were written, was, under such circumstances, unnecessary.

The plaintiff was a minor when he made the agreement for the stock and paid the money. Making known his election to rescind the agreement and reclaim his money within a fortnight after he became of age, and before he had received anything by way of consideration except these papers, he demands his money and brings this suit. Is there any good reason, upon principle or authority, why he should not prevail?

The defendant's position receives countenance from some passages in the text books.

In Chitty on Contracts, (6th Am. Ed.,) 154, we find the following: — "An infant's right to elect, whether he will avoid or confirm a contract entered into by him during his infancy, does not necessarily entitle him to recover back money which he has paid thereon. It is indeed a general rule that an infant cannot recover back money paid by him, even upon a contract which by reason of his infancy he is not bound to complete, there being no imposition."

And PARSONS lays it down very broadly thus: — "If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover the money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." Parsons on Contracts, vol. 1, p. 268, (Ed. of 1853.)

The origin of this doctrine is to be found in a dictum of

Lord MANSFIELD, in the celebrated case of *The Earl of Buckingham* v. *Drury*, 2 Eden, 60. One of the questions in that case was whether an infant could by contract bar her dower. When the case came before the House of Lords, upon appeal, the opinion of Lord NORTHINGTON, that the statute applied only to adults, was reversed, and Lord MANSFIELD, in delivering his opinion, said:—"If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." This *dictum* was quoted to support the decision in *Holmes* v. *Blogg*, 8 Taunt., 508. But it was uncalled for in that case, the true doctrine of which is that a minor cannot recover money paid on a valuable consideration, which he has partially enjoyed, when he cannot put the other party in the same position as before; and, in *Corpe* v. *Overton*, 10 Bingham, 252, while the decision in *Holmes* v. *Blogg* was sustained, the *dictum* of Lord MANSFIELD, and "the strong expressions" in the latter case, were reviewed and substantially overruled, and it was held that plaintiff might recover back, in an action for money had and received, a sum which, while an infant, he had paid in advance towards the purchase of a share in defendant's trade, to be forfeited if the purchase was not completed, when it appeared that he, on arriving at the age of twenty-one years, had refused to complete the purchase.

The *dicta* of the learned Judges, in *The Earl of Buckingham* v. *Drury*, and *Holmes* v. *Blogg*, *ubi supra*, seem to have been followed in *M'Coy* v. *Huffman*, 8 Cowen, 84, *Weeks* v. *Leighton*, 5 N. H., 343, and *Harney* v. *Owen*, 4 Blackf., 337, and thus far they do not seem to have been eliminated from the text books, but they have been practically rejected, not only in *Corpe* v. *Overton*, above cited, but by many courts in cases where the question has arisen whether an infant who has engaged to labor for a certain period, and, after performing part of the work, has rescinded the contract, can recover for the work he has done. So that Parsons, (*ubi supra*,) while remarking that "the principle upon which the rule is founded, that forbids the infant's recovery

of money advanced by him on the contract which he has rescinded, would appear to lead to the conclusion that he could not recover for work done" under such circumstances, admits that the weight of authority is the other way. See *Judkins* v. *Walker*, 17 Maine, 38; *Moses* v. *Stevens*, 2 Pick., 332; *Vent* v. *Osgood*, 19 Pick., 572; *Thomas* v. *Dike*, 11 Vermont, 273; *Peters* v. *Lord*, 18 Conn., 337; *Medbury* v. *Watrous*, (overruling *M'Coy* v. *Huffman*,) 7 Hill, 110; *Whitmarsh* v. *Hall*, 3 Denio, 375; *Lufkin* v. *Mayall*, (overruling *Weeks* v. *Leighton*,) 5 Foster, 82; *Wheatley* v. *Miscal*, 5 Porter, (Indiana,) 142. Thus, it will be observed, that all the principal cases where these *dicta* have been followed, have been reconsidered and overruled by the courts in which they were decided. It is true that, in *Breed* v. *Judd & al.*, 1 Gray, 455, the right of the minor to rescind an executed contract was made to depend, not upon the character of the contract, but upon the finding of the jury that the consideration by him received was not only adequate but beneficial. That case is apparently in conflict with *Tupper* v. *Cadwell*, 12 Met., 559, which holds, we think, rightly, that what subjects of expenditure are to be termed beneficial to the infant, is a matter of law to be decided by the Court.

We think the true doctrine is that the contracts of minors may be divided into three classes:—1. Binding; if for necessaries at fair and just rates:—2. Void; if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment, or the like;—3. Voidable, at the election of the minor, either during his minority or within a reasonable time after he becomes of age; and this last class includes all the agreements of a minor which may be beneficial and are not for necessaries until fully executed on both sides, and all executed contracts of this sort where the other party can be placed substantially in *statu quo*. How far executed contracts, where the other party cannot be placed in as good a position

as before, must be excepted and the power of the minor to avoid them denied, it is not necessary here to discuss.

The mere fact that the contract has been fully executed, or that the infant has paid the money with his own hand, does not necessarily affect his right of rescission and recovery. *Williams* v. *Brown*, 34 Maine, 594; *Austin* v. *Gervas*, Hobart, 77; *Price* v. *Furman*, 1 Williams, (Vt.,) 238.

The protection which the law supposes the infant to need, is as much required against the improvidence which has paid out as against that which only promises to pay, and, where it can be afforded without converting the shield into a sword, it should be given. There seems to be no good reason why, if lands conveyed and goods sold and delivered may be reclaimed by the infant, money paid should not be.

In this case, the contract being legally rescinded, the rights of the parties are the same as if none had ever been made. He who makes a contract of this class with a minor assumes the risk of a rescission. The money must be repaid, with interest from the date of its receipt.

Defendant defaulted.

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

INHABITANTS OF JAY *versus* INHABITANTS OF EAST LIVERMORE.

A certificate under the hand of the clerk and the seal of this Court, stating substantially that, at a term named, "a divorce from the bonds of matrimony was duly decreed between" certain persons named, "as will more fully appear by the record," &c., is not admissible evidence of any fact therein stated.

Neither is a paper signed and sealed in like manner, and certified to be a "true extract from the record."

In an action between towns for the recovery of the value of certain pauper supplies, wherein an alleged divorce of one of the paupers from his former

wife becomes a material question at issue, the judgment of divorce rendered by this Court twelve years previously, but shown not to have been extended upon the records, may be proved by a certified copy of the docket entry of the libel and the clerk's memoranda of the action of the Court thereon.

What evidence is sufficient in such case to legally establish such judgment.

In such case, it is not necessary to show, by direct proof, that the allegations in the libel brought the case within the jurisdiction of this Court.

Nor to show that the libellee was defaulted.

From the docket entry "notice proved," this Court will assume that legal notice was ordered and given.

The identity of the parties to the libel may be proved by parol evidence.

ON FACTS AGREED.

ASSUMPSIT, for supplies furnished to Nathaniel Blackwell, his *de facto* wife, Lois G. Blackwell, and their three children, named, whose settlement was alleged to be in the defendant town.

The overseers of the poor of the plaintiff town gave seasonable notice to the overseers of the poor of the defendant town, that the five persons named had become chargeable, that their settlement was in the defendant town, and requested them to pay the value of the supplies furnished and remove the paupers. The overseers of the poor of the defendant town seasonably denied that the alleged wife and her three children had their lawful settlement in their town, but made no denial that Nath'l Blackwell had his lawful settlement there. It was agreed that the supplies were necessary and that they were furnished. And, if the full Court should find that all the paupers named had their lawful settlement in the defendant town, the plaintiff town was to have judgment for the sum of $95,18, with interest, from the date of the writ.

The plaintiffs admitted that Nathaniel Blackwell was lawfully married to one Nancy Hannaford, May 18, 1845, and that the said Nancy was still living at the time of the trial; but claimed that a divorce of the bonds of matrimony between those persons was decreed at the March term, 1856, of this Court, in Oxford county, which the defendants denied.

In order to prove the alleged divorce, the plaintiffs offered papers A, B, D and E, (the material parts of which appear in the opinion,) to which the defendants objected as in themselves illegal evidence and insufficient to prove a legal divorce.

It was also admitted that a marriage was solemnized between Nathaniel Blackwell and Lois G. West, one of the paupers, by a person duly authorized, July 26, 1858, and that the same was a legal marriage, provided Nath'l Blackwell had been divorced from his former wife Nancy; and that, subsequent to July 26, 1858, Nathaniel and Lois lived and cohabited together, as husband and wife, and that Lois became the mother of the three children named.

S. Belcher, for the plaintiffs.

J. C. Woodman, for the defendants, elaborately argued the following points.

1. Doc. A, is not a certified copy and is inadmissible.

2. Doc. D, is equivalent to no record. No residence given to the parties, nothing to identify them, and shows no judgment.

3. Doc. E, purports to be "copy of docket," and shows on its face that the case is recorded in volume 5, page 44, and hence the docket is superseded.

4. B, is inadmissible, not being a copy but an extract.

5. No evidence that there ever was a libel, or that it was signed by the libellant, or that the allegations were according to the statute, or that it was ever filed, or that either of the parties to it resided in Oxford county.

6. If libel not filed within three months, no judgment can be entered except on petition, as in writs. 37 Maine, 579.

7. If libel was filed and lost, then contents should be proved by parol. *Gore* v. *Elwell*, 22 Maine, 444.

8. No evidence of legal notice.

9. No default. R. S., 1841, c. 115, § 2.

10. That *Leathers* v. *Cooley*, 49 Maine, 344, is not good law.

KENT, J.—The single question before us is whether the present *de facto* wife of Nathaniel Blackwell and their three children acquired a settlement in East Livermore, by virtue of the admitted settlement of Nathaniel in that town. That depends upon the decision of the question, whether there was a legal marriage between the parties above named—and that depends upon the question, whether he was competent to contract and enter into a marriage at the time it was solemnized—and that depends upon the determination of the question, whether he had been divorced from a former wife, who is still living. The only matter in dispute relates to the last question. If a divorce had been decreed before the second marriage, "either of the parties might lawfully marry again." Stat. 1858, c. 45. The second marriage was after this Act went into effect. The case is submitted to the Court to determine, upon the facts agreed and the evidence reported, the whole case.

It is incumbent upon the plaintiffs to satisfy us, by legal and sufficient evidence, that a divorce was decreed by a competent tribunal, by which the bonds of matrimony were severed and the husband put into a marriageable condition.

To prove this, they introduce several papers. The first, (marked A,) is a certificate signed by the clerk of this Court, stating in substance that a divorce was decreed by the Court, at a term named, "as will more fully appear by the record of the proceedings in this office." It is objected that this is a mere statement by the clerk of what he thinks is contained in the records and papers of the Court. It does not purport to be a copy of any record or docket, or paper. An official certificate of what is contained in a record, docket, deed or other instrument, is not admissible in evidence, unless made so by statute. The paper (A,) therefore, is not admissible as proof of any fact therein stated, and is out of the case. *McGuire* v. *Sayward*, 22 Maine, 233; *Green* v. *Durfee*, 6 Cush., 363; *English* v. *Sprague*, 33 Maine, 441; *Oakes* v. *Hill*, 14 Pick., 448.

It is objected by the defendants, that paper B is not ad-

missible as evidence of what is contained on the docket, because the clerk only certifies that it is a true extract from the docket, and not a true copy of all on the docket relating to the case. We think this objection also is well taken. A clerk, or other certifying officer must not make extracts, unless by consent, but must copy and certify the whole record or instrument. We therefore lay this certificate and extract out of the case.

The paper (E) is a duly certified copy of the docket of this Court, held in the county of Oxford, March term, 1856, by a Justice named. That copy is as follows: —

"No. 464. NANCY BLACKWELL, *Libellant*, *versus* NATH'L BLACKWELL. (Counsel's name.)

"Notice proved, 9th day. Divorce decreed. $50 worth of property decreed to the wife, and custody of David E. Blackwell, as prayed for in the libel. [Recorded vol. 5, page 44]"

Then follows, as part of the docket, the entry of the general order on the 11th day of the term, that judgment be entered up in all cases where a final decision has been had.

The paper D is then produced, which is certified as a true copy of record, and must be from the book in which the extended records are kept, otherwise it could not properly be certified as a record distinct from the docket. The heading is the same as to the term, and then follows the declaration, that, — "In the following actions, papers not filed." "Nancy Blackwell, *Libellant*, v. Nathaniel Blackwell."

Then follows the record of the same general order as to judgments, as on the docket. This record is attested by the then clerk, as was the docket.

Although there is no formal certificate that this record is the 5th volume on page 44, as indicated in brackets on the docket, yet we cannot hesitate to regard it as the record there referred to — no other being produced or alleged to exist by either party.

These papers, (D & E,) present in substance a case, where the suit has been disposed of on the docket, which shows the

action of the Court, but has never been otherwise recorded *in extenso*, than is shown by paper D, because the papers have never yet been filed.

The question is whether the Court can find on this docket and record enough to satisfy them legally that a divorce was granted. How far is the docket and its entries evidence of the doings of the Court?

It will be observed that this is not a question arising in a suit on a judgment, or in a controversy between the parties thereto, or in which either of the parties to the divorce is before the Court, as plaintiff or defendant. It is a case where the question arises incidentally — and, as a matter of evidence offered to establish a fact, which becomes important in determining the legal rights of third parties.

The first question is how far the docket entries are evidence of what the Court has decreed or adjudged, and, secondly, if they can be thus used, how long can they thus remain as evidence.

There seems to be a perfect agreement, in all the cases in this State and in Massachusetts, that the docket is sufficient evidence of the doings and judgments of the Court, and may be used in evidence, for a time at least. The question is when these entries cease to be evidence? Are they such only until a sufficient time has elapsed to enable the clerk to extend the record, or are they to remain as the evidence of what the Court has done, until the extended record is made and certified.

In examining some of the cases bearing on the question, we may reverse the usual order and examine the latest case first, and then trace the rule back through the various cases relied upon. The case of *Central Bridge* v. *City of Lowell*, 15 Gray, 122, was decided in 1860, but the volume in which it is contained has been issued since the argument in this case. In that case certain dockets of judgments in suits at law and equity between the parties were admitted by the Judge at the trial. C. J. SHAW, in answer to the exceptions taken to that ruling, says, — we think "that the ad-

mission of dockets of judgments, it not appearing that judgments had been entered *in extenso* in books of record, was also correct." It appears, by a note of the reporter, that "the respondents contended that the only competent evidence of other suits was a duly certified copy of the record."

It will be observed that the decision is placed on the ground that it was not shown that there had been any extension of the judgments on books of record. And further, that it does not appear that there was any exhibition of or proof in relation to the existence of the original writs or bills — or of any document or paper, in any of the cases. The docket entries alone were admitted as evidence of the judgments given, and were regarded as sufficient proof of the facts therein stated.

The case of *Benedict* v. *Cutting*, 13 Met., 181, was where a recognizance, on which an action was brought, had never been extended on the record. The Court say, — "It is not necessary that matters should be entered at large on the books of the Court to be a record. The docket and files constitute the record, until it can be made up in form by the proper recording officer."

The case of *Reed* v. *Sutton*, 2 Cush., 115, resembles in many features the case at bar. In that case, the validity of a sale of an equity of redemption depended upon proof of a judgment against the original debtor. The case was between third parties. The docket entries were offered as proof of such judgment. They were the usual brief notes of the amount of damages and cost, with the addition of "judgment by agreement." No default was minuted. An entry of "Cont., *ex re*," which was first entered, was stricken out, an appearance for defendant having been entered. It appeared also, by the books in clerk's office, purporting to be the records, or part thereof, for the same term, that the case was there extended in usual form, but it did not appear that this record was in the handwriting of the then clerk, (who deceased before the entry of the action,) and it appeared that the supposed record had never been examined

and certified by that clerk. The deposition of the presiding Judge and the affidavit of the clerk, given in another case, were offered, but not deemed admissible as controlling or qualifying the docket entries. The supposed record was laid out of the case, and the case stood upon the docket entries alone. No statement of any offer or examination of the original writ or papers appears in the report. SHAW, C. J., in delivering the opinion of the Court, says, — "The docket is the record, until the record is fully extended, and the same rules of presumed verity apply to it as to the record. Every entry is a statement of the act of the Court, and must be presumed to be made by its direction." The judgment of the Court was held as sufficiently proved by the docket entries.

In *Davidson* v. *Slocomb*, 18 Pick., 464, it was held that the minutes of a justice of the peace, "although not technically a record, contain all the material parts which the record would comprise if it were made up at large and in the usual form, and as the record has not been thus extended in form in consequence of the death of the justice, the minutes are to be regarded as substantially a record of the proceedings, and are entitled to the same credit as a record at large would be if it had been thus made up. The minutes of the journals of the House of Lords are held to be records, and a copy of these admissible in evidence. *Jones* v. *Randall*, Cowp. 17; Bac. Abr., Evidence, F."

The Court in Massachusetts has gone still further and held that where no record and no docket entries are shown, yet the docket entries may be proved by parol, where there is evidence actual or presumed of a loss. The case of *Pruden* v. *Allen*, 23 Pick., 187, was, perhaps, the first in the series as to the Court docket, and, in that, the Court held that it had proof enough from extraneous sources to permit the Court to find that there was once a docket, although none was found, and no extended record, and no petition for license, and no papers of any kind, and that the lost docket did contain a minute of the granting of a license to

an administrator to sell real estate, and the title under such sale was sustained. The Court say, "that the clerk intrusted with the duty of keeping records, must, of necessity, take down the doings of the Court in short and brief notes, from which a full, extended and intelligible record is afterwards to be made up. But, until they can be made up, these short notes must stand as the record." If the docket is lost, the contents may be proved as other lost documents may be.

Tillotson v. *Warner*, 3 Gray, 574, holds the same doctrine as to proof of lost minutes, and adds that, "it was not necessary that the minutes should have been extended so as to form a full and complete record."

In *Sayles* v. *Briggs*, 4 Met., 421, it was held that when the evidence is distinct, that no record and no minutes or docket entry of any kind was made, parol evidence cannot be admitted to supply it. Mr. Justice HUBBARD says,— "And the cases are abundant to show that a lost record, like a lost deed, may be proved by parol; and that the minutes may be introduced where the record has not been drawn out in *extenso*, as containing the elements of the record, and, in truth, for the time being, the record itself." 2 Saund. Pl. & Ev., 661. He then adds these forcible words: —"If this were not the rule, substantial injustice might be done to innocent parties who had no duty to perform in making up the records, and were not charged with the care of their preservation."

In our own Court, there have been several decisions on the questions here involved. The case of *Longley* v. *Vose*, 27 Maine, 179, recognizes the soundness of the doctrines set forth in the Massachusetts cases, and sustains the view that the docket entries are to stand as the record until more fully extended. SHEPLEY, J., in supporting this view, says, —"the Court can as well be informed of the substance of the record by the minutes as by the record made up from them under its direction. When proof of the existence of a record is to be made before the same Court, that arising

from the minutes of the clerk, properly made, may be nearly if not quite as satisfactory as that derived from an extended and completed record."

The Court also held, that where the short minute on the docket was only that the defendant "recognizes in $100"— "the Court in which it was made would be informed that he had entered into such a recognizance as the law then required, in the sum of $100, to be extended according to the usual form and course of proceeding in that Court, and such a record would accordingly be considered as *proved* by the minute of the deceased clerk, until a more extended and perfect one could be made."

In that case, it was objected that, in the record as made up, the recognizance was stated to be "to prosecute the appeal with effect," and that that was not the one required by the existing law. The Court say,—"If the clerk misapprehended the law and erroneously made use of the word "effect," such an error in the record of the action would not affect a record of the recognizance as proved by the minutes. The latter would be the true record of it, the former but a *reference* to it, stating, it may be, its contents in one particular erroneously." This would seem to make the docket entries the true record, and, to determine that, those entries might override the extended record, even before any amendment made in it.

In the same volume, (27 Maine,) *Chamberlain* v. *Sands*, 467, it was held that the minutes of examining magistrates, who were bound to make up a record, might be used in evidence, in accordance with decided cases, "before such formal record had been made."

The case of *Leathers* v. *Cooley*, 49 Maine, 337, is a very strong, if not entirely conclusive authority in favor of the plaintiff.

It was an action on a recognizance, to prosecute an appeal and to pay costs recovered. It became necessary to establish the fact of the existence and rendition of a judgment. The only evidence offered were the docket entries

in another court. It appears that no extended record had been made, because no papers had been filed, either the writ or other papers. All rested on the docket entries. The Court say, in the opinion of the majority, — "The rule is now well established that the docket is the record, until the record is fully extended and the same rules of presumed verity apply to it as to the record. * * The entries upon the docket sufficiently show that the judgment had been entered up before this suit was brought."

Indeed, the learned counsel for the defendants seems to admit that this case is a full authority against his main propositions, and that "the less that is said about it the better." This may be a very convenient, as it certainly is a very summary mode of disposing of an adverse decision. We might have rested, so far as a direct authority in our own Court is concerned, upon this case, as one not overruled. But we have deemed it proper and expedient, after the very earnest attempt of counsel to overthrow it, to examine the authorities, to see if it was so entirely unsupported as is contended in the argument.

The counsel objects on various grounds to the admission of the docket entries as evidence of the fact of a divorce, and insists that the party offering it should produce, at least, the libel and other papers from which the record could be extended. But the plaintiffs are no parties to the record, and are not presumed to have in their possession the libel and papers. They are in no fault, if any one is, that the record has not yet been extended. The counsel seems to assume that it is impossible that the record should ever be made up more fully. But *non constat* that it may not now be extended. We see that in New Hampshire the record is never extended, except in very particular cases, unless a party to it desires a copy to sustain a suit upon it, or for some new use. And this is often made up twenty or thirty years after the rendition of the judgment. Until such extension, everything rests upon the docket entries. *Willard* v. *Harvey*, 24 N. H., (4 Foster,) 344.

The exact fact in this case is, that the record had not been extended at the hearing. The authorities hold the docket entries may be used, certainly by third parties, until this is done. The reason is obvious. The docket showing that a judgment or decree was entered at a particular term, is confessedly evidence of the fact for a time. Suppose that the parties in the case of divorce should both contract a new marriage, as they might legally, the day after the adjournment of the Court, and the entering up of judgments of the term, and, of course, before any extension of the record. If, thereupon, they had been arrested for the crime of adultery, and, if the attorney had destroyed the libel, or refused to produce it, or to furnish any papers, and the clerk declined to extend the record without the original, must they be convicted notwithstanding the docket record?

The legal settlement in this case depends upon the fact of divorce. If there ever was, for a day, a divorce, that fact is sufficient for the plaintiffs, unless there had been a judicial revocation. Can any one doubt that there was, and that it was proveable by the docket entry, for a time long enough for the record to be extended in the usual course? This is admitted. If, then, the record was enough to establish the fact of divorce, as once existing, no subsequent neglect of an attorney or the clerk could restore the parties to the married state and deprive them of their legal rights as divorced parties.

The cases of divorce are distinguishable from the ordinary judicial controversies. The public have an interest in them. Morality and domestic relations, and public policy and the peace of society, all claim a share in the effect to be given to divorces. New rights are conferred on the parties, and new married relations may be lawful, which, but for the legal efficacy of the divorce, would be adulterous and criminal. Our statute has therefore refused a right in the Court to grant a new trial or review, where either of the parties has contracted a new marriage. The decree is absolute, and, however strong the reasons may be, there can,

in such a case, be no opening of the case anew. This feature distinguishes divorces from the common cases between party and party. The reason for the distinction is obviously one resting upon considerations of public policy and domestic harmony, giving to the decree an unusual conclusiveness.

The counsel for the defendants insists that the Court cannot regard the docket entries as a sufficient record, because the original libel is not produced and exhibited to the Court, to show that it contained averments sufficient to give the Court jurisdiction, and that it was signed, &c.

Now, in none of the cases cited, has this been required. These plaintiffs never had any possession of that paper. They rest upon the docket as the record, until a full record is made. If a third party cannot avail himself of such entry, without producing all the original papers, in most, if not all cases, the party would be remediless.

What does the docket show? It shows that Nancy Blackwell entered a case, as libellant, against Nath'l Blackwell. It shows it was heard on a libel, for it gives the custody of the child, "as prayed for in the libel." It shows that notice was proved, and that the divorce was decreed, and that a certain amount of property was decreed to the wife.

In the quotation from the opinion in *Longley* v. *Vose*, it will be observed that the Court held that, from the short minute on the docket, that defendant "recognizes in $100," the Court would be informed that he had entered into such recognizance as the law then required.

In the case before us, we are informed that a libel was entered, acted upon after proof of notice, and a decree of divorce made, and also a decree of allowance and one relating to the custody of the child.

But, it is said, that the docket does not show that the Court had jurisdiction. But the proceedings were in this Court, which is the highest Court, and not of limited jurisdiction. We are not to assume, that it had no jurisdiction, but, on the contrary, when it appears that it has acted on a subject confessedly within its jurisdiction, we are not re-

quired to demand direct proof that the case was brought by the allegations or terms of the libel within the powers and jurisdiction of the Court. The Legislature has seen fit to give to this Court an almost unlimited power to grant divorces. This authority is only limited by the requirement that, in the judgment of the Justice presiding, the granting of the divorce would be "reasonable and proper, conducive to domestic harmony," &c.

By reference to the various cases in the reports, it does not appear that in any of them the decision was made on the ground that the original writs were or were not produced.

It is also objected, that it does not appear that the defendant was defaulted. But a divorce is never decreed on a default alone. The Court always requires proof of the allegations, and the default, if one is entered, has really no effect on the judgment, and is immaterial.

The identity of the party, with the pauper, it is said, has not been and cannot be established. But, is there any more difficulty in identifying, under the docket entries, than there would be if the record had been fully extended? The same question might then be made as is here made. A fully extended judgment for or against "John Smith" might require evidence to fix it upon a particular individual of that name. It is the constant and well established practice to admit parol testimony to identify persons or property named in a deed or record. *Dane* v. *Gilmore*, 49 Maine, 179.

It is urged that the mode and character of the notice, named on the docket, does not appear. But when a record states that notice was given and proved, we may safely assume that it was a legal notice. Even extended records do not show how the notice to a defendant was given, or even refer to the return of an officer on the writ. If the Court, in *Longley* v. *Vose*, could understand that a party had given a legal recognizance, in the usual and required form, from the docket entry of "recognized in $100," we may be en-

tirely safe in understanding, from the words "notice proved," that due and legal notice had been given.

On the whole, after a full examination of the case as presented to us, we are of opinion that the legal evidence is sufficient to prove the divorce, and therefore, according to the agreement of the parties, there must be

Judgment for the plaintiffs for $95,18, *with interest from date of the writ.*

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

JESSE M. FIELD *versus* JEFFERSON B. BRACKETT *& als.*

A naked verbal promise to return, in good order and at a specified time, a thing hired, does not, as matter of law, import a contract on the part of the hirer to insure it against loss occurring without his fault.

ON EXCEPTIONS.

ASSUMPSIT to recover damages under the following count: "For that the said defendants, at Lewiston, to wit, at said Auburn, on the eighteenth day of June, in the year of our Lord one thousand eight hundred and sixty-seven, had and received of the plaintiff the plaintiff's single wagon, of the value of one hundred and fifty dollars, the same to be kept and used by the said defendants for the period of one month from the said eighteenth day of June aforesaid, and the said defendants, in consideration that the plaintiff would so let to them, the said defendants, said wagon as aforesaid, then and there promised the plaintiff to return the said wagon to him at the expiration of the month aforesaid in good order; yet the said defendants, not regarding their promise aforesaid, did not return the said wagon according to their promise, but, though the month aforesaid has long since elapsed, and though often thereto requested, the said defendants

have neglected and refused and still neglect and refuse so to do."

The defendants, admitting that there was a verbal agreement as set out in said count, alleged that said wagon was stolen from them during the month for which it was hired, and while they were in the exercise of ordinary and proper care of the same, and that they have never been able to find or recover said wagon, although they have used all care and diligence so to do, and that therefore they were not liable in this action.

The plaintiff admitted the foregoing facts, whereupon the question was submitted to the presiding Judge, with the right to except, whether as matter of law the plaintiff was entitled to recover. The presiding Judge ruled as matter of law that the plaintiff was entitled to recover, to which ruling the defendants alleged exceptions.

Bicknell & Stetson, for the plaintiff.

1. By the general law of contracts, the failure of a party to perform his contract is not excusable merely on the ground that he has not been guilty of any ordinary negligence in so doing. 2 Parsons on Con., (4th Ed.,) 185–6.

2. In the ordinary case of the hiring of a chattel, the bailee is bound to use only ordinary care of the thing hired, and "is responsible for the loss thereof, or injury thereto, only when, by the terms of his contract, he has taken upon himself such risk." By the terms of the contract in this case defendants expressly took upon themselves that risk. 2 Ld. Raym., 909, 917, 918; 4 Taunt., 787; 6 Taunt., 577; 2 Marsh, 293; Jones' Bailm., 103, 106, 121; 2 Bos. & Pull., 417; 1 Bouvier's Inst., n. 1020.

3. If one for a valid consideration promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, and is not on its face obviously impossible, the promisor is liable in damages for a breach of the contract. 2 Parsons on Con., (4th Ed.,) 185–6.

4. If one contracts, at the time of hiring a chattel, "to make good," or "return in good order," the property at the expiration of the term of the bailment, he thereby becomes insurer of the property against all casualties and contingencies whatsoever. *Paradine* v. *Jane*, Aleyn, 26; *Huling* v. *Craig*, Addis., 342; *Harmony* v. *Bingham*, 2 Kern., 99; *Bullock* v. *Dommitt*, 6 T. R., 650; Bouvier's Law Dict., Title, "Act of God," and cases there cited.

T. A. D. Fessenden, *W. P. Frye* and *J. B. Cotton*, for the defendants.

BARROWS, J.—The plaintiff's writ sets out a hiring by the defendants of his wagon to be used by them for a month, and alleges a promise in consideration of this letting of the wagon, to return it to him, at the expiration of the month for which it was let, in good order, and a failure to return according to promise. It was admitted by the defendants that they made a verbal agreement to that effect, but they claim that nothing more was intended than the law implies in ordinary cases of hiring, and they allege, and the plaintiff admits, that the wagon was stolen from them during the month for which it was hired, while they were in the exercise of ordinary and proper care of the same, and that they have never been able to find or recover it, though they have used all care and diligence to do so.

The question submitted was "whether, as matter of law, upon this state of facts, the plaintiff was entitled to recover."

There is nothing, either in the plaintiff's declaration or in the statement of facts, to indicate that the case differs in any respect whatever from the ordinary transaction of letting a vehicle to hire. "How long do you want it?" "A month." "Will you bring it back in good shape in a month?" "I will." Similar questions and answers might, and probably would, pass in most cases between neighbors negotiating such a transaction, without either the letter or the hirer sup-

posing that any special obligation (beyond that which the law implies, on the part of the hirer, to be guilty of no negligence and to return at the time appointed, in as good order as when received, ordinary wear and tear and casualties for which no blame could attach to the hirer, excepted,) was assumed or intended to be assumed. I carry my watch to a watchmaker to be repaired. "When can I have it?" "You shall have it in a week." Here is the same verbal agreement, and, upon like consideration as that alleged and admitted in the case at bar. Yet I do not understand that the watchmaker assumes any liability for safe keeping, different from that which the law would impose, if he said nothing about the return. When he tells me I shall have my watch in a week, I do not expect him to add, in good set phrase, "provided my safe is not robbed in the meantime." That is understood between us.

PARKER, C. J., in *Foster & al.* v. *Essex Bank*, 17 Mass., 501, remarks as follows;—"The common understanding of a promise to keep safely would be, that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust, if, notwithstanding such care, the goods should be spoiled or purloined; anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement and an adequate consideration therefor."

In the case at bar, no agreement to insure, or consideration for such agreement appears. Upon such a meagre statement of the transaction between these parties, it was erroneous to predicate a ruling, "as matter of law," that the defendants were liable. The transaction being a verbal one, it would be for the jury (or for the presiding Judge, if the case were submitted to him under the statute,) to find that there was a contract between the parties, based on a legal consideration, to insure the safety of the thing hired, before the defendants could be declared liable for a loss happening under the circumstances here disclosed.

The case of *Paradine* v. *Jane*, Aleyn, 26, cited for plain-

tiff, bears little resemblance to this. It was founded on a written covenant to pay rent. Neither in that case nor in *Huling* v. *Craig*, Addison, 342, nor in *Harmony* v. *Bingham & als.*, 2 Kernan, 99, (which was brought upon the covenants of a sealed instrument, by which the defendants, who were common carriers, undertook to carry from New York, and safely deliver at Independence, Mo., within a stipulated time, all goods which the plaintiffs might send by their line prior to a day fixed, at a certain rate of freight, and to pay damages at an agreed rate per cwt. per day, for each day's delay,) was there any question as to what the true intent and meaning of the defendants' contract was, but simply what would excuse the non-performance of it where the character of the undertaking was explicit.

But the doctrine of these cases, which are relied on by the plaintiff, will not justify us in determining, as matter of law, that, where nothing more appears, a naked verbal promise to return the thing hired at a specified time imports a contract on the part of the hirer to insure it against inevitable casualties, or losses occurring without fault on his part. Ordinarily it would not be the intent or understanding of the parties to such a promise, to transfer thereby risks of this description from the letter to the hirer.

Exceptions sustained.

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

DAVID BROWN *versus* CHARLES THURSTON.

A parol reservation of growing crops, made either before or at the time of the making and delivery of the deed, cannot control the legal effect of the deed; and parol evidence tending to show such a reservation is inadmissible to affect the force of the conveyance.

Rights of tenants at will to crops.

ON EXCEPTIONS.

TRESPASS QUARE CLAUSUM.

The plaintiff excepted to the ruling of the presiding Judge, which ruling, together with the material facts in the case, sufficiently appears in the opinion.

Luce, for the defendant.

The potatoes growing upon land under a lease not terminated, never had the character of realty, the title to them and the title to the land being separate and distinct. The owner of the land had no interest in the potatoes, — they were fixtures and removable by the tenant at any time. Brown on Stat. of Frauds, (2d Ed.,) §§ 234, 236; *Miller* v. *Baker*, 1 Met., 27. The rights of the tenant were not destroyed by the conveyance. *Davis* v. *Thompson*, 13 Maine, 209; *Sherburne* v. *Jones*, 20 Maine, 70; *Young* v. *Young*, 36 Maine, 136.

The instruction was given in view of the fact that the grantor was not owner of the potatoes at the time of the conveyance, and was right.

There is a distinction between *prima vestura* and *fructus industriales*.

A. M. Pulsifer, for the plaintiff.

APPLETON, C. J. — This is an action of trespass for breaking and entering the plaintiff's close, and carrying away therefrom three hundred bushels of potatoes.

It appeared in evidence that the defendant, then owning the premises upon which the alleged trespass was commit-

ted, verbally leased the same in the spring of 1864, to one William R. Goss, who entered upon the same, planted and cultivated, and harvested potatoes growing thereon, and carried them away. The entry by him as the servant, or by direction of the defendant, for the purpose of removing the potatoes on 31st October, 1864, is the trespass complained of.

The plaintiff, to show title in himself, offered a warranty deed of the premises from the defendant to himself, dated Oct. 8, 1864, and proved that, on 11th of the same October, he entered into possession thereof, where he has ever since remained.

The defendant was permitted to show that there was a verbal reservation of said potatoes growing on said land at the time of the execution of his deed to the plaintiff.

This evidence was inadmissible. A parol reservation of fixtures or growing crops, before or at the time of the delivery of the deed, is not admissible in evidence to alter or control the effect of the deed. If the agreement was before the execution and delivery of the deed, it is merged in the final determination of the parties as evidenced by the deed. If it was made at the time of the delivery, it must be regarded as an exception or reservation, and, being repugnant to the terms and effect of the deed, is void. *Noble* v. *Bosworth*, 19 Pick., 314. A parol reservation of the manure upon a farm, made either before or at the time of making the deed, cannot control the legal effect and operation of the deed; and parol evidence tending to show such a reservation is inadmissible to affect the force of the conveyance. *Counce* v. *Foster*, 29 N. H., 538; *Austin* v. *Sawyer*, 9 Cow., 39.

At the date of the defendant's deed to the plaintiff, Goss was the tenant at will of the former. The tenant at will having planted during his tenancy, is entitled to the products of his planting. Neither party, by determining the tenancy, can unfairly prejudice the other in regard to rents or emblements. If the lessee terminate before the day on which

rent is due, he must pay up the rent to that day; when the lessor determines the rent at such a time, he loses his rent. If the lessor determines the tenancy before the wheat or other produce is reaped or gathered, the lessee shall have the emblements, and free ingress, egress and regress to take them away; but when the lessee determines the tenancy at such a time, he loses the emblements. *Davis* v. *Thompson*, 13 Maine, 209; *Sherburne* v. *Jones*, 20 Maine, 70; 1 Cruise on Real Estate, T. 9, c. 1, § 14; 4 Kent's Com., 110.

When a tenant, holding for an uncertain time, sows the land, he is entitled to the crops as emblements. If the plaintiff had notice of the tenancy at will of Goss, at the time of the deed to him, he cannot defeat the right of Goss to his crops. *Davis* v. *Brocklebank*, 9 N. H., 73.

The ruling, that a parol reservation of the potatoes at or prior to the execution of the deed is valid, was erroneous, and a new trial must be had. *Exceptions sustained.*

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

GILBERT MILLER *versus* OLIVER MOSES.

The return upon a replevin writ should state precisely what property is thereby replevied; if it does not, the sureties on the replevin bond are not liable to return what was not taken.

A surety on a replevin bond is not estopped by the recitals therein to show how much of the property mentioned in the writ was actually replevied, when the officer's return is indefinite in this particular.

Nor is he estopped by the return of the officer, as to the amount of property replevied, unless the return is definite, distinct and certain in this respect.

Where, by the writ, the officer was commanded to replevy eleven different parcels of wood, situated in various towns mentioned, along the line of a railroad, with the number of cords in each parcel distinctly stated, and the officer returned thereon that he had "replevied all the wood at the various places within mentioned;" — *Held*, that the return was indefinite and uncertain as to the quantity of wood replevied.

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Miller *v.* Moses.

A judgment in replevin that "the said wood be returned and restored to the said" defendant, "irrepleviable, with costs," &c., refers only to the wood actually replevied.

At common law, *nil debet* is not a good plea to debt on bond.

But, if pleaded and joined, the obligor may, it seems, prove any fact tending to reduce his indebtedness.

On Report.

Debt on a replevin bond, dated Dec. 16, 1862, given by the city of Bath, as principal, and the defendant and one Linscott, as sureties, in the penal sum of $7,914.

Plea, *nil debet* and joinder, with a brief statement alleging substantially that the wood replevied in *Miller* v. *Bath* was not legally attached, and that what was attached was much less in quantity than that stated in the bond, and less than the estimated amount stated in the plaintiff's returns upon the several writs of attachment.

On a writ in favor of *Azor Dyer* v. *The Androscoggin Railroad Co.*, the plaintiff, as deputy sheriff for the county of Androscoggin, on Sept. 9, 1862, made a return as follows:—

"Androscoggin, ss.—September 9th, 1862.

"By virtue of this writ, I attached about three hundred and sixty-five cords of wood, as the property of the within Androscoggin Railroad Company, valued at nine hundred and ten dollars, situated as follows; in the town of East Livermore, about one hundred and eighty cords of wood at Livermore Falls depot; [also two hundred sleepers at Livermore Falls depot, and one hundred and fifty cords of wood and eighty sleepers at East Livermore station;] also thirty-five cords of wood at Strickland's Ferry station, [and a lot of timber for wood-shed, said sleepers valued at fifty-six dollars and timber valued at ten dollars;] also the following lot of wood in Leeds, viz., about twenty cords at Leeds Centre depot, valued at fifty dollars; about fifty cords of wood valued at one hundred and twenty-five dollars, [also ninety sleepers valued at eighteen dollars,] on line of said road at Curtis' Corner, and about eighty-five cords of wood

on line of railroad, near the Jerry Day Crossing, valued at two hundred dollars; also, September 10, 1862, I attached about six hundred and thirty-eight cords of wood in the town of Wales, valued at sixteen hundred dollars, situated as follows, five hundred cords on line of railroad and about one hundred rods south of Leeds Crossing, and one hundred and thirty-eight cords, about one hundred and fifty rods south of Leeds Crossing; also, on the same day, I attached another lot of wood sawed, estimated to contain two hundred and twenty-five cords, situated as follows, near the wood-shed at Little River station, in the town of Lisbon, as the property of said corporation, and, on the same day, I attached another lot of wood as the property of said corporation, estimated to contain eighteen cords, in the wood-shed at Lisbon Factory station, in the town of Lisbon, and, within five days after the above attachments, I filed in the offices of the town clerks in the several towns within named, a true copy of so much of my return on this writ as relates to the attachments in the several towns, the names of the parties, the date of said writ, and the Court to which the same is returnable, and the amount that I was commanded to attach on said writ. Gilbert Miller, *Deputy Sheriff*."

On Dec. 16, 1862, the city of Bath, claiming to be the owner of so much of the wood thus attached as is not included within the brackets, sued out a writ of replevin, wherein the officer was commanded to replevy the goods and chattels following, viz.:—

One hundred and eighty cords of wood at the Livermore Falls depot, also thirty-five cords of sawed wood, southerly of and near to Strickland's Ferry, also twenty cords of wood at Leeds Center depot, also fifty cords near Curtis' Corner, also eighty-five cords of wood in the town of Leeds, near the Jerry Day Crossing, also five hundred cords of wood in the town of Wales, about one hundred rods south of Leeds Crossing, also one hundred and thirty-eight cords of wood in the town of Wales, about one hundred and fifty rods below Leeds Crossing, also eighteen cords of wood at the

Lisbon Factory depot, in the wood-shed, also two hundred and twenty-five cords of wood, in the wood-shed at Little River station, also forty cords of wood, near the Lisbon Factory depot, also thirty-eight cords of wood, at Curtis' Corner,—all belonging to the city of Bath, in the county of Sagadahoc, and now taken and detained by Gilbert Miller, at the places above described, in the county aforesaid; which amounted in all to 1329 cords.

The bond taken by the coroner, prior to serving the replevin writ, was the one in suit, and its penal sum was erroneously fixed at twice the value of 1319 cords of wood, at $3 per cord, instead of 1329 cords, the number mentioned in the writ; but it was for the sum which he was directed in the writ to take. The condition of the bond contains a recital as follows:—"The condition of the above obligation is such,—that whereas the said city of Bath hath this day commenced against the said Gilbert Miller, an action of replevin for thirteen hundred and nineteen cords of wood, more particularly described in said writ, they say the said Gilbert Miller hath unlawfully taken;—Now, therefore," &c.

On the replevin writ was a return as follows:—

"Androscoggin, ss.—Dec. 19, 1862.—By virtue of the within writ, having first taken a bond as prescribed by law, I have this day replevied all of the wood at the various places within mentioned, and have delivered it to the city of Bath," &c. "John Hamlin, *Coroner*."

In the replevin suit a judgment was entered and recorded as follows:—

"This action was entered at the January term of this Court, A. D., 1863, and thence continued to the April term, A. D., 1863. The action was thence continued on report and transferred to the Supreme Judicial Court for the Western District, for adjudication upon questions of law and fact arising in the case, as per report and pleadings on file will more fully appear, from term to term, to this term, and on the eighth day of July, A. D., 1864, the Clerk of this

Court received from the Clerk of the Court for the Western District, the decision of the Court in the premises as follows: —'Plaintiff nonsuit. —Judgment for a Return.'

"It is therefore considered by the Court that the said wood be returned and restored to the said Gilbert Miller irrepleviable with costs taxed at forty-nine dollars and eleven cents."

The defendant offered to show by parol evidence that the whole amount of wood mentioned in the replevin bond was not attached by Miller or replevied by the coroner, which was objected to by the plaintiff, but the testimony was admitted by the presiding Judge for the purposes of the trial. After the testimony was closed, the parties agreed that the presiding Judge might determine the actual quantity of wood attached by Miller, and also the quantity taken by the coroner and delivered to the plaintiff in replevin, the plaintiff claiming that these questions were immaterial and that the findings could not affect the decision of the case.

The parties then submitted the case to the whole Court to determine what judgment should be given on the whole case, upon the testimony legally admissible and the findings of the presiding Judge, and to render judgment accordingly.

The presiding Judge determined that the actual quantity of wood attached was 935 cords, and the actual quantity replevied and delivered to the plaintiff in replevin was 930 cords.

Jabez C. Woodman, for the plaintiff.

The writ commanded the coroner to replevy 1329 cords of wood, and deliver the same to the city of Bath. Coroner returned that he "replevied all the wood at the various places within mentioned and delivered it to the city of Bath as within directed." Miller recovered judgment "that the said wood" [that is, all the wood described in the replevin writ,] "be returned and restored to Miller irreplevviable," &c.

On parol testimony, "the presiding Judge determined the actual quantity of wood replevied."

The parol testimony was not admissible to contradict the coroner's return, except in a suit against him for a false return. *Slayton* v. *Chester*, 4 Mass., 479; *Stinson & al.* v. *Snow*, 10 Maine, 265; *Patterson* v. *Creighton*, 42 Maine, 378; *Agry* v. *Betts*, 12 Maine, 417; *Wyer* v. *Andrews*, 13 Maine, 168; *Grover* v. *Howard*, 31 Maine, 548; *Cowan* v. *Wheeler*, 31 Maine, 442; *Bunker* v. *Gilmore*, 40 Maine, 93; *Bolt* v. *Burnell*, 9 Mass., 98; same case, 11 Mass., 165; *Lawrence* v. *Pond*, 17 Mass., 434; *Whitaker* v. *Sumner*, 7 Pick., 555; *Bamford* v. *Melvin*, 7 Maine, 21; *McKeen* v. *Gammon*, 33 Maine, 190.

The defendant being a privy to that judgment, is equally concluded by the return. *Porter* v. *Rummery*, 10 Mass., 68; *Merrill* v. *Suffolk Bank*, 31 Maine, 61; *Bean* v. *Parker*, 17 Mass., 591, 592, 600; *Came* v. *Bridgham*, 39 Maine, 40.

The defendant is also estopped by the recital in the bond, "that the city of Bath hath this day commenced against the said Miller, an action of replevin for 1319 cords of wood, more particularly described in the writ," &c. *Winchell* v. *Stiles*, 15 Mass., 230, 232. Indorsers of writs are analogous. *Harkness* v. *Farley*, 11 Maine, 491; *Chase* v. *Gilman*, 15 Maine, 64, 67; *Craig* v. *Fessenden*, 21 Maine, 34. That Moses was privy to the judgment recovered by Miller appears from the form of the writ prescribed. Stat. of 1821, c. 63, § 8; *Pettygrove* v. *Hoyt*, 11 Maine, 69; *Thomas* v. *Spofford*, 46 Maine, 411. If defendant can prove the officer did not take as much as is stated in the return, he can prove he did not take any.

The estimates of the wood, as by the returns of attachment, were not originally conclusive upon third parties, but they have been adopted by the defendant's principal, and he, as a privy, is bound also.

Bath and sureties are concluded by the judgment of return. *Bannister* v. *Higginson*, 15 Maine, 78; *Granger* v. *Clark*, 22 Maine, 129; *Pierce* v. *Strickland*, 26 Maine, 293; *Smith* v. *Keen*, 26 Maine, 420; *Pease* v. *Whitten*,

31 Maine, 118; *Footman* v. *Stetson*, 32 Maine, 18; *Woodman* v. *Smith*, 37 Maine, 24; *Willard* v. *Whitney*, 49 Maine, 238; *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *Bath* v. *Miller*, 53 Maine, 308.

A question that was involved, and might have been decided in the replevin suit, could not be re-opened and tried in this action against the defendant, who was a privy in law to the original judgment. *Emery* v. *Goodwin*, 13 Maine, 14; *Marriot* v. *Hampton*, 7 T. R., 269; *Leguen* v. *Governeur & al.*, 1 Johns. Cases, 436; *York Man. Co.* v. *Cutts*, 18 Maine, 211; *Smith* v. *McIvor*, 9 Wheat., 535, 537; *Simpson* v. *Hart*, 1 Johns. Ch. R., 95; *Williams* v. *Lee*, 3 Atkins, 223; *Moses* v. *McFarlan*, 2 Burrows, 209; *Phillips* v. *Hunter*, 2 H. Bl., 415; *Homer* v. *Fish & al.*, 1 Pick., 439; *Bateman* v. *Willoe*, 1 Sch. & Lef., 204, 205; *M'Vicar* v. *Wolcott*, 4 Johns., 534; *Simpson* v. *Hart*, 14 Johns., 77; *Anderson* v. *Roberts*, 18 Johns., 534; *Russ* v. *Wilson*, 22 Maine, 211; *Marine Ins. Co. of Alexandria* v. *Hodgson*, 7 Cranch, 336; *Hopkins* v. *Lee*, 6 Wheat., 113; *Smith* v. *Lowry*, 1 Johns. Ch., 322; *Hawley* v. *Mancius*, 7 Johns. Ch., 182.

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

APPLETON, C. J. — The plaintiff, a deputy Sheriff, having, on 9th September, 1862, a writ in his hands in favor of Azor Dyer *v.* The Androscoggin Rail Road Company, attached at different places quantities of wood as the property of said Railroad Corporation, describing the lots as containing *about* so many cords, or estimated to contain so many cords, describing the places where these estimated quantities were situated, and made return of his doings thereon. He subsequently attached the same and other wood on other writs against the same corporation and other defendants, and made similar returns thereon.

The plaintiff having this wood thus attached and described in his returns on the several writs in his hands, the city of Bath, on Dec 16, 1862, claiming to be the owner of the same

wood, sued out their writ of replevin, commanding the officer to replevy the said lots described in the plaintiff's return, stating the actual amount to be replevied at the several places where the wood was situated, according to the estimated amounts in the plaintiff's several returns and in his notice to the Androscoggin Railroad dated Dec. 11, 1862. The amount ordered to be replevied was thirteen hundred and twenty-nine cords. The replevin bond erroneously described the replevin writ as "for thirteen hundred and nineteen cords of wood, as more particularly described in said writ."

The coroner by whom the replevin writ was served made his return in the following words: — "Androscoggin, ss., Dec. 19, 1862. By virtue of the within writ, having first taken a bond as prescribed by law, I have *this* day replevied all the wood at the various places within mentioned, and have delivered it to the city of Bath as within directed.

John Hamlin, Coroner."

The attachment of the plaintiff was dated September 9, 1862. The replevin writ bears the date of Dec. 16, 1862. It is not pretended that the plaintiff, when he made his attachments, or the coroner, when he replevied the wood thus attached, caused the true amount to be ascertained by a survey thereof.

On the trial of the replevin suit, the *City of Bath* v. *Miller*, the then defendant, but present plaintiff, justified under the writs before referred to and his several returns thereon, in which he had described his attachments as being of an estimated and not of a definite and ascertained quantity.

The City of Bath, failing in their action of replevin to make out a good title to the wood replevied, the judgment of the Court was, that, "the said wood be returned and restored to the said Gilbert Miller irrepleviable," &c. This judgment could only refer to the wood actually replevied. It could embrace no more. It did not necessarily cover the amount ordered to be replevied, for the officer might not be able to find the quantity embraced in the writ. It could

have reference only to the quantity actually replevied, and that was to be ascertained from the return of the officer by whom service was made. The bond given was for an amount different from that described in the writ.

Judgment having been in favor of Miller in the replevin suit and a return ordered, and the wood not being restored, he brings his suit upon the replevin bond. He had attached divers lots of wood at different specified places. The quantity attached was left indefinite and uncertain. The wood had been replevied from his possession. It was ordered by the judgment of the Court, before which the replevin suit was pending, to be restored. This is not done. He is entitled to the wood actually attached or its value, to be accounted for on the several executions in the suits upon which his attachments were made, or in case the attachments were lost, to the debtors as whose property the wood was attached.

The writ commands the replevying of 1329 cords. The bond is in double the value of 1319 cords. The quantity actually attached was 935 cords, of which only 930 were replevied. These facts appear on inspection of the papers, or are found by the presiding Justice to whom the question of the quantity attached and replevied was referred. The amount replevied was all that was secured by the bond, unless it be held that it is security for what the officer failed to replevy.

According to the plaintiff's returns on the several writs on which the wood was attached, his attachments were of certain lots at different places, of an estimated but uncertain quantity. Neither the creditors nor the debtors in those suits could hold the plaintiff liable, as an officer, for more than the actual amount. The attachments, though indefinite as to quantity, would hold the lots described and no more. The amount attached being thus indefinite, the actual amount is all for which the plaintiff, as a deputy sheriff, could be held responsible. The value of the wood actually attached constituted the measure of his liability.

He could not be made liable for non-existent wood by reason of an over estimate of quantity, when his return described not the actual but the estimated quantity. He could not have been made liable by his return for more than he actually attached.

It was undoubtedly within the power of the Court, if convinced of an error in the return, to permit that error to be corrected for the purposes of justice, by allowing the officer to amend in accordance with the fact, though such power should be reluctantly and cautiously exercised. *Pierce* v. *Strickland*, 2 Story, 292.

The plaintiff sues as trustee. The amount recovered, if the attachments have been preserved, will enure to the benefit of the creditors. If not preserved, for that of the debtors in the several suits in which the attachments were made. As trustee, the plaintiff could make no personal gains. He is entitled to recover only to the extent of his liability. In *Bartlett* v. *Kidder*, 14 Gray, 449, personal property owned in common was attached on mesne process against one of the owners, and replevin brought in the name of all against the attaching officer and dismissed. It was there held that the measure of damages, in an action on the replevin bond, was the value of that one's interest. "The principle," remarks DEWEY, J., "upon which such facts may be shown in mitigation of damages, is, that full indemnity will be thus given to the obligee of the bond; and this is all that he is entitled to in the hearing in equity." In *Davis* v. *Harding*, 3 Allen, 302, in a suit upon a replevin bond, it was decided that it might be proved, in mitigation of damages, that the action of replevin was defeated solely because it was prematurely commenced. So, in *Huggeford* v. *Ford*, 11 Pick., 223, where the goods, when attached, were subject to duties, and the plaintiff in replevin paid them, the amount thus paid was deducted from the valuation in a suit upon the bond. In *Farnham* v. *Moor*, 21 Maine, 509, in a suit upon a replevin bond, "judgment is to be rendered upon default," remarks WHITMAN, C. J., "for the plaintiff, for as

much as he is in equity and good conscience entitled to recover."

The evidence to show the actual amount of wood attached should be received, unless there is some stringent rule of law to prevent our arriving at a just and equitable result. Is the plaintiff, suing as trustee for others, to recover beyond the amount of his liability to those for whom he is thus trustee? Are the defendants estopped from showing the exact extent of such liability?

The bond constitutes no estoppel. It is ordinarily given before the goods are replevied. It is based upon the writ, and assumes that what is ordered to be replevied will be so replevied. But such may not be the case. The articles described in the writ and in the bond corresponding to the writ, may not all be found, and, if not found, of course they cannot be replevied. The officer may find a part, and for those the bond will be security, and for no more. The amount thus replevied should appear in his return, — but if, through the neglect of the officer, it does not so appear, the sureties are, nevertheless, not to be held liable to return what was never taken.

If it be conceded, as a general rule, that the return of the officer as to what was replevied is conclusive and cannot be contradicted, the concession will not affect the right of the obligees to show, in the case at bar, what was actually replevied. The return of the coroner is vague and indefinite. He does not refer to the replevin writ for amounts. The attachments by the plaintiff were made Sept. 9, 1862. The service of the replevin writ on him was made Dec. 19, 1862. The return is, — "I have *this* day replevied all the wood at the various places within mentioned." This means all the wood *then* there, not what was there days or months before. It might embrace all the wood which had been attached and which was ordered to be replevied, or it might not. It is left uncertain. The officer took all that was then "at the various places within mentioned," without in any way defining the quantity taken. How much was replevied?

Granting that his return should be construed as *prima facie* embracing all that is described in the writ, still it does not conclusively embrace all. It leaves the actual amount replevied uncertain and contingent, depending upon whether there had been a change between the date of the attachment and that of the service of the replevin writ. To constitute an estoppel, the return of the officer should be definite, distinct and certain, and those elements are wanting therein. The defendants assuredly should not suffer from the vagueness of the plaintiff's return.

The judgment of the Court was that "the said wood be returned and restored to the said Gilbert Miller." What wood? The judgment can refer only to the wood actually replevied, not to that ordered to be replevied and not replevied. The variations between these quantities may be greater or less. The present plaintiff, in his brief statement, justified under his vague and indefinite attachments, and his justification was co-extensive with those attachments. The return of the coroner, when replevying, was vague and uncertain. No question was made, no issue raised as to the number of cords attached or replevied. "An estoppel," remarks WILDE, J., in *Gould* v. *Richardson*, 6 Pick., 369, "must be certain to every intent. Therefore, if a thing be not precisely and expressly alleged, it will be no estoppel." Replevin is a process *in rem*, and the wood actually replevied, not that ordered to be replevied, was alone in controversy. The plaintiff in replevin claimed only so much as having been attached was replevied, and the defendant justified only for that amount. How much was attached? How much replevied? The writ does not necessarily show, for the officer serving it may fail to obtain possession of the amount specified therein. Half might be taken or the whole, but the writ would not determine the quantity. Suppose a replevin writ issues for three horses, and the officer replevies but two, and the judgment be for the return of "said horses," would the obligors in the replevin bond be liable for more than the two replevied? The judgment is

for a return to the defendant of what is taken from him. To that only is he entitled. To that only does he show any right. That only was in controversy, and to that only does the judgment relate. The officer replevying left the amount uncertain, indefinite. The Court could not act upon what was not replevied, and, as the justification related only to what was replevied, and that was left an uncertain quantity, the judgment can only refer to the same. It was the duty of the officer replevying to state precisely what he replevied. His omission to do so can give no new rights to the plaintiff, nor impose increased obligations on the defendants. The amount replevied was left uncertain by the coroner. It has been ascertained by the Court,—and both law and equity forbid that the plaintiff should recover for what was never taken from him.

The plaintiff returned on his writs that he attached *about* so many cords. He was not estopped to show the exact amount. Still less should he ask that the defendants should be estopped to prove the truth. The indefiniteness of the amount attached was his fault, and if he over estimated amounts, which he returned as uncertain, he should not seek to make them suffer on account of the indefiniteness of the return, which it was his duty to have made clear and definite.

His indefinite return is the cause of the present litigation, and he should not be permitted to take advantage of his own misconduct in not defining what he attached, nor should he be allowed to recover for more than he was liable for by virtue of his attachments,—that is, he should be held responsible for what he actually attached, and no more.

Further, the defendant, upon the principles of pleading, would seem to be let into the partial defence upon which he relies.

At common law the proper plea to debt on bond is *non est factum*. *Nil debet* was the plea in the present case, and it was joined. But "*nil debet* is not a good plea to debt on bond; and the plea is ill on demurrer. It being the nature

of the plea and not the manner of pleading it, that is defective."

"But, if *nil debet* is pleaded to debt on bond, and the plaintiff, instead of demurring, accepts the plea and joins in the issue; the defendant is at liberty to prove any and every special matter of defence, which might be proved under the same plea, in debt on simple contract,—such as want of consideration, payment, release, usury, infancy, &c. For the plaintiff, by accepting the plea, founds his demand solely upon the defendant's being indebted; and thus waives the estoppel or conclusive evidence of that fact, which the deed would have furnished against the defendant, under the plea of *non est factum.*" Gould on Pleading, c. 6, p. 1, § 12.

In *Rawlins* v. *Danvers*, 5 Esp., 38, the action was debt on a bail bond, to which the defendant pleaded *nil debet,* and issue was joined. Lord ELLENBOROUGH said,—"He was of opinion that, as the plea had not been demurred to, the plaintiff had let the defendant into any defence that he could prove."

By this plea "in debt on bond, everything is thrown open," remarks TILGHMAN, C. J., in *Evans* v. *Tatem*, 9 S. & R., 252. "It puts in issue every material fact in the declaration, if pleaded and not demurred to." *Jansen* v. *Ostrander*, 1 Cowen, 670.

If R. S., c. 82, § 55, is to be regarded as applicable, then the defendants, under the plea of *nil debet*, would be "entitled to every defence" that they would have by any form of pleading.

It would therefore seem that the defendant, under this plea, in the case of a replevin bond, should be permitted to show any fact either negativing or reducing their indebtedness to the plaintiff.

The value of the wood, as stated in the writ and the bond, is binding upon the defendant. The plaintiff is not estopped by this valuation, but may show the true value. In

the absence of proof, the valuation in the bond is to be regarded as the actual value of the property replevied.

Defendant defaulted for the value of 930 *cords of wood. — Damages to be assessed by the clerk.*

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

WALTON and BARROWS, JJ., dissented.

LYMAN RAWSON *versus* JAMES N. HALL *& al.*

The lien of a mortgagee attaches equally for the debt and for the costs necessarily arising in the enforcement of his rights by a suit at law.

The burden is upon the party objecting to a report of referees to establish the facts upon which he relies.

Where a real action, brought by the assignee of a mortgage against the mortgager and his tenant at will, was referred, together with all matters in dispute between the parties, and the referees reported that, in fixing upon the amount to be paid by the mortgager to enable him to redeem, they took "into consideration the mutual notes and accounts, and claims of said assignee and mortgager against each other;" — *Held*, that it did not appear, from the report, that the sum thus fixed upon was thereby increased rather than diminished; and therefore that the report would not be set aside for that reason.

ON EXCEPTIONS.

REAL ACTION brought upon a mortgage.

The defendant Benj. Hall disclaimed as to lot No. 5, and claimed title in the remaining lots. James N. Hall justified his possession as tenant at will of Benjamin Hall.

The action was referred, by rule of Court, with all other matters, to certain referees, who heard the parties and made their award as follows: — That the plaintiff have judgment for Intervale Lot numbered five, demanded in his writ, the defendant having disclaimed all right, title, and interest in and to the same; and that we find that the defendants did disseize the plaintiff of the premises demanded, except such

lot numbered five, as alleged in plaintiff's writ, and therefore award that the plaintiff have judgment for the possession of the same, and for costs of reference taxed at one hundred fifty-two dollars, forty-seven cents, and costs of Court to be taxed by the Court. And that we further find that the plaintiff purchased his title to said last mentioned premises at the request of Benjamin Hall, one of the defendants, and that said Benjamin Hall is entitled to a conveyance of the same from the plaintiff, upon payment by him to the plaintiff of the sum of six hundred and ninety-three dollars and sixty-eight cents, provided that the costs above named, shall have been paid before said Benjamin Hall shall be entitled to said conveyance.

In coming to our conclusion as to the amount to be paid by said Benjamin Hall, to entitle him to said conveyance, we have taken into consideration the mutual notes and accounts and claims of said Rawson and Hall against each other, offered in evidence, but have not considered any claims connected with or growing out of said lot numbered five.

To the acceptance of the report of the referees the defendants seasonably filed in writing the following objections:

1. Because the writ in said action contained nothing but a declaration in ejectment founded on a mortgage given by one of the defendants, of which mortgage the plaintiff is the assignee; that, by the rule of Court, all matters between the parties were submitted to said referees; that, in accordance with said rule, matters, accounts and notes other than the mortgage aforesaid were considered by the referees, to wit: mutual accounts and claims between Benjamin Hall and the plaintiff; and that the amount adjudged and reported by said referees in their said report, due from and to be paid by said defendant to the plaintiff on the conditional judgment to be entered on said report, to redeem the premises mentioned in the plaintiff's writ, included other sums, accounts and amounts not mentioned, included in or secured by said mortgage.

2. Because the said referees report and adjudge, that the

said defendant shall not redeem the premises demanded unless they pay costs of reference and costs of Court.

3. Because the referees exceeded their authority in adjudging a conveyance between the parties.

The presiding Judge overruled the objections and accepted the report, *pro forma*, and the defendants alleged exceptions.

D. Hammons, for the defendants.

The rule authorized the referees to consider all matters between the plaintiff, on one side, and both defendants, on the other. The report declares that B. Hall is entitled to a conveyance from the plaintiff, upon payment of $693,68, provided the costs of reference and costs of court shall first be paid. They also report that, in arriving at the amount, they took into consideration the mutual notes and accounts, and claims of said Rawson and Hall against each other. This was clearly wrong. *Black* v. *Hickey*, 48 Maine, 545; *Butler* v. *Mace*, 47 Maine, 423.

S. May, for the plaintiff.

APPLETON, C. J.—This is a real action, brought to recover certain lots in Andover. The demandant claims title by virtue of a mortgage from the tenant, Benjamin Hall, to James Stevens, and an assignment from said Stevens to him.

Benjamin Hall, in his specifications, denies the title of the demandant and sets up title in himself. He further denies the execution of the notes described in his mortgage to Stevens, and alleges that they are paid.

The other tenant, James N. Hall, justifies his possession under Benjamin Hall, and as his tenant at will. The tenants join in pleading the general issue.

This action was referred, with all other matters, to certain referees, who, after hearing the parties, "find that the defendants did disseize the plaintiff of the premises demanded, except lot numbered five, as alleged in the plaintiff's

writ, and therefore award that the plaintiff have judgment for the possession of the same, and costs of reference taxed at one hundred and fifty-two dollars and forty-seven cents, and costs of Court to be taxed by the Court."

The award, thus far, is final and conclusive upon the main issue between the parties. The referees decide that the tenants did disseize the demandant, and award judgment in his favor.

But objections are made to the acceptance of the award because of certain subsequent findings by the referees. An award may be good in part and bad in part. An award will be sustained so far as the same is good, if it can be so disconnected from the remainder that no injustice will be done. *Orcutt* v. *Butler*, 42 Maine, 83.

It is objected that the referees found the amount due the demandant as mortgagee. But, upon recurrence to the brief statement and pleadings, it will be perceived that the real controversy was between the demandant and Benjamin Hall, the other tenant claiming no interest in the demanded premises.

Under the reference of all demands, if the only parties thereto had been the demandant and Benjamin Hall, there can be no question that the referees would have been authorized to determine the amount for which conditional judgment should be rendered. In making their award, the referees say, they did not take into consideration any claims relating to lot No. 5, the title to which is in the tenants. There is no evidence that the referees acted upon any claims but those of the demandant as assignee of the Stevens mortgage, and of such claims as the tenant offered in reduction of the amount due thereon.

To all this the tenant, James N. Hall, could not well object, as he claimed no interest. If this finding of the referees, (for they merely found the amount due to entitle Benjamin Hall to redeem,) is to be regarded as relating to a matter not submitted, it is easily separable from the rest of

the award, which is clear and decisive upon the question in controversy. *Orcutt* v. *Butler, ubi sup.*

The lien of the mortgagee attaches equally for the debt and for the costs necessarily arising in the enforcement of his rights by a suit at law. *Hurd* v. *Coleman*, 42 Maine, 182. It is a claim which the mortgager would be obliged to pay before he would be entitled to redeem.

It is objected that the referees adjudicated upon matters not submitted. This would be somewhat difficult, as all matters in controversy were included in the submission. Upon this subject no proof was offered before the presiding Justice. The burden is upon the party objecting to a report of referees to establish the facts upon which he relies. This he has not done. It no where appears that any injustice has been done. Though the mutual notes and accounts of Rawson and Hall were taken into consideration, it does not appear that thereby the demandant's claim was increased. For aught that appears, it may have been diminished, and of that he cannot complain. Without some evidence tending to show injustice has been done, the report should not be set aside. No valid reasons appear why the report should not be accepted. *Exceptions overruled.*

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

ANDREW SAWTELLE *& al. versus* WILLIAM WARDWELL.

The surname of the attorney written on the back of a writ is an indorsement of it, under R. S., c. 81, § 9.

ON EXCEPTIONS.

ASSUMPSIT upon two promissory notes given by the defendant, a resident of Oxford, in this county, to the plaintiffs, residents of Boston, Mass. The writ was drawn by Josiah

H. Drummond, a counsellor of this Court, residing in Portland. On the back of the writ were the words:—"From the office of Drummond;" the first four words being printed, and the word Drummond having been written by the said J. H. Drummond, prior to the entry of the writ.

On the second day of the return term, the defendant's counsel appeared and filed a written motion to abate the writ, alleging, for a cause, that the writ was not indorsed. The presiding Judge sustained the motion and dismissed the action, ruling that the writ was not indorsed; whereupon the plaintiffs alleged exceptions.

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

J. J. Perry, *contra*, cited, Stat. of 1821, c. 59, § 8; R. S., c. 81, § 9; *Hartwell* v. *Hemingway*, 7 Pick., 117; *Clark* v. *Paine*, 11 Pick., 66; *Stratton* v. *Foster*, 11 Maine, 467; *Strout* v. *Bradbury*, 5 Maine, 313.

DANFORTH, J.—The only question raised in this case, is as to the sufficiency of the indorsement of the writ, and it is admitted that it is properly indorsed as required by law in all respects, except as to the signature used. In this respect the surname only is put upon the back of the writ, while it is contended that there should be both surname and christian name. The early provincial statute provided, that the surname should be sufficient. Subsequently it was changed and the christian name was also required. Still later, another change was made and the statute adopted as it now stands, simply requiring, in certain cases, an indorsement, making no provision as to the mode in which it should be made. R. S., c. 81, § 9.

The object of the statute is to afford a security to the defendant for his costs, in case the suit should fail. The indorsement, then, is simply a contract by which the indorser becomes liable to the defendant for such costs, and is to be construed by the same rules as are applicable to other contracts. In the absence of all statute provisions regulating the form of signature, it is left to the general principles of

the common law. By these rules, "a person may become bound by any mark or designation he thinks proper to adopt, provided it is used as a substitute for his name, and he intends to bind himself." *Brown* v. *Butchers' Bank*, 6 Hill, 443. In *Cooper* v. *Bailey*, 52 Maine, 230, it was held that, an indorsement of a note "with the surname of the payee must be deemed valid." If such a signature would bind the indorser of a note, we see no reason why it should not be equally valid upon a writ.

Exceptions sustained.
Defendant to answer over.

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

KENT, J., dissenting. —If the doctrines of the common law in relation to signatures on contracts are to be applied in this case, the argument of Mr. Drummond is conclusive. But I do not think that the law, in relation to the indorsement of a writ, ever intended to make any name, mark or initials, or nick-name, or assumed designation, which might hold a party on a note or contract, a sufficient indorsement. The statute of 1821 required that the christian and surname should be indorsed. The change of phraseology was not intended to change the rule so that any mark should be sufficient. As I understand the requirement of the statute, it is that some sufficient inhabitant of the State shall so place his name on the writ, that the other party, in case of avoidance, or inability of the plaintiff to pay the judgment for costs, may have an action and sustain it without being compelled to seek extraneous proof to show what person was intended by the indorsement. He is not to be put to the trouble or expense of hunting up proof to show who indorsed the writ. The indorsement in this respect should itself identify the person. A man indorses the name of "Smith" on the back of a writ. Must the defendant go about to find out which of that multitudinous family in fact put his name there?

It may be entirely just and right to hold a man who puts any initial or abbreviation, or nick-name on his contract, where the question is between him and another party. If a party accepts a contract thus signed, he knows it at the time, and he accepts it, *cum onere* of proving who did it. But in case of an indorsement of a writ, the defendant is no party to the transaction, — has no power to reject it as imperfect or insufficient. He can only object after entry. It is a statute requirement to make the writ perfect. Would it be sufficient for a clerk to sign a writ "Fessenden?" No one would pretend that official acts of any kind can properly be signed by the surname only, — as returns of selectmen or commissioners, or sheriffs.

It seems to me plain, that when the statute requires that a person should indorse a legal process to make it valid, he must so indorse it that the other party may have the benefit of it without being obliged to run the risk of being able to prove facts *aliunde*, to fix the liability on a particular person because he has not so identified himself by his indorsement.

The suggestion, that the plaintiff will lose his debt if the ruling is sustained, if true, cannot control the law. But see § 102, c. 81, which saves his right to commence anew in cases there named.

The XVIII rule of construction, c. 1, R. S., gives this as the rule regulating signatures, when required by law,—"when the signature of any person is required, he must write it or make his mark." Here it was required by statute that he should put his signature on the writ. Can it mean anything less than his christian and surname?

DICKERSON and TAPLEY, JJ., concurred.

STEPHEN P. KILGORE *versus* JAMES WOOD.

Tenants in common of certain timber lands entered into a written contract, wherein it was agreed that the one owning two-thirds of the common estate should, in consideration of certain payments to be made at specified times, sell his interest to the other owning the remainder, and "all timber or lumber to be holden to the" vendor, "either on the landing at the river, or at the mill," and the vendor to give the vendee "a deed as soon as convenient or possible, said timber to be holden for said payments to all intents and purposes." The vendee did not make all the payments as agreed, nor demand or receive any deed, but sold the timber on the stump to the defendant, who caused it to be cut and hauled to the landing; and, while rolling it into the river for the purpose of driving it to market, the vendor appeared and claimed it, showing his contract, and forbade the defendant's turning in any more; but the defendant persisting, the vendor immediately brought trover for the logs before they had arrived at their destination: — *Held*,

1. That the lien created by the contract attached only to the plaintiff's two-thirds interest in the logs;

2. That the defendant's purchase made him a tenant in common with the plaintiff; and

3. That, as between tenants in common, the facts do not constitute a conversion.

ON REPORT.

TROVER for three hundred and eighty-six thousand feet of logs.

The facts are sufficiently stated in the opinion. The case was submitted to the full Court to render judgment according to the legal rights of the parties.

S. F. Gibson, for the plaintiff.

The plaintiff claims title to the whole of the property by force of the agreement.

The plaintiff had a good and sufficient lien on the timber upon the landing, and that lien was in full force and effect at the time of the forbidding. *Sawyer* v. *Fisher*, 32 Maine, 28.

There was no waiver by plaintiff of his rights, by voluntarily parting with the possession, or by any act or agreement

founded upon a valuable consideration. *Spaulding* v. *Adams*, 32 Maine, 211; *Danforth* v. *Pratt*, 42 Maine, 50.

The principle of *caveat emptor* must be applied in all its force against the defendant. *Sawyer* v. *Fisher*, 32 Maine, 28.

The defendant, by his purchase from Bragg, could not acquire any greater rights than his vendor (Bragg) had.

The question of confusion or intermixing of the timber, has no force as against the plaintiff; if they were so intermixed, it was done by the defendant, through his vendor. *Hazeltine* v. *Stockwell*, 30 Maine, 237; *Spofford* v. *True*, 33 Maine, 284.

The timber being, to all intents and purposes, the property of the plaintiff, and the immediate right to possession in him, when on the landing, the demand and forbidding by plaintiff (in April, 1866,) and the subsequent acts of the defendant, establish, beyond question, a wrongful conversion by the defendant. *Dickey* v. *Franklin Bank*, 32 Maine, 572; *Moody* v. *Whitney*, 34 Maine, 563; *Fernald* v. *Chase*, 37 Maine, 289.

The damages to the plaintiff, in this case, should be the value of the property at the time of conversion, or right to the action commenced, with interest. *Brown* v. *Haynes*, 52 Maine, 578; *Pierce* v. *Benjamin*, 14 Pick., 357; *Fowler* v. *Gilman*, 13 Met., 267.

The plaintiff is the general owner, and, as such, is entitled to compensation. The defendant had no lien, and never had, and cannot claim any deduction.

There having been a demand and forbidding on the landing, the damage should be the value of the timber on the landing. *Moody* v. *Whitney*, 38 Maine, 174, (last clause of the opinion.)

But the defendant (*dehors* the agreement "A,") may contend that Bragg was a co-tenant of the plaintiff, and, by the sale by Bragg to him, the defendant became co-tenant of the plaintiff.

If the Court should find that the plaintiff had no lien on

the timber, then plaintiff claims that the defendant is liable in this form of action, to the extent of plaintiff's interest (two-thirds,) in the timber cut and hauled by Bragg. *Weld* v. *Oliver*, 21 Pick., 559; *Wheeler* v. *Wheeler*, 33 Maine, 347.

Bragg could only sell his share to the defendant, and he could hold only that share. The defendant sold and disposed of the entire property, for, he says, he "drove the timber to Lewiston and the Lewiston St. M. Co. used it." How came they by it? The defendant was the last person seen by plaintiff in possession of the timber, and the presumption of law is that he disposed of it.

We contend that an agent is liable for misfeasances or torts to the owner of the property, whether he acted by the direction of his principal or not. *Perkins* v. *Smith*, 1 Wilson, 328; *Bush* v. *Steinman*, 1 B. & P., 410; *Fairbrother* v. *Ansley*, 1 Camp., 343.

D. Hammons, for the defendant.

BARROWS, J. — The logs for which this action of trover is brought, were cut on land owned in common and undivided by one Wm. W. Bragg and the plaintiff; the plaintiff owning two-thirds, and Bragg one third of the land. The defendant, as agent for the Lewiston Steam Mill Co., in Nov., 1865, bargained for them before they were cut, with Bragg, who agreed to sell and deliver them at a stipulated price on the banks of Bear river. They were worth $1 per M. on the stump, and $6, when delivered as stipulated. Bragg received from the defendant an advance of $1200 on the timber, at the time of the bargain, and employed one Widbur to get it to the banks of the river, at $5 per M. Widbur was paid by the defendant; the amount to be paid being settled by him with Bragg. Bragg testifies that he informed Alvah Kilgore, the father and agent of the plaintiff, (who being out of health, lives with his father, and entrusts the management of his business to him,) of this sale, on the day it was made; that he told Alvah that he could not pay

plaintiff then, but would in the spring, and that Alvah made no objection, either to the sale or to the time of payment. This Alvah denies, but admits that he knew that Widbur drew timber from the same land for Bragg, the winter before, which the Lewiston Steam Mill Co. had, and that he knew of this transaction about the time they commenced operating. It appears that the timber was all drawn past the house occupied by the plaintiff and his father, and landed upon the bank, about fifty rods from the house, on land belonging to Alvah Kilgore's wife; and, it cannot be doubted, that both the plaintiff and his father were fully cognizant of the operation and its purpose throughout its entire progress. Yet neither of them interposed any objection or claimed any right in or lien on the logs, until the defendant came in the spring to turn the logs into the river.

The plaintiff now claims that he alone was entitled to the possession of the timber, (notwithstanding it was cut upon land owned by him in common with Bragg, the defendant's vendor,) by virtue of an agreement made between himself and Bragg, Nov. 15, 1864, whereby the plaintiff agreed to sell the land to Bragg for $75 cash down, $100 in January, 1865, and $225 in April, 1865, containing also the following provision;—"and all timber or lumber is to be holden to him the said Stephen P. Kilgore, either on the landing of the lumber at the river or at the mill." There is a further stipulation, that "said Kilgore is to give the said Bragg a good and sufficient deed soon as convenient or possible, said timber to be holden for said payments to all intents and purposes."

Bragg had paid only $125 on the agreement,—had never received a deed from plaintiff nor called for one.

Under these circumstances, the defendant came to the landing in the spring of 1866, to turn the logs into the river, which is a rapid and narrow one, capable of being driven only in the spring; and, while he was thus engaged, the plaintiff's agent forbade his doing it, thus first making known

the plaintiff's claim on the timber. The defendant persisted in turning the logs into the river, saying that plaintiff's claim was as good at Lewiston as it was there; and this suit was commenced forthwith, long before the logs could have arrived at Lewiston.

It is not necessary to decide in this case whether, if the plaintiff's claim of lien upon all the timber cut on the common land could be sustained, he has so conducted as to preclude him from asserting it, or has ratified Bragg's sale to the defendant. A fair construction of the plaintiff's agreement with Bragg will not extend the plaintiff's lien to the interest which Bragg previously had in the timber, as tenant in common with the plaintiff of the land on which it was cut. The agreement provides for a sale of the plaintiff's interest in the land to his co-tenant Bragg, and the lien reserved to secure the payments attaches to the plaintiff's two-thirds of the timber only. To hold it valid and binding on Bragg's third, as against his grantee, would be to ignore the statute requiring mortgages of personal property to be recorded. The operation upon the common land was carried on by Bragg with the consent of his co-tenant, the plaintiff. The existence of this agreement and the reservation of the lien upon the timber, both at the landing and at the mill, proves this beyond question. Bragg and the plaintiff, then, were owners of the timber as tenants in common. The purchase from Bragg made the defendant, at the worst, a tenant in common with the plaintiff therein. In this condition of things the plaintiff assumed to prevent his co-tenant, the defendant, from turning the logs into the river. The defendant, scarcely denying the plaintiff's claim, but saying it was as good at Lewiston as it was there, declined to yield to this assumption, maintained his possession of the common property, and proceeded to do what was necessary, as it appears, to save it from a heavy depreciation, to wit, to drive it out of Bear river while the season and state of the water permitted. Hereupon an action of trover is brought against him by his co-tenant. When the action was commenced,

the defendant was in possession of the property and doing his best for its preservation. As between tenants in common, here is no proof of a conversion.

It is settled that trover will not lie against the vendee of the original co-tenant while he remains in possession of the property, although claiming it as sole owner. *Dain* v. *Cowing*, 22 Maine, 347; *Gilbert* v. *Dickenson*, 7 Wendell, 449.

The action was at all events prematurely brought.

Plaintiff nonsuit.

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

JOEL PARKHURST, *in Equity*, *versus* EMELINE CUMMINGS, *Executrix*.

Nothing but payment of the debt secured by a mortgage on real estate, or a release, will operate a discharge of the mortgage.

A mortgager, when redeeming his mortgage, is not obliged to pay compound interest, although the note secured thereby, in terms, requires it.

On March 4, 1846, a mortgage of real estate was given to the respondent's testator to secure a note, of the same date, payable "with interest annually." A few years afterwards, the mortgager gave to the complainant's assignor a mortgage of the premises, "subject to the former," to secure a sum therein specified. March 4, 1865, the mortgager gave to the respondent's testator another negotiable note for the interest computed annually, which had accrued upon the original note, and on the same day made an indorsement upon the original note as follows: — "Received the interest on the within note to date by a note of March 4, 1865," &c. The respondent in her account of the amount due upon the mortgage, claimed payment of both notes, and interest on each, from the date of the latter. In a bill brought by the assignee of the junior mortgage, to redeem the senior mortgage: — *Held*,

1. That the second note was not intended as payment;

2. That the complainant was entitled to redeem upon payment of the original note and simple interest; and

3. That the respondent having claimed in her account more than she was entitled to recover, was liable for costs.

BILL IN EQUITY, heard upon bill, answer and proofs. Upon demand by the complainant, the respondent made the following statement as the true account of the sum due on the mortgage: — "The note described in said mortgage, and of even date with it, for one hundred and fifty-six dollars, payable in one year from date with interest annually, on which there is the following indorsements: — March 4, 1865, received the interest on the within note to date by a note of March 4, 1865, for the sum of three hundred and fifteen dollars and ninety-eight cents, payable on demand and interest, and signed by said Cephas Sampson; on which said original note I claim as due, July 4, 1867, the sum of one hundred seventy-seven dollars, eighty-four cents, ($177,84.) Also the note described in said indorsement on the original note, given for the interest on the same, on which I claim as due on said July 4, 1867, the sum of three hundred and sixty dollars and twenty-one cents, ($360,21,) — both of said sums amounting to the sum of five hundred thirty-eight dollars and five cents, ($538,05,) and being the amount due on said mortgage."

The remaining facts sufficiently appear in the opinion.

W. W. Virgin, for the complainant, contended, *inter alia*, that the note of March 4, 1865, was payment, because:

1. It is negotiable, and therefore presumed to be in payment of what it was given for. 2 Pars. on Notes & Bills, 150, note *a*, where all the authorities are cited. *Paine* v. *Dwinel*, 53 Maine, 52.

2. Cummings intended it as payment, to save the original note from the statute of limitations.

3. The express language of the indorsement, — "Received the interest," &c., is that selected by the parties to express their intention; while the latter clause of the indorsement simply refers to the note for the amount thus paid as interest.

4. If the note had been simply given and not indorsed

upon the original, it might not have been considered as payment.

5. Cummings might well waive the mortgage security of so much of the note as included the simple interest ($177.84) for Sampson's personal security for interest compounded for nineteen years ($315,98) with interest annually, even upon that. He took the money changer's risk and must abide the consequences, as between these parties.

6. The note is good against Sampson's estate. *Wilcox* v. *Howland*, 23 Pick., 167, but not secured by the mortgage. It is not a renewal, as in *Watkins* v. *Hill*, 8 Pick., 522, and *Pomroy* v. *Rice*, 16 Pick., 22. But a personal promise to pay $138,14 more than was collectable on the original note, made years after the intervention of the rights of third persons. Interest due is no part of the principal, and cannot bear interest except by a new special promise. *Doe* v. *Warren*, 7 Greenl., 48, approved by C. J. SHAW, in *Ferry* v. *Ferry*, 2 Cush., 98.

7. As between themselves, immediate parties to a senior mortgage, may select their own rules of equity and pay semi-annual interest, as in *Farwell* v. *Sturdivant*, 37 Maine, 308; and the Court will not disturb them after executed in good faith; but a mortgagee of a senior mortgage cannot compel the mortgagee of a junior mortgage to be shod on the former's last.

8. Respondent, not having rendered a "true account," is liable for costs. R. S., c. 90, § 13; *Cushing* v. *Ayer*, 25 Maine, 388–9; *Pease* v. *Benson*, 28 Maine, 336; *Roby* v. *Skinner*, 34 Maine, 270.

Alvah Black, for the respondent.

1. Nothing but payment in fact, or the release of the mortgagee, will discharge a mortgage. *Crosby* v. *Chase*, 17 Maine, 369. The whole debt must be paid,—if separated into parts, the parts must all be paid. 1 Hill. on Mort., 372. Renewal is not payment, and will not discharge a mortgage. *Haddock* v. *Bulfinch*, 31 Maine, 246;

Pomroy v. *Rice*, 16 Pick., 22; 1 Hill. on Mort., 450. No change in the evidence of the debt secured will operate a discharge. 1 Hill. on Mort., 453.

2. When a negotiable note is taken for a simple contract debt, a presumption of fact arises, that it is taken in payment; but the presumption may be rebutted. 2 Pars. on Bills & Notes, 150, notes *a* & *b*; *Curtis* v. *Hubbard*, 9 Met., 322; *Kidder* v. *Knox*, 48 Maine, 551. The taking of a negotiable note is to be regarded as payment only when the security of the creditor is not thereby impaired. *Kidder* v. *Knox*, *ubi sup.*; *Paine* v. *Dwinel*, 53 Maine, 52. The facts show that the second note was not intended as payment. The language of the second note and that of the indorsement indicate the same thing.

3. Renewal notes, with accruing interest added, are secured by the mortgage securing original notes. *Pomroy* v. *Rice*, *ubi sup.*

4. Notes for annual interest, given by a mortgager before conveying the equity of redemption, absolutely, or in mortgage, are secured by the mortgage, and must be paid to redeem. *Farwell* v. *Sturdivant*, 37 Maine, 308.

5. The giving of the annual interest note was in accordance with the terms of the original note and mortgage, and not an additional charge upon the estate, especially, when, as in the case at bar, the second mortgage, by its terms, is made subject to the former. There is no such privity between the holders of the second mortgage and of the Cummings mortgage as to permit the former to hold the mortgaged estate discharged of the annual interest. *Green* v. *Kemp*, 13 Mass., 515; *Ellsworth* v. *Mitchell*, 31 Maine, 247.

6. Respondent rendered a true account according to the terms of the mortgage and notes, and thereby complied with R. S., c. 90, § 13, and is not liable for costs. She could not be required to determine the legal effect of the notes. It was not an unreasonable neglect to render a true account. *Roby* v. *Skinner*, 34 Maine, 270.

Parkhurst *v.* Cummings.

APPLETON, C. J.—This is a bill in equity, brought by the assignee of a junior mortgage, given subject to a prior mortgage, against the prior mortgagee, to redeem the prior mortgage. The right of the complainant to redeem is not denied. The main question presented is the amount to be paid in order to redeem. It is conceded that the original debt must be paid. It is claimed that the defendant has been paid the interest thereon.

The mortgage sought to be redeemed was dated March 4, 1846, and was given to secure a note of the same date, for $156, "with interest annually," and payable in one year.

No interest was paid on the mortgage until March 4, 1865, when the mortgager gave the mortgagee a note of the following tenor:—

"Paris, March 4, 1865.

"For value received, I promise to pay Simeon Cummings or order, three hundred and fifteen dollars and ninety-eight cents, on demand, and interest annually. This note is for the interest on a certain note dated March 4, 1846, for the sum of $156, payable in one year from date and interest, and signed by myself and secured by mortgage.

Cephas Sampson."

On the back of the note of $156 is the following indorsement.

"March 4, 1865.—Received the interest on the within note of March 4, 1865, for the sum of $315,98, payable on demand and interest, and signed by Cephas Sampson."

The complainant asks equity and he must be willing to do equity. Nothing but payment of the mortgage debt or its release will operate as a discharge. A renewal of a note secured by mortgage is not such a payment as will discharge the mortgage, unless it was so intended by the parties. *Crosby* v. *Chase*, 17 Maine, 369; *Ellsworth* v. *Mitchell*, 31 Maine, 247; *Pomroy* v. *Rice*, 16 Pick., 22. We think it is evident that the parties to the note given for interest did not regard that as a payment and discharge of such interest. The circumstances manifestly rebut the presumption

of payment. The mortgagee could never have intended thereby to surrender his claim for the interest unquestionably due.

The mortgager when redeeming a mortgage is not obliged to pay compound interest, though the note secured by the mortgage may in terms require it. *Doe* v. *Warren*, 7 Greenl., 48; *Stone* v. *Locke*, 46 Maine, 445; *McLaughlin* v. *Kittridge*, 38 Maine, 513. The mortgagee, when the mortgage note is payable at some future period and with annual interest may require the interest as it accrues, and, if not paid, may sue for and recover it. He may take a note when the interest becomes due and the mortgage may be a security for such note. But, after the principal becomes due, annual interest cannot be recovered in a separate suit. *Howe* v. *Bradley*, 19 Maine, 31. When the note for annual interest was given by the original mortgager, the holder thereof could not have recovered by suit more than simple interest, nor could he have maintained a separate action for the annual interest.

The plaintiff is entitled to redeem upon payment of the original note and simple interest.

The defendant, in reply to the plaintiff's demand for a statement of the amount due, sets forth claims beyond the amount to which she was entitled. The plaintiff, if he redeems, will recover costs. *Cushing* v. *Ayer*, 25 Maine, 388.

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

CHARLES WARD *versus* EDWARD E. BOURNE *& al., Ex'rs.*

By the law of Massachusetts and of Maine, the giving of a negotiable draft is to be deemed *prima facie* evidence of payment of that for which it is given.

The plaintiff, as agent of the owners, chartered their vessel for a voyage from Boston to Callao, for $1625 per calendar month, payable at Callao, so far as earned, up to time of discharge there, in drafts on the United States, at sixty days sight, to the order of the captain, first deducting amounts advanced him for disbursements, with liberty to the charterers to recharter her for a cargo of guano. The consignees, at Callao, paid the master on account of freight earned $5210 in cash, and gave their draft on a Boston house for $7000, at sixty days, payable to the order of the master, who indorsed it to the plaintiff. The consignees rechartered the vessel for a cargo of guano. At its maturity, the draft remaining unpaid and the drawees having failed, they transferred their interest in the freight money in the guano to the plaintiff, as agent of the owners, to collect the same on account of the vessel's earnings. Twenty days afterwards, the defendants' testator, owning three-sixteenths of the vessel, sold his interest in the unpaid draft to the plaintiff, at fifty per cent., taking therefor the plaintiff's note, which by its terms was "for" the testator's "three-sixteenths interest in the unpaid $7000 draft." The guano freight was received and divided among the owners, the testator receiving three-sixteenths thereof. In assumpsit to recover the money received by the testator: — *Held*,

1. That the giving of the draft was *prima facie* payment *pro tanto* of the freight earned.

2. That the plaintiff purchased of the testator the latter's interest in the draft only, and not his interest in the guano freight.

ON REPORT.

ASSUMPSIT to recover $1983 alleged to have been received prior to Dec., 1861, by Thomas Lord, the defendant's testator, the same being an interest of three-sixteenths of a certain guano freight money earned by the bark Waverly. The money was claimed by virtue of a certain assignment made to said Ward by Rollin Thorne & Co., of Boston, May 18, 1858, in words following: — "Having been advised by our Lima house, that the bark Waverly, chartered by us of you, has been rechartered at Callao for the U. S., for a cargo of guano, we hereby transfer to you all our interest in the freight money in said cargo of guano and authorize

you, as agent for the owners of above bark, to collect same on account of the bark's earnings under your charter of her to us."

"Should any drafts come to us from our Lima house, for sums advanced by them to Capt. Nowell, of ship 'General Nowell,' we agree to transfer the same over to you, on account of whatever balance there may be due you from us on account ch. of bark 'Waverly' over and above the amount already paid by us and the proceeds of the guano freight."

It appeared that Lord died Dec. 1, 1861.

John Murphy, called by the plaintiff, testified substantially, that plaintiff was ship's husband until Oct., 1858, when witness was appointed and so continued until she was lost in 1861; that she was chartered to Rollin Thorne & Co., and arrived in New York, Oct., 1858, with guano. Witness collected guano freight under the R. T. & Co's. assignment, and gave a receipt for it, the amount being $11,394,75. Nov. 11, 1858, settled the charter party with R. T. & Co. Balance has never been collected. With guano freight money, paid disbursements, fitted bark in N. Y. for sea, paid insurance and other bills against the bark and then divided the balance among her owners in their respective proportions, paying to Lord $670. Settlement of charter party was as follows:—

Statement of settlement, &c., charter party bark Waverly.

June 10th, 1857, to Oct. 20th, 1858, 16 mos., 10 days, at $1625 per month,		$26,541 67
Port charges in New York,		150 28
1-2 Expense cleaning ship, New York,		30 00
1-2 " discharging, New York,		119 62
		26,841 57
Paid in Callao,	$5210 00	
69 tons guano 8 hundred,	828 00	
Bal. on guano freight, *a* $12,	10,675 75	16,713 75
Bal. due to owners,		10,127 82

GUANO FREIGHT.

Total delivered	2,142,631 lbs.	
Tare and damage	15,611	
	2,127,020	
Tons 949, 11 cwt. 1 qr. 0 lbs. at $12,		$11,394 75
Com. on $2239,25 *a* 2½ per cent.,	55 98	
" " 11,394 75 *a* 4½ per cent.,	512 76	
Discount on $8,586 76, 3 mos.,	150 26	719 00
Cash paid to owners of bark,		10,675 75

The remaining facts are sufficiently stated in the opinion.

The full Court were to render such judgment as law and evidence required.

J. Dane, for the plaintiff, contended that the $7000 acceptance, taken under the charter, represented that amount of earnings, and was not an absolute payment or extinguishment *pro tanto* thereof, and cited 2 Pars. on Con., 135; *Derickson* v. *Whitney*, 6 Gray, 248; *Zerrano* v. *Wilson*, 8 Cush., 424; *Alcock* v. *Hopkins*, 6 Cush., 484; 2 Pars. on Mar. Law, 256; *Descadillas* v. *Harris*, 8 Greenl., 298; *Williams* v. *Agry*, 4 Mason, 343.

The acceptance, representing so much of the earnings under the charter party, was secured by the assignment of the guano freight money. Bark had a lien on the future earnings but none on past. The intention is shown by the language in the assignment,—"collect same on account of the bark's earnings under your charter of her to us,"—i. e., all her earnings, between the owners on the one side and R. T. & Co. on the other.

The guano freight money was applied by competent authority to discharge so much of the earnings as was represented by the acceptance, as appears by Murphy's settlement. The round voyage is charged at the chartered price and no credit of the $7000. Lord's estate has had the benefit of three-sixteenths of the $7000, and the plaintiff is entitled

to it. If the $7000 draft was considered as outstanding, it would have entered into the settlement.

Bourne, pro se and the other defendant.

APPLETON, C. J.—It appears from the evidence that the plaintiff was the agent for bark Waverly, and that Thomas Lord was the owner of the three-sixteenths of the same bark.

On May 7, 1857, the plaintiff, as agent for the owners, chartered the Waverly to Rollin Thorne & Co., of Boston, "for a voyage from Boston to port or ports on the west coast of South America, and to Chincha Islands, thence to an Atlantic port of discharge in the United States, a port of discharge in Europe, the West India Islands, or to Mauritius, at the option of the charterers, bark to be consigned to Messrs. Rollin Thorne & Co., of Lima." The charterers were "to pay the said party of the first part, or his agent, for the charter or freight of said vessel during the voyage aforesaid, in manner following, that is to say:—the sum of sixteen hundred and twenty-five dollars ($1625) per calendar month, and in proportion for any part of a month during the time under this charter, payable at Callao, so far as earned up to time of bark's discharge on the coast of South America, in bills or drafts on the United States, at sixty days sight, to order of the captain, first deducting the amounts advanced him for his disbursements," &c., "and parties of the second part are at liberty to recharter the bark for a cargo of guano."

The vessel arrived at Callao, and, on Feb. 9, 1858, Rollin Thorne & Co., of Lima, paid the master on account of freight earned, $5210 in cash, and gave their draft on their Boston house, of that date, for $7000, at sixty days sight, payable to the order of Isaac Curtis, master of the Waverly, by whom it was indorsed to the plaintiff as agent.

The Lima house, in pursuance of the liberty given in the charter party, rechartered the vessel for a cargo of guano, while it was at Callao.

On May 18, 1868, the house of Rollin Thorne & Co. having failed, and the draft for $7000 remaining unpaid, they transferred to the plaintiff, as agent for the owners of the bark, their "interest in the freight money on said cargo of guano," * * "to collect same on account of bark's earnings" under the charter given them.

On June 10, 1858, Lord sold his interest in the unpaid draft of Rollin Thorne & Co. at fifty per cent. of the amount due, and received therefor the following note of the plaintiff, which he has paid.

"Kennebunk, June 10, 1868.

"Six months after date, I promise to pay to Thomas Lord the sum of six hundred fifty-six dollars for his $\frac{3}{16}$ interest in Rollin Thorne & Co. acceptance for $7000, given on account of bark Waverly, and remaining unpaid.

Charles Ward."

The freight on the guano was received and divided among the owners of the bark, Lord receiving his three-sixteenths thereof, and was not enough to pay what was due on the charter party, accruing subsequently to the settlement of freight at Callao.

The plaintiff claims that he is entitled to three-sixteenths of the guano freight money earned by the bark Waverly, after she sailed from Callao, and that the purchase of the draft was the purchase of three-sixteenths of the freight money earned, and to be earned thereafterwards.

But this claim is untenable. The charter party was entered into in Massachusetts. By its terms, the freight earned at Callao was to be paid by a draft on time. It was so paid. By the law of Massachusetts and of Maine, the giving a negotiable note or draft is to be deemed *prima facie* evidence of payment. The draft of Thorne & Co. is to be regarded as payment *pro tanto* of the freight earned at that date. Nothing is shown to rebut the presumption of law that it was so given in payment. The plaintiff, then, by his purchase, acquired only "three-sixteenths interest in Rollin Thorne & Co. acceptance for $7000," and nothing more. It

was all that was sold and all that was purchased. The risk run is indicated by the price paid.

The guano freight money should equitably go to pay the freight under the charter party which was cotemporaneously accruing. In fact, it was not sufficient for that purpose. But it could never have been the intention of the parties that Lord should surrender the freight which was being earned, for the benefit of the plaintiff who had bought an unpaid draft of the charterers at a discount of fifty per cent. Lord sold no interest of his in the freight then accruing. His transfer was of his interest in a note given for freight already earned. Lord had sold his interest in the past freight, as represented by the draft for $7000, at fifty per cent. He was entitled to his share of the freight accruing after the vessel left Callao. This, he has not sold nor transferred, and this is all he has received, and it does not amount to the sum due on the charter party after leaving Callao.

In *Zerrano* v. *Wilson*, 8 Cush., 424, cited by the counsel for the plaintiff, the bill of exchange was brought into Court and filed in a suit between the original parties. In *Derickson* v. *Whitney*, 6 Gray, 248, it was held that the payee of a bill of exchange, acceptance and payment of which had been refused, might surrender the bill and maintain an action on the debt for which the bill was given. So, in *Alcock* v. *Hopkins*, 6 Cush., 484, the Court held an action could not be maintained upon the original account, if the bill given for the amount was outstanding. But these cases do not apply, because this is not a suit upon the charter party, nor between the original parties thereto. The draft has never been cancelled nor surrendered, but is still outstanding. *Plaintiff nonsuit.*

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

AMERICAN BANK *versus* ARIEL WALL.

To an action in the name of an insolvent bank, prosecuted by direction of the receivers against an indorser of a promissory note, the defendants filed in set-off certain bills of the bank, some of which he held when the bank failed and passed into the hands of the receivers, and the others he purchased subsequently: — *Held*,

1. That the amount of such of the bills as he held when the bank became insolvent and passed into the hands of the receivers should be allowed in set-off; but

2. That upon those purchased by him subsequently, the defendant must seek his remedy under R. S., c. 47, §§ 70, 71, 72, 73 and 74.

ON REPORT.

ASSUMPSIT against the defendant as indorser of a promissory note for $150, dated March 1, 1864. The action was brought by direction of the receivers of the bank. The defendant seasonably filed in set-off bills of the bank, amounting to $176, which bills had been filed and proved before the receivers, Aug., 1866, and their certificate given therefor. The remaining facts sufficiently appear in the opinion. The Court were to render such judgment as the legal rights of the parties require.

J. Baker, for the plaintiff.

A. P. Gould, and A. G. Stinchfield, for the defendant.

APPLETON, C. J. — The plaintiff bank is in the hands of receivers, by whose direction this suit is prosecuted for the benefit of its stockholders and creditors.

This action is on a note of hand indorsed by the defendant, who files in set-off the bills of the plaintiff bank. At the time the receivers were appointed the defendant held one hundred dollars of the plaintiff's bills, and, after their appointment, he purchased more, to the amount of seventy-six dollars. Both sums are included in the account filed in set-off.

By R. S., 1857, c. 47, § 24, — "Every bank shall receive its own bills, if offered in payment of its dues." In *South-*

gate v. *Sargent*, 5 Pick., 319, it is said, that bills of a bank coming into the defendant's hands, *bona fide*, before its failure, may be filed in set-off.

By R. S., c. 82, § 49,—"When a plaintiff has received notice that a demand against him has been assigned to the defendant, and has agreed to pay it to him or to receive it as payment towards his demand, before his suit was commenced, it may be set off." Now, the provision by which "every bank shall receive its own bills, if offered in payment," is equivalent to an agreement so to receive. Indeed, by accepting the charter, the bank impliedly agrees that all bills of the bank shall be received by the bank in payment of the debts of the holders. It becomes unnecessary, therefore, to consider whether or not there was any necessity to make a demand upon the bank for their payment before so filing them.

In equity it was held, in *Miller* v. *Receiver of Franklin Bank*, 1 Paige, 444, and, in the matter of the receiver of Middle District Bank, 1 Paige, 585, that the debtor had a right to offset any demands held against the bank at the time it stopped payment, and, that it was the duty of the receiver to set off the bills so held by the debtor, against the counter claims of the bank. To the same effect is the decision of the Court in *Niagara Bank* v. *Rosevelt*, 9 Cow., 404. Where one was a debtor to a State bank, and also its creditor, by holding its bills, the bank was held bound to receive its own bills in payment whether insolvent or not; but a debtor, after the bank has become insolvent, cannot purchase bills to set off against his debt. *Thorp* v. *Wegefarth*, 56 Penn., 82.

It would seem, therefore, that defendant might file in set-off the money in his hands at the time of the failure of the bank and the appointment of receivers. But, whether so or not, that sum should have been allowed by the receivers in part payment of the amount due from the defendant, and, as the bills are in their hands, it should be credited him in making up judgment.

But the bills purchased after the appointment of receivers stand upon a different footing. The receivers represent the creditors of the bank. After the bank became insolvent and receivers were appointed, its debtors could not purchase its bills at a discount wherewith to pay their indebtedness. It would be to allow all debtors to compound their debts, however solvent they may be, to the loss of the other creditors of the bank. Accordingly, by c. 47, § 75, after the appointment of receivers, all creditors must seek their remedy under the provisions of the five preceding sections and not by action. The receivers, however, may receive bills in payment of its demands if they deem it for the interests of the Bank. By § 67,—"If they think any debt cannot be collected, they may receive payment of it in the bills of the bank, or compound it on such terms as they think expedient."

But the receivers of the bank cannot deprive its debtors of rights existing before their appointment, nor does the statute intend they should. The provisions of the statute are in perfect accordance with the equities of all parties. The debtors are to be protected in their right of paying the debts due the bank with the bills in their possession at the time of its failure. After that, if they purchase bills, they hold them with the same rights as other bill holders, and receive their dividend upon them with the other creditors of the bank. *Defendant defaulted for the note in suit after deducting* $100.

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

ELBRIDGE BERRY *versus* LEWIS J. HOEFFNER.

In an action on a replevin bond, the principal not being an inhabitant of this State and having no agent or attorney or property here, seasonably appeared and moved the writ abate for want of jurisdiction as to him: — *Held*, that the plaintiff have leave to discontinue as to him upon the terms prescribed by R. S., c. 82, § 12.

If goods have been damaged since they were replevied, and while in the possession of the plaintiff in replevin, their mere restoration in a damaged condition will not be a compliance with the bond which requires them to be restored in like good order and condition as when taken.

The language prescribed by the statute, both in replevin bonds and in judgments for returns, by implication, if not in terms, requires the property replevied to be returned in the same condition as when taken.

ON FACTS AGREED.

DEBT on a replevin bond, dated June 10, 1859. The plaintiff was a deputy sheriff for this county, when the bond in suit was given, and as such, held in his possession, a piano, which he had taken from one McGowan upon a legal search warrant issued upon complaint of the defendant Hoeffner. The title to the piano was claimed by both Hoeffner and McGowan, who notified Berry of the fact, and demanded possession. Berry declined to deliver the piano to either party until their legal rights to the same were determined. Whereupon, on June 10, 1859, Hoeffner replevied the piano, giving the bond in suit.

The replevin suit was reported to the full Court in 1861, who were to "render such judgment thereon as the law and evidence required." Subsequently, an order was issued by the full Court directing the clerk to enter the replevin suit, "plaintiff nonsuit." Judgment was made up for a return* as of the previous term, and, on May 17, 1862, a writ of restitution was issued, placed in the hands of a coroner, who returned the piano, Aug. 1, 1862, and collected the costs of replevin. The piano was in the possession of Hoeffner's attorney, for safe keeping, from the time it was replevied

* See opinion.

until it was returned, and was used some of the time by a person who was taking lessons in music.

The plaintiff claimed to recover in this suit a reasonable sum for the use and detention of the piano, in trust for the owner of the same, and also damages, upon the ground that it was not "returned in like good order and condition as when taken;" and offered to prove the damages and loss by detention.

The defendants claimed that the piano was returned in like good order and condition as when taken, and denied the plaintiff's right to recover in this suit any sum, either for damages or detention, for the reason that no damages were awarded by the Court in the original suit.

If the plaintiff could legally recover damages upon any ground mentioned, the action was to stand for trial and damages to be assessed by the Court or jury, as either party might desire.

L. Clay, for the plaintiff, cited R. S., c. 96, § 18; c. §§ 11 & 13; *Howe* v. *Handley*, 28 Maine, 241; *Greely* v. *Currier*, 39 Maine, 516; *Quincy* v. *Hall*, 1 Pick., 357; *Dawson* v. *Wetherbee*, 2 Allen, 461; *Johnson* v. *Neale*, 6 Allen, 227; *Hartlett* v. *Fowler*, 10 Allen, 36; *Farnham* v. *Moor*, 21 Maine, 508; *Wheat* v. *Catterline*, 23 Ind., 85; *Potter* v. *James*, 7 R. I., 312; *Smith* v. *Dillingham*, 32 Maine, 182; *Same* v. *Same*, 33 Maine, 384; *Thomas* v. *Spofford*, 46 Maine, 408; *Cook* v. *Lothrop*, 18 Maine, 260; *Bank* v. *Leavitt*, 17 Pick., 1; *Kaley* v. *Shed*, 10 Met., 317; *Ripley* v. *Dolbier*, 18 Maine, 388.

S. Lancaster, for the defendants, contended—

That the property had been returned and costs paid and thereby the conditions of the bond fully performed; citing *Pettygrove* v. *Hoyt*, 2 Fairf., (11 Maine,) 66; *Smith* v. *Dillingham*, 33 Maine, 284.

APPLETON, C. J. —This is an action of debt upon a replevin bond.

No service was made by the officer upon Hoeffner, he not being an inhabitant of this State, and having no property nor any attorney therein. After the entry of the action, notice was given by publication in a paper printed in the State. The defendant seasonably appeared after such publication for the purpose of denying jurisdiction and abating the writ.

It is apparent from the officer's return that the Court have no jurisdiction over the person or property of Hoeffner. The plaintiff may have leave to discontinue as to him, upon the terms prescribed by R. S., c. 82, § 12.

As Stanwood is dead, the case must proceed, if prosecuted further, against Wendenburg the only remaining surety.

It was decided in *Pettygrove* v. *Hoyt*, 2 Fairf., 67, in a replevin suit, where the plaintiff neglected to enter his suit and the defendant filed his complaint for costs, but neglected to pray for a return of the goods replevied, and judgment was rendered for costs on which execution issued, that the costs having been seasonably paid, no action could be maintained upon the bond, for, as is well remarked by MELLEN, C. J., "by the conditions, the obligors were bound to pay the obligee such damages as he should recover, and he recovered none; and return the boat, if such be the final judgment; and there never was any such judgment."

In the case at bar, the replevin bond was in the statute form; that, if the plaintiff "shall prosecute the said replevin to final judgment, and pay such damages and costs as the said Berry shall recover against him, and shall also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment in said suit, then this obligation to be void, otherwise to remain in full force." The judgment of the Court, as appears of record, was in these words:—"It is therefore considered by the Court here, that the said defendant recover against the plaintiff restitution and return of the property replevied and costs of suit taxed at $71,32." The question presented is whether a return of the goods replev-

ied *not* "in like good order and condition as when taken," is a sufficient compliance with and performance of the condition of the replevin bond?

The record must govern. There has been no motion for its amendment, if erroneous. It is not necessary, therefore, to consider whether it was erroneously made up or not.

The form of the replevin writ is prescribed by stat. 1821, c. 63, which specifies likewise the bond to be given. The writ and the bond in the present case are in accordance with the statute.

By statute of 1821, c. 80, the statute judgment in replevin, in case the verdict is for the defendant, is "for a return and restoration of the goods and chattels replevied." In the revision of 1841, c. 130, § 11, "the judgment is for a return of the goods." In R. S., 1857, c. 96, § 11, "if it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs." In the form of a writ of restitution, stat. 1821, c. 63, the command is to "forthwith return and restore the same beasts unto the said S. P.," &c. The judgment in replevin is, "it is considered that he have return of the cattle aforesaid, to be kept by him irrepleviable forever." Jacob's Law Dictionary. Replevin.

It will be perceived that neither by the statutes nor the forms, so far as given, are the words in the bond, "in like good order and condition as when taken," required to be inserted in the judgment. It is rather implied that they shall be in such order and condition, and, if not, the defendant has his bond in case of a failure to perform this specific condition.

In Massachusetts, by stat. 1789, c. 26, § 4, where the form of the writ of replevin is given, one proviso of the writ is "and also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment." In the revision of the statutes c. 113, §§ 19, 29, when the plaintiff is required to give bond, the language is, "and also to return the said property, in

case such shall be the final judgment," without any mention that the goods and chattels are to be restored in like order and condition. It was insisted in *Parker* v. *Simonds*, 8 Met., 210, that, in consequence of this change, the plaintiff in replevin was not bound to restore the goods replevied in the same condition as when taken. But the Court held otherwise and that the goods were to be restored in like good order and condition as when taken.

Mere restoration of the goods replevied, if damaged, will not be a compliance with the bond, which requires them to be restored in like good order and condition as when taken.

As the action is not maintainable against Hoeffner, the Court having no jurisdiction over his person or his property, the plaintiff must become nonsuit unless he discontinues as to him; in which event, the case, according to the agreement of parties, is to stand for trial for the assessment of damages.

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

ESTHER S. FORBES *versus* SUMNER SMILEY.

Parties to a tenancy at will may abandon the original verbal agreement without resorting to the statute method of terminating the tenancy.

When parties to a tenancy at will have abandoned the original verbal agreement, under which the tenant took possession, and they fail to agree upon new terms, the tenant will be liable to pay whatever the rent is reasonably worth for the time he holds over.

ON REPORT.

ASSUMPSIT, to recover $31,25 for three months' rent of one undivided half of a store in Gardiner.

After verdict, the parties, in order to have a final disposition of the case, reported the evidence to the full Court,

who were to render such judgment as the law and evidence required.

The remaining facts sufficiently appear in the opinion.

L. Clay, for the plaintiff.

N. M. Whitmore, 2*d*, for the defendant.

TAPLEY, J. — The defendant was the tenant at will of the plaintiff, holding under a verbal agreement to pay rent quarterly, at the rate of $90 per year. While so holding, the plaintiff notified the defendant that, if he remained in the occupation after the expiration of the quarter not then expired, he must pay at the rate of $125 per year. This the defendant declined to do, saying, at one time, he "would move * * * first," and, at another time, "he said he would leave the store or move * * * first." When asked when he would leave the store, "he said he would leave it in thirty days," and, when asked if he wanted to be notified out "according to law," "he said no." During these negotiations he offered to pay $25 per quarter, and, previous to the commencement of this suit, he tendered the sum of $25 for the quarter's rent sued for.

The plaintiff declined to lease for less than $125 per year, and brings this suit to recover at that rate.

Upon this state of facts, "the presiding Judge instructed the jury to determine from the evidence, what the rent was reasonably worth for the quarter sued for, and, if it did not exceed the $25 tendered, to return a verdict for the defendant; if it did exceed that sum, to return a verdict for the plaintiff, not exceeding, however, the sum of 31,25 sued for, and interest from the date of the writ."

The jury returned a verdict for the plaintiff for the sum of $34,56.

From the evidence reported and the acts of the parties prior to the commencement of the suit, it is quite apparent that both parties regarded the original contract at an end, and it is quite as apparent no new contract was made in its

stead; the plaintiff claiming $125 per year, and the defendant offering $100, following it by a tender at that rate. It was competent for the parties to abandon the original contract, without any resort to the statutory methods of terminating the tenancy, and if, having done so, they failed to make such new terms as were mutually satisfactory, the law will supply its omission by holding the defendant to pay "what the rent was reasonably worth." This the jury have found to be a sum exceeding even that asked by the plaintiff, but, under the instructions of the presiding Judge, they have limited it to the amount sued for. We do not regard it necessary to discuss the questions of law raised by the defendant in his argument. The case as presented is one almost entirely of fact; upon an examination of the evidence, we are satisfied the verdict is right, and that there should be

Judgment for the plaintiff for the amount of the verdict and interest thereon since its rendition to the time of final judgment.

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

AUGUSTA SAVINGS BANK *versus* CITY OF AUGUSTA.

A savings bank is not liable to be taxed for national bank stock or city bonds in which it has invested moneys received on deposit.

ON REPORT.

ASSUMPSIT to recover back a tax assessed in 1866, by the proper authorities of the city of Augusta, against the plaintiff corporation, for certain national bank stock and city bonds, in which it had invested moneys received on deposit. The tax was paid under protest and to relieve certain of the shares from distraint for the tax.

A. Libbey, for the plaintiff.

W. P. Whitehouse, City Solicitor, for the defendant.

DANFORTH, J.—By the charter of the plaintiff corporation, approved August 10, 1848, it is authorized to receive deposits of money from any person, and required to invest such deposits in such way as may be deemed most advisable, and divide the net income among the depositors in just proportion. A portion of these deposits were invested in bank stocks and city bonds, and the question submitted in this case is whether such bank stock and city bonds were legally liable to be taxed to the corporation.

In the case of the *Salem Iron Factory* v. *Inhabitants of Danvers*, 10 Mass., 514, under tax acts similar to our own, it was held that property, otherwise taxable, could not be taxed to the corporation, but could only be taxed by assessments upon the shareholders, for the value of their several shares. The same doctrine was subsequently held in *Amesbury C. & W. Manufacturing Co.* v. *Amesbury*, 17 Mass., 461. These cases were cited with approbation, and the same construction given to our statutes in *Gardiner C. & W. Factory Co.* v. *Gardiner*, 5 Maine, 133. WESTON, J., in the opinion, on page 139, says;—"If, therefore, the merchandize in the store is not exempted from taxation by the Act of 1825, c. 258, and it does not appear to us that it is, yet, as personal property, according to the tax act, and the principles decided in the case of the *Salem Iron Factory Co.* v. *Inhabitants of Danvers*, 10 Mass., 514, it cannot be taxed to the corporation, but to the several holders of the stock."

The same doctrine is recognized in *Augusta Bank* v. *Augusta*, 36 Maine, 255. On page 259, SHEPLEY, C. J., says; "If the fifty shares of the Portland, Saco & Portsmouth Railroad Co. constituted a part of the capital stock of the Augusta Bank, they were liable to taxation only by an assessment upon its stockholders, for the value of their shares." In all these cases, the personal property was liable to taxa-

tion by the provisions of the statute, but was held exempt in the form taxed, because it constituted a part of the capital stock, and, as such, was liable to be taxed to the several stockholders, by an assessment upon their shares, and these shares, by other provisions of the statute, were to be assessed in the town of the owner's residence. If both the shares and the capital are to be taxed, the result would be a double taxation, which would be contrary to the policy of the law, and never permitted unless required by positive provisions of the statute. The cases cited show clearly that a fair construction of the tax acts require no such taxation. That these principles apply to Savings banks is settled in *Worcester County Institution for Savings* v. *City of Worcester*, 10 Cush., 128, a case in all respects like the one at bar and decisive of it.

The property taxed is the capital of the bank, and, as such, is made up exclusively of the deposits. The deposits are but the parts, the capital the whole composed of these parts, and, for the purposes of taxation, are one and the same thing. The depositors are taxable for their deposits in the several towns in which they reside, and the capital made up of those deposits cannot be again taxed to the corporation. *Judgment for the plaintiff.*

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

JAMES BELL *versus* JOHN B. FURBUSH *& als.*

A bond given by a person for his release from arrest on mesne process, stipulating, in addition to the conditions prescribed by R. S., c. 113, § 16, that the obligor will "take the oath prescribed in the 28th section of said chapter," is invalid as a statute bond.

In fulfilling the conditions of such a bond, the obligor is not required to perform any statute provisions in relation to poor debtors, except those recited in the bond given.

Bell *v.* Furbush,

Thus, where, at the time and place fixed by the citation for the disclosure, the justices duly chosen by the parties present, disagreeing as to the sufficiency of the service of the citation, selected a third justice, and a majority of the Court thus constituted, holding the service insufficient, refused to hear the disclosure and recorded their proceedings; and the creditor's attorney, together with two of the magistrates, although notified that the debtor persisted in proceeding to disclose under the citation, notwithstanding the adjudication, withdrew, whereupon the justice originally chosen by the debtor, adjourned for a few minutes to procure the attendance of another justice; and the creditor neglecting to choose, one was duly selected in his behalf by a deputy sheriff; and, before the tribunal thus constituted, the debtor submitted himself to examination, made a true disclosure of his business affairs and property under oath, and took the oath specified in his bond: — *Held*, that there was a common law compliance with the conditions of a bond which was good only at common law.

On Report.

Debt on a bond, dated Nov. 9, 1860, given by the defendants to the plaintiff for the release of the principal from arrest in this county, on a writ in favor of the plaintiff, returnable at the Nov. term, 1860, of this Court for this county. The conditions of the bond were as follows: —

"Now if the said John B. Furbush, shall, within fifteen days after the last day of the term of the Court, at which the judgment shall be rendered in said suit, notify the said James Bell, his agent or attorney, to attend before two justices of the peace, and of the quorum, at a certain place within said county of Kennebec, and, at a time to be fixed, within thirty days, after such notice, and not less than fifteen days, for the purpose of disclosure and examination under the provisions of the 16th section of chap. 113 of the Revised Statutes, and if he shall at such time and place submit himself to examination, make true disclosure of his business affairs and property under oath, and take the oath prescribed in the 28th section of said chapter, if allowed by said justices, and abide the order of said justices thereon in manner provided in the 16th, 17th, 18th and 19th sections of said chapter, then this obligation shall be void, otherwise remain in full force."

Writ dated Oct. 21st, 1861. Plaintiff introduced writ,

James Bell v. John B. Furbush and others, dated October 29, 1860; affidavit on writ, dated Oct. 29, 1860; officer's return thereon, dated Nov. 9, 1860; bond declared on, dated Nov. 9, 1860; judgment in the suit, Bell v. Furbush and others, at the August term of this Court, 1861, rendered September 17, 1861; and execution issued Oct. 1, 1861.

Defendants introduced citation, John B. Furbush to James Bell, dated Sept. 23, 1861, returnable Oct. 10th, 2 P. M., at S. Titcomb's office in Augusta. It was admitted that M. Cunningham and S. Lancaster, justices of the peace and quorum, gave to said Furbush a certificate of discharge, dated Oct. 10, 1861, in the usual form, excepting it did not recite how they were appointed.

Plaintiff then put in the record of M. Cunningham, Wm. Gaslin, Jr., and J. M. Meserve, justices of the peace and quorum, of their action under said citation. This record had been burned, but it was agreed that it recited in effect that, under the citation put in by defendants, M. Cunningham was selected by S. Titcomb, attorney for debtor, and Wm. Gaslin, Jr., was selected by G. C. Vose, attorney for creditor; that said justices proceeded to act in the premises; that the notice was objected to as insufficient by Mr. Vose for creditor, for the reason mentioned in *Furbush, pet.*, v. *Cunningham*; that they heard the parties on that question and were divided in opinion, and selected said Meserve as a third Justice, who came in and acted with them, heard the parties, and that a majority of the Court thus constituted, decided that the notice was insufficient, and that they could proceed no further under it. This record was signed by the three justices.

G. C. Vose, called by the plaintiff, testified as follows: I acted for the creditor in Furbush's disclosure. The justices were selected and proceeded to hear the parties soon after 2 P. M., Oct. 10th. I selected Gaslin and Titcomb selected Cunningham to hear the disclosure. They divided on the sufficiency of the notice, and they selected J. M. Meserve. A majority decided the notice insufficient, and

I left. This was between three and four P. M. Mr. Titcomb said to me, I think about the time I left, that he should proceed and have a disclosure. I at first hesitated, but finally said to him I should have no further action in the matter, and I withdrew. I knew nothing about the action after that. My office was in the same building, opposite Titcomb's, next room across the stairs. John Mower, son of Nathan Mower, was in my office and conferred with me in relation to the selection of a justice.

Defendants then put in the contents of the record of M. Cunningham and S. Lancaster, justices of the peace and quorum; said record had been burned. It was agreed that it showed that M. Cunningham was selected by S. Titcomb for debtor, as before stated, and continued to act throughout the disclosure, and, at ten minutes after 4 P. M., Oct. 10th, he continued the matter to fifteen minutes before 5 P. M., to enable the debtor to procure the selection of another justice; that S. Lancaster was selected by C. Hewins, deputy sheriff, the creditor neglecting to choose one; that, adjudging the notice sufficient, they then proceeded to hear the debtor's disclosure; that the debtor did make a disclosure, and they administered the oath to him and gave him a discharge.

It was admitted that all the proceedings were under the same citation.

The case was reported to the full Court for such judgment as the law and evidence may require.

A. Libbey, for the plaintiff.

1. The judgment rendered by the Court as to the sufficiency of the notice was final. The right to proceed under the citation was exhausted, and no new Court could be organized.

2. The new Court was not organized in season. The citation was returnable at 2 P. M.; the creditor present with his justice, and remained there until nearly 4 P. M.; debtor's justice did not act until ten minutes after 4 P. M. *Blake* v. *Brackett*, 47 Maine, 28.

3. In requiring the debtor to take the oath prescribed in the 28th section, the bond required only what § 17 requires, and is like *Hatch* v. *Lawrence*, 29 Maine, 480.

4. The disclosure should have conformed to the provisions of the statute mentioned in the bond, or there could be no performance.

S. Lancaster, for the defendants.

BARROWS, J.—The bond here sued is a bond taken on mesne process, and it is in most respects similar to the one provided for in § 16, c. 113, R. S., which is referred to in it, but it embraces, in addition to the conditions prescribed in that section, a further condition, that the principal obligor shall "take the oath prescribed in the 28th section of said chapter."

It cannot be considered a statute bond. The taking of the oath was not a necessary sequence of the submission to examination in the regular statute course of proceeding. Full compliance with the conditions of a statute bond might be had without taking it at all, as appears by reference to §§ 18 and 19 of c. 113. Herein the facts in this case differ essentially from those in *Hatch* v. *Lawrence*, 29 Maine, 480, cited by plaintiff's counsel. There, the condition of the bond was substantially, though not in terms, identical with that of the statute bond.

As this is not a statute bond, in the absence of any proof that the conditions were varied by mistake or accident, we must hold, in accordance with the doctrine laid down in *Clark* v. *Metcalf*, 38 Maine, 122, *Flowers* v. *Flowers*, 45 Maine, 459, *Merchant's Bank* v. *Lord*, 49 Maine, 99, and *Ross* v. *Berry*, 49 Maine, 434, that the debtor is not required to perform any statute provisions relating to poor debtors except those which are recited in the bond he has given; and, in this case, if he has seasonably cited the creditor, submitted himself to examination at the time and place appointed, made true disclosure of his business affairs and property, under oath, and taken the prescribed oath before

two justices of the peace and of the quorum, according to the conditions of his bond, he is entitled to judgment in his favor, notwithstanding a failure to conform, in the proceedings before the justices, to the statute requirements. It appears that Furbush did seasonably cite James Bell, the plaintiff in the suit in which he was arrested, and his judgment creditor therein, to attend his disclosure within the time fixed by the bond, before two justices of the peace and of the quorum, at the office of Samuel Titcomb, Esq., in Augusta. The citation seems to have taken effect, for at the time and place appointed came Nathan Mower, the assignee of the original suit and the equitable owner of the judgment recovered therein, by his agent and attorney, to object that the citation ought to have been served upon him and not upon the plaintiff of record. Two justices of the peace and quorum, one selected by Furbush and the other by Mower's attorney, disagreed as to the sufficiency of the service and selected a third justice, and a majority of the Court, thus constituted, held the notice insufficient and refused to hear the disclosure, and made a record of their proceedings. But the debtor and his attorney, and the justice by them selected, persisted in proceeding under the citation to have a disclosure, notwithstanding this adjudication, and the creditor's attorney was informed of this intention on the spot. He, however, with two of the three magistrates, withdrew, and thereupon the justice originally selected by the debtor adjourned for a few minutes to procure the attendance of another justice; the creditor neglecting to choose, one was selected by a deputy sheriff in his behalf, and, before the tribunal thus constituted, the debtor went on and made his disclosure and took the oath specified in his bond. Thus there has been a common law compliance with the conditions of a bond which was good only at common law. It is unnecessary to determine whether the point which the creditor made before the first corps of justices was well taken or not. The debtor did cite the creditor, did submit himself to examination in accordance with the terms of his

bond, before two justices, and take the required oath; and, the bond not being a statute bond, it matters not, according to the cases above cited, that the requirements of the statute were disregarded in their selection and proceedings. It is a satisfaction to remark that there are no apparent equities with the creditor. He declined to hear the proffered disclosure, and sought to work a forfeiture of the bond by a resort to technicalities. For want of technical accuracy in the outset, in the taking of his bond, the effort proves unavailing. *Judgment for defendants.*

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

JOHN B. FURBUSH, *pet'r for certiorari, versus* MELVIN CUNNINGHAM *& als.*

This Court will not entertain a petition for *certiorari* for the correction of merely harmless errors which can in no event seriously prejudice the petitioner.

Thus, on a petition for a writ of *certiorari* to quash the record of a corps of justices of the peace and of the quorum, organized to hear the disclosure of the petitioner as a poor debtor, for the alleged reason that their decision as to the legality of his application, citation and service thereof, was contrary to law and in violation of his legal reghts; such writ will not be granted when it appears that the petitioner, notwithstanding the action of the justices, is entitled to judgment in an action by the creditor upon the petitioner's bond.

ON REPORT.

Petition for *certiorari*, alleging substantially that he was arrested upon a writ dated Oct. 29, 1863, in favor of James Bell against the petitioner and procured his discharge therefrom Nov. 9, 1860, by giving the bond mentioned in R. S., c. 113, § 16; that judgment was recovered in said suit, Sept. 17, 1861, and execution duly issued; that on Sept. 23, 1861, upon the petitioner's application duly made to Sam'l

Titcomb, a justice of the peace within the county, said Titcomb issued a citation to the said Bell, which was duly served, appointing Oct. 10, 1861, at 2 o'clock P. M., and said Titcomb's office as the time and place for the petitioner to disclose, &c.; that, on the day and at the place named, the petitioner appeared and selected Melvin Cunningham, and counsel for the creditor appeared and selected William Gaslin, Jr., both disinterested justices of the peace and quorum within the county, to hear petitioner's examination; that counsel for the creditor objected to the citation and service upon the ground that it should have been made to and served on one Mower, assignee of the suit, as appeared by an assignment upon the back of said writ; that the justices disagreed, and that J. M. Meserve, a justice, &c., was duly selected as the third justice to decide the question; that Gaslin and Meserve decided that service should have been made upon the assignee and refused to hear the petitioner's disclosure, "as will more fully appear by the record of said justices, the substance of which record is recited in the case *James Bell* v. *J. B. Furbush & als.*, brought upon said bond, and now pending in this Court."* The reasons assigned for granting the prayer of the petition were:

1. Because a majority of said justices illegally refused to hear the disclosure of said J. B. Furbush.

2. Because the decision of said majority as to the legality of said application and citation, and service thereof, was contrary to law.

3. Because the action of said Gaslin and Meserve, in refusing to hear the disclosure of said John B. Furbush, was in violation of the legal rights of your petitioner.

4. Because said assignment was illegally admitted by a majority of said justices.

The facts set out in the petition were admitted.

S. Lancaster, for the petitioner, cited

Follansbee v. *Bird*, 8 Cush., 289.

* See *Bell* v. *Furbush & als*, *ante*, p. 178.

A. Libbey, for the respondents.

BARROWS, J.—This is a petition for a writ of certiorari to bring up and quash the record of the respondents, sitting as justices of the peace and quorum, upon a citation procured by the petitioner, wherein it was adjudged, by a majority of the respondents, that the notice given by the petitioner was insufficient and that he should not be permitted to disclose thereupon.

Doubts have been suggested whether, under the present provisions of our statutes, the writ of certiorari can properly issue in any case of this kind. See *Pike* v. *Herriman*, 39 Maine, 52, and *Ross* v. *Ellsworth*, 49 Maine, 417. It is unnecessary to decide the question here. When some manifest error on a point of law is disclosed by any record which justices are required to make in these cases, and that error is shown to be injurious to the petitioner, and capable of being corrected by the writ and the proceedings thereon, so as to relieve the petitioner from the apprehended mischief, we shall feel bound to settle that question.

Upon a petition presenting such a condition of things, it would be a matter for careful consideration, whether the notice ought not to go to the party adversely interested, to appear and show cause against the granting of the writ, rather than to the magistrates, who have no interest in the matter to be affected and no duty to perform, except to present the record when the petitioner makes out a case requiring the intervention of the Court.

But, without determining any of these matters, it is sufficient here to say, that, as remarked by MORTON, J., in *Gleason* v. *Soper*, 24 Pick., 181, "a petition for a certiorari is always an application to the discretion of the Court." And the Court will not entertain such a petition for the correction of merely harmless errors which can, in no event, seriously prejudice the petitioner.

In this case the facts are admitted to be set forth in the petition. The gravamen therein alleged appears to be, that a majority of the justices held that the citation should have

been served upon Nathan Mower, assignee of the claim sued in the action wherein Furbush was arrested, instead of being served upon James Bell, the plaintiff of record and judgment creditor, and thereupon "refused to hear the disclosure of said J. B. Furbush, as will more fully appear by the record of said justices, the substance of which record is recited in the case, *James Bell* v. *J. B. Furbush and others*, brought upon said bond and now pending in this Court."

But, in the suit thus referred to, we have found the defendants (*Furbush & als.*) entitled to judgment, notwithstanding this action on the part of the magistrates; so that, granting there was error in their decision, nobody was harmed thereby, nor could any benefit result from quashing the proceedings.

There is nothing in the copies before us to show that the respondents have not volunteered a needless appearance here. Their claim for costs, made *arguendo*, is therefore disregarded. *Petition dismissed without costs.*

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

ELEANOR LAWRENCE *versus* LORENZO D. COOKE.

Where the defendant told the plaintiff he was not able to marry her then, but promised her he would marry her within four years; it not appearing that the parties understood that the promise was not to be performed within one year, such promise is not within the statute of frauds.

In the trial of an action for the breach of a promise of marriage, an instruction to the jury that evidence in regard to the defendant's property was admissible, for the purpose of showing, *inter alia*, "the injury to the plaintiff's affections, if any, and the mortification and pain resulting from the breach," is unexceptionable.

The instruction that, if they could find from the testimony in the case any unjust imputation upon the plaintiff's character, they might consider it, and measure these elements as nearly as they could in dollars and cents, is also unobjectionable, whether there was or was not any evidence upon which to predicate it.

In such a case, the plaintiff is entitled to such damages as would place her in as good a condition, pecuniarily, as she would have been in if the contract had been fulfilled.

In the trial of such a case, the plaintiff's testimony, as to what declarations the defendant's mother made to the plaintiff, in the absence of the defendant, and not communicated to him, is not admissible, either as tending to prove the alleged promise on the part of the defendant or that on the part of the plaintiff.

On Exceptions.

Assumpsit for breach of promise of marriage.

Writ dated January 30, 1866.

The plaintiff being a witness, was asked by her counsel — what, if anything, was said to the witness (plaintiff) by Mrs. Cook, defendant's mother, in relation to the plaintiff's future connection with the family. It not being claimed that the remark inquired about was made in the presence of the defendant or communicated to him, his counsel objected to the question and answer; but the objection was overruled by the presiding Judge, and the plaintiff answered — I called at Mrs. Cooke's with a friend. And, after Mrs. Cooke spoke of her husband's being ill, she added that she, (Mrs. Cooke,) could leave her husband with the plaintiff after she (Mrs. Cooke) was gone, feeling that he would be in good hands; and that she would give plaintiff all her property.

The plaintiff also testified that, in the winter of 1858, she met the defendant at the house of one of her friends, and told him he had been with her so long she had considered herself engaged, and thought she ought to know something more definite. Defendant said he was not able to marry then; but, if he were to be married the next day, he would marry her. Met him again in two weeks, one Sunday evening, when he carried her home; he manifested much love and affection, but she could not receive it unless he gave her something more definite, — unless he fixed upon a time for marriage, that she might have something definite to look forward to. He said he was not able to marry then, but promised to marry her within four years.

The defendant requested the Court to instruct the jury

that, if the only promise proved, was a promise to marry within four years, such a promise was within the statute of frauds and must be in writing; but the Court declined to give the instruction, and ruled that it was not necessary that such a promise, or such a promise as is set out in the second count in the writ, should be in writing, and that it was not within the statute.

On the question of damages, the presiding Judge instructed the jury in substance, that, if they found for the plaintiff, the rule in this case as in other cases is, that the plaintiff is entitled to such damages as will place her in as good condition as she would have been in if the contract had been fulfilled; but while in most cases of contract there is a rule for computation of damages, in this there is no such rule. There is no rule by which damages can be computed, but the jury must exercise their own judgment and good sense, not capriciously, but in the exercise of a sound discretion, and give the plaintiff just such damages as she has sustained by reason of the non-fulfilment of the contract by the defendant. That the testimony in regard to the property of the defendant was not admitted for the purpose of showing his ability to pay, but for the purpose of showing the standing and position in society she would have had if the promise had been fulfilled, the injury to her affections, if any, the mortification and pain of mind resulting from the breach, and, if they could find, from the testimony in the case, any unjust imputation upon her character, they would consider this also, and measure these elements as nearly as they could in dollars and cents, and that would be the amount of damages to be allowed.

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

Shepley & Strout, for the defendant.

I. Illegal testimony was admitted.

a. The conversation of plaintiff with defendant's mother ought not to have been admitted.

Defendant's promise cannot be proved by the statement of the opinions of others, or their declarations not made in his presence or hearing.

II. The Court should have given the instructions requested by defendant's counsel. The promise was not to be performed within one year, and therefore void by statute of frauds.

The only promise proved, was a promise to marry within four years.

This within the statute. *Derby* v. *Phelps*, 2 N. H., 515; 2 Parsons on Contracts, 64.

The result of the cases upon this point is, that when the verbal contract does not certainly provide that it shall or shall not be performed within one year, it is to be explained and have effect according to the understanding of the parties at the time of making it. *Fenton* v. *Emblers*, 3 Burr., 1278; *Boydell* v. *Drummond*, 11 East, 142; *Linscott* v. *McIntire*, 15 Maine, 201; *Herrin* v. *Butters*, 20 Maine, 119; *Peters* v. *Westborough*, 19 Pick., 364.

It is apparent that neither of these parties at the time contemplated a marriage within one year.

Plaintiff says she "insisted a time should be fixed upon for the marriage, that I might have something definite to look forward to. He said he was not able to marry then, but promised to marry me within four years. I gave him to understand that was satisfactory to me."

She then understood he was not "able" to marry her—that they must wait until his ability to support a family had been increased by his business—that this could not be expected within a year, for he claimed four years, or nearly that time for it. She was satisfied to allow him that time, and have that time fixed "as something definite to look forward to."

If either then had been asked if they were to be married within one year, is it not certain from the evidence that each would have replied they were not?

In the contemplation of both parties, then, this was not a contract to be performed in one year.

III. The instructions given were erroneous.

a. Respecting the purpose for which testimony with regard to property was admitted. "That among other things it was admitted for the purpose of showing * * * the injury to her affections, if any, the mortification and pain of mind resulting from the breach."

The amount of property of the defendant could have no such effect or tendency. The jury were left to infer such injuries merely from proof of property; were not by instructions required to find as facts proved, whether her affections had been injured, whether she had suffered mortification and pain of mind. They were authorized to infer all this from proof of property.

b. Were erroneous in this, "if they could find from the testimony in the case any unjust imputation upon her character, they would consider this also, * * * and measure these elements as nearly as they could in dollars and cents."

This instruction leaves the jury to find, if they possibly could do so from the testimony, "any unjust imputation," without requiring them to find whether the plaintiff had proved to their satisfaction any such imputation.

Erroneous also in this, that it leaves the jury to find what would be "any unjust imputation upon her character," as a legal and fit subject for damages.

It is obvious that "any unjust imputation upon her character," however unimportant or trivial it might be, could not legally be the subject of damages. Yet the jury were authorized by the instructions to make the least possible unjust imputation an element of great damages, although such imputation did not affect in any degree her moral character or fitness for married life.

There is nothing in the testimony on which this instruction could be based, except that "all her sisters wished she had sense enough to stay out of the store and let him alone," and "she wished Miss Lawrence would not be foolish enough

to run after him." If such imputations were unjust and proved to be so, they would not constitute any legal or proper subject for damages, yet they would be suited to excite indignation in the minds of a jury and induce them to give exorbitant damages as a punishment.

A. Libbey and L. Clay, for the defendant, upon the admissibility of the defendant's mother's declarations, contended,

1. It was competent for the plaintiff to prove how she and defendant were received by their respective families, and the understanding of their friends and relatives in regard to their engagement. 1 Parsons on Contracts, 546; *Hutton* v. *Mansel*, 3 Salk., 16, 46; *Wightman* v. *Coats*, 15 Mass., 1; *Honyman* v. *Campbell*, 2 Dow. & C., 282; *Southard* v. *Rexford*, 6 Cowen, 254; Comyn on Con., 416; Addison on Con., 677; *Wells* v. *Pudget*, 8 Barb., 323; *Southard* v. *Rexford*, 6 Cow., 254; *Perkins* v. *Hersey*, 1 R. I., 493; *Baldy* v. *Stratton*, 1 Jones, (11 Penn.,) 316.

To show how and in what capacity defendant's mother received plaintiff, it is competent for her to show what she said to her in regard to those matters during the reception. Indeed, it is difficult to conceive how it can be shown that the parents of the parties receive them as suitors and as betrothed, without proving what is said and done during the reception. A silent reception would prove nothing. What is said is a part of the *res gestæ*.

2. The promise to marry must be mutual. To make out her case it is as important that plaintiff should prove a promise on her part as on the part of defendant. The authorities all agree in this. The evidence was admissible as tending to show a promise on part of plaintiff. *Hutton* v. *Mansel*, and *Wightman* v. *Coats*, before cited; *Peppinger* v. *Low*, 1 Halsted, N. J. R., 384; *King* v. *Kersey*, 2 Carter, Indiana R. 402; 1 Parsons on Contracts, 546; *Daniel* v. *Bowles*, 2 Car. & P., 554.

In *Hutton* v. *Mansel*, C. J. HOLT held it was sufficient for the plaintiff to show that she carried herself as one consent-

ing." This evidence shew that plaintiff carried herself as one consenting. Plaintiff visited defendant's mother on his invitation. During that visit Mrs. Cooke addressed her in a manner tending to show that she understood plaintiff was to marry her son. Plaintiff made no reply to the contrary. She demeaned herself as one consenting, and held herself out as engaged.

Peppinger v. *Low*, and *King* v. *Kersey*, go so far as to hold that declarations made by plaintiff to her friends, while receiving defendant's visits and before any estrangement, are competent evidence to prove a promise on her part.

DICKERSON, J. — Assumpsit for an alleged breach of promise of marriage.

Several questions are reserved by the defendant.

1. That the verbal promise proved is void by the statute of frauds, as it was not to be performed within a year. The testimony upon this point was, that the defendant said to the plaintiff that he was not able to marry her then, but promised to marry her within four years. It is obvious that this promise might have been performed within a year; and it does not appear that the parties understood that it was not to be performed within that time. It is well settled that such a promise need not be in writing. *Linscott* v. *McIntire*, 15 Maine, 201.

2. Exception is also taken to the instruction of the Judge that evidence of the defendant's property was admissible to show, among other things, the injury to the plaintiff's affections, or the mortification and pain resulting from the breach. It was competent for the plaintiff to show the pecuniary ability of the defendant to afford her a comfortable support, as one of the elements of the damage she had sustained by his failure to perform his contract. The instruction simply stated an inference which the jury had a right to draw from the evidence without such instruction; the greater the defendant's pecuniary ability, other things being equal, the stronger would naturally be her hopes of

happiness from the alliance, and the deeper would be the wound to her feelings from the contrast of disappointment. The instruction was unexceptionable.

3. The Judge instructed the jury that, in estimating the damages, they might take into consideration any unjust imputation upon the plaintiff's character. This instruction is claimed to be erroneous. It is, also, suggested that there is no evidence upon which to predicate it. If there is not, the defendant could not have been damaged by it, and has no legal ground of complaint on account of it; but if there is such evidence the instruction was clearly correct.

The circumstances which attend a breach of promise of marriage may be given in evidence in aggravation of damages, whether they occurred before, at the time, or after the breach. *Baldy* v. *Stratton*, 11 Penn., 316.

Seduction, produced under color of a promise of marriage, is admissible to aggravate the damages. *Paul* v. *Frazier*, 3 Mass., 73.

Evidence, showing the circumstances of contumely and aggravation which attend the refusal of a party to perform a contract of marriage, is admissible, though it may involve a slander, whether actionable or not. *Chesley* v. *Chesley*, 10 N. H.

In the exercise of their right to draw inferences from the facts proved, it was competent for the jury, in the case at bar, in estimating the damages, to consider the period of time that had elapsed pending the engagement, the intimacy of the parties, the frequency of the defendant's visits, the time, place and circumstances of making such visits, and the imputations, if any, cast upon the plaintiff's character, under these circumstances, by the defendant's denial, on oath, that, notwithstanding all these considerations, he never promised or intended to marry her. The jury, by their verdict, discredited this part of the defendant's testimony, and, doing so, they had a right to regard it as an attempt on the part of the defendant, in the most public and solemn manner,

to excite groundless suspicions against the plaintiff's character.

4. The instruction complained of, that the defendant in case of a breach of his promise was bound to put the plaintiff in as good condition as if the contract had been performed, must be taken as referring to her pecuniary condition. Her loss of pecuniary support is one of the elements of damages. Evidence of the defendant's pecuniary ability was properly introduced to show the probable character of such support. No inquiry was instituted into his habits or temper, and no evidence introduced to show whether the marriage would prove a fortunate or unfortunate one for the plaintiff, in other respects. The jury must be presumed to have understood this instruction to be applicable to the evidence upon the subject to which it related, and not to have indulged in vague speculations not warranted by the evidence. The instruction called for the judgment of the jury upon the question of the pecuniary value to the plaintiff of a matrimonial alliance with the defendant, and the jury must have so understood it. In this view of the case, the instruction was unobjectionable.

5. The defendant further objects that the plaintiff was permitted to testify that, while at the defendant's mother's, the latter said to her that, when she was gone, she should leave her husband in the plaintiff's hands, feeling he would be in good hands, and that she should give the plaintiff her property. To this the plaintiff made no reply.

If the defendant is liable, it is in virtue of his own personal promise, which is to be proved by his acts and declarations and conduct toward the plaintiff. His parents could not bind him by any declarations they might make, or opinions they might express in his absence, and without his knowledge. They might wish to promote an alliance repugnant to his wishes and intentions. Their naked declarations, touching the relation between him and the plaintiff, made in his absence, make no part of the *res gestæ*, and are not admissible to prove a promise by him.

The defendant's mother, moreover, was a competent witness. Now that parties are witnesses, it would be an unwarrantable relaxation of the rules of evidence to sustain the admission of the declarations in question to prove a promise by the defendant.*

Nor is this difficulty removed on the ground that the testimony is admissible to prove a promise by the plaintiff. She is a competent witness, and could testify to such promise, if any was made by her, or to her demeanor toward him as a suitor. It is not competent for her to testify to the declarations of other competent witnesses, in order to lay the foundation for corroborating her testimony, by leaving the jury to infer a promise on her part from her silence when such declarations were made. In the cases cited by the plaintiff's council, the promise of the woman was inferred from her presence when the offer was made, and the consent of her parents asked, without her making any objection, her subsequent reception of the suitor's visits, or her demeanor toward him, in his presence, as one betrothed. After a somewhat extended examination of the authorities, we have not been able to find any case which authorizes the admission of the testimony complained of.

The exceptions upon this point must, therefore, be sustained; and, as there must be another trial of the case, it is unnecessary to consider the motion to set aside the verdict, as against the weight of evidence, or for excessive damages.

Exceptions sustained, and a new trial granted.

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

WALTON and BARROWS, JJ., did not concur.

* See *Russell* v. *Cowles*, 15 Gray, 582, published since this opinion was announced. — REP.

LABAN E. LINCOLN *versus* NATHANIEL B. CHADBOURNE.

As between proprietors of dams on the same stream, he has the better right who was first in point of time.

In the trial of an action of trespass on the case, brought by the owner of the middle one of three dams on the same stream against the owner of the lowest, subsequently erected, for damages caused by flowing the wheels of the former, — it is not competent for the defendant, except so far as it might affect the question of abandonment, to prove that the plaintiff's dam caused the water to flow back and injure the oldest and uppermost dam and the mills thereon; and that the proprietor of the last mentioned dam abated the plaintiff's dam as a nuisance, at the time the defendant erected his dam.

Unless the plaintiff abandoned his site, the temporary destruction of his dam would not enable the defendant to acquire, as against the plaintiff, the right of a prior occupant.

ON EXCEPTIONS.

TRESPASS ON THE CASE, to recover compensation for damages alleged to have been sustained to the plaintiff's mill by a dam erected by the defendant.

The first and uppermost dam upon the stream was built as early as 1802, which, with the mills erected thereon, has been maintained ever since.

The plaintiff's (middle) dam was erected from 1823 to 1830.

The defendant commenced the erection of his (lowest) dam in the fall of 1843 and completed it in March, 1844.

The remaining facts appear in the opinion.

S. D. Lindsey, for the defendant, and in support of the exceptions, contended that, —

If the plaintiff's dam was lawfully abated as a nuisance, its former existence as a nuisance would give him no right to erect it.

If, after such abatement, and when no dam existed there, defendant erected his dam, he was in the exercise of his lawful rights and would be protected by R. S., c. 126.

Defendant's dam, at the time of erection, operated no injury to a mill lawfully existing.

The abatement severed the connection between plaintiff's present and original dam.

D. D. Stewart, for the plaintiff.

BARROWS, J. — Of three dams situated within a short distance of each other on the same stream, each erected either by or with the consent of the riparian proprietor on whose land it stands, the plaintiff's is the middle one and the defendant's the lowest. The plaintiff's dam was originally erected before the defendant's. This is not controverted. In cases of this description *qui prior est in tempore, potior est in jure.*

Cary v. *Daniels*, 8 Met., 477; *Gould* v. *Boston Duck Co.* 13 Gray, 450, 451. Unless the plaintiff's site had been abandoned when the defendant erected his dam, it follows that, as against the defendant, the plaintiff's dam was lawfully there. The defendant claimed that there has been an abandonment and introduced evidence tending to prove that, in 1843 and 1844, during all the time the defendant was erecting his dam, there was no dam at the place or on the land claimed by the plaintiff, and that none was built there till 1848. Controverting this, the plaintiff offered evidence tending to prove that his dam was only partially torn down in 1843, during the absence of the owner, and that it was rebuilt by him within six weeks, and that the privilege was never abandoned. On this question of abandonment it is expressly stated that no exceptions, either to the rulings or instructions, were taken. The ruling complained of is the refusal to permit the defendant to prove that plaintiff's dam caused the water to flow back and injure the upper dam and the mills erected thereon, which were built long before it, and that the owners of the upper dam claimed that plaintiff's dam was a nuisance and tore it down, removed and abated it as such in 1843. Upon the defendant's offer to prove these things, the presiding Judge ruled that, if it was a nuisance as against the owners of the upper dam, that would not avail this defendant, and accordingly excluded the evidence.

The only question raised by the exceptions is as to the propriety of this one thing.

So far as this evidence might be supposed to bear upon the question of abandonment, we must understand that the facts were allowed to come out; for, as to the rulings and instructions upon that point, no exceptions were taken. Was it admissible for any other purpose than as it might affect the question of abandonment?

The ingenious effort of defendant's counsel is based upon the idea that, if plaintiff's dam was lawfully abated by the proprietors of the upper dam, its former existence as a nuisance would give him no right to re-erect it, and that if the defendant erected his dam after it has been thus abated and while no dam existed upon that site, then the defendant's dam, having been erected in the exercise of his lawful rights, would come under the protection of the statute, and, in fine, he would thus acquire a right superior to that of the plaintiff.

But it must not be forgotten that there is no pretence of a claim that plaintiff's dam could be accounted a nuisance to the defendant, who here simply proposes to set up an injury, done by the plaintiff to a third party, to preclude his recovery in this action. The plaintiff having erected his dam before the defendant had made any movement of the sort, had, so far as the defendant was concerned, a perfect right to maintain it perpetually, and to recover for any injury which the defendant might inflict by means of any subsequent erection below him. Unless he abandoned the site, the temporary destruction of his dam, whether by accident or design, would not enable the defendant to acquire, as against him, the rights of a prior occupant. That he did not abandon has been found by the jury, under rulings and instructions of which the defendant makes no complaint. Only those who were injured by the plaintiff's dam would have a right to cause its abatement. The defendant was not one of these. What the proprietors of the upper dam did, or omitted to do, could confer no rights on the defendant as against the

plaintiff. With the respective rights and liabilities of the plaintiff and those proprietors, and the manner in which they saw fit, as between themselves, either to enforce or waive them, the defendant had no concern. That was a matter which might be the subject of action, negotiation or waiver, between the parties interested; but the defendant was not interested in it. As against him, at all events, the prior occupation by the plaintiff was lawful, the right to maintain such occupation, until the plaintiff chose to abandon it, was perfect; and these carry with them the right to maintain an action for damages done to the possession by one who is unable to justify. Possession alone is, in such cases, sufficient title to warrant a recovery against a mere wrongdoer. *Branch* v. *Doane,* 18 Conn., 233.

One cannot answer proof that he has done an injury to the property of his neighbor, by allegation and proof that that property is in itself injurious to some third person, whose rights he does not represent. The right of abatement of private nuisances cannot be thus extended. And that was the substance of the ruling complained of, — these facts, if they are proved, "cannot avail the defendant." Even if the mill of the plaintiff were a public nuisance, it could not avail the defendant. See *Simpson & al.* v. *Seavey,* 8 Maine, 145; *Odiorne* v. *Lyford,* 9 N. H., 502; *Haller* v. *Pine,* 8 Blackf., 175.

That which mainly serves to give plausibility to the defendant's position, is the erroneous assumption that, if plaintiff's occupation of his mill site was in violation of the rights of the owners of the previously existing upper mill, it was an unlawful occupation as to the defendant also. Not so. No one who was not a proprietor in the upper dam could object to the continuance of the plaintiff's use of his privilege, nor to his rebuilding his dam when it was destroyed. If they demolished his dam, so long as he did not abandon the site, it was competent for him to make his peace with them, and, when they ceased to object, no one else could assert their rights to his detriment. If the defendant assum-

ed to build before the plaintiff abandoned, he took the risk of such a contingency and must abide it.

Exceptions overruled.

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

INHABITANTS OF CONCORD *versus* GEORGE M. DELANEY *& al.*

Prior to and including the year 1864, no town had any lawful authority to contract with substitute brokers for the furnishing of men to fill its quotas.

And none of the statutes enacted since that time has authorized or ratified, or confirmed such a contract.

The inhabitants of a town can maintain no action for the breach of such a contract.

The defendants demurred to a declaration in such an action, containing a special count duly setting out such an agreement, the consideration thereof, its non-performance and the consequent damages, and a count for money had and received, claiming under the latter, to recover the consideration paid by the plaintiffs, upon the ground that the same was obtained from them by "false and fraudulent assurances, representations and promises of the defendants:" — *Held*, that, as the latter count disclosed a good cause of action, the demurrer cannot be sustained.

ON EXCEPTIONS.

ASSUMPSIT to recover damages alleged to have occurred in consequence of a breach on the part of the defendants, of a contract declared to have been entered into between the parties.

The facts are sufficiently stated in the opinion.

John S. Abbott, for the plaintiffs, contended, *inter alia*, that Public Laws of 1865, c. 298, ratified all such contracts as the one set forth.

D. D. Stewart, for the defendants.

APPLETON, C. J. — The first count in the plaintiffs' declaration alleges that the defendants, co-partners as substitute brokers, in consideration that the plaintiffs would pay them $5400, promised and agreed "to furnish them with nine men," to be accepted and allowed on the quota of said town of Concord, under the call of the President of the United States, of July 18, 1864, "for a term of service of three years." The breach alleged is that the men furnished were one year's men. The contract is alleged to have been made on Sept. 30, 1864, and broken on Oct. 5, 1864.

The contract set forth is not one made with the soldier nor for his benefit. It does not provide for any bounty to be paid him. The Act of Feb. 20, 1864, c. 227, is for "providing bounties for soldiers."

By § 1, a bounty of $300 is to be "paid from the treasury of the State to each person who shall enlist and be mustered into the service of the United States, on the quota of this State," subject to certain limitations therein set forth.

By § 3, "no person shall be entitled to receive from this State or any town in it, any sum in addition to the bounty provided for by this Act." By § 6, towns are authorized "to make temporary provision for and pay to its recruits, such bounty, under the aforesaid conditions, which shall be reimbursed to it from the State treasury, but payment of a greater sum than three hundred dollars per man shall operate as a forfeiture of the right of reimbursement, in the case of each person so overpaid."

It is apparent that the contract, for the breach of which the plaintiffs claim to recover, was not one authorized by any existing statute, or which they had any right to make. The contracts to which this statute refers were with the soldiers enlisting and for their benefit.

This contract, as set forth, is not ratified or made valid by the Act of Feb. 17, 1865, c. 298. By § 1, the past acts and doings of towns, &c., "in offering, paying, agreeing to pay, and in raising and providing means to pay bounties to, and all notes and town orders given by the municipal offi-

cers of any city, town or plantation, in pursuance of a previous vote, for the benefit of volunteers, drafted men, or the substitutes of drafted or enrolled men, * * * are hereby made valid." The contract described in the declaration was not, nor does it purport to be "for the benefit of volunteers," &c.

By § 2, "all contracts heretofore made * * * by the municipal officers of any city, town or plantation, that has voted to raise bounties, with any volunteer, drafted man or substitute, for the payment of the bounty thus voted, and all contracts * * * for the purpose of raising means to pay such bounties so voted, are hereby made valid." It is obvious that this section gives no sanction to the contract upon which the plaintiff has declared.

Neither is this a contract "to pay bounties to such volunteers," &c., * * * "or to raise money to pay such bounties," nor one which could be ratified and confirmed under § 3.

The Act of Feb. 23, 1866, c. 59, gives no validity to the contract as set forth in the plaintiff's writ. It was clearly a contract unauthorized by any then existing law, and, if it were held, by a forced construction of § 3, to be within its provisions and susceptible of being ratified and confirmed by the subsequent action of the town, still, it has never received such ratification or confirmation.

Further, by the statute of 1864, c. 22, the amount authorized to be given a soldier as a bounty was limited to three hundred dollars. By the contract, as set forth in the plaintiffs' declaration, the defendants were to be paid six hundred dollars for each soldier. The alleged contract was in direct violation of the Act last referred to. Nor is it sanctioned by the Act of 1865, c. 298.

The object of the Legislature, in the various statutes relating to bounties, was to encourage and reward enlistment. The volunteers were the persons to be benefitted, not speculators nor substitute brokers.

These views are in accordance with the previous decisions

of this Court, in which a construction was given to the statutes under consideration. *Alley* v. *Edgecomb*, 53 Maine, 450; *Barker* v. *Dixmont*, 53 Maine, 576.

It follows, that the special counts in the plaintiffs' declaration set forth no valid contract, for the violation of which they would be entitled to recover damages.

The writ contains money counts, upon which the plaintiffs claim to recover the sum of fifty-four hundred dollars, and interest thereon, on the ground that the same was obtained from them by "the false and fraudulent assurances, statements, representations, and promises of the defendants." This count discloses a good ground of action. Whether the plaintiffs will be able to establish the facts necessary to entitle them to recover, upon a trial of the case, remains to be seen.

The demurrer, in the present case, is general, and applies to both counts. As there is a good count and a bad one, the demurrer cannot be sustained. *Blanchard* v. *Hoxie*, 34 Maine, 377. *Exceptions sustained.*

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

TAPLEY, J., concurred in overruling the demurrer.

JOHN H. WEBSTER *versus* ASAEL W. CALDEN.

To enable the plaintiff in a real action, claiming under a mortgager of the premises in controversy, to give in evidence the declarations of the mortgagee under whom the defendant claims, in relation to the payment of the mortgage, — he must show that the mortgage note, payable on demand, &c., bearing an indorsement in blank, was not indorsed before maturity, or that it was in the hands of the mortgagee when the declarations were made.

Exceptions to the exclusion of certain declarations offered cannot be sustained, unless their materiality to some issue in the case is shown.

If the administrator of the estate of a deceased mortgagee of land in controversy, consent that the legal owner of the mortgage note may go into

possession of the mortgaged premises, and the latter, by himself, or agent, thereupon take possession thereof, he will, in law, be deemed in possession under the authority of the administrator.

On Exceptions.

Writ of Entry to recover possession of Spaulding Island, situated in the Kennebec river, in Norridgewock. Writ dated Aug. 29, 1865. Plea, general issue, with the following brief statement:—

That he is in possession of the demanded premises under the authority of John W. Sawtelle, administrator of Thomas Spaulding, in whom, as administrator of said Spaulding, the legal title to said premises is vested in fee and in mortgage; that William M. Mann, under whom the demandant claims to derive title, conveyed said premises in fee and mortgage to said Thomas Spaulding, to secure payment of the amount of a note described in said mortgage. That this defendant, before the death of said Spaulding, purchased said note of said Spaulding, who duly indorsed and transferred the same to him. That, after the death of said Spaulding, said John W. Sawtelle was duly appointed his administrator, and, by virtue of his authority as such, became seized of the legal title under said mortgage in trust for this defendant, he being the legal owner of said note, and the equitable owner of said mortgage; and said Sawtelle duly authorized this defendant to take possession of the demanded premises under said mortgage, as he legally might do; and this defendant, acting under the authority of said Sawtelle's legal title, and of his own equitable title, took possession of said premises, and thus holds the same under his own title and under that of said Sawtelle. And this defendant therefore alleges and claims that his right to the possession of the demanded premises is prior to, and superior to, any supposed or alleged title of said demandant.

The plaintiff introduced testimony tending to show that one A. A. Mann commenced carrying on the island in controversy, about the year 1853, and continued to do so until

1863; and that he made a levy upon the premises in March, 1864, by virtue of an execution in his favor against A. A. Mann; after proving the death of William M. Mann, the plaintiff put in letter of guardianship to one James Trench, of the minor heirs of William M. Mann; inventory of the estate; license to sell the real estate, including the island, dated March, 1864, together with the bond on such license; guardian's return of the license; guardian's deed to the plaintiff, dated April 16, 1864, acknowledged and recorded April 18, 1864.

The plaintiff testified that he took possession of the island, latter part of April, or first of May, 1864, and continued in possession until July 9, 1865.

The defendant put in a deed of the premises, dated Nov. 8, 1853, and recorded, from Thomas Spaulding to William M. Mann; mortgage deed of the same premises of same date and record from William M. Mann to Thomas Spaulding; note of William M. Mann to Thomas Spaulding, same date as mortgage, for $200 on demand, indorsed in blank by the payee and bearing two indorsements of money, dated Nov. 9, 1854, and January 13, 1855, respectively; letter of administration, dated Feb. 4, 1862, on the estate of Thomas Spaulding, to John W. Sawtelle; deed of quitclaim ("of Spaulding island, same conveyed to me by A. A. Mann,") dated Sept. 11, 1862, and recorded 16th Sept., from H. D. Frost to the plaintiff; and deed of warranty, dated July 14, 1860, recorded Sept. 1, following, from Obadiah Mann to H. D. Frost.

The defendant also introduced testimony tending to prove the allegations in his brief statement, of which was the testimony of *John W. Sawtelle*, who testified, substantially, that Thomas Spaulding, and his father before him, once owned the island; that witness was administrator of the former's estate; that, in the spring or early summer of 1864, A. A. Mann applied to witness for authority, under him as administrator, to take possession of the island, and that witness granted the request; that Mann said, at the time, he

applied as agent of the defendant. On cross-examination, he testified that he found neither the mortgage or note among Spaulding's papers.

After the testimony was all in, the following questions were submitted to the jury:—

"Was the defendant Asael W. Calden, when this action was brought, Aug. 29, 1865, holding the demanded premises under the authority and permission of John W. Sawtelle as administrator of Thomas Spaulding, the original mortgagee? Was said defendant, at that time, the holder of the note described in the mortgage from William M. Mann to Thomas Spaulding?" To both of which questions the jury returned an affirmative answer.

Thereupon, the parties agreed to report the case, including the special findings, for the consideration of the full Court, to enter such judgment, upon so much of the foregoing evidence as is legally admissible, as law and evidence should require.

In the course of the trial, plaintiff offered evidence of statements made by Amos A. Mann and William M. Mann, made when both said they were returning from the disputed territory, though he stated he did not know of his own knowledge whether they were returning from the Island during Amos A. Mann's occupancy of it, relative to Amos' title to and interest in it, and the Court excluded them.

In his charge to the jury, the Court instructed them that, in finding their verdict, they should not consider the evidence of Spaulding's statements, that the mortgage had been paid up, as testified by Morse, that testimony having been excluded on the ground that it did not appear that Spaulding was the owner or in possession of the note when the statements were made.

He also instructed them that, if the administrator of Spaulding consented to the defendant's going into the possession of the premises, and the defendant, by himself or agent, went into possession thereupon, he would in law be

deemed in possession under the authority of the administrator.

To which rulings the plaintiff excepted.

Webster, pro se, elaborately argued the following propositions.

1. The defendant derived whatever interest he had to the Mann mortgage and note as late as July 14, 1860.

2. No evidence that the condition of the mortgage had been broken.

3. The declarations of Spaulding, in relation to the payment of the mortgage, were erroneously withdrawn from the jury. 1 Greenl. on Ev., §§ 189, 190; *Hatch* v. *Dennis*, 10 Maine, 249; *Shirley* v. *Todd*, 9 Maine, 83; *Lanathan* v. *Patten*, 39 Maine, 142; *Bond* v. *Fitzpatrick*, 4 Gray, 89; *Church in Brattle Square* 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 Paige, 180; *Pitts* v. *Wilder*, 1 N. Y., 526; *Merrill* v. *Foster*, 33 N. H., 379; *Fellows* v. *Fellows*, 37 N. H., 75; *Davis* v. *Spooner*, 3 Pick., 284; *Morgan* v. *Lawrence*, 10 Met., 754; *Carver* v. *Jackson*, 4 Peters, 1.

4. That the note was paid before breach, and before any pretended interest in it was obtained by the defendant.

5. If the note were not paid, there is no evidence that the defendant had any interest in it or in the mortgage.

6. The last instruction was erroneous; 1, upon the hypothesis stated in giving it; and, 2, not applicable to the facts proved.

7. The defendant, claiming nothing but an equitable title, cannot set that up as a bar to the plaintiff's legal title. R. S., c. 73, § 8; c. 111, § 1; *Jackson* v. *Chase*, 2 Johns., 84; *Jackson* v. *Pierce*, 2 Johns., 221; *Sinclair* v. *Jackson*, 8 Cow., 543; *Jackson* v. *VanSlyck*, 8 Johns., 488; *Crane* v. *Crane*, 4 Gray, 323; *Moore* v. *Spellman*, 5 Denio, 225; *Bunyan* v. *Mersenion*, 1 Johns., 534; *Hitchcock* v. *Harrington*, 6 Johns., 290; *Coles* v. *Coles*, 15 Johns., 319; *Astor* v. *Miller*, 2 Paige, 68; *same* v. *Hoyt*, 5 Wend.,

603; *Blaney* v. *Bearce*, 2 Maine, 132; *Wilkins* v. *French*, 20 Maine, 111; *Upham* v. *Bradley*, 17 Maine, 423; *Vose* v. *Handy*, 2 Maine, 321; *Prescott* v. *Ellingwood*, 23 Maine, 34.

8. The mortgagee never having been in possession, payment, if made after forfeiture, revests the entire seizin in the mortgager. R. S., c. 90, § 26; c. 90, §§ 9, 14; *Whitcomb* v. *Simpson*, 3 Maine, 21; *Holman* v. *Bailey*, 3 Met., 55; *Stewart* v. *Crosby*, 50 Maine, 130; *Bank* v. *Drummond*, 5 Mass., 321; Co. Lit., 218, § 350.

9. The mortgage having been paid to Spaulding in his lifetime, if any seizin did remain in him at his death, it descended to his heirs, and his administrator had no control over it. 8 Mass., (Sup.,) 557; *Parsons* v. *Welles*, 17 Mass., 421; Stat. of 1789, Feb. 11, §§ 1, 2, 3. This statute being in derogation of the common law, to be construed strictly. Mortgages have words of inheritance.

Johnson v. *Bartlett*, 17 Pick., 477; *Crooker* v. *Jewell*, 31 Maine, 306; *Webber* v. *Webber*, 6 Maine, 127.

D. D. Stewart, for the defendant.

APPLETON, C. J.—The plaintiff claims title under William M. Mann, and that he entered into possession of the island in controversy, in April or May, 1864, and retained possession until July, 1865.

It is in proof that William M. Mann, on the 9th of Nov., 1853, mortgaged the demanded premises to one Thomas Spaulding, to secure a note given by him to said Spaulding for two hundred dollars, payable on demand with interest, of the same date as the mortgage.

Thomas Spaulding deceased, and John W. Sawtelle was appointed administrator on his estate, Feb. 4, 1862.

The tenant produces the note of Mann to Spaulding, indorsed, and justifies his entry under a verbal license from the administrator of Spaulding, the mortgage having never been assigned, though in the possession of the tenant.

The plaintiff offered evidence of the declarations of Spauld-

ing, made in 1855, to the effect that the mortgage had been paid up. This evidence was excluded and the question presented is whether it was rightfully so excluded.

It is a general presumption of law that indorsed paper is indorsed before its maturity. The party who denies this is bound to prove it, and, without such proof, he cannot be let into the equities of his defence. 2 Parsons on Notes and Bills, 9; *Hutchinson* v. *Moody*, 18 Maine, 393. The plaintiff having failed to negative this, was not entitled to offer in evidence the declarations of Spaulding. He should have shown that the note was not indorsed before maturity, or was in his hands at the time the declarations offered were made. This he has failed to do. They were therefore properly excluded.

The statements made by Amos A. Mann and William M. Mann, made when they said they were returning from the disputed territory, relative to Amos' title and interest in it, were properly excluded. It does not appear that they were relevant or material. Both were admissible witnesses and their declarations are mere hearsay.

When a mortgagee is dead, the proceedings to foreclose must be in the name of his executor or administrator. The lands mortgaged are assets in their hands before foreclosure, and "when they recover seizin and possession thereof, it shall be to the use of the widow and heirs, and devisees or creditors of the deceased, as the case may be." R. S., 1857, c. 90, §§ 10 and 11. If nothing is due on the mortgage, no action can be maintained to obtain possession of the mortgaged premises, § 10. An administrator of a mortgagee of real estate, who has obtained judgment and possession by foreclosure, can maintain trespass against the heir at law of the mortgagee for cutting wood on the mortgaged premises. *Palmer* v. *Stevens*, 11 Cush, 147. A mortgagee's title vests, on his decease, in his administrator or executor, and a quitclaim by the heir at law before foreclosure conveys no title to his grantee. *Taft* v. *Stevens*, 3 Gray, 506.

Where a mortgage is given to secure one or more notes, and the note or notes is transferred without the mortgage, the mortgagee holds the mortgaged estate in trust for the payment of all the notes it was given to secure. *Moore* v. *Ware*, 38 Maine, 496. In case of death, the mortgage vests in the administrator or executor of the mortgagee, by whom alone the suit could be brought for the benefit of the assignee to foreclose the mortgage.

Exceptions overruled.—Judgment on the verdict.

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

MICAH W. NORTON *versus* JOSEPH F. NYE.

Lawful money cannot be held derelict in the hands of a deputy sheriff into whose possession it came by virtue of a search warrant.

The refusal of the deputy to pay over money thus obtained, to one entitled to receive it, on demand, is a misfeasance for which the sheriff is liable.

To an action of trespass against the sheriff for such a misfeasance, it is no defence, that the plaintiff secreted the money in the house of another person, for the unlawful purpose of laying a foundation for a prosecution for larceny against him; that, thereupon he made a complaint, under oath, to a trial justice, that the money was stolen from the plaintiff's possession by such person and concealed in the latter's dwellinghouse; that, upon a search warrant duly issued thereon, the defendant's deputy searched and found in such dwellinghouse the money, which, together with such person was returned before a trial justice, who, after examination, discharged the respondent, and declined to make any order concerning the money, but left the same in the hands of the deputy; and, that the allegations in the complaint were false, and known to be false by the plaintiff, when he signed and made oath to them.

Whether, if the deputy, after the discharge of the accused, had returned the money into the possession of him from whom it was taken, this suit could have been successfully defended; *quære.*

Or whether, if the money had been thus returned, the plaintiff could, under the circumstances, recover it from the accused; *quære.*

ON REPORT.

Norton *v.* Nye.

TRESPASS against the sheriff of Somerset county; for that the defendant, by Josiah D. Bartlett, his deputy, on July 1, 1865, with force and arms, seized, took and carried away five hundred dollars, in bank bills, current in this State as money, and of the value of five hundred dollars, the property of the plaintiff, and unlawfully converted the same, &c.

Plea, general issue with brief statement.

The plaintiff testified that the $500, mentioned in the declaration, was his property, and was taken from his house in his absence, on Aug. 9, 1865; that one Fletcher was at his house on that day, and was the only person there who was not a member of the plaintiff's family; that he missed the money about 5 o'clock in the afternoon, and immediately after procured a search warrant and placed it in the hands of Bartlett for service, who searched Fletcher's house, found the money, arrested Fletcher and took him before a trial justice, who, after an examination, discharged Fletcher. The complaint, warrant, return of the officer and the record of the magistrate were put into the case. The record of the magistrate was as follows:—

"Somerset, ss:—September 6, 1865.—Upon the foregoing complaint and warrant, which are hereby referred to and make part of this record, returned before me this day, as appears by the officer's return of service thereon, the said Jesse Fletcher was brought before me, one of the trial justices within and for said county, and after examination was duly discharged. And no offence having been proved against him, I made no order and gave no direction touching the five hundred dollars mentioned in the officer's return of service on said warrant, or touching the disposal thereof, but left the same in the hands of said officer to be disposed of according to law and the rights of the parties."

During the examination before the magistrate, Bartlett produced the money and it was laid on the table and examined, but he put it up again in his pocket and carried it away. It consisted of two fifties, two or three twenties, and balance in fives and tens on various National and State

Banks, and part of the bills were United States greenbacks. No schedule of the money was made by said Bartlett and attached to his return. On the day said Fletcher was discharged and after the discharge, the plaintiff demanded the money of Bartlett, who said he did not feel at liberty to give up the same, that he had doubts whether he should give it up, and alleged that he expected an order of the Court, which was soon to sit in this county, to give up the money to the plaintiff, and as soon as he received such order he would do so. At said Court, plaintiff asked him about the money and Bartlett said he had taken it out of the bank and supposed the Court would pass an order, but it has not, and he should return the money to the bank. No such order, however, was ever obtained, nor was any indictment found or returned against said Fletcher in said Court, nor was there any further prosecution against him. After the adjournment of said Court and before the commencement of this suit, the plaintiff several times demanded the money of Bartlett, who as often refused to give it up.

At the trial of the present suit, the defendant proposed to offer evidence to prove the allegations in the brief statement. The Court ruled that, if proved, they would constitute no defence to the action, and excluded the evidence. Thereupon, by consent of parties, the case was withdrawn from the jury and reported to the full Court upon the testimony and facts, the defendant for the purposes of the trial admitted that the money sued for was the property of the plaintiff before it came into the hands of said Bartlett, his deputy. If the evidence offered and excluded was admissible, and would constitute a sufficient defence, the action was to stand for trial, unless the Court should be of opinion that the defendant, as sheriff, was not liable in this suit for the foregoing acts of his deputy. In that event, a nonsuit was to be entered.

But, if said Sheriff was so liable, and the evidence offered was properly excluded, judgment was to be entered for the plaintiff.

The brief statement appears in the opinion.

D. D. Stewart, for the plaintiff.

The deputy held the money in his official capacity, and is liable for the money. R. S. c. 120, §§ 10, 11. The magistrate had no authority over the money. *Ibid.*

Upon the discharge of the supposed offender, the common law right of the plaintiff to his property instantly attached, and the officer should have returned it immediately. *Commonwealth* v. *Boudrie*, 4 Gray, 418; *Fitzgerald* v. *Jordan*, 11 Allen, 128.

The retention of the money was a breach of official duty, and the plaintiff could maintain his action for it. R. S., c. 120, § 12; *Knowlton* v. *Bartlett*, 1 Pick., 271, 273, 274.

Defendant is "answerable" for official misconduct and neglect of his deputies. R. S., c. 80, § 8.

The deputy is "answerable." R. S., c. 120, § 10; *Robinson* v. *Howard*, 7 Cush., 257, 258, 259; *Fitzgerald* v. *Jordan*, *ubi supra*; *Smiley* v. *Allen*, 13 Allen, 465.

Sheriff is liable, whenever his deputy would be, for acts done under color of office. *Knowlton* v. *Bartlett*, *ubi supra*; *Marshall* v. *Hosmer*, 4 Mass., 63; *Smith* v. *Berry*, 37 Maine, 303.

Evidence offered no defence. *Welsh* v. *Wesson*, 6 Gray, 505–6. No law confiscates the money. Plaintiff cannot be deprived of his property but by due process of law. *Rockwell* v. *Nearing*, 35 N. Y., 305, 306.

John S. Abbott, for the defendant.

A party guilty of a violation of the law cannot successfully invoke the aid of the law touching any matter growing out of such violation. It makes no difference by which party the illegal act is shown.

A man, learning that his neighbor with whom he is at variance, is to leave home late at night, places a loaded gun in such a position as to be discharged upon his neighbor's opening the door, — with the intent to kill him. He is detected and the gun taken. After demand and refusal he

sues for his gun. Or, he puts poison and large steel traps in his neighbor's pasture to destroy his neighbor's cattle, is detected before his purpose is accomplished and the poison and traps taken. After demand and refusal, he sues for the poison and traps. He may make out a *prima facie* case of conversion without showing any wrongful act. Can't the defendant show the wrongful act in defence?

When one parts with his property in the perpetration of crime, the mildest view to be taken for the plaintiff in such case is to treat the property as derelict.

A highwayman attacks a traveller and in attempting to rob him, throws his bowie knife and revolver at him. The robber escapes and afterwards finding his knife and revolver in possession of a third person, and after demand and refusal brings replevin, trespass or trover. He could prove the articles to have been his before they came into the possession of the defendant, possession by the defendant, demand and refusal. He did not intend to abandon his property; he intended to rob, then pick up his property and retire. This is analogous to case at bar. The property became "outlawed." *Lord* v. *Chadbourne*, 42 Maine, 440.

Defendant, if liable at all, is not liable in trespass. The original taking was in obedience to a precept and not wrongful. No such subsequent wrongdoing by Bartlett as to make defendant a trespasser *ab initio*. Retention of the money was simply a nonfeasance, and will not make defendant a trespasser *ab initio*. *Gardner* v. *Campbell*, 15 Johns., 401; *Ross* v. *Philbrick*, 39 Maine, 34.

Defendant is not liable if Bartlett is.

"Official misconduct and neglect," mentioned in R. S., c. 80, § 8, does not apply to such conduct or neglect while in the execution of criminal process. At most, it embraces only "official misconduct and neglect." Bartlett's official acts ceased when the money was returned before the magistrate and the examination ended.

CUTTING, J. — Trespass against the defendant as sheriff of Somerset county, for the misfeasance of one Josiah D. Bartlett, his deputy. For the purposes of the trial at *nisi prius*, and to present certain questions of law, it was admitted that the money sued for ($500) was the property of the plaintiff before it came into the hands of the deputy, of whom it was demanded prior to the commencement of this suit.

Upon the evidence produced by the plaintiff, we are of the opinion that he would be entitled to judgment, unless the testimony offered in defence was improperly excluded, or that for the alleged default of his deputy the defendant is not liable; questions raised in the specifications and a brief statement of his defence.

The evidence offered, and ruled inadmissible, was to sustain the following brief statement, viz.: — "And for his brief statement in this behalf, the defendant says, that, on the 11th of August, 1865, he was and ever since has been a sheriff within and for the said county of Somerset; and that one Josiah D. Bartlett then was and ever since has been a deputy sheriff within and for said county, under him duly appointed and qualified.

"That, on said 11th day of August, 1865, the plaintiff made a complaint to one William Bartlett, a trial justice, charging that one thousand dollars in bank bills, the property of the plaintiff, had been feloniously stolen and carried away from his possession; and that he had probable cause to suspect, and did suspect, that the same had been stolen by Jesse Fletcher of Embden; and that the same, or a part thereof, was concealed in said Fletcher's dwellinghouse, and requesting a search warrant with an order to arrest said Fletcher.

"That, on the same day, a warrant was issued, in due form, by said William Bartlett, as such trial justice, addressed to the sheriff of said county, or either of his deputies, or any coroner of said county, and delivered to said

Josiah D. Bartlett, defendant's deputy, as aforesaid, and a coroner, within and for said county of Somerset, for service.

"That, on the 6th day of September, 1865, said Josiah D. Bartlett duly served and executed said warrant; and, in accordance with his doings therein, made his return thereon, in substance, that he had searched said dwellinghouse and found a package of money containing five hundred dollars, and that he had the same and said Fletcher before Sullivan Williamson, Esq., a trial justice, within and for said county of Somerset, for examination. That, on said 6th day of September, said Williamson, at New Portland, in said county, after an examination and full hearing touching the charges and allegations in said complaint, at which hearing the said Norton appeared, with counsel, and took part therein throughout the hearing, and was examined as a witness, decided and adjudged that said Fletcher was not guilty as it had been alleged in said complaint said Norton suspected, and he acquitted and discharged him."

Had the brief statement, which was offered to be proved, terminated here, evidence as to its truth may have been properly excluded, since it had been admitted that the money sued for, before it came into the hands of the deputy, was the property of the plaintiff.

But the statement proceeds further and says, — "If the money belonged to the plaintiff, he placed it in the house of said Fletcher for the wicked and unlawful purpose of causing the arrest and conviction of said Fletcher, and that the material allegations and charges contained in said complaint, signed and sworn to by the plaintiff, are false, and were by the plaintiff known to be false when he signed and swore to the same."

If such an allegation be true, the plaintiff, it is argued with much force, instead of being in a court of justice, should be incarcerated with convicted perjurers, far from any aid from the court, and, perhaps, beyond the Executive clemency; and, as the case is presented, that allegation must be presumed to be true.

But the plaintiff is in court, and not in prison. For some cause the injured party has not seen fit to institute a criminal prosecution; and the plaintiff, under the admission that the money was his before the time it came into the possession of the defendant's deputy, brings this action for its recovery, and calls on him to account for its detention. If it was once the property of the plaintiff, it remains his until some person shows a superior title. If the officer, after all criminal proceedings had been terminated, instead of retaining the money, had returned it into the possession of the person from whom he had taken it, as he might lawfully have done, perhaps this suit might have been successfully defended; but upon this point we express no opinion, and, in a suit against a person, in whose possession the money was found, perhaps the plaintiff, under the circumstances, could not have prevailed, as no Court would have been willing to lend its aid to a party guilty of such infamy; and, in such case, the able argument of the defendant's counsel would have been conclusive. But Jesse Fletcher, the party criminally charged, sets up no claim to the money or on the officer who took it from his constructive possession.

Then it is contended that this action for the money cannot be maintained, because it becomes derelict, and such defence is set forth in the brief statement. Such defence might have prevailed in an action against Fletcher, but we know of no decision in the whole history of jurisprudence where property was held to be derelict in the hands of an officer taken on judicial process.

Again, the specification discloses, and it is urged, that trespass does not lie against the sheriff; first, because the property was rightfully taken, and secondly, because, if rightfully taken, and not delivered on demand, it was nonfeasance, and not misfeasance as alleged, and, for the latter, trespass *ab initio* cannot be maintained. But the neglect to pay over money in the hands of an officer, to one entitled to it, on demand, is not only an act of nonfeasance but also of misfeasance, and, for such misdemeanor on the part of

the deputy, the sheriff is liable, whether it occurs in the service of civil or criminal process.

On the whole, our conclusion is, that the evidence offered was rightfully excluded, and, according to the agreement of the parties,

Judgment must be rendered for the plaintiff.

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

STATE OF MAINE *versus* AURELIUS YOUNG *& als.*

A recognizance, with sureties for his appearance at a certain term of this Court, entered into before a police judge by a person accused of an assault with intent to kill, is amendable even after suit is commenced upon it.

Such a recognizance taken by the police judge before whom the examination was had, after the officer, in pursuance of a mittimus duly issued upon the default of the accused to recognize, had taken the prisoner into his custody and departed from the police Court, and before a full commitment thereon, is void.

ON REPORT.

SCIRE FACIAS on a recognizance, with sureties in the sum of $3000, entered into before the judge of the police court of Rockland, in this county, for the personal appearance of one James Rouse, at the Oct. term, 1863, of the S. J. Court at Rockland, then and there to answer to the charge of an assault with an intent to kill.

At the April term, 1866, the counsel for the defendants filed a motion that the police judge, before whom the recognizance was taken, have leave to amend the recognizance by adding the following facts, and to prove that they were consistent with the truth: —

"That the said James Rouse, when brought before the said police Court, was required to recognize for his appearance as is set forth in said recognizance, in the sum of $3000

with sureties, but failing to produce any sureties, was ordered by the said judge to be committed to jail; and the said judge thereupon issued his mittimus in due form of law, directed to the jailer of the Lincoln county jail, in which the prisoners of Knox county are confined, there being no jail in Knox county. The city marshal of Rockland, to whom said mittimus was addressed, proceeded to execute the same, and by virtue of it took the said Rouse and carried him as far toward said Lincoln county jail as the town of Nobleboro' in Lincoln county, where said Rouse escaped from the officer and from the State of Maine into the British Provinces where he has ever since remained; that, after the officer had reached the town of Waldoboro', in Lincoln county, with said Rouse, these defendants appeared before said police court and there entered into this recognizance, the said Rouse never having, at any time, been before said court with them."

The whole Court were to determine whether the recognizance could be amended as proposed, and if so, what would be the effect of such amendment.

Frye, *Attorney General*, for the State.

A. P. Gould, for the defendants.

WALTON, J.—The first question to be determined is whether the recognizance can be legally amended, and if so, what the effect of the proposed amendment will be.

Undoubtedly the recognizance may be legally amended. In *Com.* v. *Field*, (11 Allen, 488,) a recognizance was amended three years after it was taken, and after a suit had been commenced on it. In *Means* v. *Trout*, (16 Serg. & Rawle,) Chief Justice GIBSON said that justices of the peace manifest such a remarkable inaptitude in these matters, and return so many defective recognizances, that not to allow them to be amended would be attended with an insufferable amount of mischief. And in *Bream* v. *Spangler*, (1 Watts & Serg., 378,) upon a motion to quash an appeal from the

judgment of a justice of the peace on the ground of a defective recognizance, the Court held that in all such cases the appellant should be allowed a reasonable time within which to perfect his appeal by having the recognizance amended, as otherwise he might suffer great hardship, and be deprived of a constitutional right, without being in fault.

The conditions of all recognizances are fixed by law. Hence, parties and their sureties understand perfectly what their liabilities are; and when defective or illegal recognizances have been returned, there can be neither hardship nor injustice, in allowing them to be amended as soon as the defect or error is discovered. And in criminal cases especially, not only should the magistrate be allowed to amend a defective or illegal recognizance returned by him, but he should be required to do so, if he can consistently with the truth; otherwise a door is opened through which the most atrocious criminals may escape with impunity.

In this case the proposed amendment is moved by the defendants. We think the police judge should be allowed to make the amendment if he can do so consistently with the truth.

What will be the effect of the proposed amendment, if made? We think it will be fatal to the validity of the recognizance. The recognizance will then show upon its face, that it was taken after the issuing of a mittimus for the commitment of the principal, and he was many miles away from the court and the judge, in the custody of an officer, who was then taking him to jail, unless he had already escaped. The case was then *coram non judice*. The police judge had no authority to recall the officer and supersede the further execution of the mittimus; and he had no more authority to take the recognizance of the prisoner than any other magistrate. His jurisdiction had been fully exercised and was ended. His jurisdiction ended when the officer, in pursuance of the mittimus, had taken the prisoner into his custody, and departed from the court. A recognizance taken after that, and before the prisoner had been fully

committed, would be taken without legal authority, and would be void. *State* v. *Berry*, 8 Maine, 179.

As we do not know whether the police judge can make the proposed amendment consistently with the truth, the action must stand for trial, with leave for the police judge to make it, if such amendment will be in conformity with the truth. *Action to stand for trial. — Police judge has leave to amend the recognizance if he can do so consistently with the truth.*

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

SAMUEL GLIDDEN *& ux. versus* JOHNSON PHILBRICK.

The return of a levy of an execution upon real estate, made under R. S. of 1841, c. 94, § 4, must expressly show that the appraisers were "discreet' as well as "disinterested men," or the levy cannot be sustained.

The officer making such return may amend it, when it can be done in accordance with the truth, and the rights of third persons, acquired in good faith, do not intervene.

So he may amend his certificate of his administration of the oath to the appraisers, by appending his signature to it, when his return and the certificate of the appraisers recite that the appraisers were duly sworn.

Where the officer's return calls the appraisers "persons" instead of "men," the word used in the statute, and specifically mentions them by names given to males, alone, this Court will construe the word "persons" to mean "men" and not women.

Where an entire estate is appraised, set out by metes and bounds and levied upon as the property of the execution creditor, who owned only an undivided portion of it, the levy is valid as to the debtor's undivided part.

ON REPORT.

WRIT OF ENTRY.

Both parties claim title from Matthew Cottrill, the plaintiffs by deeds as follows: — Matthew Cottrill to Samuel Glidden, Feb. 7, 1846; Samuel Glidden to Hannah E. Cottril, Sept. 17, 1858; and Hannah E. Cottrill to the plaintiff,

Catherine Glidden, April 28, 1860; and the defendant by virtue of a levy, March 7, 1856.

After the testimony was all in, the case was reported to the full Court, with the agreement that, if the defendant's levy was valid or could be so lawfully amended as to be made so, as against the title of Catherine Glidden, the action was to stand for trial.

The remaining facts appear in the opinion.

A. P. Gould, for the plaintiffs.

The debtor's "share" in the estate levied upon is not "stated," and hence the levy is invalid. R. S., 1841, c. 94, § 11. Sections 10 and 11 must be made to harmonize; but, if inconsistent, the latter must be held to limit the former and not the former to nullify the latter.

These sections are consistent with each other. The "debtor's interest" in section 10 does not refer to the same thing as the "debtor's share or part" in § 11. The word "interest" refers to the grade or extent of his estate, whether it is a fee simple or any less estate; and the section simply means that any inferior estate of a debtor will pass by a levy although it be described by the appraisers as a fee simple or any grade above that actually owned by the debtor. Whereas the words "share or part," in § 11, refer to the debtor's particular proportion of the estate. So that the Legislature intended by the two sections to provide that a levy upon a debtor's estate inferior in its character should be good, although it be described as a larger one; but that a levy upon an estate held in joint tenancy or tenancy in common should not be good, and should not be held to create an estate in common in the levying creditor unless levied upon as an estate in common, "and the debtor's share or part of it be stated by them."

The construction contended for was given to this section in 1852, in *Howe* v. *Wildes*, 34 Maine, 566, and *Thayer* v. *Mayo*, 34 Maine, 139. And the same having been reënacted in the revision of 1857, R. S., c. 76, § 7, the Legislature thereby adopted the construction with it.

The reason given for this construction in *Howe* v. *Wildes*, *ubi supra*, is not answered in *Swanton* v. *Crooker*, 49 Maine, 455.

Section 11 says the "debtor's share or part must be stated," while the opinion in *Swanton* v. *Crooker*, says in effect the "debtor's share or part need not be stated."

The amendments of the return are not allowable. Vested rights of third persons intervene. If amendments are allowed, they will relate back only to the time they are made, and take effect from that time only. *Means* v. *Osgood*, 7 Maine, 146.

Counsel also cited upon amendments, *Williams* v. *Amory*, 14 Mass., 29; *Pierce* v. *Strickland*, 26 Maine, 277—288, 289; *Howard* v. *Turner*, 6 Maine, 106; *Thatcher* v. *Miller*, 13 Mass., 271.

J. Ruggles, for the defendant.

APPLETON, C. J.,—Amendments are allowed between the parties to a pending suit and to the proceedings to be amended, which would not be permitted when the rights of third persons would be injuriously affected thereby. No amendment of an officer's return should be permitted, when such amendment would destroy or lessen the rights of third persons acquired *bona fide* and without notice by the record or otherwise. *Fairfield* v. *Paine*, 28 Maine, 498. But if the return contain sufficient matter to indicate that, in making the extent, all the requisitions of the statute have been complied with, an amendment may be made, notwithstanding any intervening interest of a subsequent purchaser or creditor. *Ib.* *Fitch* v. *Tyler*, 34 Maine, 463; *Whittier* v. *Varney*, 10 N. H., 291.

The levy in controversy was made under R. S., 1841, c. 94, § 4, which requires the appraisal of real estate to be made "by three discreet and disinterested men."

A levy is void when the sheriff omits to return that the appraisers are discreet and disinterested freeholders. *Williams* v. *Amory*, 14 Mass., 20. So, it must likewise ap-

pear that they are discreet as well as disinterested, else the levy will be void. *Bradley* v. *Bassett*, 2 Cush., 417. To the same effect is the decision of this Court in *Russ* v. *Gilman*, 16 Maine, 209.

The return of the extent must expressly show a compliance with every requirement, which the statute makes essential to its validity. The omission to state the appraisers to be discreet and disinterested would avoid a levy unless amended.

The fact of discretion is no more to be implied than that of disinterestedness. The same reasoning, which would justify the inference of the former, when not expressly stated by the officer, would equally justify the inference of the latter. If one might be inferred, so might the other, and a return omitting the statement of discretion and disinterestedness be upheld because it might be presumed that the officer would not disregard the statute.

In *Pierce* v. *Strickland*, 26 Maine, 277, the officer omitted to certify that the appraisers were disinterested, and returned only that they were discreet and freeholders. The Court held the levy void, and refused, after six years, to permit an amendment. But, in that case, the rights of third persons acquired in good faith would be affected by allowing the amendment. The officer, by whom the return had been made, was out of office and had become a purchaser and was the claimant of the estate levied upon and was a party to the suit then pending in which its validity was to be determined.

In the present case, it appears that the defendant, by virtue of an execution in his favor against Matthew Cottrill, on 7th March, 1856, levied on the premises in controversy as his property. But Cottrill had previously, and on the 26th Feb. 1846, conveyed the same to Samuel Glidden. Both parties claim title from Matthew Cottrill.

It is insisted that the conveyance under which the demandants derive their title is fraudulent and void as to creditors. If so, the fraudulent grantee cannot expect that the law will

protect his claim. He can be in no better condition than his fraudulent grantor. An amendment, which would be allowable against his grantor, should be equally permitted as against him.

As against Cottrill, the judgment debtor, the return is amendable. An officer will be permitted to amend his return, in order to perfect the title according to the justice and truth of the case, when no rights of third persons have intervened. In *Avery* v. *Bowman*, 39 N. H., 393, an amendment like the one proposed in this case was allowed, it being proved to be in accordance with existing facts.

If the grantee of the judgment debtor hold by a deed fraudulent as to creditors, he cannot retain the estate as against such creditors. The deed of Cottrill to Glidden, under which the demandants claim title, is long prior in time to the levy of the tenant. Being prior in time, if *bona fide*, it must prevail, whether the levy be good or bad. An amendment in such case could have no effect. If the deed was fraudulent, the creditors of the fraudulent grantor should be permitted to impeach it. The amendment, therefore, should be allowed as against the judgment debtor and against his fraudulent grantee. Such grantee and all deriving their title from him, with notice of the fraudulent conveyance, should stand in no better condition than the judgment debtor, through whom they claim.

The amendment should, upon proof of the necessary facts, be allowed, with a qualification saving the rights of all persons acquired in good faith before its allowance. *Chamberlain* v. *Cram*, 4 N. H., 115; *Whittier* v. *Varney*, 10 N. H., 291.

The certificate of the oath administered to the appraisers is in due form, but it is not signed by the deputy sheriff, who was authorized by stat. of 1843, c. 13, to administer it. The words, deputy sheriff, are found with a space left for the insertion of his name. In the return signed by him, however, the officer states that he has "caused three disinterested persons of the county of Lincoln to be sworn," &c.

The appraisers likewise state in their appraisal that they were "duly sworn." The return fully indicates that the requirements of the statute in reference to the swearing of the appraisers was complied with. In *Wilton Man. Co.* v. *Butler*, 34 Maine, 431, the omission of an officer to affix his signature to a return of a sale of property on execution, was allowed to be amended, on proof that the return, as amended, was in accordance with the facts. Much more should the officer be permitted to affix his signature to a certificate, which he has recognized in his return.

It was held, in *Swanton* v. *Crooker*, 49 Maine, 455, where an entire estate was appraised, set out by metes and bounds, and levied upon as the property of the debtor in an execution, who was an owner of an undivided portion only of the same, that the levy transferred the debtor's title to his undivided part, it being a less estate than that mentioned by the appraisers. The effect of such a levy was fully considered in that case, and we have no doubt of the correctness of the conclusion to which the Court arrived.

It is suggested that the levy is fatally defective, because the officer in his return calls the appraisers "persons," and not "men," the word used in the statute. The implication is that they might be women. But we should be slow to infer, when masculine names appear on the return, that those "persons" are females because called "persons."

The amendments prayed for may be made, upon proof of the facts, with a saving of all rights acquired in good faith, before its allowance.

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

J. W. KNOWLTON, (*Judge of Probate,*) *versus* ELISHA CHICK *& als.*

The surviving partner having been duly appointed executor of the will of his deceased partner, and given bond as executor in common form, included in his inventory "the whole of the partnership" property, with the proper value carried out, and charged himself, in his executor's accounts, with "one-half amount of personal estate of" the firm, "except notes and accounts, at the value mentioned in the inventory," and with "one-half collected on notes and accounts of the firm," together with "one-half of rents collected on the real estate of the firm," all of which the Judge of Probate allowed, against the objections of the executor's sureties, and thereupon found a balance due from the executor to the estate. In an action against the sureties upon the executor's bond, to recover the balance thus found: — *Held*, that the sureties were liable under R. S. of 1841, c. 107, although the executor filed no bond as surviving partner.

ON FACTS AGREED.

The case is stated in the opinion.

W. G. Crosby, for the plaintiff.

N. H. Hubbard, for the defendants, cited R. S. of 1841, c. 106, §§ 7 & 8; c. 107, §§ 26, 27, 28, 30 & 31; *Cook* v. *Lee*, 36 Maine, 340; *Foxcroft* v. *Nevins*, 4 Greenl., 72.

BARROWS, J. — This suit is brought against the sureties upon a probate bond, given by Henry A. Arey, as executor of the will of his father, James Arey, with whom he had been a co-partner. The executor never gave any bond as surviving partner, but, in the settlement of his accounts, as executor, in the Probate Court, against the objection of the sureties, charged himself with "one-half amount of personal estate of James Arey & Son, except notes and accounts," at the value set down in the inventory by him returned as executor, and with "one-half collected on notes and accounts of said firm," and with certain sums collected as rents on real estate owned by said firm. The Judge of Probate allowed the executor thus to charge himself, and found a balance due from him to the estate.

It is not claimed that there was any fraudulent surcharge and the only question presented is whether the sureties are liable, under such circumstances, on this bond, for the one-half of the personal property and of moneys collected on demands and rents belonging to James Arey & Son, as stated in said executor's accounts. We can have no doubt or hesitation in saying that they are so liable, so far as it is necessary for the protection of the rights of any creditors of James Arey's private estate, or of any legatees under his will, except the executor himself. The bond required (by §§ 27, 28 and 31, of c. 107, of the Revised Statutes of 1841, under which these proceedings took place,) to be given by the surviving partner, or by the executor or administrator, in case the surviving partner declined to assume the trust, was designed for the security of the co-partnership creditors, the estate, and the several members of the co-partnership. But, when the share of the deceased co-partner in the personal assets of the firm has been ascertained, and has gone into the hands of his executor or administrator, as part and parcel of the individual estate of the deceased co-partner, the sureties on the executor's or administrator's bond are responsible for its appropriation in a proper manner by him, in like manner as they are for any other portion of the assets of the estate into which it is absorbed.

Nor is it of any importance in this case that the administration of the co-partnership estate proceeded irregularly, without the filing of any bond by the executor, as surviving partner. Under the circumstances here presented, the creditors of the co-partnership only could have occasion to complain of this neglect, and the lapse of time since these proceedings were had would seem to indicate that they have been satisfied. It is not claimed that this suit can be maintained for their benefit. Nor is it suggested that the executor, in his accounts settled with the Judge of Probate, charged himself as executor with anything more than the net half belonging to his testator's estate, after a proper adjustment of his own affairs with the co-partnership. For

aught that appears, he may have been personally indebted to the co-partnership to an amount fully equal to the debts which the firm owed.

Money actually received by an executor or administrator, in behalf of the estate which he represents, he holds as trustee for those interested, and he must account for it, even though wrongfully received, unless he show his liability to refund or pay over the money to some other party having a right to demand it, and that payment has been demanded, or, at least, that it probably would be demanded. *Jennison* v. *Hapgood*, 10 Pick., 104.

The same is true of other personal assets thus received. The executor might properly charge himself, as executor, with the half of the personal property of the co-partnership which actually belonged to the estate of his father, at the appraisal, when it came into his hands as executor, and, unless the parties interested in his father's estate claimed that it should be sold and the proceeds accounted for, and the Judge of Probate so ordered, he should account for that portion thus passed over to him as executor, at its appraisal.

Nor does it seem that any other rule should prevail with regard to the half of the rents received from the real estate belonging to the firm.

The defendant's counsel argues that the amount of the bond required of the executor indicates that it was not intended to cover what might accrue from the testator's share in the co-partnership. But no legal inference can be drawn from that fact as to the liability on the bond, which must depend upon the statute requirements and the conditions of the bond; and, if any such inference could be drawn, it would be unfavorable to his position. The total amount of the personal property belonging to James Arey's estate, aside from his interest in the co-partnership effects, was but $511,75, while the bond required and given as executor was in the sum of $10,000.

The conditions of any "further" bond, which Henry A. Arey might have given as surviving partner, would have

been fulfilled, so far as James Arey's estate was concerned, when he had ascertained and carried into his accounts as executor the proper share of James Arey's estate in the co-partnership effects, and the responsibility for the proper disposition of it thereafterwards would have been thereby transferred to the executor, and the sureties upon his bond. When the same result is reached without the filing of a bond by the surviving partner, it adds nothing to the liability of the executor's sureties beyond what they originally assumed, and they cannot complain. They are not called upon here to answer for any default of Henry A. Arey in the execution of his duty as surviving partner.

If there was error in the settlement of his accounts as executor, it might and should have been corrected upon a subsequent settlement in Probate Court.

According to the stipulations in the report,

The action is to stand for an assessment of damages by the jury.

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

EDWIN P. TREAT *versus* THE UNION INSURANCE COMPANY.

In the trial of an action on a policy of insurance upon a vessel, the burden of proof is not upon the plaintiff to show in the first instance the seaworthiness of the vessel at the inception of the voyage.

In the outset, the presumption is that all things are as they should be in this respect.

The burden of proof would be changed if it appeared that the vessel, without being subjected to any stress of weather, or to any unusual buffeting of the seas or other extraordinary peril, had suddenly foundered and gone down with all sails set shortly after leaving port.

A mere report of the evidence, made upon a motion to set aside the verdict as being against evidence, may be amended at any time before a final hearing before the full Court.

On Exceptions and Motion to set aside the verdict as being against the weight of evidence.

Assumpsit on a policy of insurance effected on the schooner R. H. Perkins, which left Bangor June 12, 1866, and, after being delayed at Bucksport several days, on account of head winds and bad weather, left the latter port, June 20, and foundered the next day, with all sails set.

The counsel for the defendants requested the presiding Judge to instruct the jury that the burden of proof was on the plaintiff to show, in the first instance, that the vessel was seaworthy at the inception of the voyage; but the presiding Judge declined to give the requested instruction, but did instruct them that the vessel was presumed to be seaworthy at the commencement of the voyage. And the defendants alleged exceptions.

The original report was by leave of Court made by the defendants, during the illness of the plaintiff's counsel, and after adjournment of the *nisi prius* term. After the report was certified and the case entered on the district docket and a time assigned for the argument, and the defendant's argument had been passed over to the plaintiff's counsel, the presiding Judge, upon motion and proof, amended the report.

N. Abbott & Wilson, for the defendants.

Jewett, for the plaintiff.

Barrows, J. — The position assumed by the defendants that the burden of proof was on the plaintiff to show, in the first instance, the seaworthiness of the vessel at the inception of the voyage, and the instruction requested in conformity therewith, were not correct. In the outset, the presumption is that all things are as they should be in that respect. *Taylor* v. *Lowell*, 3 Mass., 347; *Paddock* v. *Franklin Ins. Co.*, 11 Pick., 226. If anything appear in the evidence relating to the manner and circumstances of the loss, to repel that presumption and change the burden of proof as to seaworthiness, it would be for the defendant to

call the attention of the Court thereto and request instructions dependent upon the finding by the jury of the facts upon which he relies. That the burden of proof in this respect would be changed if it appeared that the vessel, without being subjected to any stress of weather, or to any unusual buffeting of the seas or other extraordinary peril, had suddenly foundered and gone down with all sails set, shortly after leaving port, is undoubtedly true. *Paddock* v. *Franklin Ins. Co., ubi supra.*

But, whether that was this case or not, was for the jury to determine, and no request for instructions based upon such a contingency seems to have been made. The exceptions must be overruled.

We see no objection to amending a mere report of the evidence given at the trial, and reported upon a motion to set aside the verdict as against evidence, at any time before the case comes on for a final hearing before the Court, if it is made to appear, to the satisfaction of the Judge presiding at the trial, that truth requires that it should be amended.

With regard to the motion for a new trial on that ground in this case; while a review of the testimony makes the foundering of the vessel, under the circumstances described, seem not a little mysterious, and we might, perhaps, be inclined to differ from the jury as to her seaworthiness at the inception of the voyage, — still, it was a question for them to pass upon, and we cannot say that their decision was so palpably against the evidence as to justify us in setting aside the verdict. *Motion and exceptions overruled.*

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

KENT, J., dissented.

AMELIA A. KNIGHT *versus* THE PORTLAND, SACO & PORTSMOUTH RAILROAD COMPANY.

A through ticket over three several distinct lines of passenger transportation, issued in the form of three tickets on one piece of paper, and recognized by the proprietors of each line, is to be regarded as a distinct ticket for each line.

The rights of a passenger purchasing such a ticket, and the liabilities of the proprietors of the several lines recognizing its validity, are the same as if the purchase had been made at the ticket office of the respective lines.

Common carriers of passengers are not bound to insure the absolute safety of their passengers; but they are required to exercise the strictest care consistent with the reasonable performance of their contract of transportation.

To render them liable for an injury to a passenger while under their charge, it is enough if it was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care and precaution, reasonably within their power, the injury would not have been sustained.

Where the plaintiff's ticket entitled her to a passage over the defendants' road to Portland, and by steamboat from Portland to Belfast; and the defendants had built their track upon their wharf down to the steamboat, and had run their passenger train upon it for a time, and still continued to run their baggage train there; and they directed their passengers verbally, or by printed sign, to use the wharf as a passage-way to the boat, and they did so use it; and they made the wharf subsidiary and necessary to the proper use and enjoyment of their road; in an action by the plaintiff to recover for an injury upon the wharf; — *Held*,

1. That the defendants are bound to exercise the same degree of care, in making the wharf safe and convenient for their through passengers to travel over, as is required of common carriers of passengers, although they required them to disembark at their depot, forty rods distant from the steamboat; and,

2. That this liability continued until, in the ordinary course of their passage over the wharf, they reached the point where the liability of the steamboat company commenced.

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

CASE, for injury received at the slip on the defendants' wharf in Portland.

The defendants requested the presiding Judge to instruct the jury:—

1. That the defendants were under no obligations to carry the plaintiff beyond the point at which they regularly received and discharged passengers in Portland:—

2. That, when they had safely carried the plaintiff from their station in Berwick to their station in Portland, and had safely delivered her from their depot in the latter place, their duty as carriers of passengers ceased:—

3. That the wharf in Portland, used by the steamboat company for the purposes of its business, though owned by the defendants, was not such a part of the appliance of the defendants' railroad as the defendants, in their capacity of carriers of passengers, are responsible for the condition of:—

4. That, if the jury should find that a slip or drop was necessary for the transaction of the business of the wharf, and it was constructed in the best known manner and with all usual and reasonable precautions for safety, and had no unreasonable or improvident space for its movement, but only sufficient for its easy and convenient operation, then the defendants have been guilty of no laches and cannot be held in this action.

The presiding Judge declined to give the first three requested instructions, but gave the fourth, with this addition:—"but, if the space between the wharf and slip, though necessary to be kept open for the movement of the slip in raising it or letting it down, did not need to be kept open, and, while in actual use for passengers to pass over, the care required for common carriers of passengers rendered it necessary that it should be closed or guarded on such occasions, and the accident was caused wholly by the neglect of the defendants to close it or to provide all reasonable safeguards against passengers stepping into it, the defendants would be liable."

But the jury, together with other things not objected to, were instructed as follows:—

Common carriers of passengers are required to exercise

the strictest care which is consistent with the reasonable performance of their contract of transportation.

While they are not bound to insure the absolute safety of their passengers, they are required to make use of such safeguards for the protection of their passengers as science and art have devised, and as experience has proved to be efficacious in accomplishing their object.

It is not sufficient that they exercise slight, common, or even great care.

They have discharged their duty only when they have employed all the means reasonably in their power to prevent accident.

To render them liable for an injury to passengers while under their charge, it is not necessary that they be guilty of gross or great negligence; it is enough if the accident was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained.

That the arrangements between the several connecting companies, by which each sold tickets through, only imposed on each the obligation to carry passengers over its own portion of the entire route.

If the plaintiff purchased a through ticket to Belfast at Lawrence, and the defendants recognized the validity of that ticket by passing her over their road, they took upon themselves the duties and responsibilities of common carriers of passengers as effectually as if the ticket had been purchased at their office in Berwick.

The plaintiff's ticket entitled her to a passage over the defendant's road to Portland, and, by steamboat, from Portland to Belfast; and, if the defendants built their track down to the steamboat upon the wharf, running their passenger train down upon it for a time, and their baggage train there at the time of the accident; and, if they directed their passengers verbally or by a printed sign to use the wharf as a passage-way to the boat, and they did so use it, and, if they

made the wharf subsidiary and necessary to the proper use and enjoyment of their road, they are bound to exercise the same degree of care in making the wharf safe and convenient for passengers to travel over, which is required of common carriers of passengers, though at the time of the accident they detained their passenger train at their depot, and required their passengers to disembark at that place.

The jury, under these instructions and others not excepted to, returned a verdict for the plaintiff, and assessed damages at two thousand five hundred dollars, and the defendants alleged exceptions.

The principal facts testified to by the plaintiff appear in the opinion.

Nathan Webb, for the defendants.

First, second and third requested instructions should have been given. Defendants were bound to carry plaintiff safely from Berwick to their depot at Portland only, and not to deliver her to the next carrier; otherwise, they could control her action. Their depot at Portland is their station for the discharge of their passengers, and, when the passengers have safely left that station, defendants' liability has ceased. The location of a railroad company's passenger stations fixes the points where their liabilities begin and end, and these must be safe. Their liability does not extend over all the contiguous property they may own. The fact of ownership of the wharf does not vary their responsibility as carriers of passengers. The distance of the wharf negatives any pretence that it was a necessary and immediate appliance to their depot. Wharves are auxiliary to water and not land transportation, and, in this case, it was an appliance to the steamboat and not to railroad. Defendants had a chartered right to regulate the point to which their trains should go and their passengers should end their transit, and to change it at will, only taking care that they be safe. The refusal to give the requested instructions operated a denial of these principles and extended the requirement of utmost care beyond its proper limits.

2. The addition to the 4th requested instruction is erroneous, because it in effect instructed the jury that the defendants, by virtue of the plaintiff's ticket, were liable for the condition of the slip at the end of the wharf, 40 rods from the station where they discharged their passengers.

3. The instruction, that the defendants "have discharged their duty only when they have employed all the means reasonably in their power to prevent accident," is incorrect in substituting power for precaution, prudence and foresight. Many things are within the reasonable power of a carrier, which the utmost timidity would never think of employing, till some experience had indicated their necessity. Moreover, the rule of utmost prudence applies only to those means and instruments employed in active and actual transportation, such as cars, &c.

4. Instructions were wrong in assuming that by informing passengers verbally, or by signs, where the steamboat was, and the way to it, made the defendants liable as common carriers of passengers to the end of the wharf; also, in leaving to the jury to decide what was the legal relation of the wharf to the railroad as a part of their route; also, in that it implied that the carriage of baggage to the steamboat evidenced the extent of their liability to carry passengers, and that the duty of defendants, as carriers of passengers, was coëxtensive with their obligation as to the baggage.

Counsel cited *Schopman* v. *Boston & Wor. R. R. Co.*, 9 Cush., 24; *Sprague* v. *Smith*, 29 Vt., 421; *Hood* v. *N. Y. & N. Haven R. R. Co.*, 22 Conn., 1; *Naugatuck R. R. Co.* v. *Waterbury Button Co.*, 24 Conn., 468; *Farmers' & Mech. Bank* v. *Champlain T. Co.*, 18 Vt., 140; *Straiton* v. *N. Y. & New Haven Railroad Co.*, 2 E. D. Smith, 184; *Norway P. Co.* v. *B. & M. R. R. Co.*, 1 Gray, 263; *Nutting* v. *Conn. Riv. R. R. Co.*, 1 Gray, 502; 2 Redf. on Railways, (3d Ed.,) 227, 228; *Ackley* v. *Kellogg*, 8 Cow., 223; *Van Santroon* v. *St. John*, 6 Hill, 158.

Jewett, for the plaintiff.

Knight *v.* Portland, Saco & Portsmouth R. R. Co.

APPLETON, C. J. — This was an action on the case against the defendants for negligence.

It appeared in evidence, from the plaintiff, that she, on the 10th Aug., 1866, purchased at Lawrence, Mass., a through ticket from that place to Belfast in this State, for which she paid four dollars; that the ticket so purchased was on one piece of paper, but creased for three different tickets; that one part of the ticket was taken by the conductor on the Boston & Maine Railroad, soon after she entered the cars at Lawrence; that a second part was taken at South Berwick by the conductor of the defendant corporation, and the third part on board the steamer, between Portland and Belfast; that she arrived about 11 o'clock at night at the defendants' depot at Portland, where the cars stopped; that she left the cars there to walk to the steamboat Regulator, which lay at the end of a wharf contiguous; that the way to the steamboat was dark; that she proceeded in company with other passengers from the depot to the place of embarkation, without accident, until within, as she judged, from ten to fifteen feet of the edge of the wharf, when, as she was walking along a level surface, without warning of any danger, she stepped her foot into a hole or opening in the planking of the wharf, over which she was passing, and fell backward and fainted; that it was found, on examination, that the small bone of her right leg had been fractured and her right ankle sprained and lamed and that her back and side were wrenched and lamed; that it was a considerable distance from where the passengers left the cars to the place where they go on board the boat; that she heard no directions nor instructions by any officer of the railroad or steamboat about getting from the cars to the boat, nor saw any one to guide her, and that no one accompanied her with a light; and that she had been over this route twice before.

It was admitted that an arrangement, for the sale of through tickets and division of the price, existed between the steamboat and railroad companies, over which the plaintiff passed, and that the baggage of passengers was checked through;

and that the wharf from which the steamboat sailed and on which the plaintiff was when injured, was the property of the defendant corporation.

It was in evidence that the distance from the place where the cars stopped in the depot, at Portland, to the steamboat, was about forty rods, and that the defendants had a side track running from their main track, near the depot, to within six or eight feet of the steamboat; that, until within four or five years, passenger cars had been run down this side track to the steamboat; but that, since that time, the use of the side track for passenger cars had been discontinued; and that it was still and had constantly been used for running freight and baggage cars to the steamboat.

The defendants introduced evidence tending to show that, at the entrance to the steamboat wharf was a guide-board, or sign, indicating the way to the steamboat.

There was evidence introduced tending to show that the wharf was in good condition and that it was amply lighted, and evidence to the contrary.

(1.) The through tickets in the form of coupons, purchased at Lawrence, entitled the plaintiff to pass over the defendants' road. They are to be regarded as distinct tickets for each road, sold by the first company as agents for the other companies. The rights and liabilities of the parties are the same as if the purchase had been made of the defendants at their station. *Schopman* v. *Boston & Worcester R. R. Co.*, 9 Cush., 24; *Sprague* v. *Smith*, 29 Vermont, 421; *Hood* v. *N. Y. & N. H. R. R. Co.*, 22 Conn., 1; 2 Redfield on Railroads, § 185. But railroads may so issue their tickets and so conduct as to have the purchasers understand that they undertake for the whole route, in which case they will be held responsible to that extent. *Quimby* v. *Vanderbilt*, 17 N. Y., A., 306; *Blake* v. *G. W. R. Co.*, 7 Hurls. & Nor., 987.

(2.) The degree of care and caution required of the carriers of passengers was correctly stated by the presiding Justice and in accordance with the authorities. The care to

be used depends somewhat upon the value and importance of what is to be carried. The greater the value to be transported, the greater the need of care and caution on the part of the carrier. If the business is of the highest moment, then the skill, care and diligence should be in proportion thereto. In *Ford* v. *London & S. W. Railway Co.*, 2 F. & F., 732, Mr. Chief Justice ERLE uses the following language:—"The action is grounded on negligence. The railway company is bound to take reasonable care, to use the best precautions in known practical use for securing the safety and convenience of passengers." In *Philadelphia & Reading Railroad Co.* v. *Derby*, 14 Howard, 486, Mr. Justice GRIER remarks as follows:—"When carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." The question came before this Court, in *Edwards* v. *Lord*, 49 Maine, 279, and the instructions given in this case will be found in accordance with the views of the Court as there expressed.

(3.) The depot and the grounds around the depot belonging to the defendant corporation, and used in connection therewith, should be in safe condition for those who, in the course of travel, are obliged to pass over them. The defendants own the wharf. It is in their use for the purpose of their business as carriers. The cars containing the baggage for the steamboat, with which the defendant corporation is connected, pass over it. The cars, with passengers for the steamboat, formerly passed over it, though they are now discontinued. The wharf is used by the railroad and in connection with the boat. The passengers for the boat pass over it on their way to the boat. It is the way provided. It is the way passengers in the cars are directed to take. The train arrives in the evening. Passengers from the cars to the boat pass rapidly over the intervening distance. The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe. The defendants should

be justly held responsible for any neglect of their servants, or for any deficiencies in the wharf, which, with due care, might be avoided. If the defendants had carried the plaintiff over the wharf, as heretofore, in their cars, and she had been injured in consequence of the neglect of the defendants, she would have been entitled to recover. Her rights are none the less because she walks over the wharf to reach the steamboat, than if she had been borne over it, if, on the way, she is injured through the negligence of the defendants by leaving the wharf in an unsafe and dangerous condition. The defendants are not released from liability because, for their convenience, she used her own limbs, when she might be entitled to the use of their cars. Their liability did not cease the moment the cars reached the depot. It continued, equally as if at the depot, while she was on her way over the defendants' wharf, and, by their direction, to the steamboat, and until, in the ordinary course of her passage, she should reach the point where the liability of the steamboat company commences. The passage contracted for was from Lawrence to Belfast. The plaintiff was *in itinere* from the point of departure to the destined point of arrival. The defendants must, at any rate, be deemed liable from the place where they received the passenger to the place where she was to be transferred to the next agent in the course of transmission to the place of her destination.

These views seem to be in accordance with the general principles of law established in similar cases. The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all subsidiary arrangements necessary to the safety of passengers. *McElroy* v. *The Nashua & Lowell Railroad Company*, 4 Cush., 400. Assuredly, a safe passage-way to and from the cars is a subsidiary arrangement which passengers have a right to require to be safe. The wharf was this passage-way for those going to the boat from the cars or coming to the cars from the boat. A

railway company, for the more convenient access of passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous; held, that the company were liable for the death of the passenger, through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used. *Longmore* v. *G. W. Railway Co.*, 115 E. C. L., 183. In *Nicholson* v. *L. & Y. Railway Co.*, 3 Hurlstone & Coltman, 534, the plaintiff sued the defendants, common carriers, for not sufficiently lighting their depot, and for not providing proper and sufficient accommodation for their passengers to depart safely from their station after their arrival, and for leaving hampers in the way of passengers departing, over which the plaintiff falling was injured. The facts were these. The plaintiff, a passenger by the defendants' railway, was set down at T., after dark, on the side of the line opposite to the station and the place of egress. The train was detained more than ten minutes at T. and, from its length, blocked up the ordinary crossing to the station which is on the level. The ticket collector stood near the crossing with a light, telling passengers to "pass on." The plaintiff passed down the train, to pass behind it, and, from the want of light, stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company:—Held, that these facts disclosed evidence for the jury of negligence on the part of the company. In *Martin* v. *The Great N. Railway Co.*, 30 E. L. & Eq., 473, the defendants, sued as common carriers, were held liable for so negligently managing and lighting their station, that the plaintiff, being a passenger by the railway, was thrown down, while on his way to the carriages. In *Murch* v. *Concord Railroad Corporation*, 29 N. H., 9, it was held that the owners of railroads, which are public highways, are bound to make such landings and places of access to their roads, as are necessary for the public accommodation,

and to keep them in a suitable and safe state for the accommodation of persons who may reasonably be expected to use them. In *Penn. Railroad Co.* v. *Henderson*, 51 Penn., (1 Smith,) 315, the railroad corporation was held liable, as common carriers, for an injury occasioned by not having a safe and convenient platform, the Court terming the want of such platform "an imperfection or defect in the road." So the ferryman is bound to have his landing in a complete state of repair for the reception of travellers, and to furnish proper easements for entering the boat, and to provide fastenings to keep the boat in a firm and steady position while passengers are being received. *Cohen* v. *Hume*, 1 McCord, (S. C.,) 439.

Indeed, natural persons, who assume no public duties, are held liable, if they suffer their property to remain in a condition dangerous to the public. *Elliot* v. *Pray*, 10 Allen, 378. In *Corby* v. *Hill*, 93 E. C. L., 556, the defendant was held liable in tort for negligently placing and leaving an obstruction in the private avenue, known to be used in the ordinary way, whereby a passer lawfully using it, though having no permanent right of way, was injured. In *Packard* v. *Smith*, 100 E. C. L., 468, the refreshment rooms and a coal cellar at a railway station were let by the company to one S, the opening for putting in coals being on the arrival platform. A train coming in while the servants of a coal merchant were shooting coals into the cellar for S, the plaintiff, a passenger, whilst passing in the usual way out of the station, without fault of his own, fell into the cellar opening, which the coal merchant's servants had left insufficiently guarded;—Held, that S, the occupier of the refreshment rooms and cellar, was responsible for this negligence. Much more is it the duty of railway companies to the public, using their railway, to keep the approaches thereto safe and free from obstruction at all points where freight or passengers are received. 1 Redfield on Railroads, 144. So a railway company is bound to fence the station, that the public may not be misled, by seeing a place unfenced, into

injuring themselves by passing that way, being the shortest to the station. *Burgess* v. *The Great N. W. Railway Co.*, 95 E. C. L., 923.

5. The damages assessed by the jury are large. Different individuals would vary in their estimate of what would be a just pecuniary compensation for bodily pain and suffering. "It is one thing," observes Mr. Justice STORY, in *Thurston* v. *Martin*, 1 Mason, 197, "for a Court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of the jury because it exceeds that measure." The damages given are not so excessive as to require or justify our interference.

6. Under instructions of the presiding Justice, deemed unexceptionable, the jury have found the defendants guilty of negligence. The question was one properly for their determination. The law makes them judges of fact. It is not enough for the Court to be satisfied that they should have come to a different conclusion, to authorize it to be set aside. As was remarked by ERLE, C. J., in *Longmore* v. *G. W. Railway Co.*, 115 E. C. L., 183 in reference to the safety of a bridge,—"I think the Judge clearly would not have been justified in taking upon himself as matter of law to determine as to the propriety of its construction, and withdrew that question from the jury." So too, in the same case, KEATING, J., says,—"No doubt, the jury might, if so minded, have found that there was no negligence on the part of the company. And it certainly seemed to me there was a strong case for the company." Yet the verdict was sustained. There is no such proof of misconduct, that imperatively demands the verdict to be set aside. The law has made the jury the judges, to determine whether the defendants have been negligent or not, and to their determination the defendants must submit.

Exceptions and motion overruled.

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

Francis Darby *versus* Harrison Hayford.

Where the sanity of a grantor, at the time of executing a deed of the land in controversy, is in issue, the party seeking to uphold the deed cannot justly complain of the instruction, that mere nervous excitement or mental weakness would not be sufficient to defeat the operation of the deed; but, if the grantor had the mental capacity to know and rationally understand and comprehend the nature of the business she was then transacting, that was all the law required to render her deed effectual.

When additional instructions in matters of law are desired, specific requests should be made.

A refusal to instruct generally as to the legal bearing of selected portions of the testimony is no ground of exceptions.

Although the reading of the reported evidence may incline the members of this Court to the opinion that, sitting as jurors, they would have found a different verdict; still, if there be testimony on the part of the party in whose favor it is rendered, amply sufficient to account for the verdict, without supposing any corruption, undue influence, bias or passion, on the part of the jury, the verdict will not be set aside as being against the weight of evidence.

On Exceptions.

Real action to recover a parcel of land situated in Belfast, tried on a writ of review sued out by the defendant. The original writ was dated April 19, 1864.

The plaintiff claimed title under a deed of warranty from Mary A. Butler to himself, dated, acknowledged and recorded April 15, 1864. The defendant claimed title under a quitclaim deed from Phebe C. Brown to himself, dated April 26, 1862, and a deed of warranty from Mary A. Butler to Phebe C. Brown, dated Aug. 18, 1860, both duly acknowledged and recorded.

The plaintiff contended that Mary A. Butler was insane Aug. 18, 1860, when she executed her deed to Phebe C. Brown, but that she had become sane April 15, 1864, when she executed her deed to him.

It was in evidence that the consideration of the deed of Aug. 18, 1860, was a loan of $200 for one year, with an agreement to reconvey if the money was repaid at the end of the year.

There was testimony tending to prove that the defendant repeatedly told Benj. Brown and Phebe C. Brown, between Aug. 18, 1860, and April 15, 1862, that Mary A. Butler's deed to the latter was void on account of the insanity of Mrs. Butler at the time of executing it; that the Browns had investigated the subject of her insanity and finally conveyed to the defendant in consideration of $200, having come to the conclusion that she was insane; that the defendant said, before conveyance to him, that he was intending to sell the place as guardian.

The plaintiff put in a petition to the Judge of Probate for this county, dated March 9, 1861, praying that the defendant be appointed guardian of Mary A. Butler.

The exceptions appear in the opinion.

F. S. Nickerson, for defendant.

1st. The first requested instruction was correct and was improperly withheld. The instruction given did not contain the substance of the request. It was too broad and involved upon the general question of insanity, and clearly so in this case.

2d. The testimony clearly shows a bond or obligation given back. "If the transaction" or "business" referred to had only related to the deed of Aug. 18, 1860, defendant's position might be doubted, but the instruction given required the jury to inquire into the "nature" of the transaction, (sort.— kind) and see if Mrs. Butler knew and could "comprehend and understand the nature of the business she was then transacting," — the whole of it — including the writing given back by Brown. Not alone the thing done, transacted, or performed; but its legal effect or "nature." The jury might well have believed that she knew very well all about parting with her property, receiving pay, and making even a good trade; yet, if she did not understand the nature of the writing given back by Brown, that she still lacked the "mental capacity to understand and comprehend the nature of the business then transacting." There was a

question, whether or not, this writing was under seal. Was she expected to "understand and comprehend" so far the "nature of this business" as to know whether or not this writing constituted a mortgage or not?

3d. "No mental weakness" would be sufficient to defeat the operation of the deed; not "mere nervous excitement or mental weakness." It is sufficient, if she knew what she was "about" when she signed the deed; though she might not know the "nature" of the bond or obligation. *Hovey* v. *Chase*, 52 Maine, and cases cited. Chitty on Contracts, 588, 130, 132.

4. If the second requested instruction had been given, the jury would not have been led into an error in relation to the defendant's appointment as guardian of Mrs. Butler.

The counsel also elaborately argued the motion.

Jewett, for the plaintiff.

BARROWS, J.—The demandant and tenant both claim under conveyances made by Mary A. Butler. That under which the tenant holds was prior in time, by some years, but the sanity of the grantor, at the time it was made, and consequently her capacity to convey, are controverted.

The tenant's counsel contended at the trial that the burden of proof was on the plaintiff to satisfy the jury not only that she was of unsound mind at the date of the deed, but that her insanity or imbecility was of such character or degree as to render her incapable of understanding what she was doing when she signed the deed.

The presiding Judge did not so charge; but, after instructing the jury with due care and distinctness as to the burden of proof which was resting on the plaintiff, and as to the presumption of sanity, he told them that the practical question for them to answer was this;—"When, on the 18th day of August, 1860, Mrs. Butler signed and acknowledged the deed from her to Mrs. Brown, did she know and rationally understand and comprehend what she was doing? Mere nervous excitement or mental weakness would not be

sufficient to defeat the operation of the deed. If she had the mental capacity to know and rationally understand and comprehend the nature of the business she was then transacting, that was all that the law would require to render her deed effectual."

The tenant cannot justly complain of these instructions. His own position might be objectionable, as not defining with sufficient care and exactness the mental capacity requisite to give an intelligent assent to the contract and make a valid conveyance.

It is not perceived that the instructions actually given materially differ from those which were approved in *Hovey* v. *Chase*, 52 Maine, 304, and *Hovey* v. *Hobson*, 55 Maine, 256. They do not require the jury to find that the grantor minutely and perfectly comprehended the legal results of the bargain she was making, or knew and understood whether the deed she gave, and the writing she received, did or did not constitute a mortgage, as the counsel ingeniously argues. The jury could not have so understood them. The call is substantially for a decision of the question whether, at the time of the conveyance, the grantor was in possession of mental capacity sufficient to transact the business with intelligence, understanding rationally what she was doing. Less than this would not suffice to make a valid contract or conveyance; for the intelligent assent, that is necessary, would be wanting.

It appears, by the exceptions, that, at the close of the Judge's charge, defendant's counsel requested him generally "to instruct the jury as to the proper legal bearing and character of the testimony and evidence of and concerning defendant's proceedings in, and the doings, acts and decrees of the Probate Court, and the conversation, offers, bargains or transactions of defendant to and with Mr. or Mrs. Brown, as bearing upon the transaction of August 18th, 1860."

A refusal to comply with such a request is not a subject of exceptions. When counsel wish for additional instruc-

tions in matters of law, they should make specific requests, in writing, if desired by the Judge, so that he may have the subject matter so placed before him as to be able to determine whether the propositions are tenable and pertinent. If instructions of this description, thus requested, are refused and nothing equivalent given, exceptions will be sustained. But a refusal to comment generally upon selected portions of the testimony, can, in no case, be the ground of exceptions. It is for the presiding Judge to determine finally how far his duty requires him to discuss or rehearse the testimony. We do not sit as a Law Court to revise his doings in this respect. We are to ascertain only whether the law in the case was correctly laid down.

A sufficient reason for refusing to sustain exceptions for such a cause is to be found in the fact that it would be impossible to determine whether the party excepting was unfavorably affected by the omission.

It belongs to the counsel, not to the Court, to argue the facts to the jury, nor can he call upon the Judge to reiterate or enforce his observations upon them. With regard to the motion to set aside the verdict as against evidence, — it may be that a jury of experts would have come to a different conclusion as to the capacity of this woman to convey her lands. It may be that the reading of this report will incline the members of this Court to the opinion that, sitting as jurors, they would have found a different verdict. But it is hardly necessary to say, that this alone will not authorize us to sustain the motion. The case has been once before tried with the same result, and there is testimony on the part of the plaintiff amply sufficient to account for the verdict, without supposing any corruption, undue influence, bias, prejudice or passion, on the part of the jury.

Motion and exceptions overruled.

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

CHARLES A. HOOPER *versus* SYLVANUS G. HASKELL *& als.*

In the trial of an action brought in the name of the plaintiff alone, for injuring his property, destroying his business and violently expelling him and his wife from the town, —neither the wife's "mental anguish in being separated from her husband," nor her "feelings as a woman, compelled to abandon a chosen residence and turn her back on associations formed in early life," is a matter for the consideration of the jury in estimating the damages.

ON EXCEPTIONS.

TRESPASS for violently and unlawfully expelling and banishing the plaintiff and his wife from the town of Deer Isle, and breaking up the plaintiff's business as a merchant, injuring his property, making his wife sick, "whereby he lost her comfort and services, and has been put to great expense for medicine and medical aid, in consequence of the acts of the defendants."

The presiding Judge instructed the jury, *inter alia*, that the amount of damages for injury to the plaintiff's wife, her health, shock to her nervous system, the physical harm, mental anguish in being separated from her husband, her feelings as a woman compelled to abandon a chosen residence and turn her back on associations formed in early life, were all matters for their consideration in estimating the damages.

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

W. G. Crosby, for the defendants.

Jewett & Boyle, for the plaintiff.

WALTON, J.—The plaintiff in his declaration avers that his wife was made sick, that he thereby lost her comfort and services and was put to great expense for medicine and medical aid, in consequence of the illegal acts of the defendants. For such injuries he was undoubtedly entitled to recover damages. But the action being in his name alone,

he could not recover for her "mental anguish in being separated from her husband," nor for her "feelings as a woman compelled to abandon a chosen residence and turn her back on associations formed in early life." Damages for such injuries, if recoverable at all, can only be recovered in an action in which husband and wife join. On this point the instructions of the presiding Judge were erroneous. See opinion of the Court in *Laughlin* v. *Eaton*, 54 Maine, 156, and authorities there cited. *Exceptions sustained.*

New trial granted.

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

RUSSELL HOTCHKISS *& als. versus* WILLIAM R. HUNT *& al.*

Whether, in a *writ of entry*, the fact of non-tenure, seasonably pleaded by one of several tenants, be established by verdict, or the admission of the demandant, the effect will, so far as the tenant disclaiming is concerned, operate an estoppel of record.

But this result will not affect the right of the demandant to recover against the remaining defendants.

The return of the officer as to the choice of the appraisers, in a levy upon real estate, cannot be contradicted by parol.

ON REPORT.

WRIT OF ENTRY against William R. Hunt and William H. Hunt, to recover possession of certain land described in the return of the levy of an execution, issued upon a judgment, recovered in favor of the plaintiffs, against the defendants, in January, 1862.

William H. Hunt seasonably pleaded non-tenure, by brief statement, under the general issue, and filed a disclaimer, which was accepted by the plaintiffs.

The plaintiffs introduced copy of the judgment, execution, return and record thereof, of a levy upon the demand-

ed premises. The defendants offered to prove by J. C. Knowlton, that, on the day of the date of the levy, but before it was made, the defendants, then co-partners in the tanning business, showed to the officer holding the execution, their tannery and the land adjoining it, as their property, and upon which the execution creditors (demandants) or officer might levy their execution; that the said J. C. Knowlton was then and there chosen by the execution debtors, (defendants,) partners, as one of the appraisers to appraise and set off so much of the tannery and adjoining land, belonging to both of the defendants in common, as might be necessary to satisfy the execution and costs thereon; that thereupon the said Knowlton, with the other appraisers, proceeded to appraise and set off a portion of the tannery for the purpose aforesaid; that, after the appraisal had been made, the plaintiffs' attorney directed the officer to levy the execution upon other real estate, which is fully described in the record thereof; that the land thus set off was wholly owned and occupied by William R. Hunt, and that the said Knowlton was never selected by said William R. Hunt as one of the appraisers.

The case was thereupon reported for the decision of the full Court upon so much of the evidence reported as was legally admissible, with the agreement that, if the action could be maintained, judgment was to be for the demandants.

Joseph Williamson, for the plaintiffs.

J. W. Knowlton, for the defendants.

The offered evidence is admissible for every purpose except to contradict the officer's return.

The fact of non-tenure being proved, "defeats the action." R. S., c. 104, § 6.

W. H. Hunt's name might have been stricken out at *nisi prius*, but it cannot be done now. *Crocker* v. *Craig*, 46 Maine, 327; R. S., c. 77, § 17.

The action is maintainable against both defendants or

neither; for there is but one issue tendered, and the agreement forbids it. And it cannot be sent back to *nisi prius* for the same reason.

APPLETON, C. J.—This is a writ of entry. William H. Hunt, one of the defendants, seasonably pleaded that he was not tenant of the freehold, and disclaimed all right, title and interest in the demanded premises, which disclaimer was accepted by the demandants.

By R. S., c. 104, § 6, the tenant "may show that he was not in possession of the premises, when the action was commenced, and disclaim any right, title or interest therein, and proof of such fact shall defeat the action." It matters not whether the fact of non-tenure is established by the verdict of a jury or by the admission of the demandants. The effect in either case is the same. It operates, unless withdrawn, as an estoppel by record. *Greely* v. *Thomas*, 56 Penn., 35. The demandants, in the present case, decline contesting the facts set forth in the tenant's plea, and admit their truth.

The suit, then, as against the tenant disclaiming, is defeated. In torts, judgment may be rendered against some of the defendants and in favor of others, when there are many defendants. This is an action of tort. Upon the facts admitted, the tenant disclaiming is entitled to judgment and for his costs as the prevailing party, but this does not affect the right of the demandant to recover against the other defendant.

The title of the demandants is by levy. No exceptions are taken to the proceedings of the officer. John C. Knowlton was one of the appraisers chosen, as the return states, by the defendants, the judgment debtors upon whose estate the levy purports to have been made. The tenant offers to show that Knowlton was not chosen by Wm. R. Hunt, in whom he alleges the title to the land levied upon to be. But the return of the officer, as to the choice of appraisers, cannot be contradicted by parol. If false, the remedy of

the party aggrieved is by suit against the officer for a false return. *Huntress* v. *Tiney*, 39 Maine, 241.

Judgment for plaintiffs against William R. Hunt.
Costs for William H. Hunt.

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

JAMES H. SMITH *versus* ISRAEL R. GRANT *& al.*

The writ of replevin was never intended as a means for the summary removal from a dwellinghouse of a tenant at will, who has a possession thereof, which he has a right to retain until removed by due process of law for such cases made and provided.

Thus, where the owner of a messuage notified his tenant at will to quit, and, subsequently, on the trial of a complaint for forcible entry and detainer, judgment was rendered for the tenant; and, two days thereafterwards, the owner executed a bill of sale of the dwellinghouse, together with the right of occupying the same, including the underpinning where it stood, or of removing it before a day named; and the tenant, on the same day, refused to quit on written notice to do so, and of the purchase by the vendee; and thereupon the vendee replevied the house, and the officer, in serving the writ of replevin, by direction and with the aid of the vendee, ejected the tenant and his family, removed his furniture, and put the vendee in possession; and thereupon the tenant sued the officer and the vendee in trespass *quare clausum*; — *Held*,

That the replevin writ afforded no protection to the officer under the circumstances.

In the trial of an action of trespass *quare clausum*, brought by a tenant at will against an officer for illegally ejecting the plaintiff and his wife, and removing their furniture from the dwellinghouse occupied under the tenancy, — an instruction authorizing the jury, in their assessment of the damages, to find "a reasonable compensation to the plaintiff and wife for the injury done to their feelings in being removed, is erroneous.

ON EXCEPTIONS.

TRESPASS QUARE CLAUSUM, for breaking and entering a dwellinghouse on Nov. 13, 1866, then occupied by the

16 Me. 170

plaintiff, and ejecting him and his family, and removing his furniture; all of which was duly proved.

On the part of the defence, it appeared that, on Dec. 5, 1864, the house with a cellar under it, together with the land on which it stood, and to which it was attached by an underpinning of split stone, was the property of one Mrs. Black, who on that day verbally leased it to the plaintiff for $30 per year, payable quarterly; that, between that day and August 3, 1866, the plaintiff had paid to Mrs. Black in money and labor $52,86 as rent; that, on Sept. 5, 1866, Mrs. Black gave the plaintiff written notice to quit and surrender the premises in thirty days; that on Nov. 7, 1866, Mrs. Black, in consideration of $100 paid by Benjamin A. Ray, one of the defendants, executed and delivered to him a bill of sale of the house, "with the right to occupy the same where it now is, to the ground, including the underpinning, and also the right to remove the same any time before the first day of June, 1867;" that Ray took delivery and paid the consideration; that, on the same 7th of November, Ray notified the plaintiff in writing that he had purchased the house, and requested him to quit and surrender it, which the plaintiff refused to do; that thereafterwards, on same day, Ray sued out a writ of replevin for the house against the plaintiff, and, on the 13th of the same month, placed the writ with a good and sufficient replevin bond in the hands of Grant, the other defendant, who was then sheriff of the county, for service, and requested him to replevy the house; that Grant did thereupon replevy the house, eject the plaintiff and family and remove his furniture, and put Ray into possession of the house.

It also appeared that the plaintiff had overpaid the rent on the premises at the time of the alleged sale, and that, on the fifth day of November, 1866, in an action of forcible entry and detainer, brought by Mrs. Black against the plaintiff, before the police court in Belfast, for the recovery of the premises, judgment was entered in favor of the present plaintiff.

The defendants requested the presiding Judge to instruct the jury that, if they should find that Ray acted in good faith in purchasing the house, (not knowing that there was any trouble between the plaintiff and Mrs. Black about the immediate possession of it;) and that Grant acted in good faith in the service of the replevin writ, doing no more damage than was necessary in the removal of the plaintiff, his family and furniture, then the writ of replevin would be a justification for the alleged trespass and that the defendants would not be liable.

But the presiding Judge declined to give the requested instruction; but did give the following among other instructions not excepted to, viz.:—That if the jury should find that the premises in question were real estate, and that the plaintiff had exclusive possession thereof when the writ of replevin was served, that writ afforded the defendant no protection for ejecting the plaintiff and his goods; and that, in the assessment of damages, they were authorized to find, in addition to the damages done to the furniture, a reasonable compensation to the plaintiff and wife for the injury done to their feelings in being removed from the premises.

The jury found specially that the damage done to the furniture was $25; and, to the plaintiff and wife, $50.

The jury returned a general verdict for the plaintiff for $75, and the defendants alleged exceptions.

N. Abbott, for the defendants.

1. The plaintiff's tenancy was terminated by the statute notice, and his possession afterwards was by wrong.

2. Mrs. Black, having the right of possession, had the right to sell the house without the land, and thus make it personal property.

3. Ray having bought the house and demanded it, could replevy it.

4. Plaintiff could not take advantage of the wrong by which he held possession, nor dictate the process by which an end should be put to his wrongful possession.

5. The presiding Judge erred in submitting the question, involving the nature of the property, to the jury, —that being a question of law.

6. And as to the assessment of damages.

7. The requested instruction should have been given.

8. Defendant in replevin cannot maintain trespass for taking the property replevied,— remedy is on the replevin bond. He is estopped from bringing such action during the pendency of the replevin.

E. K. Boyle, for the plaintiff.

KENT, J.—The owner of the house and lot in question, gave notice to her tenant to quit. He did not, and she instituted a process of forcible entry and detainer before a magistrate. This case was tried and judgment rendered against her and in favor of the tenant, the present plaintiff. Thereupon, two days afterwards, she executed a bill of sale to Ray, one of the defendants, of the house (which had a cellar and underpinning,) "to the ground, including the underpinning." Ray, on the same day, notified the plaintiff in writing, of his purchase, and requested him to quit, and he refused to do so. On the same day Ray sued out a writ of replevin "for the house," and put it into the hands of the other defendant, then sheriff of the county, for service, and requested him to replevy the house, and he did replevy the house, and removed the plaintiff and his family and furniture, and put Ray into possession. The plaintiff brings this action of trespass *quare clausum*, for the entry and removal, against the sheriff and Ray, who assisted him.

It is very clear that, if the plaintiff had rights as a tenant in possession, those rights could not be affected by the sale of the building, so far as to justify a forcible removal, without sufficient notice. A sale may operate to terminate a tenancy at will, when it is of the whole estate, and of the fee of the land and in the premises.

It is unnecessary to consider the effect, as between the grantor and grantee, or vendor and vendee, of the sale of

a house alone, annexed to the freehold as this was. Assuming that it made it personal property, yet, if another person was a tenant in possession, his rights cannot be lost or changed, by this change of the nature of the property, from real to personal. If a man owns a house which, by reason of its having been built on the land of another, by his consent, is regarded in law as personal property, leases it to another, the relation of landlord and tenant, and all the legal rights and duties of such relation exist and must be performed. In such a case, could the landlord, if he claimed that the tenancy at will was ended, sue out a writ of replevin, and cause it to be served by turning out the tenant and his goods and furniture? If he could do this, it would be a new mode of proceeding and would supersede all the provisions of law in relation to forcible entry and detainer and the notice required, and enable a dissatisfied lessor to adopt a remarkably summary mode of ejectment, without resort to any of the modes pointed out in the statute or common law. Where the property when leased was real estate, the same result might be obtained, by pursuing the course apparently adopted in this case, viz., sell out the building to the foundation, calling that personal property, leaving the foundation, cellar, &c., the real estate of the original owners. Whether real estate can thus be parceled out, by a common bill of sale, so that a house fixed to the freehold, and part of it, can be thus divided and held permanently, while remaining thus fixed, part personal and part real estate, might deserve consideration, if necessary to the determination of the case. It is not the case, where such a building is sold, to be immediately removed and it is so removed. The dwellinghouse, fixed like this, when sold by a bill of sale, was as much real estate as the soil on which it rests. *Cujus est solum ejus est usque ad coelum.*

But, granting that it was thus made personal property, and that, if unoccupied, it might be the subject of replevin. Can the writ of replevin authorize the forcible removal of a tenant and his family; and, if it could in any case, must

there not be a notice by the officer to the tenant to quit, giving him a reasonable time to remove?

In this case a notice was given by the purchaser, on the 7th of Nov., that he had purchased the house, with a request to quit, which plaintiff refused to do. On the 10th this writ of replevin was put into the officer's hand, and on that day executed. It does not appear that the officer made any request of the plaintiff to remove, or give him any time to do so. No time for removal had been named in the written notice by Ray. It was but three days afterwards that the officer executed the writ of replevin. We think, that even if such a replevin writ could be legally served by removing the tenant and his family, it could only be done after giving reasonable notice and time sufficient to make the removal. It would be such a direct interference with what the law looks upon as almost sacred, — a man's dwellinghouse, when occupied by himself and family, that nothing short of a refusal or neglect to remove, after sufficient notice, could justify an officer, under a writ of replevin, in forcibly ejecting the family with its goods and furniture, if it could be executed by removal. Anything short of this would be an intolerable abuse of legal process.

Usually, the purpose of a replevin suit is to try the title to the specific article; and, in contemplation of law, the goods, in a certain sense, are in the custody of the law, to await the decision between the claimants. *Walker* v. *Osgood*, 53 Maine, 424. In the common case of moveable and portable articles, — as it is necessary that some one should take and keep possession to prevent loss or destruction, our law differs in this respect from the English law, and allows the plaintiff to take the article into his possession, upon giving bond to have it forthcoming to answer the judgment, if against him. Now, a dwellinghouse is not a portable article, or one easily removed, or likely to disappear, or be concealed. Therefore, all the real purposes of the law would be complied with, by a formal delivery of the house, as it stands, to the plaintiff. There is no necessity of a forcible removal of the tenant and his family.

The writ of replevin was never intended as a means of interference with the sanctity of home, and as an instrument to remove summarily a tenant, who has a possession which he has a right to retain, until removed by due process of the law, made and provided for such cases.

We think the Judge did not err in refusing the requested instruction as to the justification of the officer. There can be no doubt that the ruling, that, if the house was real estate, no action of replevin could be legally instituted, was correct. In the view we have taken of the case, it is not necessary to determine whether the Judge should not have determined this question, rather than have submitted it to the jury. The case finds that other instructions, not excepted to, were given. We presume that the Judge properly explained and stated the law, and what facts must be proved, to sever the house from the freehold and make it personal property. This would be proper when it is a mixed question of law and fact.

We cannot sustain that portion of the charge, which allowed the jury to find, in addition to the damages to the furniture, "a reasonable compensation to the plaintiff and wife for the injury done to *their feelings*, in being removed from the premises." The action is in the name of the husband alone. There is no allegation of loss to him by injury done to the wife. The rule given was not the one allowing vindictive or exemplary damages, but confined to the injury to the feelings of each. The instruction in terms authorized the jury to give a compensation in this action to the wife for injury to her feelings, independently of the husband. The jury, however, found specially that the injury to the furniture was twenty-five dollars, and to the plaintiff and wife fifty dollars. There can be no apportionment of this last sum. *Exceptions sustained. — New trial granted, unless the plaintiff will remit all but* $25 *in the verdict.*

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

ELLIS FRIEND, *Appellant from the decision of the County Commissioners of Penobscot County, versus* MOSES ABBOTT *& als., original petitioners.*

In the case of an appeal from the decision of county commissioners laying out a highway, it is for the appellant to see that a competent committee is appointed at the term when the appeal is entered.

If one of the committee then appointed be incompetent on account of his interest in the proceedings, the R. S., c. 18, § 35, authorizing the Court to "appoint some suitable person in place" of any member of the committee who "dies, refuses to act, or becomes interested," does not authorize the Court, at a subsequent term, to substitute a disinterested person in place of the interested member of the committee.

ON EXCEPTIONS.

Wm. H. McCrillis, for the appellant.

L. Barker, for the respondents.

BARROWS, J.—Looking at the several enactments regulating appeals from the decisions of county commissioners relating to highways, it is apparent that the Legislature have always had an eye to the speedy determination of all such controversies.

Such appeals were first allowed in this state by c. 28 Laws of 1847, which authorized the entry of them at the next term of the appellate court holden in the county after the return of the county commissioners is made, "and not afterwards." Further provision was made for the appointment by the Court of a special committee of three disinterested persons, "at the term when such appeal shall be entered as aforesaid, and not afterwards," and this committee was required to report at the term next ensuing.

Under this latter provision, the Court held all proceedings in the appellate court upon a report, partially made at the first, but not finally completed till the second term after the appointment of the committee, irregular and void. *Windham, Pet'rs.*, 32 Maine, 453.

Chapter 45 of the Laws of 1857, (the provisions of which are substantially incorporated into Rev. Stat., c. 18, § 35,) authorizes the reception of the report of the committee at the second term after their appointment, and also the appointment by the Court of some suitable person in place of any member of such committee who "shall die, refuse to act, or become interested in the subject matter of the appeal."

In the present case, the appeal was entered at the Jan. term of the Court, 1865. On the 27th day of that term, on motion of the appellant, there being no appearance for the respondents, a committee was appointed to whom a commission issued Feb. 15, 1865.

Upon notice of a hearing, given by the committee in the course of the following summer, the original petitioners appeared by counsel and filed their written protest against the proceedings, on the ground that two of the committee were interested at the time of their appointment and at the time of the hearing, being stockholders in a railroad company across whose land the road was located. The committee, however, made their report, reversing in part the doings of the commissioners, at the October term, 1865, being the second term after their appointment, therein stating their interest, as above, and, for this reason, the report was rejected by the Court, (*Friend, Appellant*, 53 Maine, 387,) prior to the October term, 1866. Nothing was done in the premises at that or the following terms, but, at the April term, 1867, being the seventh term after the entry of the appeal and the third after the rejection of the report, the appellant moved for the appointment of a new committee, and, on this motion, the case was continued to the October term, 1867, when it was granted by the presiding Judge, to whose order in this respect the original petitioners filed the exceptions now under consideration.

Overlooking the appellant's manifest laches and remissness, his counsel ingeniously argues that, as the committee are appointed by the Court, the statute must be so construed

as to give the Court an opportunity to correct its own error in assigning men, who when thus appointed were not disinterested as the statute requires; that the statute is remedial and should receive a liberal construction in aid of its object; that, whenever a power is given by a statute, every thing necessary to the making of it effectual is given by implication; and, finally, that the interest of the committee, at the time of their appointment, is as much within the mischief intended to be provided for as an interest acquired after their appointment.

Plausible as this line of argument seems, there is nothing in the present case to justify its application here. Here was no want of power to make the remedy effectual. Want of care in its exercise alone caused the failure,—a want of care no doubt fairly attributable to the appellant upon whose motion the appointment was made, the other party not being then represented in Court. The common practice in such cases is for the presiding Judge to confirm the nominations made by the moving party, if he recognizes the persons named as men of intelligence and probity, taking it for granted that no one would be nominated who was incompetent to act by reason of interest. It is for the appellant, if he would pursue his remedy effectually, to see to it that a competent committee is designated at the term when his appeal is entered. The design of the amendment of 1857 is to prevent the failure of the appeal by reason of casualties that could not be foreseen or prevented, not to protect the party against the consequences of mistakes which reasonable vigilance might have avoided.

The Legislature having specified the causes for which a new committee may be appointed, it passes the proper limits of construction for the Court to add to them another not named in the act.

This appeal, not having been prosecuted in the manner prescribed by the statute granting it, should have been dismissed at *nisi prius*, and the decision of the county commis-

sioners confirmed when the report of the committee was rejected. Such must now be the result.

Exceptions sustained.

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

DAVID WORCESTER *versus* JOHN M. LORD.

To constitute a disseizin, the possession of the disseizor must be adverse in its character, importing a denial of the true owner's title in the specific parcel of land claimed.

The intention of the disseizor need not necessarily, in all cases, be to wrongfully possess himself of property known to him to belong to another.

It was not the intention of R. S., c. 105, § 10, to make the "possession, occupation and improvement," therein described, conclusive evidence of disseizin and a bar to "the right of the true owner."

The object of this section was to make such possession and occupancy "sufficient" evidence of the adverse intent of the party holding it, in the absence of other testimony establishing its true nature.

What testimony will overcome such sufficient evidence, and establish the true character of the possession.

ON REPORT.

WRIT OF ENTRY.

The case is stated in the opinion.

W. H. McCrillis, for the defendant, elaborately argued the following propositions: —

1. Notorious, exclusive and hostile occupation of land, without right, is not an ouster of the owner, nor a disseizin. To constitute an ouster or a disseizin, there must be notice to the owner.

2. Such occupation, continued for twenty years, is constructive notice to the owner during the whole time, bars the original owner's right of entry or action, and the tenant holding such possession gains the title by disseizin.

3. Notice is not presumed from an occupation short of twenty years. And the deed of the owner would convey the title without the statute of 1841.

4. In *Brown* v. *Gay*, 3 Maine, 126, the occupation of the tenant was less than twenty years, and the owner had no actual notice of the occupation. Hence demandant's grantor was not disseized at the time of his deed to the demandant and no impediment to its operation.

5. It is immaterial whether such occupation be with the belief, through mistake, that it is with right, or with knowledge that it is without right.

6. R. S., c. 105, § 10, was enacted immediately after the separation of Maine from Massachusetts. The law of Massachusetts was that, to constitute adverse possession, an enclosure was necessary. Such a doctrine was not in accordance with the decisions of the Federal Courts, nor founded on principle, nor adapted to the sparsely settled condition of this State. *Ellicott* v. *Pearl*, 10 Peters, 412; *Erving* v. *Burnett*, 11 Peters, 41; 2 Smith's Leading Cases, 472. The object of the statute was to remedy this mischief. *Prop'rs Ken. Purchase* v. *Laboree*, 2 Maine, 275.

It is not to be presumed that the Legislature intended to make any innovation upon the common law further than the necessity of the case required. The statute introduces the new rule that the land need not be enclosed. It affirms the other principles of the common law.

A. W. Paine, for the plaintiff.

BARROWS, J.—Writ of entry; case submitted, without the intervention of a jury, to the presiding Judge who reports the facts found by him to this Court for decision. The prominent and essential facts found are as follows:—The tenant is the owner, under a valid record title, of lot. No. 110, according to a certain survey; and the demandant, under like title, is the owner of the adjoining lot No. 39, according to same survey. According to the true original line between these lots, as found by the presiding Judge, all the land de-

manded in this suit is part and parcel of lot No. 110, except a small piece, about 17 links in width at the widest part, indicated upon the plan made by the surveyor in the case, which piece is part of demandant's lot (No. 39,) and which he is "entitled to recover, unless barred or limited by a disseizin by tenant continued for more than 20 years." In 1837, lot 39 was conveyed by the owner, Benjamin Bussey of Roxbury, Mass., to Wm. Lowder of Bangor, who went into immediate possession, mortgaging the lot back to Bussey to secure the purchase money. In 1839, more than 20 years before the commencement of this suit, while Lowder was in possession of No. 39, the tenant built a fence which he intended as a line fence between the lots, and intended to build it on the true line, and built it in fact upon that line the greater part of the distance, but by a mistake, not discovered till since the commencement of this suit, excluded in one place part of his own lot No. 110, and included in another this small parcel of lot 39. At the point where this occurred, and for a considerable distance beyond it and up to the line of an adjoining lot, the fence was a brush or lop fence made by felling trees on or near the line, such as is usual to keep out cattle. The land here was woodland and occupied as part of tenant's farm as a wood lot, and the whole fence has been kept up substantially in the same place since it was first erected. Wm. Lowder, the mortgager of No. 39, knew of the building and continuance of this fence while he was in possession, but there is no evidence that Bussey or Samuel Lowder, his agent in Bangor, had knowledge of it. Before 1843, Wm. Lowder's equity was foreclosed, and in that year Bussey's Executors sold No. 39 to one Stone of Newburyport, who, in 1855, conveyed it to demandant. Stone and the demandant, at and after the dates of their respective purchases, had knowledge of the existence of the fence, and they and Wm. Lowder severally and respectively, during their possession of lot 39, knew of tenant's occupancy up to said fence, supposing it to be on the true line, From about 1853 to 1855, the tenant, Lord, was

agent for Stone, having the general oversight of lot 39, paying the taxes on it, and being authorized to obtain a purchaser for it at a fixed price, he, (Lord,) to have for his own all that could be obtained over that sum; and did accordingly negotiate the sale to demandant, who insisted upon a warranty deed, which Stone, after some discussion in presence of the tenant, gave with his knowledge and assent, bounding the lot by the true line, all parties supposing that the fence was on that line for the whole distance; and tenant received $150 of the purchase money, being the amount over and above the price fixed by Stone upon the lot. Unless qualified or controlled (as to this small parcel of lot 39, thus included with 110) by the foregoing facts, the case finds that the tenant has been in the open, notorious, exclusive, adverse and continued possession, occupation and improvement of all the land included within his said fence for more than twenty years previous to the commencement of the suit, such possession and occupation comporting with the ordinary management of a farm by its owner.

Were those under whom the demandant claims disseized of this small parcel of their lot by the erection and maintenance of this fence under such circumstances? Was the possession of the tenant, rightly construed in the light of the foregoing facts, adverse?

The answers to these questions must determine the result. "Unless barred or limited by a disseizin by tenant, continued for more than 20 years," demandant is found entitled to recover this small strip.

Mr. Preston defines disseizin generally thus, — "It is an ouster of the rightful owner of the seizin. It is the commencement of a new title, producing that change by which the estate is taken from the rightful owner and placed in the wrongdoer. Immediately after a disseizin, the person by whom the disseizin is committed has the seizin or estate, and the person on whom this injury is committed has merely the right or title of entry."

We read this and do not seem to be much nearer a prac-

tical answer to our questions than before. What constitutes "ouster of the rightful owner?" It is a wrongful entry upon the property of another, accompanied by a removal of the owner from the possession. It is not every unlawful entry into lands that will work a disseizin. Such entry will never have that effect so long as the true owner still retains his possession, for, by intendment of law, when two persons are in possession at the same time, the seizin must be adjudged to be in the rightful owner. But neither is dispossession necessarily disseizin. Whether there is, or is not, actual disseizin must depend upon the character of the act done, and the intention of the doer. Many acts are justly held to operate a disseizin, or not, at the election of the true owner. To make a disseizin in fact, there must be an intention on the part of the party assuming possession to assert title in himself to the definite and particular parcel, or there must be "overt acts which leave no room to inquire about intention, and which amount to actual ouster in spite of the real owner."

Cruise says "a disseizin is where one enters intending to usurp the possession and to oust another of the freehold. Therefore, *quærendum est a judice quo animo* he entered." 1 Greenleaf's Cruise, page 51.

"Every disseizin is a trespass," says Chancellor KENT, "but every trespass is not a disseizin. A wrongful intention to oust the real owner must clearly appear in order to raise an act, which may be only a trespass, to the bad eminence of a disseizin." 4 Kent's Com., 486, (4th edition.)

To make a disseizin, that will, in the language of Preston, be "the commencement of a new title, producing that change by which the estate is taken from the rightful owner and placed in the wrongdoer," the possession taken by the disseizor must be hostile or adverse in its character, importing a denial of the owner's title in the property claimed, otherwise, however open, notorious, constant and long continued it may be, the owner's action will not be barred.

If in possession in submission to, and acknowledging the

title of the real owner, within twenty years before the commencement of the action, the tenant cannot make good a title by disseizin and continued possession.

In the case at bar, the description of the fence as a lop or slash fence, "made by felling trees on or near the line, such as is usual to keep out cattle," is not, of itself, decisive, because other facts are found which would, (unless controlled by still other matter in the case,) bring it within the provisions of our statute, (R. S., c. 105, § 10,) and bar the demandant's action. The land where this fence was was woodland, used as a wood lot in connection with tenant's farm, and the possession of the tenant was such as to dispense with the necessity of any fence at that point, unless the tenant's possession is affected by the existence of some other fact indicating its true character. But the manner of building the fence is not without weight in showing the origin and character of the tenant's possession of this small parcel of lot 39. Swerving slightly from the true line, as the growth upon the lot made it convenient for the erection of such a fence, excluding a portion of his own lot here, and including this portion of the demandant's lot there, he has made a line differing from the record title under which he, as well as his adversary claims, and not to be sustained unless his possession has been such as to bar the demandant's action.

Doubtless his possession has been such that, uncontrolled by other facts appearing in the case, it would make good his present claim. Such is the extent and meaning and limit of the effect of R. S., c. 105, § 10, before referred to.

It was never the intent or meaning of that section, or of the substantially similar provisions which preceded it, coeval with the organization of this State, (see Laws of 1821, c. 62, § 6, and R. S. of 1841, c. 147, § 11,) to make such possession and occupancy conclusive evidence of disseizin, and a bar to a demandant's right of action, when confronted with evidence establishing the fact that such possession and occupancy was in truth not actually hostile

or adverse in its character, or to do away the adversary element required to make a perfect title by possession. To hold otherwise, would be to relieve every tenant of twenty years standing from all obligation to his landlord, and preclude the lawful owner from asserting his rights to property which had been twenty years out of his possession, no matter what the agreement or understanding might have been in consequence of which he had suffered it to continue so. The object of these provisions was to make such possession and occupancy sufficient evidence of the adverse intent of the party holding it, in the absence of other testimony establishing its true nature.

All our decisions, in any way bearing upon the question here, whether as to the nature and essential elements of disseizin or of adverse possession, such as *Brown* v. *Gay*, 3 Greenl., 126, *Ross* v. *Gould*, 5 Greenl., 204, *Little* v. *Libby*, 2 Greenl., 242, *Dennett* v. *Crocker*, 8 Greenl., 239, *Otis* v. *Moulton*, 2 Appleton, 205, *Alden* v. *Gilmore*, 13 Maine, 178, *Lincoln* v. *Edgecomb*, 31 Maine, 345, *Eaton* v. *Jacobs*, 49 Maine, 559, were made under statute provisions substantially similar, and all are believed to be inconsistent with such a refining away of the adverse element necessary to constitute a disseizin and to bar by possession a demandant's right of action, as would enable us to sustain the tenant's position here.

He has been in the sole and continuous possession, occupation and improvement of the little strip for more than twenty years prior to the commencement of this action, and that possession and occupation have been open, notorious, and comporting with the ordinary management of a farm, and would be deemed exclusive and adverse so as to bar or limit the right of the true owner to recover it, if it did not also appear that throughout all the time, until the discovery of his present predicament, his claim of title has been according to the true line, that he intended to place his fence all the way upon that line, supposed he had done so, and did not discover his mistake until since the com-

mencement of this suit. The boundary of his land, of all in which he intended to claim title and the right of possession, was that line, laid down in the title deeds and ascertained by the Court. Hence, when, in 1855, the demandant before purchasing, claimed of Stone his immediate grantor, a warranty deed of lot 39, the tenant agreed that such a deed should be given, and, after discussion in his presence, Stone gave the deed, including with the lot the strip, which unknown to both parties was fenced in with the tenant's land, and not including that part of tenant's lot No. 110 which was by mistake separated from the rest by the fence. It is unnecessary to determine what effect, (if any,) by way of estoppel, the tenant's position as agent for Stone, or his act in negotiating this sale and receiving part of the purchase money, might have, because his assent to the making of such a conveyance, and the explicit findings (above recited) as to his intentions in regard to the fence, are conclusive as to the character of his possession, and establish the fact that it was not adverse, as might otherwise have been inferred from its being open, notorious, and comporting with the ordinary management of a farm; and there is no necessity for resorting to the doctrine of estoppel, even if the facts reported would raise one.

The controversy between these parties was not whether the line between their lots was a straight line or a crooked one. It was the point of departure and the course only which needed to be ascertained. There is no suggestion that the line has been varied by any agreement of parties, followed by an occupation under claim of right, or that the tenant's occupation originated or has been continued otherwise than by simple mistake. It is not a case where there is room to suppose that "papers may be lost, facts forgotten or witnesses dead." The tenant did not claim title to anything beyond his true line, until driven to do so by the discovery that the fence which he intended to place upon that line, and thought he had so placed throughout, was not entirely so. The character of his possession of the

little strip is clearly ascertained. The principal matter in dispute seems to have been settled in his favor at the trial.

What ought he to have done to protect himself against a liability for costs? Simply to have disclaimed seasonably so much of the demanded premises as lay westerly of the true line, and shown (as was shown in *Lincoln* v. *Edgecomb*, 31 Maine, 345,) that the fence was built on demandant's land by mistake, that he had not claimed to own beyond the true divisional line, nor actually prevented the demandant from occupying to that line. Not having done this, he must pay in costs the penalty of his mistaken assumption that the fence was actually located throughout upon the true line as he intended it should be, and supposed, until recently, it was, and of his present attempt to "raise what was only a trespass to the bad eminence of a disseizin."

Such a result alone seems conformable to the decisions of our own Court herein before referred to, and to the legal doctrine pertaining to disseizin and adverse possession herein stated.

The elaborate and ingenious argument of the tenant's counsel fails to convince us that the reason assigned by the Court for the decision in *Brown* v. *Gay*, *ubi sup.*, was erroneous, or that similar decisions of our own Court, which have followed it, should now be disregarded.

An involuntary trespass may occur, but an unintentional disseizin is an anomaly. Yet, in saying this, we are not to be understood as laying down the doctrine that, to constitute a disseizin, the intention of the disseizor must of necessity, in all cases, be wrongfully to possess himself of property known to him to belong to another. The *animus furandi*, (if that phrase could properly be applied to a wrongful appropriation of real estate,) or Ahab's wicked intention to seize as his own the vineyard of his neighbor, is not essential. Cases not unfrequently do arise where the disseizin is innocently committed under a mistake as to the validity of the title, but the title must be asserted. Cases may arise

where a man may be under a mistake as to the true extent of his domain, yet, if he intentionally claims title to all which he has in possession, his neighbors may be barred, by lapse of time, from asserting their rights. The point is here, — a man claiming title only to a specified line, capable of being ascertained, cannot, by ignorantly having possession up to another line, acquire a title by disseizin to land lying between the two which he does not intentionally claim.

Upon this matter of a disseizin by occupancy through mistake, or misapprehension of the dividing line, the decisions in this State and those in Tennessee, (*Gates* v. *Butler*, 3 Humph., 447,) are said, by Mr. GREENLEAF, to differ from those in Connecticut, (*French* v. *Pearce*, 8 Conn., 440, 445, 446,) and in Pennsylvania, (*Jones* v. *Porter*, 3 Penn., 132.) How substantial that difference might be found upon a careful examination to be, it is not necessary to the decision of this case to ascertain.

Judgment for the demandant for the strip of land lying within the tenant's fence, westerly of the true original line between the lots as ascertained at the trial.

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

GEORGE STETSON *versus* CITY OF BANGOR.

A State tax assessed April 1, 1864, by the assessors of the city of Bangor, to a citizen thereof, upon his shares in a national bank situated therein, and established under the Act of Congress of Feb. 25, 1863, is constitutional, if levied in the same manner and to the same extent as taxes on other similar property.

R. S., c. 6, § 5, authorizing taxes to be assessed upon "all shares in moneyed corporations," includes shares in national banks.

Sections 79 to 82 of c. 47 of the R. S., prohibiting the establishment of moneyed corporations unless specially authorized by the Legislature, do not apply to banking corporations established by authority of Congress.

ON REPORT.

ASSUMPSIT to recover back taxes assessed April 1, 1864. The facts sufficiently appear in the opinion.

Rowe & J. A. Peters, for the plaintiff.

A. W. Paine, for the defendants.

DICKERSON, J.—The plaintiff, a citizen of Bangor, and owner of shares in the First National Bank in Bangor, established under the Act of Congress, approved Feb. 25, 1863, brings this action to recover the amount of the tax assessed on his shares by the assessors of Bangor, and paid by him under protest and arrest.

The question presented for our consideration is whether the shares of the plaintiff are legally taxable by State authority. In a complex political system like ours, with one government for national purposes, and several governments for local purposes, each vested with important powers and charged with grave duties, it is a difficult and delicate task to define the boundary of their respective spheres of action. A careful study, however, of the history of the constitution, its language and the construction put upon it by the illustrious statesmen and jurists who were called upon to interpret it, in the infancy of the republic, can hardly fail to afford a clear insight into the nature of our government, state and national, and the principles upon which both should be administered. The utter impotency of the States, while acting under the Articles of Confederation, to accomplish the purposes of an independent government, and the embarrassments and conflicts of authority resulting therefrom, taught the American people the necessity of a common and higher sovereignty, that should be inspired and vitalized by the collective wisdom of the whole people, and rest upon their voluntary consent. The great desideratum of the hour was the unification of the American people under a government of enumerated powers for national purposes, and the preservation of the rights of the States in respect to local self-government.

The preamble to the constitution, in contradistinction from the Articles of Confederation, declares it to be the work of "THE PEOPLE OF THE UNITED STATES," "ordained and established" by them to secure for themselves and their posterity a more perfect union, liberty, justice and tranquillity, and to provide for the common defence and general welfare. The supremacy of the national government is established by the requirement of the constitution, that "the United States shall guarantee to every State in the Union a republican form of government," by the grant of power to Congress "to make all laws which shall be necessary and proper for carrying into execution all the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof," and in the declaration, that "this constitution and the laws of the United States, which shall be made in pursuance thereof; and all the treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

From the supremacy of the national government it results that the States have no authority to obstruct or embarrass its action, while in the exercise of its legitimate powers. Under the constitution a nation took the place of a league of States.

But in order to secure to the States their then existing right to local self-government, the constitution declares that "the powers, not delegated to the United States, nor prohibited to the States, are reserved to the States or the people." This prohibition upon the national government against encroaching upon the reserved rights of the States, in connection with the sovereign powers granted to it, establishes an equipoise between the centripetal and centrifugal forces of our political system, and was intended to guard against the opposite dangers of consolidation and decentralization.

The authors of the constitution established a framework of government, capable of a practical and reasonable application, enumerating the great substantive powers of government, and leaving it for the Supreme Court of the United States to determine, in a given case, whether the power exercised, when not enumerated in the constitution, is an original independent power, and therefore not authorized, or one incident to, or implied from a granted power, or "necessary and proper" to carry a granted power into effect, and therefore authorized by the constitution. Great and marvelous as was their sagacity, they could not foresee all the possible crises that might thereafter arise in public affairs, nor could their wisdom devise the specific means by which the enumerated powers could be best executed. In process of time the means then deemed best might prove insufficient, or more judicious ones might be discovered. Opportunity was, therefore, left whereby the lessons of experience, taught by the future development of their system, and the improved state of civilization might be made available.

The struggle between the opposing forces of our political system arose at an early period of our constitutional history. In 1818, the General Assembly of Maryland passed an Act which provided that all bills, issued by the branch bank of the United States Bank at Baltimore, should be issued on stamped paper, furnished by the State of Maryland, at the rate of ten cents, payable by the bank, for every five dollar note so issued by it, upon penalty of forfeiting five hundred dollars for each and every offence.

James H. McCulloch, the cashier of the bank, disregarded the law of Maryland, and an action was brought against him in the Court of Appeals of Maryland, in the name of the State; and that Court rendered judgment against him. A writ of error was sued out in the Supreme Court of the United States, by the defendant, to reverse the judgment of the Court of Maryland.

The Supreme Court of the United States reversed the judgment of the Court of Appeals, holding,—

1. That, although there is no express power in the constitution of the United States to establish a United States Bank, yet such power may be "necessary and proper to carry into effect the enumerated powers" of Congress, "to borrow money on the credit of the United States," and "to regulate commerce;" and that it is competent for Congress to determine the question of "necessity," under the constitution;—and

2. That the law of Maryland, imposing a tax on the operations of the Branch Bank of the United States, was unconstitutional. *McCulloch* v. *Maryland*, 4 Wheat., 415.

In delivering the opinion of the Court in that case, Chief Justice MARSHALL says,—"The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create. There is a plain repugnance in conferring on one government power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control."

Again, he remarks,—"If the States may tax one instrument employed by the government in the execution of its powers they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States." And, further,—"The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

In *Weston* v. *The City of Charleston*, 2 Pet., 171, which

was the case of a tax assessed by authority of the defendants in error on United States stock owned by the plaintiff in error, the Supreme Court of the United States held that the tax was a tax on the contract, a tax on the "power to borrow money on the credit of the United States," and consequently repugnant to the constitution. In that case the Court say, — "The American people have conferred the power of borrowing money upon their government, and, by making their government supreme, have shielded its action in the exercise of this power from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraint or controlling power shall be exercised."

"The right to tax the contract to any extent, when made, must operate upon the power to borrow money before it is exercised, and have a sensible influence on the contract. The extent of this influence depends upon the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of the government. It may be carried to an extent which shall arrest them entirely."

Bank of Commerce v. *New York City*, 2 Black., 620, was a case where the city of New York imposed a tax on the property of the Bank of Commerce, which consisted in part of United States bonds. It was held by the Supreme Court of the United States that stock of the United States is not subject to State taxation, and that a State tax for that purpose is unconstitutional, whether it imposes the tax on United States stock *eo nomine*, or includes it in the aggregate of the tax-payer's property, to be valued like the rest at its worth. *Osborne* v. *The United States*, 9 Wheat., 732; *Bank Tax Case*, 2 Wallace, 200.

These decisions are binding upon the State Courts in respect to the questions therein raised and determined. The Supreme Court of the United States is the supreme judicial tribunal of the Union, the final arbiter of all cases in law

and equity arising under the constitution and laws of the United States.

There are two modes of treating its adjudications; the one is the constitutional mode of obedience with peace; the other is the nullification mode with secession and war. There is *now* no room to doubt which is the better policy.

The question presented to us is whether the case at bar comes within the principles of the adjudged cases we have cited. The Act of Congress entitled "An Act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved Feb. 25, 1863, under which the First National Bank of Bangor was organized, (§ 5,) authorizes the formation of associations for carrying on the business of banking, with power (§ 11,) to obtain and issue circulating notes, discount bills, notes, &c., receive deposits, buy and sell gold and silver bullion, foreign coin and bills of exchange, and, in general, to perform all the offices of banks of discount and deposit. These bills are made "receivable (§ 20,) at par, in all parts of the United States, in payment of taxes, excises, public lands, and all other dues to the United States, except for duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations and associations within the United States, except interest on the public debt, and in the redemption of the national currency."

The powers and privileges thus conferred upon these associations are calculated to become the source of great pecuniary profit to the members. By that Act, United States bonds, when thus invested, assume a new character, entitling the holders to receive, not only the specified interest, but also the profits arising from this new use of them. It is optional with the bondholders whether they will avail themselves of this new use. If they choose to do so, their investment becomes subject to the incidents which legally attach to the transaction, and to the vicissitudes attendant thereon. The national government gives them no guaranty,

either express or by implication, that this use of its bonds shall be exempt from taxation, or prove a profitable investment. If, for any cause, they become dissatisfied with the enterprise, they can discharge the liabilities of the corporation, redeem its bills, and reclaim their bonds of the government; they voluntarily formed, and they may voluntarily dissolve their association.

Under the constitution, the several States are component parts of our political system. The maintenance of the State governments in all their vigor and integrity is indispensable to the healthy action of the national government. The former no less than the latter require great pecuniary means to enable them to perform their constitutional functions. By an Act of Congress, imposing an onerous tax upon State banks, the banking business of the country is indirectly conferred upon the national banks. The States have no equivalent for the loss of the large revenue derived from a tax on the State banks, unless they have authority to tax the shares held in the banks which Congress has authorized to be established in their place.

The national government owns no part of the capital stock of the national banks; nor has it any pecuniary interest in their operations. It indeed holds their stock, in the capacity of trustee, for the security of the bill holders, and may employ them as depositaries of the public funds; but it has no share in the profit or loss of their business. Nor are these associations necessary to enable the national government to carry on its fiscal operations. The powers granted to Congress "to coin money and regulate the value thereof," and to issue United States notes, are ample for all such purposes. Indeed, all the national banks in the country might be closed up, in the mode provided by law, without detriment to the national credit or finances, whatever might be the effect upon the stockholders, or the general business of the country. National banks are private associations, authorized by Congress for the joint purposes

of convenience and profit to the holders of United States bonds, and of furnishing the public with a convenient and uniform circulating medium. They were intended to be to the nation what a well regulated system of State banks was to the States respectively.

In legal contemplation, the property in the capital stock of a national bank is in the corporation, *eo nomine*, which has the same right to control it, within the powers conferred by its charter, that a private individual has to deal with his own property. While such is the power of the corporation over the corporate property, as a whole, the shareholders have each a separate and distinct interest therein. This interest consists in the right to participate in the profits, according to the number of shares they may own respectively, and to a distributive share of the residue of the corporate property after the payment of its debts. A burden, therefore, imposed upon the corporation, or its property, *eo nomine*, affects the operations of the corporation, while a burden upon the shares affects the shareholders. The right to do the latter does not necessarily imply a right to do the former.

From this process of reasoning, it results, that a State tax on the shares owned in national banks is not, like the tax in the cases cited, a tax on the corporation, or the bonds composing its capital stock, or the property of the corporation, or the operations of the national government, but a tax on the new use to which the shareholders have put their bonds. So far from being in conflict with the right and duty of the national government to maintain the faith and credit of the United States inviolate, such a tax is in strict harmony therewith, and rests upon the solid foundation of both reason and authority. *Van Allen* v. *Nolan*, 3 Wallace, 573; *Duer* v. *Com. of Taxes*, 4 Wallace.

These decisions were made in cases arising under the Act of Congress of June 3, 1864, which contains certain provisions in regard to State taxation. The Act of Congress of Feb. 25, 1863, under which the case at bar comes before us, contains no such provisions, and the question is whether

the shares in national banks, established under this Act, are taxable by State authority.

This involves an inquiry into the respective powers of the States and the United States, over the subjects of taxation. Previous to the adoption of the national constitution, the several States, though united under the Articles of Confederation for certain purposes, were in most respects sovereign and independent States. Among the powers possessed by them respectively, was the sovereign power of taxation, the nature and extent of which are thus stated by Chief Justice MARSHALL, in *Providence Bank* v. *Billings*, 4 Pet., 563.

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of any individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the Legislature."

Upon the subject of the respective powers of the several States, and of the United States, in respect to taxation, the same eminent jurist, in *McCulloch* v. *Maryland*, remarks as follows:—"The power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments, are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power is admitted."

As the powers of the States were known, and recognized, it became unnecessary to enumerate and define these in the constitution; being derived from the people of the respec-

tive States, and not from the American people collectively, they remained the same after the adoption of the constitution as before, except so far as they are limited or prohibited by that instrument. Even a specific grant of power to the national government is not inconsistent with the exercise of the same power by the States, when it is not exercised by the supreme government. In *Sturgess* v. *Crowningshield*, 4 Wheat., 196, the Supreme Court of the United States held that, notwithstanding the grant of power to Congress to establish a uniform system of bankruptcy, a State has authority to pass a bankrupt law, provided there is no Act of Congress in force upon the subject. In that case, the Court say, — "The power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on that subject must cease. It is not the mere existence of the power but its exercise which is incompatible with the exercise of the said power by the States. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the States." The same doctrine has been held in respect to other powers granted to Congress where Congress has not seen fit to call them into exercise. *Wilson* v. *Blackbird Creek*, 2 Pet., 245; *Cady* v. *Port Wardens of Philadelphia*, 12 How., 299.

In these cases, no enabling Act of Congress is necessary to authorize the States to exercise the powers specifically granted to Congress, when Congress does not avail itself of its paramount authority to exercise such powers. Upon what principle then, does an enabling Act of Congress become necessary to authorize the States to tax the shares in moneyed corporations, created under the implied powers of Congress? The power of the States in respect to taxation are quite as important as their power to pass bankrupt laws. The former power, no less than the latter, is derived, not

from Congress, but from the original right of the States themselves over the subject. Indeed, Congress cannot confer the power of taxation upon the States; nor is it competent for the States to receive such grant of power. If the States possess this power at all, it is in virtue of their inherent authority as States of the United States.

This doctrine is expressly recognized in *Van Allen* v. *Nolan*. In that case the Court say, — "The power of taxation, under the constitution, as a general rule, and as has been repeatedly recognized, in adjudged cases in this Court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal government. * * * As it respects a subject matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act."

In that case, the Court held that a State tax on the shares of national banks is not a tax on the bonds of the government which constitute their capital stock, or upon "the means and instrumentalities employed by the national government," and that "it involves no question as to the pledged faith of the government." This result is in harmony with the language of Chief Justice MARSHALL, qualifying the decision in *McCulloch* v. *Maryland*. "This opinion," he remarks, "does not deprive the States of any resources which they originally possessed. It does not extend to the tax paid by the real property of the bank in common with other real property within the State, nor to a tax imposed on the interest which a citizen of Maryland may hold in this institution in common with other property of the same description throughout the State."

Moreover, it is to be observed, that a State tax for State purposes is not inconsistent with a national tax assessed upon the same subject for national purposes, because the

exercise of such power by a State is not the exercise of a power granted to Congress; Congress is not empowered to levy taxes for the purposes which are in the exclusive province of the States. In general, therefore, when each government exercises the power of taxation over the same subject matter for their respective purposes, neither is exercising the power of the other, but both are harmoniously acting within their respective spheres *Gibbons* v. *Ogden*, 9 Wheat., 200.

The conclusion deducible, both from principle and the authorities, would seem to be,—(1,) that, in general, the power of taxation is a concurrent power, to be exercised by the States or the national government, or by both, in respect to the same subject matter;—(2,) that the States have no power to tax the means and instruments employed by the national government in the discharge of its constitutional functions;—(3,) though the States and Congress may exercise a concurrent power of taxation over a subject matter, yet it may bear such a relation to the national government that Congress, by reason of its paramount authority, may exclude the States from the exercise of their concurrent right; and—(4,) that when, in the latter case, Congress does not exercise its right of exclusive taxation the States are left free to exercise their concurrent powers. The shares in national banks are of this last description. From the relation which these associations sustain to the national currency, and the fact of their creation by Congress, the latter might undoubtedly regulate or prohibit State taxation of their shares; but, in the absence of any such qualification, or prohibition, the States are remitted to the exercise of their power of taxation.

But it is unnecessary for us to place the decision of this case upon this ground. The Act of Congress of Feb. 25, 1863, is made subject to future amendment; and the Act of June 3, 1864, is a substantial re-enactment of that Act, with certain amendments, including that concerning State taxation. Section 41, providing that "nothing in this Act

shall be construed to prevent" State taxation, under the prescribed limitations, is an authoritative interpretation by Congress of the intent and meaning of the Act of 1863, upon this subject; and this rule of taxation is applicable to banking associations, established under either Act of Congress.

It is not improbable that the silence of the Act of 1863, in respect to local taxation, produced the impression in the public mind that the shares in national banks are not thus taxable, and that Congress improved this early opportunity to remove all doubt upon the subject.

While such are the relative powers of both governments in respect to taxation, the power of the national government is sovereign, and extends to every species of property and every citizen within its jurisdiction. It is a necessary incident of the right of property, immanent in the property itself, and creating an inchoate mortgage upon it, that it is liable to bear a share of the public burdens. The right of the citizen to the protection of the government depends, in a great degree, upon the obligation to furnish the government with the means of protection. Indeed, the reciprocal duties of allegiance and protection cannot be performed without the sovereign right of taxation. Congress may forbear to exercise this power, in certain cases, but the power is unquestionable. A public exigency might arise, when, to exempt a particular species of property from taxation, would be to deny to the government the power of self-preservation; such exigency might become even more urgent than that which shielded the same property from taxation. *Magna Charta* of 1789 allows no titles of nobility, creates no monopoly of rights of property, and surrenders no power of taxation over the means of self-preservation.

The tax of which the plaintiff complains was assessed in the usual mode; and it is not pretended that it is unequal, or differs from that imposed by the State upon the shares of State banks, or other similar property, or that it is, in any respect, incompatible with the rule prescribed by Con-

gress. Our conclusion, therefore is, that the shares owned by the plaintiff are legally taxable by the State.

Before, however, municipal officers can rightfully assess a tax upon the shares of national banks, they must be authorized so to do by some law of the State. They are the creatures of State law, and derive their powers, in this respect, solely from State enactments.

Though the shares in national banks are not specifically mentioned in our tax Act, we think they are included in § 5, c. 6, of R. S., "which authorizes the taxation of all shares in moneyed corporations." Sections 79 to 82, of c. 47, R. S., prohibiting the establishment of banking companies in this State without authority of the Legislature, were not intended to apply to banking corporations created by authority of Congress, since such corporations may be legally established in the State without the consent of the Legislature.

According to the agreement of the parties the

Nonsuit must be confirmed.

CUTTING and BARROWS, JJ., concurred.

KENT and TAPLEY, JJ., concurred in the result.

APPLETON, C. J. — I do not concur. The State had a right to tax the stockholders in national banks, without the authority of Congress, or it had not.

If the State had that right, — then, having that right, Congress had no power to interfere in the mode, manner or place of its exercise. The stock of national banks would be like the stock of other corporations, over which the United States have no control. It is not contended that Congress can interfere as to the taxation of the stock of State banks. Consequently, if the doctrine of the opinion is correct, the legislation of Congress upon the subject would be unconstitutional.

But Congress have given liberty to tax the stock of national banks, and directed when, where and how it should be taxed. Act of Congress, June 3, 1864. The Supreme

Court of the United States have decided that the different Acts of Congress on this subject are constitutional, and that the *only* right to tax this stock is derived from the Acts and that it must be exercised in accordance with their provisions. *Van Allen* v. *Assessors*, 3 Wallace, 573; *People* v. *Commissioners*, 4 Wallace, 244. It follows therefore, conclusively, that, without such legislation, the taxation was illegal, and the plaintiff is entitled to recover.

WALTON and DANFORTH, JJ., concurred.

HENRY F. MCLAUGHLIN *versus* CHARLES M. DOANE.

A new trial will not be granted on the ground of newly discovered evidence, when such evidence is cumulative, and due diligence would have enabled the party to discover the evidence before the trial.

ON MOTION to set aside the verdict as being against the weight of evidence, and for a new trial on the ground of newly discovered evidence, the latter of which motions was filed the next day after the verdict was rendered.

The facts sufficiently appear in the opinion.

Plaisted & Clark, for the defendant.

McCrillis & Flagg, for the plaintiff.

WALTON, J. — Plaintiff and defendant visited a public exhibition of fire-works on the evening of the 4th of July; plaintiff with a buggy and one horse, — defendant with a gigger and two horses. The defendant's horses took fright at the fire-works and run against the plaintiff's buggy, upset it, and broke it badly.

The principal question at the trial was whether the defendant's driver, at the time the horses took fright, did or did not have hold of the reins. The evidence was conflict-

ing, the plaintiff and his witnesses swearing that he did not, and the defendant's driver, and several other witnesses swearing that he did.

The jury returned a verdict for the plaintiff. The defendant moves to have it set aside as against evidence. He also moves for a new trial on the ground of newly discovered evidence.

The newly discovered evidence consists of the testimony of a witness who says he was present at the time of the accident, and his statements tend strongly to corroborate the testimony of the driver that, at the time the horses took fright, he had hold of the reins, and did all he could to prevent running against the plaintiff's carriage.

This evidence is only cumulative, and came to light so soon after the verdict, and the witness being a resident of the same town with the defendant, that we cannot resist the conviction that due dilligence on his part would have enabled the defendant to discover the evidence before the trial. This controversy arose four years ago, and it is a sad commentary on our system of administering justice that it is not yet settled. If we should grant a new trial for newly discovered evidence every time one of the numerous witnesses that probably saw this accident chooses to inform the litigants of what he knows, there is strong reason to believe the case would outlive the parties, and descend as inheritance to their heirs. We think a new trial should not be granted on the ground of newly discovered evidence.

Nor are we satisfied that the verdict is so clearly against the weight of evidence as to require us to set it aside on that ground. Looking at the evidence as reported, aided by the thirty-eight closely written manuscript pages of argument by the defendant's counsel, it does seem to us as if the jury would have been justified in returning a verdict for the defendant. But the jury had the advantage of seeing the witnesses, and observing their manner of testifying, and could better judge therefore what weight should be

given to their statements than we can. There are no questions of law in the case. *Motion overruled.*

Judgment on the verdict.

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

JEREMIAH HOWE *versus* ELISHA W. SHAW.

It is not essential to the maintenance of replevin, that the property replevied be, at the time of the issuing or service of the writ, in the actual possession and under the immediate and exclusive care and control of the defendant personally.

It seems, it may be maintained against either member of a co-partnership when the property replevied is in the possession of any one of them, while claiming to act for, and really acting with the concurrence of all.

ON EXCEPTIONS.

REPLEVIN for a pair of oxen "taken and detained by Elisha W. Shaw, at Newport, in the county of Penobscot." To maintain the issue of *non cepit*, the plaintiff proved that the defendant and one Peleg H. Tracy, about the first of February, 1867, took the oxen from the possession of one Randall McCrillis, at Palmyra, in the county of Somerset, and drove them towards Newport, in the county of Penobscot; that, a few days afterwards, the plaintiff found the oxen in Tracy's barn, at Newport, and the officer serving the writ in this action replevied the oxen, took them from Tracy's barn and delivered them to the plaintiff.

The defendant testified in chief, that Tracy and himself separated before reaching the line of Penobscot county; that he never had the oxen in his possession, custody or control in Newport, or in any part of Penobscot county; that he was not present when the oxen were replevied, and knew nothing of it until afterwards; and that Tracy had the sole custody, possession and control of the oxen while in Newport, and he had nothing to do with them.

On cross-examination, he testified, that all he did in relation to the taking of the oxen from McCrillis' place in Somerset county, was as a member of the partnership of Shaw, Tracy & Co.; which consisted of himself, Tracy and others; that the oxen were owned by said firm; that he and Tracy went to McCrillis' to take the oxen to Newport; that they drove them to Wyman's, in Somerset county, near the line of Newport, when he got out and Tracy drove them in. This was all the evidence introduced on either side under the issue of *non cepit*.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the refusal of the presiding Judge to give a certain requested instruction and to a certain instruction given, both of which appear in the opinion.

D. D. Stewart, for the defendant.

The writ was served by taking the oxen from Tracy, in Penobscot county, the defendant not being present and knowing nothing of it, and never having had custody, possession or control of them in the county of Penobscot. The action of replevin is local, and must be brought in the county where the wrongful detention by the defendant takes place. *Robinson* v. *Mead*, 7 Mass., 353; *Brown* v. *Webber*, 6 Cush., 566; *Hathorn* v. *Haines*, 1 Greenl., 238; *Webb* v. *Goddard*, 46 Maine, 508.

The instruction given authorized the jury to find a verdict for the plaintiff, although they might be satisfied that the defendant never had any custody, possession or control of the oxen in Penobscot county.

The fact whether the defendant did have such custody, possession or control, was a question of fact which was taken from the jury by the instruction.

The instruction was erroneous, because replevin cannot be maintained against one who commands the taking of another's property. *Ramsdell* v. *Buswell*, 54 Maine, 546; *Richardson* v. *Reed*, 4 Gray, 441.

G. W. Walker, for the plaintiff.

APPLETON, C. J. — This is an action of replevin for a yoke of oxen. The defendant pleaded *non cepit*, and filed a brief statement setting forth the title of the oxen to be in the firm of Shaw, Tracy & Co., of which firm he and Peleg H. Tracy were members.

The oxen were replevied from the barn of said Tracy, in Newport. The defendant testified that all he did, in relation to the taking of the oxen from McCrillis' place in Somerset county, was as a member of the partnership of Shaw, Tracy & Co., — that the oxen were owned by said firm, — that he and Tracy went out to McCrillis' to take the oxen to Newport, — that they drove them to Palmyra village, — thence to Wyman's in Somerset county, near the line of Newport, — and that he then got out and Tracy drove them in.

In tort, as a general rule, the action may be brought against one or all of the tort feasors. Replevin is an action of tort, — but it must be brought against the person or persons having the possession of the property replevied. The possession of the servant is the possession of the master. The action may therefore be maintained against the owner when in the possession of the servant. *Ramsdell* v. *Buswell*, 54 Maine, 546. A mere servant, or depositary has not such property as will support this action, his possession being that of the master or bailor. 2 Greenl. Ev., § 561. "Partners, like individuals, are responsible for the negligence of their servants, upon the maxim of *qui facit per alium facit per se;* and, if one of the partners acts, he is considered, in this instance, as the servant of the rest. In these cases the tort is looked upon as the joint and several tort of all the partners; so that they may either be proceeded against in a body, or one may be sued alone for the whole of the damage done." Collyer on Partnership, § 457. As the possession of one partner is, *prima facie*, the possession of the firm, it would seem that the action of replevin might be maintained against one or all the mem-

bers, when the article replevied is in the possession of one claiming to act for and with the concurrence of all.

In the present case, however, the defendant's counsel requested the Court to instruct the jury that upon the issue of *non cepit*, "the plaintiff must satisfy them that the defendant, at the time of the sueing out, or service of the writ, had the oxen in his possession in the county of Penobscot, and that the burden was on the plaintiff to satisfy them of that fact." This intruction was not given. The general proposition, that the action of replevin should be brought against the person having possession of the property to be replevied, is unquestionably sound law. The action, however, may be maintained against the master for property in the possession of his servant, holding for him, or against one of many joint claimants under a title common to all, and when the possession of one is for all and is to be deemed the possession of all.

Now, if, by the instruction requested, the counsel is to be understood as claiming that the oxen must, at the time referred to, have been in the actual possession of the defendant and under his immediate and exclusive care and control, the instruction should not have been given, for the possession of the servant is that of the master, or that of one partner that of the firm.

But, if the counsel meant that kind of possession or control which may be exercised through an agent or partner, then the instruction given was correct, and all that he could properly ask for in the case. It was applicable to the facts as existing. The pleadings set forth a title in the firm of Shaw, Tracy & Co., of which the defendant was a member. As such member he had taken possession of the oxen. The Court instructed the jury "that, if they were satisfied from the evidence that the defendant and Tracy took the oxen from McCrillis' place, in the county of Somerset, they being joint owners, for the purpose of driving them to Newport, in the county of Penobscot, and that said Tracy actually drove them to said Newport, in pursuance of said purpose,

that his possession in the county of Penobscot would be a possession of said Shaw, and the issue would be well maintained on the part of the plaintiff." The facts assumed in the above instruction were found by the jury. The defendant alleges in his plea the property to be in himself and others as members of a firm. He was acting for the firm. He asks that it be restored to him as a member of the firm. He would have been liable in trover for the conversion or the trespass in taking. The taking was commenced by him and Tracy, and the possession retained by Tracy for their common benefit. He was not aggrieved by the instructions withheld, under the circumstances of the case.

Exceptions overruled.

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

BARROWS, J., expressed his views in the following opinion: — I concur in overruling the exceptions. The defendant claimed that the cattle belonged to the firm of Shaw, Tracy & Co., of which firm he was a member, and, by his pleadings filed in this case, he justified the taking, claimed judgment for his damages and costs, and for a return of the property to his firm. His justification of the act failing, it seems unreasonable that he should now be permitted to avoid the payment of damages and costs by denying the act which, by his pleadings, he had previously admitted and justified.

If these exceptions were sustained, could he again contest the plaintiff's title, or only the taking? The question of title seems to have been settled against him under instructions of which he makes no complaint.

In his testimony, as well as by his pleadings, the defendant admits that he, in company with one of his partners, (Tracy,) went out and took these cattle from the possession of the plaintiff, in Somerset county, with the intention of bringing them to Newport, in this county; that they drove them together to Wyman's (near the Newport line, but in Somerset county,) and then this defendant got out and Tracy

drove them in, and this defendant had personally nothing more to do with them, his partner, (Tracy,) who went with him, putting them in his barn. But the defendant does not even pretend that the driving them in by Tracy, and the detention of them in Tracy's barn, in this county, were not in pursuance of his own original intention in going with Tracy to get them, or that he, at any time, changed that intention or ceased to assert the title of Shaw, Tracy & Co. to the cattle, and their right to the possession of them in Penobscot county, as against the plaintiff. Under these circumstances, with such admissions from the defendant, both in pleading and evidence, in the case, I do not see how he could be harmed by the refusal of the presiding Judge to state an abstract rule of law, which, if correct, had no pertinency to the case presented by these pleadings and this evidence. When a defendant in replevin justifies the taking and claims a return of the property, I do not think he should be permitted in the same breath to deny the taking as alleged, or to assert that that was not in his possession which he claims should be returned to it.

It seems to me that such pleadings by the defendant relieve the plaintiff from the necessity of proving the taking, and that, thenceforward, the true and only issue is one of title and right of possession. For these reasons I think the exceptions should be overruled.

PHINEAS F. BEAN *versus* HENRY R. SOPER *& certain logs.*

In a suit under the statute to enforce a laborer's lien on logs not belonging to the person for whom the personal services were performed, the writ ordered the attachment of two lots of logs in a certain river and of a specified mark; the declaration set out the plaintiff's lien upon logs in the same river, of the same marks, by reason of his labor in driving the same; the officer returned an attachment as under a lien of two lots of logs in the river, of the marks described in the declaration; all parties interested were duly summoned, and they appeared, admitted the truth of the declaration and that the logs were attached within sixty days after the same arrived at their place of destination; — *Held*, that the identity of the logs attached, with those upon which the plaintiff labored and thereby acquired a lien, were sufficiently established by the foregoing facts.

ON REPORT.

ASSUMPSIT against the defendant and two lots of logs in the Penobscot river, one marked H × S and the other 4 H 4.

The writ, dated July 27, 1867, ordered the attachment of the logs; and the declaration alleged, substantially, that the plaintiff, during the spring of 1867, had, at the request of the defendant, labored at driving on the waters of the Penobscot river and its tributaries, to the Penobscot boom, certain logs marked H × S and 4 H 4; that the sum of money actually due and unpaid, stipulated by the defendant to be paid to the plaintiff for his personal services thereon, was and is $252, as specified in the account annexed; that, in consideration of the premises, the defendant, on the day of the purchase of the writ, promised the plaintiff to pay him the said sum on demand; and that the plaintiff claims a lien upon the logs, under the statute, for the sum so due, and brings this suit to enforce and secure the same.

On July 31, 1867, the officer returned that he had attached "as under a lien, 400 spruce logs marked H × S, and 200 spruce logs marked 4 H 4, lying on Freese Island, so called, in Penobscot" river, and that, on the "3d of August, S. N. Hodgdon and Charles G. Stearns & Co. gave their receipt for the same."

61 Me 487-93

The owners of the logs were duly notified and appeared.

It was admitted that the logs described in the declaration were attached within sixty days after they arrived at the place of their destination, and the owners summoned in and confessed the truth of the declaration.

The defendant was defaulted, and such further judgment was to be rendered as the law required.

C. A. Bailey, for the plaintiff.

1. The declaration is true, and the attachment was made within the time prescribed by the statute, hence no defence can be maintained. *McPheters* v. *Lumbert*, 41 Maine, 469.

2. Notices duly given. R. S., c. 91, § 20.

3. The defendant *in personam*, and the logs *in rem*, are properly in Court. *Campbell* v. *Smith*, 47 Maine, 143.

4. Plaintiff is entitled to judgment against the defendant *in personam*, and against the logs *in rem*. *Thompson* v. *Gilmore*, 50 Maine, 428; Public Laws of 1862, c. 131, § 2.

McCrillis, for the owners of the logs, contended that the case did not show that the logs attached were identical with those upon which the labor was performed. *Thompson* v. *Gilmore*, 50 Maine, 428.

APPLETON, C. J.—It was held in *Thompson* v. *Gilmore*, 50 Maine, 428, that, in a suit under the statute, to enforce a laborer's lien on logs *not* belonging to the person for whom the services were rendered, a valid judgment *in rem* must be obtained against the property; that the record of the judgment must show that the logs, upon which the labor was expended, are the same which in the writ were commanded to be attached and which were attached; and that the officer's return of an attachment of logs having similar marks with those described in the plaintiff's declaration, does not establish the fact that the logs attached were identical with those upon which the plaintiff labored.

In *Thompson* v. *Gilmore*, the defendant was sued as sheriff for the default of his deputy, in not keeping and de-

livering over, to be taken in execution, certain logs attached by the plaintiff, in a suit against certain individuals, to secure his lien for labor done by him upon the same. The defendant was relieved from liability, because it did not appear by the judgment that the logs were those to which the plaintiff's lien attached.

The only question here presented is, whether, within that decision, it is sufficiently established that the logs attached in the present suit are those upon which the plaintiff labored, so that the judgment should be rendered specially against the logs attached.

The declaration sets forth the plaintiff's lien upon certain logs of a specified mark, by reason of his labor in driving the same. The officer returns an attachment of logs having the marks described in the plaintiff's writ and that they are subject to a lien. All parties interested have been summoned. They admit the truth of the facts set forth in the plaintiff's declaration. It is conceded, therefore, that the plaintiff labored upon logs of a specified mark and had a lien upon the same. The parties further agree that the logs described in the declaration, and upon which it is admitted there was a lien, were attached within sixty days after they arrived at their place of destination.

We think the identity of the logs attached with those upon which the plaintiff labored and thereby acquired a lien is sufficently established, and that the plaintiff is entitled to a judgment *in rem*.

Judgment to be rendered against the logs attached and that the plaintiff has a lien upon the same.

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

ARAMINTA D. STEWART, *Appellant from decision of the Judge of Probate for Penobscot County.*

The married daughter of a testator, named in his will as the sole executrix thereof, may, with the consent of her husband, be appointed executrix, and take upon herself and execute such trust.

R. S., c. 64, § 17, is not applicable to such a case.

APPEAL from the decision of the Judge of Probate for this county.

The appellant is the only daughter and principal legatee in the will of Barnabas P. Merrick; the will was duly made and executed by the testator, and after his death, and after proper notice, the will was duly proved, approved and allowed by the Court of Probate; the appellant was in and by said will named and appointed by the testator to be sole executrix thereof; yet, because the appellant at the time of the execution of the will, and of its approval in the Probate Court, was a married woman, the Judge of Probate refused to confirm her appointment as executrix, to accept her bond and issue to her letters testamentary under the will, although her husband gave his consent thereto, and jointly with her executed such a bond as was required by law. And the appellant entered an appeal.

D. D. Stewart, for the appellant.

KENT, J.—The single question, presented by this appeal, is whether a married woman can take upon herself the duty and trust of an executrix to a will in which she is named for that office, she being married at the time of the execution of the will, and her husband consenting to her thus acting.

Independently of any statute, the general rule of the English law is that any person may be an executor if mentally capable of executing its duties.

It seems to be universally conceded, in all the text books and in all the authorities, that coverture, in itself, is no in-

capacity for the office of executor or administrator, and that a married woman may execute such trust with the consent of her husband. Redfield, in his recent work on wills, thus states the result of his examination on this point: — "It is clearly settled, in the English law, that a married woman may become executrix, but cannot act without consent of her husband. If appointed while married, her husband must act concurrently with her, and if she marries whilst she is executrix her husband thereby becomes co-executor with her. 2 Redf. on Wills, c. 2, § 6, page 60. See also 1 Jarman on Wills, 31; *Holman* v. *Perry*, 4 Met., 242; 1 Williams on Ex'rs., 369, 449, 190, 191; 2 Williams on Ex'rs., 1562; Toller on Ex'rs., 34.

But it is contended that, although this is the rule of the English common law, and was formerly the law of this country, it has been entirely changed or abrogated by our statutes, either directly or by necessary implication.

In the first place, it is said that by our statute, R. S., c. 64, § 5, it is required that "every executor shall give bond, with sureties," and that a married woman cannot thus bind herself, and therefore cannot be an executrix. To this, it is answered, that by the statute of 1866, c. 52, a married woman may now execute such bond, and bind herself. It is also replied, that by a well established principle, where words are used, in a statute which necessarily include a class, and require certain acts to be done, that such requirement supersedes any exception or restriction before existing, and gives the power to do the prescribed act. Thus, where an infant gives a bond in a case of bastardy, or a married woman recognizes to prosecute an appeal taken by her, it has been held that the obligation in each case was binding. It was said by the Court, in *McCall* v. *Parker*, 13 Met., 372, that the Justice was authorized to require the accused to give a bond with sureties, and that, from the language of the statute and the nature of the subject, there was no reason to doubt that it was intended to include minors. *Curtice* v. *Bethamly*, 8 Allen, 336, where a married

woman recognized. If the law allows a married woman to be an executrix, and then requires "every executor" to give a bond, it would seem to follow, as the law must necessarily allow the executor to act, and as this cannot be done until the bond is filed and approved, that in such a case, whatever restriction exists under the general law as to contracts by married women, it could not be applied in this case.

It is analagous to the right of a married woman who is a trustee or executrix to make a will touching property held by her in a fiduciary character, although by the old common law, as a general principle, a married woman could not make a will. Jarman on Wills, 31; *Holman* v. *Perry*, 4 Met., 492.

Besides, it would hardly be a fiction of the law to invoke, if necessary, the old fashioned idea and doctrine, that the husband and wife are but one person in law, and that therefore the bond might be given by the husband with or without his wife.

It is said in 1 Williams on Ex'rs., 369, that "a *feme covert* may be an administrator. But she cannot take administration without the consent of her husband, inasmuch as, among other things, he is required to enter into the administration bond, which she is incapable of doing. Yet, if it is shown that her husband is absent or otherwise incompetent, a stranger may join in the security in his stead." This clearly shows that it is no fatal objection against the appointment of a *feme covert*, that she could not give a bond binding her, and that her husband might enter into "the required bond."

The question returns, whether, under our law, a married woman can be appointed as an executor. The answer to this question would seem to depend upon the answer to another, viz.,— is it forbidden? We have seen that the right existed at common law. Has it been abrogated? It is provided by § 17, c. 64, R. S., that "when an unmarried woman, who is joint or sole executor or administrator, marries, her husband shall not exercise such trust in her right, but her

authority is thereby extinguished, and the other executor or administrator, if any, may proceed in discharging the trust, as if she was dead. If there is no other, administration with the will annexed, or otherwise, may be granted."

This section does not include the case under consideration by its terms. It is confined to the case of an "unmarried" woman, who was an executor when sole, and its object is to terminate that relation upon her marriage. It is, however, suggested that it indicates that the will of the Legislature is that no married woman shall hold that trust. If such was the intention, it seems a little singular that the Legislature did not say so in direct terms, as it did in relation to guardianship. "No married woman, during her coverture, shall be appointed guardian; and, if any female guardian is married, her authority as such shall cease, nor shall her husband be guardian in her right." R. S., c. 67, § 16.

There seems to have been a designed omission of the general language used in the last quoted section, in the Act now in question. It would not be our proper province to supply it, even if we could see no good reason for the distinction. It may be that the section in relation to guardians was intended to apply only to guardians appointed by the Court, and not to testamentary guardians. It may be also suggested, with some plausibility, at least, that the law makers intended to allow a testator to designate an already married female friend, in whom he had confidence, and whose husband he knew and had no objection to, to be the executor of his will, and that such a designation should stand good. But, where the female was unmarried at the time of the making of the will, or at the death of the testator, and she afterwards marries, a new relation, not known to the testator, arises, and a new party is introduced into the trust. The law says, that as it was a *feme sole* that was originally designated by the will, a *feme covert*, with her new baron, shall no longer act.

The history of the legislation on this subject may throw

some light on the question before us. The Legislature of Massachusetts, in 1783, passed an Act containing provisions similar to the one now existing in this State, except that it only provided for the case, where the unmarried female was a joint executor or administrator, and married, — when she was thus only one in the trust, her right to act ceased on her marriage, and the other executors or administrators proceeded to finish the duties of the trust. At the revision of the Massachusetts statutes, in 1836, the provision was extended to the case of sole executorship, and the law was then for the first time made to apply to such a case. In *Wiggin* v. *Swett*, 6 Met., 194, a construction was given to this section and this change in the law indicated. In that case, the widow of the testator was appointed executrix and entered upon the duties whilst sole, and settled several accounts. Before 1836 she married, and she, aided by her husband, went on with the settlement of the estate. SHAW, C. J., says, that, by the general law in 1830, when her second marriage took place, the husband became joint executor, and she, being sole executor, and not joint, rightly acted as such after her marriage. If so, then it is clear that a married woman may be an executrix, notwithstanding the provision of the statute respecting her vacating the office, if she held it when sole, if she is appointed during coverture, and does not come within the class named in the statute.

This case clearly shows that the statute is to be confined to the cases included in its terms, — and that until the new provision as to sole executor, made in 1836, a married woman could be an executrix, even when she had been appointed as such when unmarried. When the new provision was included, it simply excluded the unmarried sole executrix, who afterwards married, in the same manner and to the same extent that it before excluded her from acting longer, when she was joined with others in the trust. But neither the original statute nor the amended one reaches the

case of an executrix, made such when she is a *feme covert.* That is left as at common law.

This seems to be the view of Mr. Redfield. After referring to the fact that, in most of the States of the Union, when a *feme sole*, who is an executrix, marries, her power ceases from that time, he adds: — "But, where no statutory provisions exist upon the subject, the marriage of a *feme sole* will not probably have the effect to terminate the office." 2 Redf. on Wills, 60.

This was so determined also in *Barber* v. *Bush*, 7 Mass., 510, where it was held that when a *feme sole*, who was sole executrix, marries, she retains her office and her husband becomes joined with her. This decision probably led to the amendment made in 1836, which was intended to change the statute in this respect only. There seems to be no direct provision which declares that no married woman shall be an executor of a will. She may be such by the common law. We have no right to say more than the Legislature has seen fit to say.

The tendency of legislation, and apparently of public sentiment, is not in the line of restriction upon "woman's rights." But, if legislation in that direction is desired, it must be sought from the proper department.

Appeal sustained. — Judgment of the Probate Court reversed, and case remanded to that Court for further proceedings.

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

JEREMIAH ROWE *versus* ELISHA W. SHAW.

By the mutual agreement of the parties, they, together with their witnesses, went home from Court and returned with the same witnesses on Thursday of the next week, and commenced the trial of their cause, but did not close it until the following Monday, whereupon, the prevailing party, having paid his witnesses for both travels, and for the Sunday intervening the days of the trial, taxed these fees in his bill of cost: — *Held*, that they were properly taxable.

ON EXCEPTIONS.

APPLETON, C. J. — At the April term, 1868, of this Court, the parties to this cause, with their respective witnesses, attended Court for the purpose of trying the same. Finding it could not be reached in season to be closed during the week, they agreed to go home with their witnesses and return at a time when it could be tried. They returned to Court and commenced the trial upon Thursday of the next week, being the day specified in their agreement. The case was not closed until the following Monday.

(1.) The plaintiff having paid his witnesses their travel each time they attended Court during the term, now claims that the sums thus paid should be taxed in his bill of cost. The witnesses went home for the convenience of the parties and by their mutual agreement. The expenses of litigation would have been increased by their remaining. The R. S., c. 116, § 14, allows a certain sum "for each mile's travel going out and returning home." The parties agreed that their witnesses should go home and return again to Court, instead of remaining until the case should be in order for trial. The arrangement was a judicious one, and can only be carried out in good faith by allowing the taxation as claimed by the plaintiff.

(2.) The witnesses remained in attendance during the Sabbath. Their presence was necessary. A witness is entitled to his fees, taxed during the whole time of his actual

attendance during the trial of the case, although the examination on both sides be closed; or although the illness of counsel suspend the trial of the case. *Whipple* v. *Cumberland Cotton Co.*, 3 Story, 84. "If the witnesses had left the Court without leave," remarks the Court, "they would have been liable for all damages, as well as to be attached, if their presence was required in the intermediate trial before their return."

By R. S., c. 116, § 11, grand jurors and jurors for trials are allowed a certain sum "per day, for their attendance." Jurors have always been paid for their attendance, the Sabbath being included. Indeed, a verdict may lawfully be returned on the Sabbath, if the cause have been committed to the jury before that day. *Webber* v. *Merrill*, 34 N. H., 202; *True* v. *Plumley*, 36 Maine, 466.

By c. 116, § 13, witnesses in the Supreme Judicial Court are allowed a certain sum "for each day's attendance." The language is substantially the same as that relating to jurors. The construction, which gives compensation to the juryman, is equally applicable to the witness, whose attendance is cotemporaneous with that of the juryman. Such, too, has been the view taken whenever the question has arisen.

In *Schott* v. *Benson*, 1 Blatchf., Cir. C't, 564, it was held that witnesses from a distance are entitled to fees for attendance on Sunday, when detained over that day. In *Muscott* v. *Runge*, 27 How. Pr., 85, a witness residing at a distance from Court, was held entitled to his fees for attending on Sunday as well as on secular days. This decision is cited with approbation in *Wheeler* v. *Ruckman*, 5 Robertson, 708. It was the duty of the witnesses, if duly summoned and their fees paid, to have been present at the opening of the Court on Monday. They would have been liable for contempt, had they been absent when their testimony was needed. It would have been no excuse, that they had gone home to spend the Sabbath, and that the distance was such that they could not reach the Court in due season. The respective parties, too, were bound to have their witnesses

seasonably in Court, and to do whatever was necessary to procure their attendance. The witnesses were entitled to their fees for remaining. The plaintiff being compelled to advance them for that purpose, should be allowed that amount in his bill of costs. *Exceptions overruled.*

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

D. D. Stewart, for the defendant.

G. W. Whitney, for the plaintiff.

MARY E. SAWYER *versus* SARAH LUFKIN.

At common law, the estate of an insane person, over twenty-one years of age and under guardianship, is liable for necessary nursing and care furnished in good faith and under justifiable circumstances.

And this liability is not changed by R. S., c. 67, § 22, which prohibits all express contracts by an insane person over twenty-one years of age and under guardianship, but not those implied by law.

ON REPORT.

ASSUMPSIT on an account annexed, for "labor in taking care" of the defendant "144 weeks, to March, 1859, at $1,50 per week," with certain credits.

On the part of the plaintiff, it appeared that the defendant was insane, and entirely incapable of taking care of herself; that her family consisted of herself and two minor sons; that in May, 1856, at the request of one of the sons, who was then about eighteen years of age, the plaintiff went to the defendant's house and nursed and took care of her; that she found her in a very filthy condition as to clothing, &c.; that the defendant was violent at times, and needed much care; that the guardian came to the defendant's house but two or three times during the whole time the plaintiff was there, and exercised no control and furnished

nothing; that the plaintiff continued there during the time mentioned in the writ; and that the defendant's sons were absent most of the time.

Thomas S. Fuller appeared as guardian of the defendant, duly appointed prior to the time the plaintiff's services were rendered; established his guardianship, contested the plaintiff's claim, and offered testimony tending to prove that the guardian contracted with the defendant's sons to take care of and support their mother; that, in consideration thereof, they were to be paid out of her property; and that the items of credit were received from the sons. If the action was maintainable, the action was to stand for trial.

Knowles, for the plaintiff.

C. J. Abbott, for the defendant.

There is no conflict between §§ 7 and 22, c. 67 of R. S.; the former includes those under as well as those over twenty-one years of age.

They have different objects; the former renders void all contracts and transfers of property made during the pendency of an application for the appointment of a guardian, the other declares all contracts and transfers of property, made by persons over twenty-one years of age and under guardianship, to be unqualifiedly and absolutely void, notwithstanding the death, resignation or removal of the guardian.

APPLETON, C. J. — This is an action for necessaries furnished the defendant, an insane person, over twenty-one years of age and under guardianship. The guardian appears and contests the plaintiff's claim.

If necessaries are furnished a person in this condition, in good faith and under circumstances justifying their being so furnished, the person furnishing may recover. If the law were not so, the insane might perish, if a guardian, having means, should neglect or refuse to furnish the supplies needed for their support. They stand in the same position

as minors and are liable for necessaries. *Seaver* v. *Phelps*, 11 Pick., 304; *Leach* v. *Marsh*, 47 Maine, 548. Such is the rule of the common law.

Nor is this limited liability changed by R. S., 1857, c. 67, § 22, which provides that "when a person over twenty years of age is under gurdianship, he shall be deemed incapable of disposing of his property otherwise than by his last will, or of making any contract, notwithstanding the death, resignation or removal of the guardian," &c. This prohibits all express contracts by the insane. They cannot be liable on any express promise. But their estate may be held when the law implies one. The insane must not be allowed to starve, though the guardian is dead, has resigned or been removed. The estate of the insane is legally, as well as equitably liable for necessaries furnished in good faith, and under circumstances justifying their being so furnished. *McCrillis* v. *Bartlett*, 8 N. H., 569; 1 Parsons on Con., 313, *et seq.* *The case to stand for trial.*

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

CHARLES J. ABBOTT *versus* INHABITANTS OF BANGOR.

The payment of an illegal tax assessed upon bank shares, for the purpose of preventing the seizure and sale of them by the collector, is not a voluntary payment.

To bring the assessment of a tax upon bank shares within c. 193 of the Public Laws of 1863, it must be made to appear that the stock was "held by persons out of the State or unknown, and that" it had "not been certified" to or assessed in some place in this State; or that the stock appeared, "by the books of the bank, to be held by some one residing beyond the limits of this State, or unknown."

The Act of Congress, approved Feb. 10, 1868,* "in relation to taxing shares in national banks," had no retroactive effect upon any proceedings previously had under c. 126 of the Pub. Laws of 1867.

59 Me 310

* See opinion.

Nor does it affect the decision in *Packard* v. *Lewiston*, 55 Maine, 456, as to the validity or invalidity of the several sections of that chapter.

The right of tax-payers to recover back a tax paid under protest, must be determined by the law as it was when the tax was assessed and paid.

The repeal of the statute authorizing the assessment, after such payment and the commencement of the suit to recover it back, confers no additional rights upon the tax-payer.

Packard v. *Lewiston*, 55 Maine, 456, re-examined and confirmed.

ON FACTS AGREED.

ASSUMPSIT to recover money paid in discharge of certain taxes assessed in 1866 and in 1867.

It was admitted that, on April 1, 1866, and April 1, 1867, and for many years before that time, and ever since, the plaintiff was, and has been an inhabitant of Castine; that at no time during the period named was he an inhabitant of Bangor; that on the first days of April, 1866 and 1867, he was the owner of twenty-four shares of the stock of the First National Bank of Bangor, for which he was taxed by the assessors of Bangor, a certain amount named, for State, county and municipal purposes; that, on Jan. 23, 1868, the plaintiff received from the collector of taxes in Bangor, a written notice of the amount of the respective taxes, requesting payment thereof and declaring that "payment made within ten days from date will save costs;" that, on Feb. 4, 1868, the collector being about to seize and sell said bank stock for the payment of the taxes, the plaintiff protesting that he was not liable to be taxed therefor in Bangor, and to pay the same there, and, to prevent such seizure and sale, and with the avowed design of commencing this suit to recover back the amount paid, and of testing the legality of the taxation and collection, paid to the collector the amount of the several taxes, which money went immediately into the city treasury; that the officers of Bangor, for 1866 and 1867, were legally elected and qualified; and that the proceedings in relation to the assessment were regular and legal if the stock was liable to such taxation. The Court were to enter proper judgment upon nonsuit or default.

Abbott, pro se.

The Act of Congress of Feb. 10, 1868, gave the construction to § 41 of the U. S. Bank Act of 1864. Under that construction, all of c. 126, of the Public laws of 1867, was valid; and it being considered the law, the tax was not assessable or collectable in Bangor.

Chapter 126 has been unqualifiedly repealed by c. 209 of the Pub. Laws of 1868, while proceedings relative to the tax of 1867 were still pending. The tax was paid under protest, and as a step preliminary to the commencing of this suit. The amount of the tax was delivered by the plaintiff to the collector, not as payment, not to constitute the end of a transaction, but only as one step in a series of measures. The money delivered was the plaintiff's, delivered as his, to prevent seizure and sale of his stock, and not as the defendants'. And, whether the defendants can retain it depended upon the statute of 1867; and an unqualified repeal of that statute, while proceedings were pending, put an end to any rights the defendants could claim under its provisions. *Thayer* v. *Seavey*, 11 Maine, 284; *Key* v. *Goodwin*, 4 Moore & Paine, 341; *Plant. No.* 9 v. *Bean*, 36 Maine, 359; *McNawhoc Plant.* v. *Thompson*, 36 Maine, 365; *Williams* v. *County Commiss'rs*, 35 Maine, 345.

If the collector had commenced an action for the collection of the taxes, and, during its pendency, c. 126 had been repealed, the action could not have been maintained. Change of parties makes no change in the application of the principle.

Charles Hamlin, City Solicitor, for the defendants, contended, *inter alia*, that the payments were voluntary.

BARROWS, J.—The position taken in defence of this action, that the plaintiff paid these taxes voluntarily, and is thereby precluded from maintaining a suit to recover the same, cannot be deemed tenable upon the facts presented by the agreed statement. See, on this point, *Preston* v.

Boston, 12 Pick., 7, the doctrine of which is recognized as sound by SHEPLEY, J., in *Smith* v. *Readfield*, 27 Maine, 145.

Nor does it appear that the tax of 1866 can be defended as legally assessed under c. 193 of the laws of 1863, which authorizes the assessment, in the place where the bank is located or transacts its business, of stock "held by persons out of the State or unknown, and that has not been certified according to the provisions of c. 46, § 21, of the R. S., in any city or town in this State, and is not there assessed," or stock "appearing by the books of such bank to be held by persons residing beyond the limits of this State or unknown."

It is a sufficient reply to this defence that there is nothing in the agreed statement, from which it can be inferred that the plaintiff's stock came within the provisions of this Act. On the contrary, it does appear that the plaintiff had for many years resided in Castine, in the vicinity of Bangor, and was the owner of a considerable number of shares in the bank. The presumptions hence arising tend to show that the stock could not have been rightfully taxed under the Act of 1863. If the defendants designed to raise that question, it was incumbent on them to rebut these presumptions and make it appear that the plaintiff was out of the State or unknown, and that the stock had not been certified to or assessed in some place in this State, or that the stock appeared by the books of the bank to be held by some one residing beyond the limits of this State or unknown. The plaintiff is manifestly entitled to recover the amount paid to prevent the seizure of his stock for the tax of 1866, with interest from the time of the payment. *Abbott* v. *Bangor*, 54 Maine, 540.

With regard to the tax of 1867, it is not perceived that the plaintiff's claim stands on any materially different footing from that which was attempted to be maintained in *Packard* v. *Lewiston*, 55 Maine, 456, in which the Court rendered judgment for the defendants.

We see no occasion to change any of the views expressed in the opinion delivered in that case. There is no necessity for reiterating them. We simply refer to, adopt, and confirm them.

The plaintiff seeks to distinguish this case from *Packard* v. *Lewiston* on two grounds:—1. Because the Congress of the United States, since that decision was made, and subsequently to all the transactions involved in the present suit, on the 10th of February, 1868, legislated as follows:—"that the words 'place where the bank is located and not elsewhere,' in section 41 of the Act to provide a national currency, approved June 3, 1864, shall be construed and held to mean the State within which the bank is located, and the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of said State; and, provided always, that the shares of any national bank, owned by non-residents of any State, shall be taxed at the city or town where said bank is located and not elsewhere."

This Act of Congress can have no effect upon the result in this case. It was not necessary in order to enable the assessors of Bangor to lay the tax in 1867. That was authorized by previous legislation, both of Congress and the State Legislature. It is the office of the legislative department to enact laws, not to interpret them. It belongs to the judiciary to construe the laws which are enacted.

The Act of Congress of Feb. 10, 1868, operated a change in § 41 of the "Act to provide a national currency," as previously construed by this Court, and thenceforward authorized a mode of taxation more in consonance with our custom; but it had no retroactive effect upon any proceedings previously had under our statute of 1867, nor does it affect, in any manner, the conclusion we reached in the case of *Packard* v. *Lewiston*, as to the validity or invalidity of the sev-

eral sections of c. 126 of the laws of 1867. We recognize and gladly conform to the change made by the Act of Feb. 10, 1868, in § 41 of the Act of June 3, 1864, but it cannot change our view of the true construction of § 41 as it originally stood, — a law for all cases arising under it prior to the Act of Feb. 10, 1868.

2. The second ground upon which the plaintiff claims that this case is distinguishable from *Packard* v. *Lewiston* is, that c. 126 of the laws of 1867, under which the tax in this, as well as in the Lewiston case, was assessed and collected, has now been repealed. He insists that his case is to be considered as so far a case pending that the repeal will enable him to maintain his whole claim in this suit.

We cannot adopt this view. The case finds a tax for the year 1867 legally assessed and rightfully collected, under the existing laws, paid under protest it is true, but *paid*. The right of the party making the payment to recover it back, must be tested by an examination of the laws then in force. The repeal of the statute which authorized the tax cannot confer upon him a right to recover that which he could not have recovered the day after he made his payment. *Judgment for plaintiff for amount of tax of 1866, with interest from date of payment.*

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

LUCILLIUS A. EMERY *& al. versus* INHABITANTS OF MARIAVILLE.

Town orders, made payable to the order of the payee, and accepted by the treasurer and indorsed by the payee, may be sued in the name of the indorsee.

Such orders are not regarded as commercial paper in the hands of *bona fide* holders for value; but they are subject to the same defence against an indorsee as against the payee.

On Report.

Assumpsit on a town order of the following tenor: —

"$300. Mariaville, April 19, 1867.

"To Reuben Jellison, Treasurer of the town of Mariaville. Pay Lemuel M. Jordan or order, the sum of three hundred dollars, one year from date, it being town bounty raised for drafted men." The order was signed by three persons, as "selectmen of Mariaville," accepted by Reuben Jellison, and indorsed by L. M. Jordan.

It was proved that the plaintiffs owned the order. The case was reported to the full Court. If the action was maintainable in the names of the plaintiffs, it was to stand for trial.

L. A. Emery, for the plaintiffs.

E. & F. Hale, for the defendants, cited *Smith* v. *Cheshire*, 13 Gray, 318.

Dickerson, J. — Assumpsit on an indorsed town order, payable to order, and given for soldiers' bounty.

No question is raised with regard to the legality of the doings of the town in raising the money to pay the bounty, or of the authority of the selectmen to issue any other than a negotiable order; but it is objected that the selectmen had no authority to issue a negotiable order, capable of being sued in the name of the indorsee.

In support of this objection, it is urged that no such power is expressly given by statute, and that it would be dangerous to sanction such a practice, and would enable the selectmen to pay creditors of the town by notes exceeding the amount raised for municipal purposes; and that the town would be liable to *bona fide* indorsees without notice on such orders, without any power to inquire into the consideration, or to avail themselves of any payment, set-off, or other equity, it might have against the payee.

The answer to this objection is,

1. That the order in suit, upon its face advises the holder

of the nature of the consideration, and thereby makes him liable to the same defence as the payee, and

2. That town orders, when payable to order and indorsed, are not, in the purview of the law, regarded as commercial paper in the hands of *bona fide* indorsees for value, so as to exclude evidence touching the legality of their inception; and whoever receives them is subject to the same defence that would be good against the payee. *Willey* v. *Greenbush*, 30 Maine, 452; *Sturtevant* v. *Liberty*, 46 Maine, 459.

Action to stand for trial.

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

EMMA F. PAYNE *versus* TIMOTHY B. GRAY.

Since the time when c. 272 of the Public Laws of 1864 went into effect, a complainant in a bastardy suit has been a competent witness to testify to any fact within her knowledge, essential to her case, without first having shown that, being "put on the discovery of the truth during the time of her travail, she accused the respondent of being the father of the child."

But such an accusation is a condition precedent to her right to prosecute the respondent.

ON REPORT.

WALTON, J. — The defendant in a bastardy suit cannot be held to answer, unless the complainant accused him with being the father of her child at the time of her travail. Such an accusation is a condition precedent to her right to prosecute him. (R. S., c. 97, § 6.) And it was formerly a condition precedent to her right to be a witness in the case. And, as late as 1864, she could not testify except by showing a performance of such condition, (because her accusation necessarily charged the defendant with an offence against the criminal law,) unless the defendant first offered himself as a witness. But, by the Act of March 25, 1864,

(c. 272,) this restriction is removed, and plaintiffs may now testify, notwithstanding the cause of action implies an offence against the criminal law on the part of the defendant.

Such now being the law, why is not a plaintiff in a bastardy suit a competent witness? The recent legislation, allowing parties to be witnesses, does not exclude her in terms. Why does it not remove all her disabilities the same as those of all other parties? It has removed all the disabilities resting upon the defendant in a bastardy suit. He can now be a witness in all such cases if he chooses to be. Why does it not have the same effect on the plaintiff? Why should it remove the defendant's disabilities and not hers?

The only answer we can conceive of against her right to testify, is the fact that she had less disabilities to be removed than the defendant; that the previous statutes gave her a right to testify in some cases, while the defendant had no such right in any case. But we think this is not a satisfactory answer. If the statute was broad enough to remove an entire disability,—an absolute exclusion in all cases,—we do not see why it was not sufficient to remove a partial disability.

Our conclusion is that a plaintiff in a bastardy suit is a competent witness,—that she has a right to testify to any fact within her knowledge essential to her case.

We do not decide that it is now unnecessary for a plaintiff in a bastardy suit to accuse the defendant with being the father of her child, at the time of her travail. By the very terms of the statute, such an accusation is necessary. It is one of the averments in her declaration; and, like every other material averment, it must be proved; but we hold that she is a competent witness to prove it by.

In this case, the report states that the complainant offered herself as a witness, without first showing that she had been put upon the discovery of the truth of her accusation, at the time of her travail. The defendant objected to her competency. The presiding Judge, *pro forma*, sustained the objection. Thereupon it was agreed to submit the question

to the law court; and, if the court should be of opinion that she was properly excluded, a nonsuit should be entered; otherwise the action stand for trial. We think she was not properly excluded; although, if it turns out as matter of fact, that she did not make the accusation, she must fail in her suit. *Action to stand for trial.*

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

B. W. Hinckley, for the complainant.

C. J. Abbott, for the respondent.

INHABITANTS OF CASTINE *versus* INHABITANTS OF WINTERPORT.

By R. S., c. 24, § 1, clause 4, "when part of a town is set off from it and annexed to another, the settlement of a person absent at the time of such annexation is not affected thereby."

The clause, — "all paupers whose legal settlement is upon said territory," in § 6, c. 291 of the Private Laws of 1867, means such persons only as were then actually chargeable as paupers.

ON REPORT.

ASSUMPSIT to recover the value of certain supplies furnished by the plaintiffs to a certain pauper whose settlement they alleged to be in the defendant town. The defendants contended that the pauper's settlement was in the town of Frankfort.

It appeared that, by Private Laws of 1860, c. 422, certain territory therein described was thereby "set off from the town of Frankfort and incorporated into a town by the name of Winterport." By § 3, the town of Winterport was to "support all persons now chargeable as paupers in Frankfort, whose legal settlement is within the limits of Winterport; and all persons hereafter becoming chargeable shall

belong to that town on the territory of which they shall then have their legal settlement, whether direct or derivative."

It also appeared that the pauper had never gained a settlement in his own right in this State, but had a derivative settlement from his father which was in that part of Frankfort not set off by the Act of 1860, and incorporated into Winterport.

By Private Laws of 1867, c. 291, another part of the territory of Frankfort, (including that on which the pauper last resided in either town,) was set off from Frankfort, and annexed to Winterport. By § 6, of the latter chapter, it was provided that, — "the town of Winterport shall support all paupers whose legal settlement is upon said territory." The pauper became of age prior to 1858, since which time he has not resided in Frankfort or Winterport; but his last dwelling place was Frankfort, and was in that part of it set off to Winterport by the Act of 1867.

If the settlement of the pauper was not in Winterport, the plaintiffs were to become nonsuit.

C. J. Abbott. for the plaintiffs, contended, —

That the Act of 1860, § 3, provided a rule by which the respective liabilities of the towns in regard to paupers, both present and future, where settlement was gained by residence on the former territory of Frankfort, and continued, should be regulated. Similar provision in § 6, c. 291, of 1867. Pauper's father's settlement was upon the territory set off to Winterport, it was by residence on that territory, and upon this territory, in legislative language, the pauper has his legal settlement. The fact that he was not a pauper when the Act took effect is immaterial. *Belgrade* v. *Dearborn*, 21 Maine, 334. The "legal settlement" clause has reference to pauper liabilities, and not to citizenship. *Winthrop* v. *Auburn*, 31 Maine, 465; *Wilton* v. *New Vineyard*, 43 Maine, 315; *Bloomfield* v. *Skowhegan*, 16 Maine, 58; *Calais* v. *Marshfield*, 30 Maine, 511; *Rip-*

ley v. *Levant*, 42 Maine, 308; *Yarmouth* v. *North Yarmouth*, 44 Maine, 352.

N. H. Hubbard, for the defendants.

WALTON, J. — In 1867, part of the territory of the town of Frankfort was annexed to the town of Winterport; and the sixth section of the Act of annexation provides that the town of Winterport shall support "all paupers whose legal settlement is upon said territory." What is the meaning of this language? Do the words "all paupers" mean such only as were then actually chargeable, or do they include persons who might afterwards become chargeable? In *Manchester* v. *West Gardiner*, 53 Maine, 523, similar language was held to include such only as were then actually chargeable. In that case, the words used were "all persons chargeable as paupers;" in this, "all paupers." We think the two phrases have precisely the same signification. And, in other respects, the two cases are essentially alike. In that case, the pauper was absent from the territory at the time it was annexed to the defendant town, and was not then chargeable. The same is true in this case. The Court there held that the pauper's settlement was not transferred to the defendant town, and nonsuited the plaintiffs. The result must be the same in this case. *Plaintiffs nonsuit.*

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

MACHIAS HOTEL COMPANY *versus* JOHN H. FISHER.

Proof that the tenant has been duly convicted of being a common seller of intoxicating liquor within the time covered by his lease, and has paid the fine and costs of the prosecution, is not enough to bring the case within § 3, c. 54, of the Public Laws of 1858; but to avoid the lease it must also appear that the offence was committed on the premises.

Machias Hotel Co. *v.* Fisher.

In a case presented upon a statement of facts, without any stipulation that the decision should be influenced by the pleadings, the defendant is entitled to judgment when the facts will verify any plea which is a bar to the action.

By R. S., c. 46, § 7, "when a corporation fails to hold its annual meeting on the day appointed, the officers of the preceding year continue in the exercise of their duties, and their acts are legal until other officers are duly chosen and qualified in their stead."

On Facts agreed.

Writ of Entry to recover possession of land owned by the plaintiffs. In Nov., 1860, the plaintiffs permitted the defendant and one Longfellow to place a store or shop upon the demanded premises, at a yearly ground rent of twenty dollars, which rent was paid. On Dec. 30, 1865, the defendant took a lease of the land from the president and treasurer of the company, approved by one of the directors, for five years ending Dec. 31, 1870. The officers thus executing the lease, were elected in 1859. And the lease was in accordance with the by-laws of the company.

The Court were to enter judgment by nonsuit or default, as the rights of the parties require.

The remaining facts appear in the opinion.

J. Granger & Smith, for the plaintiffs.

George Walker, for the defendant.

Appleton, C. J. — The demandants, owners of the premises demanded, on Dec. 30, 1865, leased the same to the tenant, — the lease to "expire on 31st day of Dec., 1870." The tenant has always remained in the occupation of the premises leased, and been ready to pay the ground rent agreed upon.

It is agreed that the tenant, at the October term, 1866, of this Court, was indicted as a common seller of intoxicating liquors, to which he pleaded *nolo contendere*, and was sentenced to pay the fine prescribed by the statute, and costs, which he paid.

It does not appear that the offence was committed upon

the premises leased. The case is not therefore within the statute of 1858, c. 54, § 3, by which a lease is made void, when the lessee uses the premises leased "for the illegal sale or keeping of intoxicating liquors."

The tenant seasonably filed, among other specifications, "that he holds a lease of the demanded premises from the plaintiffs, and did at the date of the plaintiffs' writ, and said lease is still valid, in force and unexpired."

The tenant likewise pleaded the general issue. By the common law, the tenant by the plea of *nul disseizin* admits that he is in possession, claiming a freehold. The plaintiffs insist that, inasmuch as the tenant has not filed a brief statement setting forth his lease, that he cannot introduce evidence of that fact under the general issue. *Williams* v. *Noiseux*, 43 N. H., 388.

But this case comes before us upon an agreed statement of facts, signed by counsel, and without any stipulation that the decision shall be influenced by the pleadings. In such case, the defendant is to have judgment if the facts would verify any plea which would be a bar to the action. *Gardiner* v. *Nutting*, 5 Greenl., 140; *Moore* v. *Philbrick*, 32 Maine, 102.

The lease to the tenant was offered in evidence without objection. It is signed by officers duly elected, who hold over, "until other officers are duly chosen and qualified in their stead." R. S., 1857, c. 46, § 7. The demandants having leased the premises for years, and the lease being in full force, this action cannot be maintained.

Plaintiff nonsuit.

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

MARY ANN HATCH *versus* THOMAS ATKINSON *& Trustees.*

To establish a gift *causa mortis*, the common law requires clear and unmistakable proof, not only of an intention to give, but of an actual gift perfected by as complete a delivery as the nature of the property will admit of.

The delivery of the key of a trunk containing money and government bonds, is not a valid delivery of the money and bonds.

The donee must take and retain possession till the donor's death.

ON MOTION to set aside the verdict as being against law and the weight of evidence.

ASSUMPSIT to recover the value of certain money and government bonds, alleged to have been given to the plaintiff by Dr. Bayles Atkinson, in apprehension of death.

The plaintiff testified, *inter alia*, that Dr. Atkinson was confined to his house about three weeks, and died Tuesday, January 16, 1866; that she came to his house a year previously; that she was with him as nurse until he died; that the first week he was confined to the house, he told the plaintiff to take his trunk and money, put it into her room and keep it; that he said that, in all probability, he never should be any better; that he said no more at that time and that nobody but the Doctor and herself were present.

That, about six o'clock, on the evening before he died, they had another conversation, when her brother William was present; that the Doctor was sitting up and he then requested her to bring his trunk with his money; that she did so and put it on the table beside him, where he was sitting; that he and her brother looked it over together; that he then told my brother to take care of it for her; that "this is for Mary Ann," and he wanted him to take care of it for her; that he said to her brother,—"as you hope for prosperity in this world and peace in heaven, do right by Mary;" that she had done more for him than any of his folks had done; that he said to plaintiff,—"I have done better by you than you have any idea of;" that she looked

40 Ann. 154
41 " 243

on and saw the Doctor and her brother count the gold, greenbacks and bonds; that she did not know that the Doctor made any memorandum of the amount at the time; had no other conversation with the Doctor during his sickness about his money and trunk; that the Doctor put the money and bonds back into the trunk; that her brother William took the trunk, put it into a clothes closet in the Doctor's room, occupied exclusively by him; that she saw the trunk in the closet repeatedly afterwards until January 24, when it was taken away by the defendant; that the contents of the trunk were not disturbed between 16th and 24th of January; that her brother and his wife stopped at the house three or four days after the Doctor died, when they went home; that one Wilder and his wife and child, and the Doctor and plaintiff composed the family prior to Doctor's death; that the Doctor gave her the furniture in his room, including secretary and map, just before he gave her the money; that the defendant was stopping at the house when the money was given to him; that he stopped there a fortnight; that she mentioned to defendant some of the things in the room given her by the Doctor, but never said anything to him about the money, bonds or trunk; told him the Doctor gave her the secretary and map; and that the defendant gave her no chance to converse with him; that she wrote the letter of Feb. 8, 1866, to John Atkinson; and that the Doctor gave to her brother William a bunch of keys, — keys of his room, secretary and trunk.

William B. Hatch, testified, among other things, that he was at Doctor Atkinson's, Sunday, January 14, 1866, when the Doctor had an ill-turn; that when he revived witness asked the Doctor if he had anything to say to him; that the Doctor replied, — he had a great deal; that the Doctor then said to the plaintiff — "I want Will, (calling witness Will,) to have my keys and money;" that the plaintiff left the room and soon returned with a trunk and keys, and put them on the table near where the doctor was sitting; that the doctor and witness then looked over the

money; that the Doctor locked the trunk and gave witness the key and said, — "I want you to keep it for Mary, — as you hope for prosperity here and peace hereafter, do right by your sister Mary;" that witness took charge of the money and keys; that the funds consisted of government bonds, greenbacks and gold, amounting to $6,390; that he kept possession until Jan. 24, 1866, when he delivered trunk, money and keys to the defendant, telling him at the same time, that the Doctor had disposed of part of his property.

The defendant put in certain letters, the material parts of which will be found in the opinion.

The defendant testified, among other things, that W. B. Hatch told him that the Doctor had disposed of a part of his property; that he had given a house to John Wilder and a part of the things, naming them, in the Doctor's room to the plaintiff; that no allusion was made to the gift of the bonds, or money; that the plaintiff claimed the things in the Doctor's room and took them, but never claimed the bonds or money of the defendant; that he was appointed administrator of the Doctor's estate in March, 1866.

Granger & Walker, for the plaintiff.

Bradbury & Bradbury, for the defendant.

WALTON, J. — Gifts *causa mortis* are not favored in law. They are a fruitful source of litigation, often bitter, protracted and expensive. They lack all those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury. Lord HARDWICK declared, more than a hundred years ago, that it was a pity the statute for the prevention of frauds and perjuries did not set aside all such gifts. Justinian was so justly apprehensive of fraud with respect to them, that he required them to be made in the presence of five witnesses. If the law limited such gifts to articles of small value, and required the gift to be executed in the presence of disinterested witnesses, they would be less objectionable.

But if large estates, amounting to thousands of dollars, may be thus disposed of, and the title of the donee supported mainly by his own testimony, and that of near relatives, the public feeling of security may well be startled.

Unfortunately the common law has not adopted any of these precautions. It does not require the gift to be executed in the presence of any stated number of witnesses; nor does it limit the amount of property that may be thus disposed of. But it does require clear and unmistakable proof, not only of an intention to give, but of an actual gift, perfected by as complete a delivery as the nature of the property will admit of. It not only requires the delivery to be actual and complete, such as deprives the donor of all further control and dominion, but it requires the donee to take and retain possession till the donor's death. Although the delivery may have been at one time complete, yet this will not be sufficient, unless the possession be constantly maintained by the donee. If the donor again has possession, the gift becomes nugatory. And public policy requires these rules to be enforced with great stringency, otherwise the wholesome safeguards of our testamentary laws become useless. It is far better that occasionally a gift of this kind fail, than that the rules of law be so relaxed as to encourage fraud and perjury.

The plaintiff claims title to the property sued for by gift. In support of her claim, she testifies that, some two or three weeks before the Doctor died, he told her to take his trunk and money and put it in her room and keep it; that he did not think he should ever be any better. But there is no evidence that either the trunk or the money was then present, or that she then, or at any subsequent time, actually took them into her custody or keeping. Here, then, is no evidence of delivery. Nor does the language used, if accurately reported, necessarily import even an intention to give. The witness swears that he said nothing more. It seems to us quite as probable that nothing more was meant by this simple request than that his trunk, containing not only his

money but other valuable papers, should be taken care of for him, as that he intended to make a final disposition of more than half the earnings of his entire professional life. This evidence, therefore, assuming it to be true, not only fails to establish a delivery, but it is not satisfactory even of an intention to give.

But it is said that, if what took place at the time above referred to, was not sufficient to establish the alleged gift, what was said and done the night before the Doctor died was sufficient. To this transaction the plaintiff and her brother are the only witnesses. The plaintiff testifies that the Doctor told her to bring his trunk; that she did so, and placed it on the table beside him; that he and her brother then looked it over together; that he then told her brother to take care of it for her; that it was for her; that he wanted him to take care of it for her; that he charged him, as he hoped for prosperity in this world and peace in heaven, to do right by her; that her brother took the trunk and put it into a closet in the Doctor's room; that this closet was used by the Doctor as a clothes press; that the trunk remained there till after the Doctor's death. The plaintiff admits, on cross-examination, that "the Doctor had other papers in the trunk."

Giving full credit to this statement, does it show such a delivery, such a continued possession in the donee, as the law requires to sustain a gift *causa mortis?* Clearly not. The trunk, with all its contents, was left in the Doctor's possession. Its place of deposit was the Doctor's own clothes press, in his own room, and under his own eye; and there it remained till after his death, when it was taken by the defendant, (afterwards appointed administrator,) without objection from any one. While the Doctor lived, the trunk and its contents were legally and actually in his possession; as much so as they could be, unless he actually held them in his hands.

Bunn v. *Markham*, 7 Taunt., 224, (2 E. C. L., 81,) was much stronger for the donee than this, and yet the Court

held the delivery insufficient. In that case, Mr. Bunn, supposing he was *in extremis*, caused India bonds, bank notes, and guineas to be brought out of his iron chest and laid on his bed; he then caused them to be sealed up in three parcels, and the amount and names of the donees written on them; he then delivered them into the hands of his son, and charged him to deliver them to the donees after his decease; he then directed the son to replace them in the iron chest, and the donor afterwards delivered the key of the chest to one of the donees, and charged her to keep it, telling her that the contents of the chest were to be hers and her daughter's; and many times afterwards declared that the money in the chest was theirs; but, on learning that the key had been obtained by his eldest son, expressed great displeasure, and caused it to be placed in a basket, with other keys, which was always kept in his bedroom; the parcels and the property therein continued in the same state, until after the donor's death; and the Court held that this was not a good *donatio causa mortis*, for want of a sufficient delivery and continuing possession. It was argued that, if the delivery was complete, a continuing possession in the donee was unnecessary; but Chief Justice GIBBS replied that all the cases agreed that, if the donor resumed the possession, it ended the gift.

In *Powell* v. *Hellicar*, 26 Beavan, 261, the deceased, immediately before her death, told one to take the key of a dressing case and box, containing a watch and trinkets, and immediately upon her death to deliver them to the plaintiff, but it was held that this did not constitute a valid gift, *causa mortis*, there being, during the life of the donor, no delivery to or for the donee. Delivery of the key was not sufficient.

Chancellor KENT says delivery is essential, whether it be a gift *inter vivos* or *causa mortis;* that the delivery must be actual; that the necessity of such a delivery has been maintained in every period of the English law; that *donatio perficitur possessione accipientis* was one of its ancient maxims;

and that the subject of the gift must be certain. (2 Kent's Com., 438, L. & B's ed., 589.) Delivery, in this, as in every case, must be such as the nature of the property will admit of. It must be an actual delivery so far as the property is capable of an actual delivery. If the property be not capable of an actual delivery, there must be some act equivalent to it; and the donor must not only part with the possession, but with the dominion of the property. (Ib., 590.)

The property claimed to have been given, in this case, was gold coin, greenbacks, and government bonds, articles capable of a perfect and complete delivery. The Doctor took the gold, and the greenbacks, and the bonds, into his own hands, and looked them over, and could have delivered them into the hands of the donee if he had chosen so to do; but he did not. So far as appears, not one of the bonds, or one of the greenbacks, or a piece of the coin, was ever in her hands, or the hands of her brother. The Doctor replaced the whole in his trunk, locked it, and the trunk was then placed in his own clothes press in his own room, where it remained till after his death.

True, the plaintiff swears, that the Doctor passed the trunk into her brother's hands when he said "this is for Mary Ann, take care of it for her;" but the brother swears that the Doctor "locked the trunk and gave him the key," and said "I want you to keep it for Mary." Which is right, the plaintiff or her brother? It is not material. If it was the trunk, as the plaintiff swears, the possession was not retained by the brother; it was but momentary; for it was immediately placed in the Doctor's own closet, where it remained under his own eye, and under his dominion and control, till his death. If it was the key only, as the brother swears, then very clearly there was no delivery or possession given, even for a moment. For, although delivery of the key of a warehouse, or other place of deposit, where cumbrous articles are kept, may constitute a sufficient con-

structive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk, chest, or box, in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is that the delivery must be as perfect and complete as the nature of the articles will admit of. While a constructive delivery may be sufficient for large or cumbrous articles, it will not be sufficient for small articles, capable of a more perfect and complete delivery. Assuming, therefore, that the testimony of the plaintiff and her brother is perfectly reliable, it fails to prove her case, and the presiding Judge would have been justified in ordering a nonsuit.

But we think the testimony of the plaintiff and her brother is not reliable. It is so at variance with their conduct and declarations, that it is impossible to credit it. If the plaintiff understood this property had been given to her, how was it possible for her to write such a letter as she did to John Atkinson?

"The Doctor was never afraid to trust us with any of his property. He gave brother the keys to take care of until some one had a right to search his things."

Is not this language utterly inconsistent with the idea that the Doctor gave William the key and told him to take care of it for the plaintiff? Again:

"He [the Doctor] always told me I should be provided for when he was taken away; and the night before he died he looked up to me and said, 'Mae,' (that is what he called me,) 'I have done better by you than you have any idea of,' and several other things, that I knew he left something for me; but nothing has come to light yet, and, if Thomas has got it, I dont think it ever will; but I shall always think there is something for me."

Always *think* there was something for her! Why, if she and her brother were eye and ear witnesses to the gift now set up, a gift consisting of gold coin, greenbacks, and gov-

ernment bonds, amounting to over five thousand dollars, did she not *know* it? Why then did she say nothing had come to light, and express fears that nothing ever would come to light? While rehearsing the utterances of the Doctor the night before he died, why did she omit all that was most material (if what she now swears to is true,) and rehearse only that which was comparatively immaterial?

The defendant came to the house a week after the Doctor died and remained there a fortnight. He came for the avowed purpose of looking after the Doctor's property and settling the estate. If it was true that this property had been given to the plaintiff, why did she not notify the defendant of the fact? Why did she remain silent when it was so important to herself, as well as others, for her to speak?

Feeling the force of these inquiries, she undertakes to excuse herself by saying that the defendant did not give her a chance to converse with him. But this seems to us a very flimsy excuse. They were in the house a fortnight together, and she admits she mentioned to him some things in the room that the Doctor gave her; that she told him the Doctor gave her the secretary and a map. It is not true, therefore, that she did not have an opportunity to converse with him. She not only had such an opportunity, but did in fact converse with him. Was it any more difficult to inform him of the money and bonds than it was of the map and the secretary?

If it be true that her brother was a witness to this gift, and had been made the depositary of it, under a solemn charge to keep it for the plaintiff, "as he hoped for prosperity in this world and peace in heaven," why did he surrender the property to the defendant without a single word of protest, and without even informing him of the fact that it had been given to Mary, and entrusted to his care for her?

There is but one rational answer to these inquiries; the pretended gift was an afterthought. The testimony in relation to it is so improbable in itself, so hopelessly irrecon-

cilable with the acts and declarations of the witnesses, that a verdict predicated upon it ought not to stand.

Motion sustained.
Verdict set aside.
New trial granted.

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

JOHN L. EMMONS *& als., in sci. fa., versus* ROBERT BRADLEY *& als.*

In *scire facias* against alleged trustees, claiming to charge them upon the ground of their being mortgagees in possession of mortgaged goods, the declarations of the principal defendant's clerk, importing that he claimed to be in possession of the goods for the mortgagees, are not admissible as evidence of his agency.

Neither, in such case, is the extra-official statement in the return of an officer attaching the mortgaged goods, that, "in consequence of and compliance with" the mortgagees' notice to him of their claim under their mortgage, he "restored" the goods to the mortgagees, evidence against them.

In such case, an overstatement of their claim, by a comparatively small amount, made by the mortgagees in their notice to an attaching officer, is not conclusive evidence of an intent to delay other creditors of the mortgager.

A mortgagee of the goods and accounts of his debtor, is not obliged to collect the accounts and apply their proceeds *pro tanto* to the discharge of his claim upon the goods, to aid other creditors, not secured.

A bill of sale of chattels, absolute in its terms, but intended as security only, is not conclusive evidence of a fraudulent intent of delaying creditors.

The presentment of their claim under a mortgage of goods, by the mortgagees to an attaching officer, cannot be considered as equivalent to the actual taking of possession, so as to render the mortgagees chargeable as trustees.

BARROWS, J.—The defendants, being residents of the county, and having heedlessly suffered a default to be recorded against them in the original suit, are liable to pay the costs of this proceeding, at all events; and, as that is a

claim accruing subsequent to the filing of the petition of Bradley, Coolidge & Rogers in bankruptcy, their liability to such judgment would not be affected thereby, and the plaintiffs are entitled to this judgment against all the defendants.

A careful examination of the disclosures and evidence satisfies us that this is all they can justly claim against either.

The attempt on the part of the plaintiffs, as creditors of Isaac B. Bean, is to hold the defendants as his trustees, either as having taken a mortgage of personal property from him with a design to defraud his creditors, or as being mortgagees in possession at the time of the service of the original writ upon them. If either position were established, the defendants could not be discharged.

It seems that, on the 4th of December, 1865, Bean was owing Bradley, Coolidge & Rogers something over $4000, and Jefferson Coolidge & Co. about $500, and, on that day, Mr. Bradley went, with the demands of his own firm, and also that of J. Coolidge & Co., which he was authorized by them to collect, to Saco to obtain payment or security. He found Bean's goods under attachment at the instance of three different creditors, and took from Bean a mortgage of the stock in the store occupied by them, appraised by the attaching officer at $2607,18, and, by Bean, at $3519,65, and of corn, flour and grain, in another store, to the amount of $1285, and of his book accounts, nominally amounting to about $8000, running to his own firm and to Jefferson Coolidge & Co., as mortgagees, to secure the amounts then due from Bean and subsequent advances, with provision that Bean should remain in possession until the mortgagees should deem it necessary to take possession for their better security; and, at the request of Bean, he paid to the three creditors who had attached, apparently from his own funds or by his own individual credit, sums amounting to about $1375, to relieve the goods from attachment.

He also received from Bean, the next day, as further se-

curity, an absolute bill of sale of a mare, top buggy, sleigh, harness and grocery wagon, valued at $475, running to Bradley, Coolidge & Rogers, and duly recorded upon the town books of Saco. It is not pretended that any of this property went into the actual possession of any of the mortgagees, except the stock in the store occupied by Bean. As to that portion of the mortgaged property, it appears that, on the 5th of December, these plaintiffs attached this stock and also the flour, corn and grain, upon a writ against Bean; that, on the 8th, Bradley, Coolidge & Rogers formally, in writing, notified the officer making the attachment of their claim under the mortgage, asserting that there was due them on the mortgage $4584,06; and Jefferson Coolidge & Co. gave a like notice, stating the amount of their claim; whereupon, on the 11th, the plaintiffs abandoned the attachment, and, on the 12th, caused both firms to be summoned as trustees.

To charge the defendants as mortgagees in possession, the plaintiffs rely upon the testimony of Emmons, the deputy sheriff, that, when he went in to attach the stock, Bean's clerk claimed to be in possession for Mr. Bradley. But the statement of Bean's clerk was not evidence of his agency for Bradley, and was properly objected to by the defendants, and must be rejected. They rely, further, upon the return made by the officer upon their writ against Bean, setting forth the attachment, and making a statement of the notices given him by the mortgagees, and adding that, "in consequence of and compliance with said claims, I restored said goods and chattels and stock to the said Bradley, Coolidge & Rogers and Jefferson Coolidge & Co., the claimants and mortgagees thereof." It is plain that this extra-official statement about a restoration in the officer's return, (which was apparently a preliminary to the commencement of the trustee process on the next day,) is not evidence against the defendants; and it is inconsistent with the officer's deposition, by which it appears that he kept possession of the stock himself, having one Getchell there as a keeper for

some days afterwards, upon a writ in favor of another party, placed in his hands by Mr. Eastman. The attaching officer and the mortgagees could not both have been in possession at the same time, and the officer's deposition taken by the plaintiffs, upon the whole, goes very clearly to negative the possibility of the mortgagees or any of them having a possession, actual or constructive, at the time of the service of the trustee writ.

But the plaintiffs rely, further, upon an answer of Mr. Bradley in his disclosure, to the effect that, after hearing of the attachment made by the plaintiffs, "I requested a clerk of said Bean to notify him of the mortgage and to keep possession of the goods for Bradley, Coolidge & Rogers, and they remained in possession of the officer, the clerk of Bean remaining in the store until the trustee writ, in the original suit, was served on me." Here was manifestly an attempt on the part of Bradley, Coolidge & Rogers to take possession of this portion of the mortgaged property, and, in the absence of the officer's testimony, showing that he still had possession under Mr. Eastman's writ, we should have been at liberty to infer that that firm went into possession of the stock as mortgagees, upon the relinquishment of the plaintiffs' attachment. But the statement of Bradley is not, as the plaintiffs' counsel argues, that Edgecomb, the clerk, retained possession of the goods for him till the service of the trustee writ,—but that they remained in the possession of the officer, the clerk remaining in the store; and the officer's testimony is explicit on that point, as we have just seen.

The disclosure of Jefferson Coolidge & Co. is direct, that they never had any possession of any portion of the mortgaged property, and never authorized any one to take possession for them of any portion of it; and there is no legal evidence in the case tending to show that they ever had any possession or endeavored to obtain it, or that Mr. Bradley assumed to do it for them. Nor is there the remotest reason for suspicion that they acted in this matter with any

fraudulent design. On Bradley's promise to pay Bean's indebtedness to them, they joined in an assignment of the mortgage, made a few days after these transactions, to Cotton Bean, the father of the debtor, who came forward and gave his notes to Bradley, Coolidge & Rogers for $4000, for the mortgage, they being apparently willing to make a liberal discount for the sake of getting bankable paper in lieu of their overdue debt and mortgage security.

Notwithstanding the ingenious attempt of the plaintiffs' counsel to excite a suspicion that here was a deep laid design to defraud and delay Bean's creditors, we are not able to see anything more in the whole transaction, so far as any of the mortgagees were concerned, than an earnest effort to secure payment from a failing debtor. Much stress is laid by plaintiffs' counsel upon the fact that Bradley, Coolidge & Rogers overstated their demand by about $300, in their notice to the officer. If the plaintiffs had not abandoned their attachment, but defended a suit against the officer, this might have availed them, but an error of comparatively small amount in transactions so large, does not go far to show a fraudulent intent. When they gave their notice, they might have supposed that some of Bradley's advances to pay off the attaching creditors, which were subsequently otherwise provided for, might be protected by the mortgage; or the mistake might otherwise be readily accounted for without imputing fraud.

Plaintiffs' counsel dwells also upon the amount of property conveyed as security. But it is plain that the whole value of the tangible property could not have exceeded $1500, (at the officer's estimate it was some hundreds less,) and though the nominal amount of security is largely increased by the addition of the book accounts, the fact, which appears, that even in the hands of the debtor only 25 per cent. had been realized on them in two years, shows conclusively that a large part were worthless. It is insisted that the mortgagees should have collected the accounts, and

that all that has now been collected on them should be applied in reduction of their demands, leaving them chargeable for a surplus of the tangible property; and the case of *Webb* v. *Peele*, 7 Pick., 247, is relied on.

But there is no law by which a creditor, holding security upon different kinds of property, can be compelled to select that which is least convenient and available to himself, in order to aid other creditors, not secured, in the collection of their demands. Such a claim was urged and denied in *Lupton* v. *Cutter & Trs.*, 8 Pick., 298, and *Gore* v. *Clisby & Trs.*, 8 Pick., 555, and *Tucker* v. *Clisby & Trs.*, 12 Pick., 22.

In *Webb* v. *Peele*, 7 Pick., 247, the absolute conveyance of the real estate was held to be a payment *pro tanto*.

Again, it is claimed that there is proof of fraudulent connivance with Bean, because the conveyance of the horse and carriages was by bill of sale, in form absolute. As to this, it may be said, in the language of PARKER, C. J., in *New England Marine Ins. Co.* v. *Chandler & Tr.*, 16 Mass., 279,—"In the case of a bill of sale or other conveyance of property, apparently absolute, proof of any secret trust or agreement inconsistent with the tenor of the agreement, [conveyance?] is undoubtedly evidence of a fraudulent bargain, made for the purpose of defeating or delaying creditors. This is mentioned in *Twyne's case* as one of the badges of fraud. But it is not fraud in itself, or conclusive evidence of fraud." When the bill of sale was made, Bradley had just been making considerable advances in order to relieve the property to which his firm were to look for security, from attachment, and, though these advances were afterwards otherwise provided for, the taking of the bill of sale, under such circumstances, can hardly be considered as satisfactory proof of a design to defraud the other creditors of Bean.

Upon the whole case, we hold that the presentment of a claim under the mortgage, on the part of the mortgagees, to an attaching officer, cannot be considered as equivalent

to the actual taking of possession by the mortgagees, so as to make them chargeable as trustees, unless they thereupon go into actual uncontrolled possession. Such actual possession does not appear, and the mortgagees had a right to dispose of their mortgage in such manner as they deemed most for their own interest; and are entitled to their discharge here, while, as they did not appear in the original suit, there must be *Judgment for plaintiffs for their costs.*

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

DANFORTH, J., did not sit.

E. B. Smith, for the plaintiffs.

Davis & Drummond, for the defendants.

JOHN RAND *& al. versus* CHARLES C. NUTTER.

When, in *indebitatus assumpsit*, it appears that one of several joint defendants resides without the State, so that no service can be made upon him, the plaintiff may discontinue as to him and have judgment against such alone as are within the jurisdiction.

And such judgment, remaining in part unsatisfied, is no bar to a subsequent suit and judgment for a balance of the same cause of action against the remaining defendant, whenever he comes within the jurisdiction.

ON EXCEPTIONS.

INDEBITATUS ASSUMPSIT.

The writ was against "Charles C. Nutter of Boston, Commonwealth of Massachusetts, and George H. Chadwick and William F. Chadwick of Portland." Service was made upon Nutter alone, he having been found within the jurisdiction, and a discontinuance entered as to the other named defendants.

The action was entered in the Superior Court for this county, at the December term, 1868, and, at the February

term, it was tried, without the intervention of a jury, subject to exceptions in matters of law.

The defendant offered in evidence the record of the Superior Court, whereby it appeared that the plaintiffs, on June 29, 1868, commenced an action of *indebitatus assumpsit*, against George F. Chadwick, William F. Chadwick and Charles C. Nutter, returnable to the September term, 1868, of the Superior Court, and that, at the October term, 1868, plaintiffs discontinued as to the other defendants therein, no service having been made on them, and recovered judgment against George H. Chadwick alone. It also appeared that a part of that judgment had been collected.

This action was for the balance of the plaintiffs' account sued in the former action.

Upon the facts, GODDARD, J., of the Superior Court, ruled, as matter of law, that the plaintiffs were entitled to recover in this action the balance sued for, with interest from the date of the writ, and the defendant alleged exceptions.

W. L. Putnam, for the defendant.

J. & E. M. Rand, pro sese.

APPLETON, C. J.—It appears, from the exceptions, that the plaintiffs, in June, 1868, commenced a suit against Geo. H. Chadwick, Wm. F. Chadwick and Charles C. Nutter, and, at the October term of the Superior Court in this county, obtained judgment against George H. Chadwick, having discontinued as to all save the defendant against whom judgment was rendered.

This suit was commenced against the same defendants for the same cause of action, but the service was made upon Charles C. Nutter alone, a resident of Boston, Mass., he having been found within the jurisdiction of this State. A discontinuance having been entered as to the other defendants, judgment was rendered for the amount due against him, to which he has filed exceptions.

The rule of the common law is well settled that, in case of joint and several liability, the suit may be joint or several. But, when the claim is joint, the action must be against all, who are jointly liable. If a suit is brought against one, the non-joinder of the others may be pleaded in abatement, but, if not so pleaded, the judgment thus obtained may be pleaded in bar to a suit brought against the others. Thus, if two are jointly liable upon a note or other joint liability, a judgment against one is a bar to a suit against the other, the cause of action being merged in the judgment thus obtained. *Ward* v. *Johnson*, 13 Mass., 149; *King* v. *Hoare*, 3 Mees. & Wels., 494. To this rule there are exceptions.

In joint actions, there may be a severance by operation of law, as by bankruptcy, infancy, &c.; in such case, the plaintiff may proceed without joining those having such special discharge. So, where there are several defendants sued on a joint demand, and some are without the jurisdiction and having no property within the same, the plaintiff may cause his writ to be served on those within the State, and proceed against them for a breach of the contract. *Tappen* v. *Bruen*, 5 Mass., 193. If one of two joint promisors, have neither domicil nor property in this State, a separate action may be maintained against the other. *Dennett* v. *Chick*, 2 Greenl., 191. Neither is a judgment in another State against one of two joint promisors, without satisfaction, a bar to an action in this State against the other, upon the joint contract. *Ibid.* When one of two joint contractors is without the State, as appears by the officer's return, so that no service can be made upon him, judgment may be rendered against such of the joint contractors as are found within the jurisdiction, and such judgment, remaining unsatisfied, is no bar to a subsequent suit and judgment against the remaining signer or signers. *Olcott* v. *Little*, 9 N. H., 259; *Burt* v. *Stevens*, 22 N. H., 232.

By the express provisions of R. S., c. 81, § 114, "if any person is out of the State when a cause of action accrues

against him, the action may be commenced within the time limited therefor, after he comes into the State."

Exceptions overruled.

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

ALFRED MAYBERRY *& ux. versus* INHAB'TS OF STANDISH.

The existence of highways may be established by proof of location, prescription, or dedication and acceptance.

Long continued, uninterrupted public use of a way, is a proper element of proof to establish the existence of a highway in either of these modes.

The presumption arising from such evidence, that there has been a legal location at some forgotten period in the past, is one of fact and liable to be rebutted.

When such evidence is offered in proof of a highway by prescription, it must also appear that the user was adverse and not permissive; and that it continued twenty years at least.

That the use of a way was permissive and not adverse, may be presumed from the unenclosed and uncultivated condition, sandy nature and trifling value of the large extent of land over which it passes.

When long continued, uninterrupted public use of a way is offered in proof of a highway by dedication, there must also be evidence of an acceptance by the town in its corporate capacity, or of some recognition of it as a highway on the part of some lawfully authorized agents of the town.

The time during which a way has been publicly used is not necessarily an essential element in the proof of a highway by dedication and acceptance.

Twenty years' permissive public use of a way without interruption, either by the town or the owner of the land over which it passes, is not sufficient evidence of a legal highway, and to charge the town with its repair.

The public use of a way "as a highway" excludes the idea of permissive use.

ON EXCEPTIONS and MOTION to set aside the verdict as being against evidence.

CASE for injury occurring in consequence of a defect in an alleged highway in the defendant town.

The following instructions, (requested by the defendants'

counsel, so far as indicated by quotation marks) were given to the jury: —

"2. If, from the facts in the case, the jury shall find that the use of the road in question, as proved, has been permissive, and by the indulgence and license of the owner of the land over which it passes, then such use does not impose upon the defendants an obligation to keep it in repair." If the public have used this way by permission, indulgence and license from the owners, it does not constitute that adverse use which the law requires; because, if they are occupying by license, they are not occupying adversely to the owners of the land.

"If the plaintiffs claim the existence of the road in question, by dedication, then it is incumbent on them, not only to prove the act of dedication by the owners of the land over which it passes, but also to prove that the inhabitants of the town of Standish have adopted the road, by repairing it, assigning it to a surveyor of highways for his supervision, or by some other act, recognizing it as a highway, and their liability to repair it."

If a person dedicates a piece of land to the town as a highway, the dedication of it does not impose upon the town the liability of repairing it, or of using it. In order to make the town liable, they must accept the dedication, gift or grant. If they do, it becomes a highway, — and unless the town does accept, by some act or other recognizing it as a highway, then there is no liability to keep it in repair.

"That the evidence of a dedication may be rebutted in various ways, and if the jury find such facts as are stated in requested instruction, No. 3, then they may presume that the owners of the land over which the road passes only intended to give license to pass over their land, and not to dedicate it to the public, — but if the jury find a dedication, still that is not operative to subject the town of Standish to a liability to repair the road, unless the plaintiff shall also prove that the town has adopted the road."

If the owners intended to give license instead of dedicat-

ing it, then you may so find,—and, if the jury find a dedication and do not find an acceptance by the town, as before remarked, that does not make the town liable to keep the way in repair.

The verdict was for the defendants, and the plaintiffs alleged exceptions.

The remaining material facts and instructions are stated in the opinion.

S. C. Strout & Gage, for the plaintiffs.

There was no evidence upon which to base the second requested instruction, and thereby the jury were confused.

The fourth request, with the addition made by the presiding Judge, makes necessary the acceptance of the way by the town in its corporate capacity. If a way is dedicated to the public (as all highways by dedication are, and not to the town,) the use of it by the public indiscriminately, who have occasion therefor, is sufficient evidence of acceptance by the public to make it a highway, especially if the use have continued more than twenty years. It is not necessary that the town accept it; but the public by using it.

The same objection to the fifth request as given, in requiring the acceptance by the town, as a town, of a way dedicated to the public, as a condition precedent to the liability of the town to keep in repair. *Rex* v. *Leake*, 5 B. & Ad., 481, 488; *Commonwealth* v. *Low*, 3 Pick., 412.

The instruction which the Court finally gave, as containing the embodiment of the whole charge on the subject, required the plaintiffs to show an uninterrupted and adverse use of the way by the inhabitants of Standish and others of the public for sixty years, in order to constitute it a highway.

This required us to prove a strict prescriptive way, and excluded all ways by dedication or of location, the evidence of which was lost, or by user alone,—and so confined the plaintiffs within too narrow limits.

The true instruction which should have been given (free

from the technicalities of dedication and prescription,) is: that proof of the public use of the way, as a highway, for more than twenty years, without any interruption by the town or the owners of the land over which it passed, is sufficient evidence that it was a legal highway, and to charge the town with its repair.

This position is as favorable to the defendant as the law will allow, and is fully sustained by the authorities in this State and Massachusetts, and is based upon satisfactory reasoning. *Jennings* v. *Tisbury*, 5 Gray, 77; *Estes* v. *Troy*, 5 Maine, 368; *Abbott* v. *Mills*, 3 Vt., 521; *State* v. *Wilkinson*, 2 Vt., 480; *Valentine* v. *Boston*, 22 Pick., 80, 81.

It is not necessary that the user should be adverse to the owner of the land, nor that the user should be by the inhabitants of Standish. If the owner acquiesces in the public use of the way, as a highway, for more than twenty years, that is a dedication, and he is estopped to deny the existence of the way and cannot afterwards revoke the dedication. *City of Cincinnati* v. *White*, 6 Pet., 438; *Larned* v. *Larned*, 11 Met., 421; *Bangor House* v. *Brown*, 33 Maine, 315; *Cole* v. *Sprowl*, 35 Maine, 170.

The instructions of the Court, in these particulars, were erroneous, and confined the plaintiffs within narrower limits than the law required, and had a tendency to mislead the jury,—and, it is believed, did mislead them,—to the injury of the plaintiffs.

Swazey, for the defendants.

Barrows, J.—The report of the evidence shows that, over a somewhat extensive tract of pitchpine plains nowhere enclosed by fences, deemed of trifling value for agricultural purposes, called Chadbourne's Plains, in the town of Standish, there has been a road more or less travelled for the last sixty-five years during summer, and, in winter, when the depth of snow would permit, by those who had occasion to go from Standish Neck to Gorham Corner, or Moody's

mill, in Gorham. It was also a convenient route for those living in one neighborhood in the north-western part of the town of Gorham to go to Standish Corner, or the east side of Sebago lake, and for people in the vicinity, who visited these plains to pick blueberries in their season or to get hoop poles; and it was somewhat frequented for such purposes. It was the continuation of a town road in Gorham, and was wrought and repaired in that town up to the Standish line, and it even had served occasionally as a by-way for a stage to pass over, when one was running to Chadbourne's Landing, at the foot of the lake. But there were no houses on it in Standish, nor was it anywhere fenced out in that town. There was no record evidence that it had ever been located, nor any evidence whatever that, during all these years, the town of Standish, or any of its officers, had ever recognized its existence as a highway or town way, by expending anything upon it for repairs, for the removal of obstructions temporary or permanent, for the erection of guideboards, or for any other purpose in any manner connected with it. It was never broken out or travelled during the winter after the heavy snows came. In "blueberry time" it seems to have been a good deal frequented; carriages passed over it at all hours at that season. In short, it appears to be satisfactorily proved that, for a period of not less than sixty-five years, anybody who saw fit to go through there, whether on foot or with a team, or carriage, had done so. Bushes springing up in the path or interfering with the travel, were removed from time to time, by a man who lived near by and made frequent use of the road, and who testifies that he got permission of the owner of the land to do so. Up to the time of the accident, the proprietors of the land do not appear to have interfered to prevent anybody from going there. The road had never been fenced up or the travel intentionally obstructed by any one. After the accident, and some two years before the trial, the owner of the land fenced up a small piece of the end of the road, (from four to six rods,) whereupon the travellers, instead of

removing the obstruction, struck out a new path outside of his fence.

The plaintiffs' testimony tends to show that, on the day of the accident, they had visited these plains to pick blueberries, and were on their return when the accident happened, at a place where there were two travelled carriage paths about six feet apart. Mr. Mayberry took the older track, which was a little sideling, and, in the wheelrut on the lower side, the hard crust had been worn through to the loose sand, and there was a sudden falling off of some ten inches in depth or thereabouts, continuing for some rods, while the other wheel track ran on firm earth.

There were four grown persons in a common two-seated express wagon, and, when the wheels struck into this depression, the wagon tipped far enough to throw out the female plaintiff and the lady who was sitting behind her on the lower side, each with her pail of blueberries in her lap; and Mrs. Mayberry suffered serious injury. The wagon was not upset nor the fluid contents of a pail, which was in it, spilled.

The defendants introduced testimony tending to show that the condition of the road was not such as to constitute a defect, and that other people, exercising no more than ordinary care, drove over the same track on that day without inconvenience.

From this abstract of the voluminous testimony, it is apparent that there were at least three vital questions contested before the jury, — the existence of a way which the town of Standish was bound to keep in repair, — the existence of a defect, — and the exercise of ordinary care on the part of the plaintiffs. The jury viewed the premises, and returned a verdict for the defendants, which the plaintiffs move to set aside as against law and evidence.

It cannot be known upon which of the grounds above referred to, the verdict was based. The testimony, as to two of them is sufficiently conflicting to forbid our sustaining the motion.

Exceptions were filed to instructions given relating to the existence of a way, and these remain to be examined.

The jury was substantially instructed, among other things, as follows: — "that a way might be established by a location in the mode pointed out by the statutes; or that the public might acquire the right of way by prescription, that is, by the long continued, uninterrupted adverse use of it, continued for at least twenty years in succession," — or by dedication, which was thus explained; "if an individual owning a piece of land dedicates it to the public for a way, and the public accept it, they may thus acquire a right of way over that property, and the particular length of time of the user is not a very material circumstance in determining that question. If an individual had openly and publicly, or by a written instrument, given the land for a street or highway, and the city or town by corporate action accepted it, that would be a dedication and acceptance."

They were further instructed that when ways have become public highways in either of these modes, then towns were obliged to keep them in repair. But the instructions particularly complained of by the plaintiffs' counsel are the following: — "If, from the facts in the case, the jury shall find that the use of the road in question, as proved, has been permissive, and by the indulgence and license of the owner of the land over which it passes, then such use does not constitute a road by prescription so as to impose upon the defendants an obligation to keep it in repair." "If the public has used this way by permission, indulgence, and license from the owners, it does not constitute that adverse use which the law requires, because, if they are occupying by license, they are not occupying it adversely to the owners of the land." "If, from the facts proved, the jury shall find that the road in question passes over a large extent of woodland not enclosed with fences, and uncultivated, and that the use of the road, as proved, has not been injurious to the owner of the land over which it passes, then the jury may presume that such use has been permissive and not ad-

verse." "If the plaintiffs claim the existence of the road in question by dedication, then it is incumbent on them not only to prove the act of dedication by the owners of the land over which it passes, but also to prove that the inhabitants of the town of Standish have adopted the road, by repairing it, assigning it to a surveyor of highways for his supervision, or by some other act recognizing it as a highway, and their liability to repair it."

Now, in opposition to these doctrines, the plaintiffs contended at the trial, and claim here that proof of the public use of the road for more than twenty years, without any interruption by the town or the owners of the land over which it passed, was sufficient evidence that it was a legal highway, and to charge the town with its repair. They assert that there was no evidence in the case upon which the foregoing instructions as to the effect of a permissive use or license from the owners of the land could properly be based, — that it is not necessary to the establishment of a highway by dedication that there should be any corporate action accepting it. It is urged, that twenty years' permissive use shows a dedication, and makes the town liable to repair the way, whether they have ever recognized it or accepted the dedication or not, — that the dedication is to the public, the acceptance is made by the public, — and that the town thereby becomes liable to keep the way in repair; and that the jury should have been instructed that proof of the public use of the way as a highway for more than twenty years, without any interruption by the town or the owners of the land over which it passed, is sufficient evidence that it was a legal highway, and to charge the town with its repair, and that in this manner the jury would have had a correct practical rule, free from any technical learning about dedication and prescription.

It must not be overlooked that a new element is here introduced into the doctrine contended for at the trial, and into which the ingenious counsel occasionally slides in his argument here, when he contends that twenty years' per-

missive use shows a dedication, and makes the town liable to repair. At the trial it was claimed, on the part of the plaintiffs, that such a use as was indisputably proved, i. e., an actual, frequent use of the road over these unenclosed plains by all and sundry who had occasion to go there, continued for a period of sixty years or more, as the witnesses testified, and not prohibited by the owners of the land, was of itself sufficient to charge the town with the maintenance of the way and make them responsible for accidents occurring by reason of defects therein. But such use might be permissive merely; and when counsel comes to state the legal proposition which he claims to be correct, he qualifies his original position thus: — "the public use of the way *as a highway* for more than twenty years without interruption, &c., is sufficient evidence that it was a legal highway, and to charge the town with its repair." Now the use of the way *as a highway*, excludes the idea of permissive use. It is a use which all claim as a right. If we assume, then, as plaintiffs' counsel would have us, that "the public use of the way," as a highway, "for more than twenty years, without any interruption by the town or the owners of the land over which it passed, is sufficient evidence that it was a legal highway, and to charge the town with its repair," it is evidently necessary, in order to avoid misleading the jury by such a statement, to call their attention to the distinction between the use of the way, "as a highway," and a use which might be merely permissive.

Assuredly, the plaintiffs have no just cause to complain of these instructions. Under them, they were at liberty to show the existence of a way by location, — by dedication and acceptance, or by prescription. If they failed, it was for want of sufficient evidence to establish it in either of those modes.

There was no suggestion that the town was estopped to deny its existence, under § 62, c. 18, R. S. The voluminous report of the evidence not only does not show any repairs made upon the road by the defendant town within

six years, but fails to exhibit the slightest trace of any recognition of it by the town at any time in the whole sixty or seventy years during which there has been more or less travelling over the plains there.

The jury were duly instructed that the long continued, uninterrupted user, was evidence for them to consider in determining whether there had once been a legal location of the way, the record evidence of which had perished in the lapse of time. They found no such location. It is probable that the character of the route, (which they viewed,) and of the territory over which the road wandered, and the evidence of the neighbors who occasionally "bushed it out" for their own convenience, and the utter lack of any recognition of it by the town authorities for so many years, prevented any such finding.

Upon the various points presented by the exceptions, we hold:—

1. That the unprohibited use of a road by travellers, however long continued, if it is unaccompanied by other facts from which its origin and character may be determined, does not raise an indisputable presumption that the road was ever legally located, or has become a highway by prescription, or by dedication and acceptance. If travellers strike out a path for themselves over waste lands lying in common and unenclosed, (or follow a path that has been used by the proprietor of such lands,) and other travellers continue the practice, even for a term of time whereof the memory of man runneth not to the contrary, it does not necessarily follow that there is a legal highway there. The presumption that there has been a legal location, at some forgotten period in the past, is one of fact and liable to be rebutted.

2. As to the existence of a way by prescription, the jury were instructed that if, at the time of the accident, "this way had been travelled continuously, uninterruptedly and adversely to the owners of the soil over which it passes, for a period of time extending beyond the memory of man,

and for at least sixty years, by the inhabitants of Standish and such of the public generally as have had occasion or desire to travel it, and it was in fact so travelled by the public generally, this will be sufficient evidence to authorize you to find it such a way as the town of Standish was by law on that day bound to maintain and keep in repair."

No citation of authorities can be necessary to establish the doctrine that, in order to acquire a right of way by prescription, the user must be adverse. Plaintiff complains of this instruction as calling upon him to show an uninterrupted and adverse use of the way by the inhabitants of Standish and others for sixty years, in order to make it a highway; and as requiring him to prove a highway by prescription, and excluding all ways by dedication or by location, the record evidence of which was lost.

Perhaps there might be force in the complaint, if the Judge had not told the jury, in this connexion, that the term of sixty years was mentioned, not because a less time would not be sufficient to authorize the finding, but because there was no conflict of evidence as to the length of the user, or as to the use of the road by the inhabitants of the town who had occasion to pass there, or as to the absence of any objection or interruption by the owners of the land. The jury were here reminded by the Court that "one witness recollects it for a period of sixty-five years; no witness recollects when there was not a road there." He had also elsewhere, as we have seen, instructed them that the way might be established by proof of location in the mode pointed out by the statutes, and that they "might consider the long continued uninterrupted use as evidence of the fact of such location"; and that the public might acquire a right of way by the uninterrupted adverse use of it continued for at least twenty years in succession, or by dedication of the owner and acceptance by the town; and that, when ways had become public highways in either of these modes, towns were obliged to keep them in repair.

It is not easy to perceive how under such circumstances

the jury could have been misled to the prejudice of the plaintiff by the instruction in question. Whether the instruction could have been sustained, if the jury had found that the user was adverse, and the defendants had excepted, we are not called upon to decide. It will be time enough to determine whether it is possible for individual members of that uncertain quantity, "the public," even though some of them are inhabitants of the town, to cast upon the town the burden of maintaining as a public highway every right of way they may acquire over their neighbor's waste land, in the absence of all proof of any attempt at location, or of any recognition by the town or its officers or agents, — when such determination is essential to the decision of a cause. It is sufficient here to say that no rights of the plaintiff were violated by the instruction, as explained by the presiding Judge, taking it in connection with the other instructions given in the case.

3. There was evidence in the case, some of which has been herein before referred to, from which it was competent for the jury to find the use permissive on the part of the owners of the land; and the plaintiffs' objection to the instructions for this cause is not well founded. The open and unenclosed condition of the land, a sandy, pitchpine, blueberry plain of trifling value, was a matter from which it might be presumed that the use was permissive. *Hewins* v. *Smith*, 11 Metcalf, 241.

4. Nor was there any error in requiring proof of some act equivalent to an acceptance by the town, in order to establish a way by dedication. It is not competent for a proprietor of land to cast the burden of maintaining a highway across it upon the town in which the land lies, by opening and dedicating a way over it to the public, even though he finds his neighbors willing to walk therein. They cannot claim to hold the town responsible for accidents which may occur there, unless the town or its lawfully authorized agents shall in some way signify their acceptance of such dedica-

tion. Abundant statute provisions are made for the regular location and establishment of highways and townways. If it is claimed that a way has been established in some manner independent of these, it would seem that some act of the party upon whom the liability to maintain and repair it is cast, should be held requisite to produce that effect.

It is true, that, in *Rex* v. *Leake*, 5 B. & A., 469, it was held that the assent of the parish was not necessary to establish a highway by dedication.

But the English decision is entitled to but little weight here for the reasons suggested by SHAW, C. J., in *Hobbs* v. *Lowell*, 19 Pick., 410, the decision of which is placed by that eminent jurist expressly upon the ground that the city of Lowell and all other parties concerned had expressed their assent to the dedication there in question. In that case, an ancient county road had been stopped by the erections of the Proprietors of Locks and Canals, &c., who at the same time opened Merrimac street, upon which the accident occurred, in the general direction of the old road and leading into it at each extremity. Under the direction of the selectmen of Lowell a guideboard had been placed at the corner of the new street, pointing through it. The municipal officers entirely omitted to proceed against those who stopped up the old highway and substituted the new street, and, under such circumstances, it was rightly held that the assent of the city to the dedication might be inferred.

We know of no case in this country where a way by dedication has been held to be established so as to impose any liability upon a city or town, without evidence of the assent of the corporation, express or implied.

In *State* v. *Wilson*, 42 Maine, 24, C. J. TENNEY remarks:—"But it does not follow that, because there is a dedication of a public way by the owner of the soil, and the public use it, the town or other public corporation is bound to keep it in repair. To bind a corporation to this extent, it seems to be required that there should be some

proof of acquiescence or adoption by the corporation itself." We do not hesitate to pronounce this to be the true doctrine.

Long continued, uninterrupted public use is a proper element of proof to establish the existence of a highway, in either of the three modes recognized by the law, — by location, by prescription, or by dedication and acceptance. And we think any apparent conflict of the *dicta*, in cases of this description, may be traced to a want of care to distinguish between the purposes for which the evidence of it is offered.

In *Sprague* v. *Waite*, 17 Pick., 320, it is said that "the long and uninterrupted use of a public highway is legally and justly taken to be evidence of a previous legal and regular proceeding, by which a certain portion of land has been appropriated to public use as a highway." This is true; but, if other evidence in the case rebuts the presumption thence arising, and we are satisfied that no such proceedings were ever had, then, if we would apply the evidence of the user to the establishment of a highway purely prescriptive, it must appear that the user was adverse and not permissive merely; or, if it is offered to show a way by dedication, then there must be evidence of an acceptance by the party to be charged with its maintenance.

We find nothing radically inconsistent with the views here expressed, in the authorities cited for the plaintiffs.

In *Todd* v. *Rome*, 2 Maine, 55, though there had been a laying out by the selectmen which was defective, and an acceptance by the town, and an expenditure of the town's money in repairs, the nonsuit ordered at *nisi prius* was confirmed, and the *dicta* upon which the plaintiff relies manifestly have reference to the hypothesis of a dedication or assent on the part of the owner of the lands. The proof of acceptance by the town in that case, (if any facts from which a dedication might have been inferred had appeared,) was abundant.

Rowell v. *Montville*, 4 Maine, 270, was another case of defective location, and though there was a vote of the town

accepting the road, (passed without a corresponding article in the warrant,) and a guideboard erected at one end, and the road was much used by the citizens of the town, and it appeared that the owner of the land over which it passed had always acquiesced in the appropriation of it to the public use, the Court say the action cannot be maintained, because no adverse appropriation or use of land as a road could take away the owner's right of entry, and give the town the right to dig up the soil and do what was necessary in repairing the road, and no right of way by prescription can be acquired, either by an individual or the public, except by a continued adverse claim, and user for at least twenty years. This certainly does not sustain the plaintiffs' claim that "it is not necessary that the user should be adverse to the owner of the land." The plaintiff had the full benefit of the doctrine implied, as well as the doctrine expressed in this case, in the instructions given by the presiding Judge with regard to a way by prescription.

In *Estes* v. *Troy*, 5 Maine, 368, the plaintiff was equally unfortunate, though the road had been opened in 1812, and annually repaired till 1828, by the surveyors of the town; and it is manifest that an adverse user is contemplated, when the Court say that, "after a road or way has been opened, continued and travelled for twenty years without interruption or incumbrances, it may be considered and treated as a public way."

In *Jennings* v. *Tisbury*, 5 Gray, 73, the Court are speaking of "public ways by prescription," for the acquirement of which, as we have already seen, an adverse user is necessary; and the case simply declares the doctrine that evidence of general uninterrupted public use of a road, *as a highway* for twenty years, is sufficient to charge a town with liability to keep it in repair. What is implied in the use of a road "as a highway" we have already seen. In the case at bar, the plaintiffs' misfortune consisted in a want of evidence to satisfy the jury that the use of this path over the plains was any other than a permissive use.

Finding no error in the instructions of which the plaintiffs can justly complain, the entry must be

Motion and exceptions overruled.

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

APPLETON, C. J., did not sit.

AUGUSTUS ROBINSON, *pet'r for review, versus* HIRAM W. DEERING *& al.*

A lessor who, without the knowledge or consent of his lessee, has voluntarily terminated between the rent days the tenancy created by a verbal lease, cannot, in the absence of any agreement of apportionment, maintain an action for rent which accrued between the last rent day and the time of the termination of the tenancy.

ON EXCEPTIONS.

PETITION FOR REVIEW.

At the January term, 1868, of this Court, the defendants recovered a judgment against the plaintiff, by default, in an action of *indebitatus assumpsit*, for "two months and five days house rent, from June 7, 1866, to Aug. 13, 1866." At the next succeeding term, the plaintiff entered his petition for a review.

It appeared that the petitioner, on the 7th June, 1856, entered into possession of a house of the respondents, under a verbal agreement with them to pay the annual rent of $300, quarterly, on the 7th Sept., Dec., March, and June respectively, with no time agreed upon for the termination of the tenancy. The petitioner continued in possession thereof until Aug. 11, 1866, and paid the rent regularly to June 7, 1866. On Aug. 11, the respondents, without the knowledge or consent of the petitioner, conveyed the premises to J. H. Williams, who notified the petitioner of his purchase, and requested him to vacate. The petitioner paid

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78 " 424
82 " 425

no rent to any one for the part of the quarter he occupied next preceding the conveyance; and the respondents sued him therefor and recovered the judgment before mentioned.

For the purpose of presenting the question to the full Court, the presiding Judge ruled, *pro forma*, as matter of law, that the petitioner had, in the foregoing facts, no defence to the suit sought to be reviewed, and that for this reason and purpose he would refuse to grant the review; and thereupon the petitioner alleged exceptions.

Deane & Verrill, for the petitioner.

J. H. Williams, for the respondents.

KENT, J. — The question of law presented for our determination, is whether a tenant, who was in under a verbal agreement or lease, at an annual rent of $300, payable quarterly, on fixed days, and who had occupied the premises for ten years under this agreement, and had paid the rent quarterly as agreed, but was dispossessed by his landlord's sale and conveyance of the property, without his knowledge or assent, after the payment for the quarter ending in June and before the termination of the quarter ending in September, is liable in *indebitatus assumpsit* for the occupation after the commencement of the last quarter, up to the time when the landlord terminated the tenancy by his own voluntary act. Can the rent agreed upon be apportioned, under these circumstances?

It was determined in *Clien's case*, in early times, 10 Coke, 127, that, where a term expires before the day on which rent is payable, whether by the eviction of the tenant from the land, or because the lease determines before the legal time of payment, no rent shall be paid, for there shall never be an apportionment in respect of part of the time.

This rule has been often recognized. *Wood* v. *Partridge*, 11 Mass., 488; *Burden* v. *Thayer*, 3 Met., 76.

This question was fully considered in the case of *Nicholson* v. *Munnigle*, 6 Allen, 215. It was there held, that

under a written lease, for years, with rent payable quarterly, but containing no provision for an apportionment, no rent could be recovered in an action upon the lease, for the portion of the quarter during which the premises were occupied, — the owner having sold and conveyed them, and thus terminated the lease, after the last payment of a quarter's rent and before the then next quarter day. It was also held, — that no action for use and occupation during that time, could be maintained, because, where there was an express contract, a party could not, after failing to establish any right under that, abandon it and recover under a count for use and occupation. If he could, he would have all the advantage which he forfeited by his act.

We refer to this case for the reasons on which the decision rests, without repeating them here.

The remaining question, viz., — whether, where the lease and contract is verbal, and the tenancy is one at will, a different rule would apply, was afterwards considered by the same Court, in the case of *Fuller* v. *Swett*, reported in a note to the above case, in the 6th of Allen. That was a case, in all its leading features, like the one at bar. The Court held that there was no distinction between this case and the former one, and held that the plaintiff could not recover for the time after the last quarter day.

We concur in this view. It is true that, by the statute, a verbal lease can have no greater force and effect than a lease at will, and may be terminated by a sale. But where there is a contract, by which one party agrees that the other shall occupy, by paying a yearly rent, quarterly on fixed days, and this condition is fulfilled strictly, it would seem just that the law should hold that, if the lessor chooses to terminate the tenancy by a sale, without notice between the quarter days, he should not recover for any part of the time after the last quarter day. The fair inference is that it is a contract for a quarter's occupancy by the tenant, and that it is an entire contract for that entire time, and if there is a payment at the quarter day, and a continued possession

afterwards, — that possession must be regarded as for the whole ensuing quarter. The question here is not as to the legal right of terminating the lease by sale or otherwise, but whether, having terminated it voluntarily in the middle of a quarter, which, under the agreement, the tenant had a right to occupy, there can be an apportionment of the time in favor of the landlord? It is clear that he could not recover rent for less than a quarter, if he, at any time during occupancy, had sued the tenant for use for a month after a regular quarter day, on which a quarter's rent had been paid. *Exceptions sustained.*

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

GEORGE WARREN *& al., in Eq., versus* JOHN G. WARREN *& al., Ex'rs.*

Equity forbids the joining in one bill of entirely distinct matters of complaint having no connection with each other; or the introduction of parties who are not interested in the subject matters or decree sought, and have but an incidental interest in some question raised by the allegations in the bill.

It is impracticable to lay down any general rule as to what constitutes multifariousness as an abstract proposition; but each case must depend upon its own circumstances, and much must necessarily be left to the sound discretion of the Court.

A bill, filed January, 1867, set out a co-partnership between two in the business of lumbering, farming, trade and navigation, from 1815 to 1845, when, one of the co-partners having died intestate, the plaintiffs, being the sole heirs of the deceased member, were admitted into the firm by the surviving partner, whereupon the partnership business continued until 1862; that, in 1844, another person was admitted into a particular branch of the partnership business, which continued till 1854, when he sold out, received from the co-partnership his share of the profits and accounted for his share of the property, and, at the same time, the plaintiffs purchased the other partner's interest in this branch of the business; that the general business of the co-partnership continued until 1862, when the original surviving partner died testate, and the defendants were appointed executors of his will;

47 N H 78

that the plaintiffs claimed an account of all partnership transactions from 1845 to 1862, as well as those prior to 1845. On demurrer, — *Held*,

1. That the bill was not multifarious;
2. That the new partner, in the particular branch of the partnership business, need not be made a party;
3. That the bill was brought by the proper plaintiffs, they sueing as partners, and not simply as heirs; and,
4. That, the bill having been filed within six years after the final dissolution, the cause of complaint is not necessarily barred by the statute of limitations.

BILL IN EQUITY, heard on demurrer, brought in the name of George Warren and Lewis P. Warren, of Westbrook, who were the sole heirs at law of the late John Warren, against John G. Warren and Charles W. Scott, executors and trustees of the last will and testament of the late Nathaniel Warren.

The bill alleges substantially that, in 1815, John and Nathaniel Warren entered into a co-partnership in the business of lumbering, farming, trade and navigation, under the firm name of J. & N. Warren, each uniting his property, real and personal, and they were in all things to share equally in their partnership affairs; that their partnership business continued till Sept. 10, 1845, when John Warren died intestate, leaving the complainants his sole heirs and representatives, and that, upon his decease, all his property, together with his interests in said partnership business, vested in them; that, during John Warren's lifetime, he advanced to the partnership more than his proportionate part of the funds and performed more than his share of the services therein; that, at John Warren's decease, Nathaniel Warren had received the larger share of the partnership profits, and was indebted to John Warren therefor and for the surplus advances aforesaid; that the partnership thus continued without any adjustment, until Feb. 11, 1824, when Nathaniel Warren was found indebted to the co-partnership in a certain sum named; that, from Feb. 11, 1824, to the time of John Warren's death, there was no settlement or exhibit of the condition of the partnership affairs, although Nathan-

iel Warren kept the partnership books and papers and was thereto often requested by John Warren, and that no account thereof has been rendered by Nathaniel Warren or his representatives, to the date of this bill; that, prior to the death of John Warren, the co-partnership acquired certain real estate, a part of which was thereafter divided, but a certain part thereof remained undivided at the decease of John Warren, which, together with a large amount of personal property, rights and credits, was continued in the partnership business; that no administration of John Warren's estate has ever been granted to any person; that the complainants became entitled to all the rights and remedies in equity to which their father in his lifetime was entitled.

The bill further alleges that, on August 11, 1844, one Walker united his business of lumbering to that of J. & N. Warren, and that the lumbering business was carried on by J. Warren, N. Warren and Walker, the said J. & N. Warren having one-fourth part interest each, and Walker one-half part interest therein; that, in all other respects, the partnership business of J. & N. Warren was conducted same as before Walker's connection therewith; that said lumbering business was carried on by the firm name of Warren & Walker, separate and distinct from the other partnership business; that, after the death of their father, the complainants succeeded to his partnership interests, all of which remained in the hands of Nathaniel Warren, and it vested in them; that, thus representing their father's interests, the complainants were admitted by Nathaniel Warren into the partnership before stated; that the co-partnership business, so far as the lumbering was concerned, was carried on by Nathaniel Warren, owning one-fourth, Walker one-half, and the complainants, owning and representing in the right of their deceased father, the remaining fourth part interest in the same; that the several parties in the lumbering business were each to contribute their respective proportion of services and property and receive a pro-

portionate share of the profits; that the former partnership business of J. & N. Warren was continued after John Warren's death by Nathaniel Warren and the complainants, owning and representing the moiety of their father deceased, and they so continued in said business till Nov. 1862; that, after the decease of John Warren, Nathaniel Warren received more than his share of its proceeds and the complainants contributed more than their share to the business.

The bill further alleges that the lumbering business was continued by Nathaniel Warren, Walker and the complainants until July, 1854, when Walker sold his interest to one Brigham, and received his share of the profits, and fully accounted for his share of the property; that, in July aforesaid, the complainants purchased Nathaniel Warren's interest in the lumbering interest; that Nathaniel Warren then held a large amount of property, rights and credits received from John Warren and never accounted for, and a large amount of interest and profits which arose from the funds of the co-partnership of J. & N. Warren, in the hands of N. Warren, before and after John Warren's death; that Nathaniel Warren, so holding the funds of J. Warren, in his lifetime, and, since his death, of the complainants, which he ought to have accounted for to the complainants, the complainants, at Nathaniel Warren's request, made their promissory note, dated July 1, 1854, and payable to Nathaniel Warren, for the sum of $8920; that said note was given for convenience, with the full understanding with Nathaniel Warren that whatever sum of money or other property Nathaniel Warren held as due John Warren in his lifetime, or, since his death, to the complainants, should be applied to the payment of said note, and that the amount so held was more than the value of the note.

The bill further alleges that the partnership business, other than the lumbering business, was continued by Nathaniel Warren and the complainants, till November, 1862, when Nathaniel Warren died testate, and the defendants were appointed executors of his will, duly probated, and trustees

of certain trusts therein named, which they accepted; that, in Nov., 1866, the defendants, as executors, disregarding the understanding before named and contriving to oppress the complainants, sued said note and entered their action at the January term, 1867, of this Court, where the same is now pending.

The bill further alleges that, during the partnership of J. & N. Warren, both before and since the death of John Warren, Nathaniel Warren applied to his own use, from the profits of said co-partnership, large sums of money exceeding his proportion, and, up to the time of his death, Nathaniel Warren has had charge of the partnership books of account between himself and John Warren and between himself and the complainants; that the complainants have had no means to ascertain the true state of their accounts; that the complainants repeatedly applied to Nathaniel Warren in his lifetime, and, since his death, to the defendants, for an account of all the affairs of the co-partnership between Nathaniel & John Warren, in his lifetime, and, since his death, between Nathaniel Warren and the complainants; that Nathaniel Warren, in his lifetime, refused and neglected to answer said account to John Warren or the complainants, as have the defendants since the death of Nathaniel Warren; that the defendants pretend that nothing is due the complainants; that Nathaniel Warren received $5000 more than his proportion of the partnership profits; that the defendants ought to apply said moneys to the payment of said note and be enjoined from prosecuting their suit thereon, and render a true account of the partnership transactions.

The prayer of the bill was for an answer and for an account of all the partnership dealings, and the defendants be decreed to apply whatever is found due the complainants to the payment of said note, and the balance to the complainants, offering to pay whatever may be found due from John Warren or the complainants; that, in the meantime, the

defendants be restrained from prosecuting their suit on the note, and for further relief.

The defendants demurred, assigning the following causes:

1. That the claims and transactions set out in the bill occurred more than six years before the filing of the bill;

2. That the plaintiffs, as heirs of John Warren, have no right to maintain the bill or to any relief touching the same;

3. That, as to so much of the bill as seeks an answer touching real estate acquired by the co-partnership prior to the death of John Warren, the plaintiffs have not made such a case in reference thereto as entitles them to any discovery or relief;

4. That as to so much of the bill as seeks an answer touching the alleged admission of the plaintiffs into the co-partnership after the death of John Warren, the continuance of the co-partnership thereafterwards, &c., the plaintiffs have not made such a case as entitles them to any discovery or relief; and,

5. That the bill is exhibited for several separate and distinct claims and causes which have no relation to or dependance on each other, and concern different and distinct persons who have no common relation to or interest in the same; because the bill is multifarious, and because it discloses no equity on the part of the plaintiffs, nor any right to the assistance of a court of equity.

Shepley & Strout, for the plaintiffs.

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

1. John Warren and Nathaniel Warren were partners from 1815 to 1845; John Warren died, and plaintiffs, as heirs, bring this bill for an account.

2. August, 1844, John Warren, Nathaniel Warren and Walker formed a co-partnership (in the "lumbering business,") which was dissolved by the death of John Warren in Sept., 1845.

3. September, 1845, the plaintiffs, "as heirs of John

Warren," (as alleged,) came into the original firm. In law a new co-partnership was formed, consisting of Nathaniel Warren and the plaintiffs, which continued till November, 1862, when Nathaniel Warren died.

4. The "lumbering" firm of the Warrens and Walker having been dissolved by the death of J. Warren, and the business having been continued, a new firm, in law, was formed consisting of Nathaniel Warren and Walker, which continued till July, 1854, when it was dissolved by each member selling out to others, Nathaniel to the plaintiffs.

The bill calls for an account of all the partnership transactions of four separate and independent firms, — in two of which the plaintiffs claim an interest as heirs, in one, in their own right, as partners, and, in the other no interest whatever.

The plaintiffs, as heirs, cannot maintain a bill for an account, touching personal property, moneys, and choses in action, — it can be done only by an administrator or executor.

All the transactions, claims and causes of action, (except those of one of the firms for a short period,) occurred and accrued more than six years before the filing of the bill.

The real estate of John Warren descended to his heirs, and is not a subject matter for such a bill.

Walker, a member of two of the firms, should have been made a party. Story's Eq. Pl., §§ 75, 236.

The bill is multifarious in embracing several distinct and independent matters. Story's Eq. Pl., § 530. Counsel also cited Story's Eq. Pl., §§ 219, 236, 444, 484, 530; 1 Daniell's Ch. Pl., 384 and notes.

KENT, J. — The principal ground, set forth in the demurrer to this bill, is that it is multifarious. Before examining the allegations in the bill, it is important to ascertain what is the true definition of multifariousness as applied to a bill in equity, and its extent and limitations. Equity, whilst it is broad and liberal in the application of remedies,

and avoids the strict technicalities of the common law, yet forbids the mixing together in one bill of entirely distinct and independent matters of complaint, or the introduction of parties who are not interested in the subject matter or decree sought, and have but an incidental interest in some question raised by the statements in the bill. The objection, therefore, is of a two fold character, one relating to the subject matter and prayer of the bill, and the other relating to the parties thereto. But "a bill is not multifarious because it joins two good causes of complaint, growing out of the same transaction, when all the defendants are interested in the same claim of right, and when the relief asked for in relation to each is of the same general character." *Foss* v. *Haynes*, 31 Maine, 81; Story's Eq. Pl., § 284.

Where the object of the bill is single, to establish and obtain relief for one claim, in which all the defendants may be interested, it is not multifarious. *Bugbee* v. *Sargent*, 23 Maine, 269. "A bill is not to be regarded as multifarious when it states a right to account from A & B against whom it has one remedy which it seeks to enforce, and also claims a lien against A for what is due." Story's Eq. Pl., § 284.

A bill is not multifarious when it sets up one substantial ground of relief and also another on which no relief can be had. *Varrick* v. *Smith*, 5 Paige, 137.

In the case of *Newland* v. *Rogers*, 3 Barb. C. R., 432, Chancellor WALWORTH, after stating that there did not appear to be any necessary connection between the different subject matters stated in the bill, says that, "the counsel is wrong in supposing that two distinct and independent matters or claims, by the same complainant against the same defendant, cannot properly be united in the same bill. Multifariousness in a bill is only where different matters, having no connection with each other, are joined in the bill against several defendants, having no interest in or connection with one or more of the distinct causes of action or claims for which the bill is brought, so that such defendants are put to

the unnecessary trouble and expense of answering and litigating matters stated in the bill in which they are not interested, and with which they have no connection. But a simple misjoinder of different causes of complaint, between the same parties, which cannot conveniently and properly be litigated together, is sometimes called multifariousness, although the ground of objection, in such cases, depends upon an entirely different principle, and is a mere matter of convenience in the administration of justice."

Story also says, — that "the objection of multifariousness and the circumstances under which it will be allowed to prevail, or not, is, in many cases, a matter of discretion and no general rule can be laid down on the subject." Eq. Plead., § 284.

The Supreme Court of the United States takes the same view in *Gaines* v. *Chew*, 2 How., 619, and in *Oliver* v. *Platt*, 3 How., 411. In the latter case, the Court say,— "We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both companies, but these interests are so mixed up in all these transactions that entire justice could scarcely be done, at least, not conveniently be done, without a union of the proprietors of both companies. It was well observed, by Lord COLTENHAM, in *Campbell* v. *McKay*, 1 Mylne & Craig, 603, and the same doctrine was affirmed in this Court, in *Gaines* v. *Chew*, 2 Howard, 642, that it is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances, and much must necessarily be left, where the authorities leave it, to the sound discretion of the Court."

If we apply the doctrines and principles of these authorities to the facts in this case, we fail to find sufficient foundation to the objections made, to require us to dismiss the bill on the ground of multifariousness.

The case presented in the bill is substantially one between partners, seeking for an adjustment of partnership business. It sets forth a co-partnership as existing between the com-

plainants and the deceased, represented by the defendants, from 1845 to 1862.

That such a partnership existed during that time, is distinctly averred. The bill in fact seeks for an adjustment of that partnership, and the ascertainment of the rights of the different parties during the existence of that firm. It is true that it sets forth the existence of a co-partnership between John and Nathaniel Warren for many years before 1845, and that the complainants are the heirs of John. If the bill had been framed as claiming a right as heirs alone to have an adjustment of the partnership, without showing any other connection with the co-partnership, than as heirs of their father, it might well be questioned whether such a bill should not be instituted by an administrator and not by the heirs. But the bill sets forth that the complainants, being heirs, "were admitted by Nathaniel into the partnership before stated." They then became co-partners, and not simply heirs, and came in as members of the firm, as individuals, and not in their representative capacity. They now ask that the old co-partnership matters may be examined, not on the ground that they were members of the firm before their father's death, but because they were so intimately connected with the business after his death, that it is necessary to investigate and settle these prior matters, in order to determine the rights of the parties under the firm as it existed after the complainants came in.

If they came in, assuming simply their father's place by consent or understanding with the surviving partner, and entitled to all his interest in the firm property, and liable for all its debts, then it may be that they should be held entitled or liable, as the case might be, from the settlement in 1824. In such a case, if it became necessary to institute a bill in equity to adjust the affairs of the firm, thus continued, it clearly would not be multifarious to connect the prior with the subsequent transactions and seek for an adjustment of both, where the parties are the same.

If another view is taken and these complainants are to be regarded as having been admitted as members of a new firm, and independent of the old one, but as contributing the capital belonging to their father at his death, in the firm, it would not be objectionable to ask for an examination and adjustment of the condition of that firm, in order to ascertain, among other things, what capital was in fact put in by the new partners. At all events, the transactions referred to in the bill are not so entirely disconnected with the main purpose of the suit, as to justify us in saying that they cannot have any bearing on the case after all the facts are developed.

The allegations in the bill in reference to the branch partnership, in which one Walker was originally a party, do not appear to us as improper, or as such distinct and independent and unconnected matters as bring them within the objection of multifariousness. That partnership was in relation to one branch only of the business of the general firm, and was confined to that particular business. It was well likened by the counsel for the complainants to the branches of a co-partnership, so common in mercantile transactions, existing in different cities or countries. It is not properly a distinct and independent firm, but a wheel within a wheel, or a branch from a common trunk.

If Walker had remained as a partner, he, undoubtedly, should have been made a party. But the bill shows that, in 1854, Walker sold out his interest, and received from the partnership his share of the profits, and fully accounted for his share of the property. On the same day, the complainants purchased of Nathaniel Warren, the testator, his interest in the lumbering business, which was the sole business of the branch firm. Thus that particular union was dissolved, and Walker had no further interest, and no claim is made upon him, nor any that could affect his interests.

How far the purchase by the complainants of Nathaniel Warren's interest was a full and final settlement, so far as that branch of the business is concerned, we cannot deter-

mine until the whole case is developed by the proof. All we now say is, that the bill is not objectionable for this cause on demurrer. The same remark may apply to the statute of limitations, invoked as one cause of demurrer. The bill was commenced within six years after the final dissolution of the partnership, by the death of Nathaniel Warren, in 1862.

We are not called upon to consider, on this demurrer, whether or not the statute of limitations should be applied to any part of the transactions between the parties, or whether they were in the nature of merchants' accounts, or open transactions, the investigation of which would not be precluded by the statute. These questions may well await the answers and proof. There is nothing in the bill which on its face shows that the cause of complaint is necessarily and absolutely barred by the statute of limitations.

Demurrer overruled.

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

NANCY E. WALKER *versus* METROPOLITAN INSURANCE COMPANY.

A contract of insurance against fire is not required by the common law, nor by R. S., c. 49, § 12, to be in writing.

Neither does § 14 of c. 49, either in terms or by implication, abridge the powers granted in § 12, in respect to the mode of effecting insurance.

A contract of insurance for one year is not within the statute of frauds.

It is no part of the duty of the assured, in case of a loss, to notify the insurers of the time and nature of the risk; and any misrecital in these respects, contained in a notice of a loss, may be rejected as surplusage.

If insurers intend to rely upon the insufficiency of preliminary proofs of loss, they should request further proofs upon receipt of notice; a failure to do so is a waiver of the right to require such proofs at the trial.

What facts will constitute a contract of insurance.

1382 Me. 412

On Report.

Assumpsit on a contract of insurance against fire. The writ was dated Sept. 25, 1866, and the declaration contained five counts; the first setting out a builder's risk for $3500 for three months, from May 5, 1866; the second, a similar risk for ninety days; the third, a permanent risk, effected July 2, 1866, for one year, for $3500; fourth, an agreement to insure and issue a policy, on July 2, 1866, for the same sum, and a failure to issue the policy; and a money count.

It was admitted that the plaintiff owned the building as alleged, that it was accidently burned by fire on the night of July 4th, 1866, and that her consequent loss largely exceeded $3500.

The notice of loss described a builder's risk for three months or ninety days, from May 26, 1866.

It appeared, on the part of the plaintiff, that John E. Dow & Son were duly appointed agents of the defendants, by a power of attorney, "with full power to receive proposals for insurance against loss or damage by fire, to act as a surveyor of buildings, or other property offered for insurance in Portland and vicinity, and to make insurances thereon, by policies, signed by the president and attested by the secretary of the said Metropolitan Insurance Company, and countersigned by the said John E. Dow & Son, and generally to do and perform all other acts necessary to the successful prosecution of the business of fire insurance."

It also appeared that the plaintiff, in April, 1866, held defendants' policy, on the building destroyed, when it was damaged and the amount of $2000 was agreed upon by the defendants' N. E. agent as the amount of loss; and that the building was subsequently repaired by plaintiff's agent.

John E. Dow & Son, agents of the defendants, testified substantially, — that they kept a blotter or daily record upon which they entered particulars of risks taken by them, and made the policy when convenient; when policies were made and delivered, they collected the premiums; that such

was the custom in all the Portland insurance agencies; that policies were not issued generally until the end of the month; that the defendant company did business in the same manner at their home office; that the defendants have paid in several instances of this kind, where the entries were made in the blotter before, but no policy issued till after the fire, when the company knew all the facts; the defendants' general agent made no objections when he was informed of the witness' mode of doing the business; that entries for all the companies for which witnesses were agents, were all entered in one blotter, which was burnt July 4, 1866; that witnesses took builder's risk on plaintiff's property for $3500, about last of May; that it was entered on the blotter; that about July 1, 1866, before the fire and after June return to home office, they took yearly risk for same amount; entry made in usual form; builder's risk had terminated; the premium was not then paid; that it was not customary to make policies on builder's risks, but usually carried premium of builder's risk, which was short, into permanent risk; considered yearly risk subsisting at the time of the fire; considered risks commenced at date of entry in blotter; made monthly return to home office, and account for all premiums at the end of each month, and accounted for this risk; went to home office at request of defendants after the fire, and they were satisfied with witnesses' mode of doing the business after hearing witness' statement; the repairs on the plaintiff's building were completed before July 1, 1866; told plaintiff's agent witnesses would take it the first of July; were requested to keep it insured; no policy made of last risk to plaintiff; never gave plaintiff or her agent any written memorandum covering the risk; the premium was paid latter part of July, but defendants refused to receive it.

It was also admitted by the defendants, that, in addition to the matters herein before stated, the plaintiff proved that the universal practice at all insurance agencies in Portland, for the last ten years, in regard to the manner of taking

risks and issuing policies, and collecting premiums after the risk is taken, has been in accordance with the custom as stated by John E. Dow and Edwin B. Dow, in their testimony.

S. C. Strout & Gage, for the plaintiff.

W. L. Putnam, for the defendants.

No bill in equity can be maintained on the facts proved, as our statutes limit the jurisdiction in equity to contracts in writing.

I. John E. Dow testifies, that he was to carry the builder's risk till the last of June. So there can be no claim upon the builder's risk, as the fire occurred July 4th.

II. There have been no proofs for a loss upon a risk for a year, so that no suit can be maintained for such a risk.

1. If any agreement was proved in relation to a risk for a year, it was an agreement to issue a policy, of course with the implied agreement that the policy should be in the usual form of their policies. *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 Howard, 403; *Oliver* v. *Ins. Co.*, 2 Curtis, 291. Or, at most, a verbal agreement for a present insurance until a policy could issue, and upon the usual conditions of the policy.

2. That those conditions required proof of loss appears from the allegation in the counts of the writ, and was admitted by plaintiff when she filed any proof of loss. And they are attached to all policies by statute of Maine, 1861, c. 34, § 5.

3. Nor does the evidence show any waiver of proofs. It nowhere appears that any claim was made on them for a year risk till suit. On the other hand, the proofs of loss were specifically for a builder's risk and excluded any other claim. No such reasons appear for presuming a waiver as appeared in *Tayloe* v. *Merchants' Ins. Co.*, *ante*. And by the affidavit annexed to the proofs, the company were distinctly notified that there was no claim for a year risk. Not

being called upon to pay such a risk, how can they be presumed to have waived anything in relation to it?

4. So much applies to all the counts, except that based upon an alleged agreement to issue a policy for a year risk. There being no proof that defendants were ever called on to issue such a policy, but were called on for something else, that count cannot be maintained. And, as already stated, her sworn proofs of loss exclude the idea of any such demand. Nor would a demand now for such a policy avail anything; as no proofs having yet been made, it is too late to make them "within a reasonable time," and a policy, if issued, would be valueless.

5. The receipt of premium by J. E. Dow, which was paid him late in July, cannot prejudice the company, as the company never received it; and, as it appears from plaintiff's proofs of loss, that she knew the matter had been referred to the company and Mr. Dow had no authority in the premises.

6. The position of all claims for a year's risk are as follows:—If there was ever a pretence of any such agreement, plaintiff has deliberately, under oath in her proofs, repudiated and disavowed it, while yet inchoate and not formally executed; and defendants have acceded to the repudiation and disavowal. How could it be recreated without the consent of both parties? How can it be honestly and lawfully set up by plaintiff after such deliberate and solemn disavowal. *Real Estate Ins. Co.* v. *Roessle*, 1 Gray, 336.

III. The agreement to insure, if any was made by Dow, was void under the statute of frauds.

No written memorandum given. The entry on his office blotter was no agreement in writing, was not intended as such, was not signed as required by the statute, and we have no evidence that it contained the proper terms of a contract.

1. This case particularly shows the wisdom of that statute. E. B. Dow thinks builder's risk was $2000,—proofs make it $3500; and he thinks the year risk $3500, while

his father says $3500 or $4000. John E. Dow does not know in what office the builder's risk was placed; nor the amount; nor can his son recollect the rate.

2. John E. Dow, some time, last of May or first of June, made, as he says, an agreement to carry builder's risk till July 1, and then to carry for a year as a permanent risk; it was a single agreement covering a year and a month. He further testifies, he put the property in the permanent risk the last day of June, to commence the first day of July; thus doing the last act recognizing any contract before the year commenced.

3. The premium was to be paid within the year; but, as we have seen, it was never really paid, and no attempt was made to pay it till the controversy arose. The case, therefore, does not come within those other cases, where it has been said that the statute did not apply, when the consideration has been fully paid within the year.

DICKERSON, J. — Assumpsit on an alleged contract of fire insurance where no policy had been issued.

The case is submitted on report, upon the evidence deemed admissible, the action to stand for trial if it, or any form of action, in law or equity, can be maintained; otherwise the plaintiff to be nonsuit.

At common law, contracts of insurance are placed on the same footing with other contracts, in respect to the capacity of the parties to contract, the subject matter of the contract, and the mode of contracting. There is, indeed, nothing in the nature of a contract of fire insurance which requires it to be in writing. The issuing a policy furnishes a convenient mode of proving the contract, but is not essential to its validity. *Trustees of First Baptist Society* v. *The Brooklyn Fire Ins. Co.*, 19 N. Y., 305.

Section 12, of c. 49, R. S., provides that, — "insurance companies may make insurance * * * * against fire, on dwellinghouses or other buildings, and on merchandize or other property within the United States; and fix the premiums and terms of payment." This language does not

confine such companies to any particular mode of insurance, either verbal or written, but gives them authority to make contracts of insurance, with all their incidents and accessories, in as broad and ample a manner as that enjoyed by natural persons. This provision makes it a corner-stone principle of their franchise, that they have authority to do in the way of insurance, as corporators, whatever private persons may do in their individual capacity. The intention of a statute to limit the general power thus granted must be clear and explicit, in order to authorize the Court to give it that construction.

We do not find such intention expressed or implied in section fourteen of the same chapter, which requires that "all policies of insurance shall be signed by the president, or, in case of his death, inability or absence, by any of the directors, and countersigned by the secretary;" and it also provides that policies thus executed "shall be binding upon the company as if executed under its corporate seal." This section does not in terms, or by implication, abridge the powers granted in § 12, in respect to the mode of effecting insurance. It provides that insurance companies can make valid "policies of insurance" only when attested in the mode prescribed; and that, when thus verified, they shall bind the company, though they do not bear its corporate seal. The language is not, all contracts of insurance, as it would have been if it had been the intention to prohibit all other modes of insurance, but it is "*all policies* of insurance." Insurance companies may still exercise their right at common law, of making parol contracts of insurance, if there is nothing in their charter to prevent, but, when they insure by issuing a policy, they must conform to the statute mode. The purpose of this provision undoubtedly was to designate the mode in which the corporate sanction of "policies" of insurance should be expressed, and to relieve the assured from the burden of proving the authority of the persons who thus execute a policy, to bind a corporation.

The construction we have given to these sections of the statute is the same as that given to similar provisions of the statute of New York, in 19 N. Y. above cited, and by the Supreme Court of the U. S. to a section of a statute of Massachusetts, almost identical in language with § 14 of our statute, as well as by the Courts of Massachusetts. *The Commercial Mutual Marine Ins. Co.* v. *The Union Mutual Ins. Co. of New York*, 19 How., 319; *New England Ins. Co.* v. *De Wolf*, 8 Pick., 63.

The writ in the suit at bar contains several counts, but the one relied upon alleges an insurance effected July 2, 1866, for a year, in the sum of $3500. The evidence shows,

1. That the agents of the defendants, residing in Portland, had authority to make any contract of insurance in behalf of the company which it was competent for the company itself to make.

2. That whatever the defendants' agents did in the premises, they did in accordance with the usage at the home office in New York, and all the insurance offices in the city of Portland; and the defendants knew the manner in which their agents conducted their business in Portland, and made no objection to it.

3. That the plaintiff applied to the defendants' agents for a builder's risk of $3500 upon the property alleged to be insured, in May, 1866, and, at the same time, requested them *to keep* the property insured. This the agents agreed to do, at the same time entering the builder's risk in "their blotter," and subsequently, upon the termination of that risk, carrying it into a permanent yearly risk, commencing July 1, 1866, for the same sum, upon the same "blotter."

4. No specific premium was agreed upon, but it was agreed between the parties that the amount of the premium should be deducted from the amount due the plaintiff from the defendants, for a previous loss, upon the same property, when that should be paid; and this deduction was made subsequently to the loss, by the defendants' agents, though the defendants declined to allow the deduction.

5. When a policy is issued, in such cases, the custom is to date it as of the entry in the blotter, though it may be, and usually is made out on a subsequent day. In contemplation of the insurance agents, the risk commences on the day of the entry in "the blotter."

6. After hearing the statements of their agents in this case and other cases, the defendants declared themselves satisfied with the manner in which their agents had conducted their business.

7. No policy was ever issued or demanded; and the property alleged to be insured, together with "the blotter," was destroyed by fire on the night of the fourth of July, 1866.

The question to be determined is whether enough was done to make a complete contract of insurance. It being competent for the defendants, as we have seen, to make a contract of insurance without issuing a policy, the decision of this question must depend upon the intention of the parties, as shown by their acts and declarations. There was an application for a builder's risk, and a permanent yearly risk, and a verbal acceptance of the application; and there were corresponding entries upon the blotter. Though the amount of the premium was not fixed, its payment was provided for by means of money due the plaintiff from the defendants; and it was not customary to pay the premium till the expiration of a month, and, before that had elapsed, the property was destroyed. Besides, the premium was subsequently paid, as agreed. The plaintiff seems to have been content with the arrangement, and undoubtedly intended to effect an insurance, and understood that she had done so. The defendants' agents did the same in this case to bind the parties as was their custom to do in similar cases, as was the universal custom of insurance agents in Portland to do, and as the defendants held them out as authorized to do. The property had but recently been damaged by fire, under a risk assumed at the defendants' office, and the defendants' agents knew the importance to the plaintiff of having it insured; if they did not intend to insure the property, they would have

so informed the plaintiff, that she might have procured insurance elsewhere. The pre-payment of the premium was an advantage to the defendants which they might and did waive. The agreement to insure, without fixing the rates of insurance, is an agreement to insure at the customary rates. What these rates would be, at the termination of the builder's risk, the parties may not have known, and hence they may have purposely omitted to fix the amount of the premium, leaving that to be determined by the rates existing when the yearly risk should commence. All the essential terms of a contract of insurance were agreed upon.

After a somewhat careful examination of the evidence, and the law applicable to it, we think that it was the intention of the parties to make a valid contract of insurance in the sum of $3500 for one year, commencing on the first day of July, 1866, at the customary rates of the defendant company, and that they did all that was necessary to bind the parties by such contract. This conclusion is consistent with public policy, as it legalizes the long established usage of insurance companies in an important particular, and saves the assured from the danger of losing his property during the interval between his application for insurance, and the receipt of his policy.

The same question came before the Court of Appeals of New York, and the Court held that an agreement to insure and to send the policy to the assured at a subsequent time, was a contract to insure presently, though the amount of the premium was not agreed upon by the parties. *Audubon* v. *The Excelsior Ins. Co.*, 27 N. Y., 223.

As the liability under the contract might accrue within a year, it is not within the statute of frauds.

It is no part of the duty of the assured, in case of a loss, to notify the company of the time and nature of the risk, as these are within its knowledge. Any misrecital, therefore, upon these points, in the notice of a loss, is immaterial, and may be regarded as surplusage.

If the defendants intended to rely upon the insufficiency

of the preliminary proofs of loss, they should have requested further proofs of the plaintiff upon receipt of notice of the loss. Failure to do this is a waiver of the right to require such proofs at the trial. *Bartlett* v. *Union M. F. Ins. Co.*, 46 Maine, 503; *Lewis* v. *Monmouth Ins. Co.*, 52 Maine, 497. *Action to stand for trial.*

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

KENT, J., did not concur.

APPLETON, C. J., submitted his views as follows: — A contract of insurance is completed when there is an assent to its terms by the parties, upon a valuable consideration. Neither the giving the premium note nor the reception of the policy of insurance by the insured are prerequisites to its consummation. *Blanchard* v. *Waite*, 28 Maine, 51. The acceptance of a written offer to insure, before its withdrawal, completes the contract. The acceptance may be verbal or in writing, by the principal or his agent.

So, if the insurance company make a verbal offer through their authorized agent to make or renew a policy of insurance on certain terms and conditions, and the offer is accepted, this constitutes a contract binding on both parties. There is, in such case, the assent of both parties *ad idem*. The insurers agree to issue a policy. The insured promise to pay the premium agreed upon. The acceptance of a proposition to insure completes the contract between the insurers and the insured. *Com. Ins. Co.* v. *Hallock*, 3 Dutcher, 645. If the premium is tendered to an agent of an insurance company and he does not receive it, but says he will consider it as actually made, and authorizes the applicants to retain the money till the policy arrives, the contract will be as binding upon the company as if the money had been actually paid to the agent. If the insurance company take the risk previous to the date of the policy, and the property is destroyed before the policy is actually executed and delivered, when there is no fraud nor concealment, the

company will be as much bound as if the loss occurred after the policy was delivered. *Com. Ins. Co.* v. *Hallock*, 2 Dutcher, 269. "I have not been able to find anything in the common law of England rendering it absolutely necessary that contracts of insurance should be in writing," remarks WALWORTH, Chancellor, in *Sanford* v. *The Trust Ins. Co.*, 11 Paige, 556, "although the custom is, so far as I can ascertain, to have some written evidence of the agreement to insure. A policy of insurance imports a written contract, as the name of the instrument derived from the Italian, necessarily implies. I am not prepared to say, however, that, in this State, there may not be a parol agreement, upon a good consideration, to execute a written policy of insurance, which a court of equity may enforce; although there is no written evidence whatever of the agreement, or of any of its stipulations or conditions." In *Union Mutual Ins. Co.* v. *Com. Mut. Ins. Co.*, 2 Curtis, 545, CURTIS, J., says, — "that he is not aware of any grounds upon which it can be maintained, that the common law requires a contract for a policy of insurance to be in writing." This same view of the law was affirmed by the Supreme Court of the United States, when the same case came under their consideration. 19 How., 318. Indeed, by the entire concurrence of decisions, it may be regarded as established that a contract for a policy of insurance need not be in writing. *Hamilton* v. *Lycoming Ins. Co.*, 5 Barr., 339; 2 Parsons on Maritime Contracts, 19.

If there be an agreement to issue a policy, and the insurers, upon reasonable demand and tender of the premium, refuse to issue it, a court of equity will enforce the performance of the contract. *Perkins* v. *Washington Ins. Co.*, 4 Cow., 645; *Carpenter* v. *Mut. Safety Ins. Co.*, 4 Sandf., 408; *Union Mut. Ins. Co.* v. *Com. Mut. Ins. Co.*, 19 How., 313.

If there be a valid contract, upon sufficient consideration, to issue a policy, an action at common law may be maintained upon such contract. In *McCulloch* v. *Eagle Ins. Co.*,

1 Pick., 278, which was an action of assumpsit upon an agreement to insure, PARKER, C. J., says, "a policy never having been made, the only question submitted is whether there was an agreement to insure; every thing necessary to entitle the plaintiff to recover being agreed by the parties. And, it is certain that, if a contract was made, the mere want of a policy will not prevent the plaintiff from recovering." In *Lightbody* v. *N. A. Ins. Co.*, 23 Wend., 18, BRONSON, J., thought the plaintiff in that case could have maintained an action on the case against the defendants for a refusal to deliver the policy, in which he would have recovered damages to the full amount of his loss. "If the defendants had tendered the policy, we have no doubt," remarks CURTIS, J., in delivering the opinion of the Court, in *Commercial Mut. Mar. Ins. Co.* v. *Union M. Ins. Co.*, 19 How., 318, "an action for not delivering the premium note would have at once lain against the plaintiffs; and we think there was a mutual right on their part, after the tender of the note, to maintain an action for the non-delivery of the policy."

It may be regarded as settled that a verbal agreement upon sufficient consideration to issue a policy of insurance is binding upon the parties thereto, and may be enforced by a suit at law. The promise to pay the premium or give a note therefor is a sufficient consideration for the promise to make a policy.

It is insisted in the defence that the rules of the common law have been changed by the provisions of R. S. of 1840, c. 79, § 14, relating to insurance companies, by which it is enacted that "all policies of insurance made by such companies shall be subscribed by the president, or in case of his death, inability or absence, by any two of the directors, and countersigned by the secretary of the company; and they shall be binding upon the company in like manner as if executed under the corporate seal thereof."

But the distinction between a contract to issue a policy of insurance or to renew one already issued, and the policy to

be issued or renewed in pursuance of such agreement, has always been recognized by the Courts and the text writers upon the subject of insurance. It is the same as that existing in bills of exchange, between an agreement to accept and the acceptance of a bill. They are distinct. The agreement to issue or renew a policy is one thing, the policy issued or renewed is another and different thing. The policy is the consummation of the agreement, the performance of what by its terms is agreed to be done.

The statutes of New York are very similar to those of this State. It was held in *The Trustees of the First Baptist Church* v. *Brooklyn Fire Ins. Co.*, 5 Smith's Reports, Court of Appeals, 305, that a provision, in the charter of such a corporation, that contracts of insurance signed by certain officers shall be valid and obligatory, as if under the corporate seal, does not abridge its general power, but is merely a specification of a mode in which it may be bound by its agents, without subtracting from its power to control otherwise. "There is nothing," remarks COMSTOCK, J., in delivering the opinion of the Court, "in the nature of insurance which requires written evidence of the contract. To deny, therefore, that parol agreements to insure are valid, would simply affirm the incapacity of parties to contract, when no such incapacity exists, according to any known rule of reason or of law."

The section in question was in force at the time of the separation of this State from Massachusetts, and since has been a part of the statute laws of both States. It regards in its terms only the formal mode of signing policies, and has no application to agreements to make insurance. There is no provision of any statute requiring an agreement to make a policy to be in writing. The practice of insurance companies has been in accordance with these views, and the repeated adjudications of courts of the highest authority has affirmed the legality of this practice. The case of the *Com. M. M. Ins. Co.* v. *The Union M. Ins. Co.*, 2 Curtis, 545, affirmed in 19 How., 318, is conclusive upon this point.

In *McCulloch* v. *Eagle Ins. Co.*, 1 Pick., 278; *Perry* v. *Newcastle M. F. Ins. Co.*, 8 Up. Can., Q. B., 360, and in *Goodall* v. *N. E. M. F. Ins. Co.*, 25 N. H., 169, the same principle was fully affirmed.

THE PRESIDENT, DIRECTORS AND COMPANY OF BANK OF MUTUAL REDEMPTION, *in Equity*, v. OLIVER HILL *& als.*, DIRECTORS OF SANFORD BANK.

By R. S., c. 47, §§ 43 and 47, a creditor of a bank who has suffered a loss described in § 43, may maintain a bill in equity against those directors through whose official mismanagement it occurred.

Directors are personally responsible for the official mismanagement only which occurred during the year for which they were chosen, and during which they acted.

Directors are personally answerable for ordinary neglect in their official business.

One board of directors cannot be answerable for renewals of worthless paper discounted by a previous board.

BILL IN EQUITY, brought in the name of the President, Directors and Company of the Bank of Mutual Redemption, in Boston, against certain persons named, directors of the Sanford Bank, in 1861.

The bill was brought as well in behalf of all the creditors of the Sanford Bank therein named, who might come in and desire to be made parties complainant, as well as in behalf of the complainants; and alleged substantially that, by an Act of the Legislature of this State, approved March 23, 1854, certain persons [named] were chartered as a banking corporation, by the name of the President, Directors and Company of the Mousam River Bank, at Sanford, with a capital of $50,000; that said corporators duly accepted and organized under their charter; and that, by a subsequent Act of the Legislature, approved April 9, 1857, the name of the corporation was changed to President, Directors and Company of the Sanford Bank.

That said bank having become insolvent, upon application of the bank commissioners to Judge GOODENOW, of the S. J. Court, an injunction was granted against it, on May 17, 1861; that, on the following day, the injunction was made perpetual and served upon the bank; and that, on May 21, certain persons [named] were appointed and qualified as receivers.

That the receivers, in accordance with the statute and orders of this Court, collected the debts due to the bank, disposed of its assets, allowed the claims against the bank, and made their reports to the Court, whereby it appeared that the amount of claims allowed against the bank, as still due and unpaid, were $11,213,01. [The amounts claimed,—the amounts allowed, including that of $6890,51, allowed to the Bank of Mutual Redemption, were duly set out in detail.] That all the assets were $2068,71; that the assets were insufficient to pay the claims allowed against the bank by $9144,31, which reports were duly accepted by the Court at the January term, 1864, and the Court adjudged that the assets were insufficient to pay the claims against the bank.

That, by said reports, the plaintiffs were declared to be, and by said decree adjudged to be, and that they still were, creditors of said bank to the amount named.

That, on or before May 8, 1861, by the official mismanagement of the directors of said Sanford Bank, nearly the whole amount of the capital stock thereof, viz., $45,000, was lost, so that the assets of said bank were wholly insufficient to pay the creditors; that the directors, by whose official mismanagement the loss was sustained, were Oliver Hill, S. B. Emery, W. L. Emery, Justin B. Merrill, and Samuel Thompson.

That the complainants charge these directors with being guilty of the following acts of official mismanagement, viz., "That they loaned the capital stock and funds of the bank to persons known to them to be pecuniarily irresponsible, and upon promissory notes and bills of exchange, the parties to which they knew were pecuniarily irresponsible, and which

notes and bills of exchange have not been paid, and are of no value, and which, together with the times when they were discounted, are more particularly described in the schedule annexed; that these directors knowingly permitted promissory notes and bills of exchange belonging to the bank, and the parties to which were pecuniarily responsible for the payment of the same, to be exchanged for bills and notes, the parties to which were irresponsible, which last named bills and notes and times when thus exchanged are particularly described in the schedule annexed;" that these directors loaned and invested the funds of the bank in notes and bills at certain times in 1861, (and particularized in the schedule annexed,) when they knew the parties thereto were not responsible, and received as collateral security a pledge of the shares in the capital stock of the bank, knowing said shares were of little or no value and afforded no adequate security for the loans; that these directors delivered to responsible parties to bills and notes belonging to the bank their paper, receiving therefor valueless certificates of this bank stock.

That these directors loaned the funds of the bank in violation of law and thereby its stock was lost.

That these directors were guilty of official gross mismanagement in loaning the bank funds in 1861, upon certain irresponsible paper, described, without making any inquiry as to its responsibility, when they could have easily learned of its irresponsibility upon inquiry, which paper was worthless and never paid; that they knowingly and negligently so managed in relation to investments and loans of the same that the capital stock was lost, &c.

All the parties defendant demurred, which demurrers were joined.

All of the defendants, except Hill, answered, denying all official mismanagement, &c.

Justin B. Merrill denied having accepted office of director or having acted as such.

The proofs sufficiently appear in the opinion.

Dane & Bourne, for the complainants.

Howard & Cleaves, for the respondents.

APPLETON, C. J. — By R. S., 1857, c. 47, § 43, "those directors, by whose official mismanagement a loss or deficiency of capital stock occurs, shall be liable therefor in their individual capacity," &c.

By § 47, "a creditor of a bank suffering loss as described in section forty-three, or a holder of unredeemed bills, as described in section forty-six, * * may avail himself of the liability of the directors and stockholders, as described in said sections, by a bill in equity."

By section 76, it is provided that the liability of directors and stockholders shall not be increased nor diminished by the other sections of c. 47 than those above recited.

There is no question that the plaintiffs were creditors of the Sanford Bank for $6890,51.

The respondents were chosen directors for the year 1861. Of those so chosen, Justin B. Merrill has not acted as such director, and is not responsible for the mismanagement of the bank.

Oliver Hill has not answered, and as to him the bill is to be taken *pro confesso*.

The statute makes the directors liable for "official mismanagement." The persons who become directors of a corporation, place themselves in the situation of trustees. "In the civil law," observes MCCOUN, V. C., in *Scott* v. *Depeyster*, 1 Edwards' Ch. R., 547, "a rule prevails, which, I think, may, with great propriety, be applied here. It is this, that 'those who are named by companies and corporations, to have the direction of their affairs, are obliged to take the same care and diligence as factors or agents. They are answerable, not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them.' Domat, 132, tit. 3, § 2. * * The rule there is, that they must answer for ordinary neglect; and ordinary neglect is understood to be the

omission of that care which every man of common prudence takes of his own concerns."

From an examination of the evidence, which is very voluminous, it fully appears that the directors discounted on a pledge of stock, — against the provisions of section 14; and that they loaned upon names utterly irresponsible, — as upon those of day laborers and clerks, — persons bankrupt in property. Indeed, it is difficult to imagine a more worthless set of notes and drafts, or a more uniform, continued, and flagrant disregard of the statutes of the State, and of the principles of common prudence than these directors have shown in the management of the bank. If they knew the character of the paper discounted, and its utter worthlessness, they were guilty of gross fraud upon the stockholders in discounting such paper. If they did not know its character, they were guilty of gross neglect in not making the inquiries, which they were bound officially to make.

But the directors for the year are only responsible for the official mismanagement occurring during the year for which they were so chosen. They cannot be liable for the mismanagement of the directors of a preceding year. It follows, from this, that when the discounts are but the renewals of those of preceding years, that, if the notes or bills renewed were entirely worthless, their renewal could not have been productive of loss to the bank. But a careful examination of the discounts shows that the directors are responsible for an amount exceeding the plaintiffs' claim.

Bill sustained as against all but Justin B. Merrill, who is entitled to his costs, and a decree must be entered against the other respondents.

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

KENT, J., concurred in the result.

AARON B. CHAPMAN *versus* INHABITANTS OF LIMERICK.

When the record is silent on the subject, parol evidence, that the moderator of a town meeting was sworn, should be of a direct and positive character.

The return upon a warrant calling a town meeting must bear the sign-manual of the constable who executed it.

It is not sufficient that his name was written at his request and in his immediate presence, after having heard it read.

ON REPORT.

KENT, J. — This case is submitted to the Court, with jury powers. The whole evidence is reported. The action is instituted to recover back the amount of a tax, which the defendant alleges was illegally raised, assessed and levied. Several objections have been made to the legality of the town meeting at which the tax was voted.

The first objection is that it does not appear that the moderator was duly sworn. This is required by c. 3, § 19, R. S. The record is silent on the subject. The defendants offer certain parol evidence to prove that he was in fact sworn "by a justice of the peace, or by the person presiding at the meeting when he was chosen." It has been decided in several cases in this State that, in the absence of record evidence, the fact that the required oath was legally administered may be proved by parol. *Kellar* v. *Savage*, 17 Maine, 444; *Hale* v. *Cushing*, 2 Maine, 218; *Cottrill* v. *Myrick*, 12 Maine, 222.

But the question here is, whether the required fact has been sufficiently established by the parol proof? It is to be considered that where the law requires a certain thing to be done, which, from its nature, if not by the positive requirement of the statute, should be recorded and duly certified, the permission to waive the production of the record and to allow parol proof should be so guarded, that nothing short of plenary or clear and distinct and absolute evidence should be received as sufficient substitute for the record.

The testimony should be of a direct and positive character, and not inferential or only a strong belief and conviction in the mind of the witness that the oath was administered, or that, from the nature of the case, it must have been.

The only evidence in the case on this point is the testimony of the moderator himself. He says, "I think I was qualified as moderator by the presiding officer of the meeting, — the man in the desk, — the chairman of the selectmen, A. A. Libby. I am very positive I was sworn. The clerk was not present. D. C. Eastman, chosen clerk *pro tem.*, was sworn by Abner Burbank, a justice of the peace."

Cross-examined. — He said, "am very confident that I was sworn by A. A. Libby. Am as confident that I was sworn by A. A. Libby as I am that I was sworn."

The next best evidence to the record in the town book would be the certificate of the magistrate who administered the oath. Perhaps the next to that would be the testimony of such magistrate to the fact. The person who, it is believed by the witness, administered the oath, is not called to testify. But it has been decided that the fact may be proved by the testimony of the party who took the oath. But is it unreasonable to require, if that is to be relied upon solely, that it should be more positive, distinct and certain than the statements of this witness? In all the cases cited, the proof by oral testimony was positive and undoubting. In one case, it was the certificate of the magistrate. It cannot escape notice that the witness speaks absolutely and unqualifiedly as to the fact that the oath was administered to the clerk *pro tem.*, and as to the person who administered it.

We do not, however, deem it necessary to finally determine this point at this stage of the case, for reasons that will appear in the conclusion to which we have come as to the present disposition of the case.

The next objection relates to the warrant and return thereon. The defendants put into this case the *original* warrant and return, and it is made part of the case by themselves, and is therefore properly before us. The constable, whose

name appears as the signer of the return, called by the defendants, testified that "the signature to the return on the warrant is not my handwriting. It was written, by my direction and in my presence, by Abner A. Libby, one of the selectmen. I was standing beside his counter, told him to write my name to the return, after he read the return, which he wrote."

This presents the question, whether a public officer can authorize another to put his name to an official document, which the law requires shall be signed by him. It may be admitted that a private person, when acting in his own business, may bind himself by a signature, which he directs another to make for him. But the law generally means by a signature, the writing by a man of his own name, or by actually making his mark.

The distinction between the signatures binding individuals, when made by another, and those made by public officers in their official capacity, is clearly set forth by the statute entitled "Rules of Construction," c. 1. By § 4, it is provided that "the following rules are to be observed in the construction of statutes, unless such construction is inconsistent with the plain meaning of the enactment." The XVIII rule is this, — "When the signature of a person is required, he must write it or make his mark."

It will be observed that this is not a general rule, applicable to contracts or instruments between private persons, except were a signature is required by a statute. It was very manifestly intended to reach the cases of public officers, required by the statute to sign official documents, and, to do away with any possible construction, by which an official signature could be made by proxy.

The statute (c. 3, § 7,) requires that "the person who notifies the meeting shall make his return on the warrant, stating the manner of notice and the time it was given." This return is an essential preliminary to a legal meeting. It is the legal evidence that it has been called according to law. It is conclusive upon the rights of all. If, therefore,

becomes a very important public document. The officer making it is responsible for its truth and correctness. It requires no argument to show that it was never in the contemplation of the law-makers, that official certificates or returns, which the law requires of those holding certain offices, might be signed by attorney or agent, or that they could have any legal validity unless signed by the officers so that they should bear his own handwriting. There may be cases, unquestionably, where the signature is made by a third party, at the request of the officer, in good faith and with honest intentions by all the parties. And this is, without question, one of such cases. But, if we sanction this mode of authentication in such a case, we establish a doctrine, which will be far reaching in its effects. It would reach to all cases where any public officer is required to sign any instrument or certificate. The clerk of the Court might sign writs, executions and records, by proxy. A sheriff might authorize a bystander, perhaps a transient person, when no one else was present, to write the sheriff's name to a return of a levy. The Governor of the State might thus sign a death-warrant.

If this action by deputy was sanctioned it would offer temptations to many officers to avoid all liability for their official misdoings or neglects, or mistakes, by taking care to have a third party write his name to his return or certificate, and taking care to have the proof, that it was done by his direction, difficult if not impossible. A denial of his signature would be his defence. It is well known that the President of the United States has a secretary who is authorized to sign the name of the President to land warrants. But this is given by a special law, and the fact that such law was required, before the President could be relieved from the drudgery of signing each warrant, is strongly corroborative of the general doctrine — that all public officers must sign their own name to their own returns and certificates of official acts.

This is not a case where the officer purports to act by deputy, and this fact appears on his properly signed return. In cases like this, there is no indication or intimation that a third party had anything to do with the return or the signature.

If the signature had been made, according to the literal fact, viz., A. B., constable, by C. D., could it have been regarded as a legal return, answering the requirement of the statute?

We find the case of *Richardson* v. *Bachelor*, 19 Maine, 82, in which it was decided that, where the signature of a justice of the peace to a writ was in his own handwriting, but on a slip of paper which was affixed to the writ, and the justice adopted and recognized it when the case was before him,—the signature was held sufficient. In this case, it will be observed, that the signature was genuine,—that no injury could result as from a forgery, and that the writ must be brought before the justice, and he could determine whether to adopt it or not, and all parties interested could avail themselves of any objection to the irregularity.

The case of *Achorn* v. *Matthews*, 38 Maine, 173, was a case where the signature of the magistrate was not written by himself, but adopted. The Court below recognized it and determined that it was sufficient. This Court only determined, after stating the question, that it was simply the exercise of discretion in the Court below, to which no exceptions could be taken. No opinion or decision was given on the point in question.

It is true that the Court feels itself justified in sustaining the acts of towns and town officers, by a liberal construction of the law, and always inclines towards a favorable view of their doings, where mere matters of form are in question. But this defect seems to us something more than form,—a town meeting is not a legal one, unless due notice was given. This is to be proved by the return "of the person who notifies the meeting," and to whom the warrant was directed. The return must be made by him under his own hand, so

that he may be held for any neglect or false return. We cannot think that it would be either safe or legal to admit the doctrine, that the signature may be made by a third party, on verbal directions by the officer. We think this should be understood by all public officers.

This case is before us on report, and we are at liberty to give the case such direction as right and justice may require. We are not satisfied that the officer cannot now sign the return, with his own hand, in the nature of an amendment under § 8 of c. 3, R. S. We therefore discharge this report and remit the case to the Court at *nisi prius*, with liberty to either party to move any amendments of the records or papers, or to furnish additional proof as to the qualification of the moderator, or to supply any defect in the records or proof, reserving the determination of the legality or effect of such matters as in other like cases.

Report discharged.

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

E. B. Smith & C. E. Clifford, for the plaintiff.

Drew & Burbank, for the defendants.

THOMAS HERSEY, *Complainant, versus* STEPHEN PACKARD *& al.*

Ths defendants' mill-dam, erected in 1796, was repaired in 1831 and rebuilt with stone in 1839. In 1841, the plaintiff demanded damages for past and future flowage, and the parties submitted the demand to referees, who were to "determine the yearly damage * * for the term of ten years and no longer," their report to be binding for that term. The referees determined that the plaintiff recover $10 for damages which occurred prior to Jan., 1841, and $5 annually for ten years, unless the defendants should sooner dispose of or lower their dam. The award was entered in the District Court and judgment rendered thereon. The defendants paid the damages in accordance with the award. In the trial of a complaint for flowage,

commenced in 1865, the defendants pleaded in bar a prescriptive right to flow without paying damages: — *Held*,

That the judgment upon the award devested the defendants of any prescriptive right they may have acquired prior thereto to flow the plaintiff's land; — BARROWS, J., *dissented*.

ON REPORT.

COMPLAINT FOR FLOWAGE.

The defendants pleaded in bar a prescriptive right to maintain their dam and flow the plaintiff's land without any compensation.

The plaintiff's title to the land flowed was admitted, as was also the defendants' title to the mills and dam; and it was further admitted that the defendants derived their title from one Brett, who owned the mills and erected the first dam in 1796.

On the part of the defendants, it appeared among other things, that Stephen Packard, one of the defendants, in May, 1819, purchased the mills and dam and had occupied them ever since; that the dam was old, but continued to be used with some repairs until 1839, when, a part of it having been carried away, it was rebuilt with stone; that a mark was made upon a post of the mill indicating the height of the old dam and that the stone dam was built "just as high as the old dam and no higher;" that the old dam was leaky for several years before it went away, and the water flowed over it some part of the year, but it did not keep the water up quite so long each year as the new dam; and that the plaintiff and Stephen Packard submitted certain questions touching the premises to referees.

The demand, submission and award put into the case by the plaintiff were as follows:

"Thomas Hersey demands of Stephen Packard the sum of fifty dollars damages, which he has sustained by reason of having his land flowed with water. For that the said Packard for more than six years last past, has been the owner and occupant of a certain mill privilege and dam across the stream leading from Little Wilson Pond to Great Wilson

Pond, in Minot, thereby flowing said Hersey's land situated in said Minot, and rendering a portion of the same useless, and of no value to the owner for the last six years, during which time the said Hersey has been the owner of the land.

"He also demands the sum of $30 damages for the coming year, if the said Packard shall continue to flow the same, or in that proportion, so long as he shall keep said dam at its present height.

(Signed) "Thomas Hersey."

"Know all men, that I, Thomas Hersey of Minot, in said county of Cumberland, and Stephen Packard of Minot aforesaid, have agreed to submit the demand made by the said Thomas Hersey against the said Packard, which is hereunto annexed, to the determination of Daniel Briggs, Nathan L. Woodbury and Samuel Freeman, Esquires, the report of whom, or the major part of whom, being made, as may be, to any District Court to be holden in and for said county of Cumberland, judgment therein to be final; and, if either party shall neglect to appear before the referees after proper notice * * * the referees shall have power to proceed *ex parte*.

"And it is further agreed, that the referees shall determine the yearly damage, if any they find, for the term of ten years and no longer; and their report shall be binding on the parties for said term of ten years, unless the said Packard shall sooner dispose of said mill." The submission was signed by the parties, but not acknowledged before a justice of the peace.

"We the subscribers, a majority of the referees appointed by the foregoing submission, having duly notified the parties therein named, met at the house of Stephen Packard, this thirtieth day of December, 1841, and, having heard their several allegations, pleas and proofs, and maturely considered the same, do award and determine that the said Thomas Hersey do recover of the said Stephen Packard the sum of ten dollars damages, for the flowage submitted to us previous to the 21st day of January, 1841. And also,

that he do recover five dollars yearly damages for each year subsequent to the 21st day of January, 1841, for the term of ten years, unless said Packard shall sooner dispose of said dam and mill, and provided said Packard shall continue said dam at its present height. The yearly damage, after January 21st, 1841, to cease, whenever said Packard shall lower his dam."

The award contained a provision in regard to costs, — recited that the other referee participated in all their deliberations, but, not concurring with the others, did not sign the award, — was signed by Briggs and Freeman, entered in District Court, in Portland, at the March term, 1842, accepted and judgment rendered thereon.

It also appeared, on the part of the defendants, that Packard never paid any damage for flowage, until after the award; that he then paid according to the terms of the award for ten years, but nothing thereafter; that the plaintiff did not urge before the referees that the dam had been raised, but that his land had been flowed by tightening the dam; that there had been no change in the dam since the award nor since it was built; that there was a log across the stream in the narrows above the mill-pond and below plaintiff's land, prior to 1839, and lay there several years before the stone dam was built, and another just above the former; never discovered that flowage was higher after new dam was built; saw-mill flume has not been raised since 1819; that plaintiff claimed damages soon after new dam was built; the fact of the obstructions was brought to the knowledge of the referees; that the old dam flowed other lands as high as the new, and the new no higher than the old; from 1831 to 1839 old dam was tighter than before; that, during summer, not water enough to carry the mill; flumes were leaky, and same since 1839; that the water kept above waste-way from twenty-five to forty days.

Defendants put in actual admeasurements of waste-way, flume and dam.

On the part of the plaintiff, and witnesses called by him, it appeared that he helped to cut the hay upon the premises in 1827, which are now flowed; that he never saw any water on same land until April, 1832; that he then talked with Packard about damages; that the water has killed 1000 trees and flowed 25 acres of land, so that nothing will grow upon it; that, before the referees, evidence was introduced showing the water was several feet higher than it had been before and that the dam had been raised; that the land was not flowed until after the repair of the dam in 1831; and that, prior to 1831, plaintiff's meadow was never flowed; water averaged 22 inches deep in meadow, in April, 1866.

The full Court was to render such judgment as the law and evidence required.

C. Record, for the plaintiff.

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

WALTON, J. — The only fact in dispute between these parties is whether the new dam, built by the defendant, (Packard,) in 1839, flowed the plaintiff's land higher than he had then acquired a prescriptive right to flow it, without the payment of damages; and this fact has been once litigated between the parties and decided against the defendant. The defendant testifies that soon after the dam was built the plaintiff claimed damages. The defendant claimed that he had a prescriptive right to flow without the payment of damages. The plaintiff claimed that the new dam flowed his land higher than it had ever been flowed before. They agreed to submit the question to arbitration. Intelligent referees were selected and a hearing had. This was soon after the new dam was built, when it must have been much easier to ascertain whether it flowed the plaintiff's land higher than any previous dam had flowed it, than it is now after the lapse of more than a quarter of a century. The referees awarded the plaintiff damages at the rate of five dollars per annum from the time the new dam was complet-

ed. Their report was accepted by the District Court and judgment rendered thereon. If there are any defects in the submission or record of the judgment, they are such as relate to matters of form only. There is nothing to indicate that the case was not fairly tried and honestly decided. The judgment still remains in full force. If liable to be reversed for informalities, it never has been. The defendant, if he did not admit the decision to be just, acquiesced in it, and for ten years paid the annual damages thereby awarded. He now claims to have the identical question that was then tried, and decided against him, tried over again. He now claims precisely what he then claimed, that the new dam, built in 1839, flowed no higher than he had then acquired a prescriptive right to flow without the payment of damages. This was his only defence then, it is his only defence now. Is it open to him? Clearly not. The defendant has had his day in Court; he has had his right to flow the plaintiff's land without payment of damages once passed upon; the decision was against him; he expressly agreed that the judgment should be final; and to allow him to again try the same question, would not only be contrary to the plainest principles of right, as between man and man, but contrary to well settled rules of law. The authorities in support of this conclusion are too familiar to require citation.

This case is not distinguishable in principle from the case of *Adams* v. *Pearson*, 7 Pick., 341, and the circumstances of the two cases are strikingly alike. That like this was a complaint for flowage. In that case as in this the defendant claimed a prescriptive right to flow the plaintiff's land. There as here the plaintiff's right to recover damages had been submitted to referees, and decided in his favor. The report had been returned to and accepted by the Court of Common Pleas, and judgment rendered thereon, as was done in this case. The defendant claimed to have the question tried over again; the plaintiff claimed that he was estopped by the former adjudication. The Court held that, it having been settled and adjudged on the former complaint that the

plaintiff was entitled to damages, the defendant could not be allowed to aver anything inconsistent with that adjudication, otherwise there would be no end to controversies. And, speaking of the reference, the Court said that although the damages were ascertained by referees mutually chosen by the parties, their report was equivalent to a verdict, and judgment thereon as binding as a judgment on the verdict of a jury.

The defendant contends that if, before submitting the question to arbitration, he had actually acquired a prescriptive right to flow the plaintiff's land, without the payment of damages, nothing short of a deed of conveyance or its equivalent would devest him of the right; and he relies upon the case of *School District* v. *Benson*, 31 Maine, 381, in which it was held that the title to real estate, obtained by disseizin, could not be devested by a parol abandonment or relinquishment, in support of his proposition. But the cases are not analogous; for, inasmuch as the right to flow land for mill purposes is given by statute, and the owner has simply a pecuniary claim for compensation, it has been held that such claim, like any other pecuniary claim, may be waived, satisfied or extinguished by parol. *Snow* v. *Moses*, 53 Maine, 546, and authorities there cited. But there is another complete answer to the objection, and that is, that the judgment of a court of record is as effectual to devest a party of any interest he may have in real estate as a deed of conveyance.

There has been no change in the dam since the award of the referees, nor since it was built. The defendant himself so testifies. The flowage is the same now as it was at the time of the former adjudication, and if the plaintiff was entitled to damages then, he is now; for there is no pretence that the defendant has acquired a right to flow without the payment of damages since that time, he having paid the annual damages till 1852. He claims now precisely what he claimed then; namely, that the new dam, built by him in 1839, flowed the plaintiff's land no higher than he had

then acquired a prescriptive right to flow it without the payment of damages. He resisted the plaintiff's claim to damages upon that ground then, he resists it upon precisely the same ground now. His counsel endeavors to avoid the effect of the former adjudication, not upon the ground that the plaintiff's land is flowed less now than it was then; but upon the ground that there were informalities in the proceedings; that such a claim for damages was not a proper matter for arbitration; that the judgment would not have the effect to devest the defendant of his right to flow without the payment of damages, if he had then actually acquired such a right; that nothing short of a deed of conveyance would have such effect. None of these grounds are in our judgment tenable.

Our conclusion, therefore, is that the plaintiff is entitled to recover, and that a committee should be appointed to appraise the damages, as provided in c. 91, § 9, of the R. S. of 1857.

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

BARROWS, J., delivered the following dissenting opinion.

The testimony of the respondents shows satisfactorily that, for more than twenty years prior to 1839, they and their grantors had maintained a dam on the site which they now occupy, at a certain height, without the payment of damages, claiming the right so to do; that, at that time, the dam here complained of was built to replace the other, and of the same height, care being taken before the remains of the old dam were removed, to mark its height permanently, and build to that height and no higher; that it has so continued to the present time, and under such circumstances as clearly to establish the prescriptive right set up in the defence, unless this position is controlled by the testimony for the complainant, or unless the respondents are estopped by the report of the arbitrators from asserting a prescriptive right.

Although, at first, the testimony offered by the complainant seems conflicting and inconsistent with the view of the case which we have taken, as presented by the respondents' testimony, yet, on examination, it may not only be reconciled with, but in part confirms it. No one of his witnesses testifies to any increased height or other change in the dam which would tend to increase the flowage, but their testimony all relates to the actual flow upon the land. Such testimony, in the absence of admeasurements and of any apparent investigation of the cause of increase, if any, is in a great degree a matter of opinion, and relating, as it does, to times past, with nothing to fix in the memory the actual depth of the water at different times, so as to compare the depth at one time with that at another, must necessarily be uncertain and unsatisfactory, and fails to overcome that which rests upon actual admeasurements of the dam.

We are satisfied that the different degrees of flowing testified to, making even small allowances for inaccuracy of memory and judgment, may be readily explained by obstructions in the stream other than the dam, the variation of the seasons, the different methods of using the water at different times, and the fact, that sometimes the dam was not so tight as at others.

The first two causes named, of course, cannot affect the position of the respondents, as established by their testimony. That the last two causes should not affect the respondents' right, is clearly established by the cases of *Cowell* v. *Thayer*, 5 Metcalf, 253, and *Ray* v. *Fletcher*, 12 Cush., 200, which, in my judgment, rest upon sound principles.

It seems not improbable that a deviation from these principles produced the award of the arbitrators, which makes the principal difficulty in this case. Aside from this award, I should not hesitate to say that the prescriptive right of the respondents is clearly proved to have existed in 1839, and that the stone dam then built, to replace the one which went away, had no greater efficient height than its predecessor, which is shown to have been more than ordinarily loose and

leaky. By the award of two of the arbitrators, (the third dissenting,) made December 30, 1841, and accepted at the March term of the District Court, 1842, the respondents were required to pay five dollars a year, for ten years, to the complainant for flowing his land by means of the dam erected in 1839, which continues unchanged to the present time, and it remains to be determined whether the award shall have the effect to estop the respondents from asserting their prescriptive right to flow; which, as we have heretofore seen, aside from the award, seems clearly established, commencing as far back as 1796. It is manifest that five dollars a year would be no compensation for the flowage of twenty-five acres and killing a thousand trees, which the complainant testifies to. It seems certain, from the amount awarded, that, if the respondents' prescriptive right to flow came in question at all before the arbitrators, they affirmed it to a certain extent by their decision, and it is not improbable that the increased actual flowing, for which the arbitrators awarded this five dollars annual payment, was caused by the increased tightness of the new dam, and perhaps, different and more economical management of the water, neither of which causes, as we have seen above, should have affected the award. The award, then, viewed merely as a matter of evidence, would not disturb the conclusion above stated, based upon the positive testimony of the respondents, as to the height of the dam of 1839, as compared with the one preceding it. Does it work an estoppel? Are the respondents precluded by it from putting the truth in evidence? Yes; if the respondents have had their day in Court and the question they seek to raise here has been decided against them by a competent tribunal; if not; no. To work an estoppel, the case must have been decided by a tribunal having jurisdiction of the parties and of the subject matter.

The agreement for arbitration here presents some peculiarities which are worthy of notice when the judgment upon the award is presented as the ground of an estoppel. It is provided by it, that "the referees shall determine the

yearly damage, if any they find, for the term of ten years, and no longer, and their report shall be binding on the parties for said term of ten years, unless the said Packard shall sooner dispose of said mill."

The ten years expired in 1852. The five dollars per annum was duly paid during the ten years, and nothing has been paid since. It might, perhaps, well be doubted whether, under such stipulations as to the length of time during which the award should bind the parties, it could be invoked as an estoppel after the expiration of that time. But there are other and graver objections to giving it that effect. The agreement for arbitration, though not acknowledged before a justice of the peace, as it ought regularly to have been, is substantially in the form prescribed in chap. 138, R. S. of 1841, which authorizes the submission to one or more referees of controversies which may be the subject of a personal action.

Even under the Massachusetts statute of July 7, 1786, authorizing the submission to referees of any "dispute of what nature soever," the Court, in *Fowler* v. *Bigelow*, 8 Mass., 1, showed their disinclination to permit such a tribunal to pass upon titles to real estate, by holding that referees, thus appointed, had no jurisdiction of questions involving such titles. And the Legislature, both in Massachusetts and in this State, afterwards confined such appointments to controversies which may be the subject of a personal action.

It is said that this case is substantially identical with *Adams* v. *Pearson*, 7 Pick., 341. Not so. The judgment which was there held to estop the respondent was upon a regular complaint for flowage before the Court of Common Pleas, referred by rule of Court, the parties specially agreeing on the record that the referees should have all the powers that the Court and jury would if the case were not referred.

The question of the jurisdiction of the tribunal, whose de-

cision was claimed as an estoppel, did not and could not arise in that case.

In *The Proprietors of Fryeburg Canal, in Error*, v. *Frye*, 5 Maine, 38, where the submission was before a justice, it is said by the Court that the judgment is erroneous "if the title to real estate is necessarily involved in this controversy. But it does not appear to us that the title to real estate is affected by the submission." No question arose in that case as to the right of either party in real estate, and the Court accordingly liken it to an action of trespass *quare clausum*, brought before a justice of the peace, where the defendant does not dispute the plaintiff's title, and say, "it is a mere question of damage and not of title." Now, in the case at bar, the respondent's title by prescription to flow the land without the payment of damages, was involved in the controversy before the arbitrators, or it was not. If it was not in controversy, there can be no pretence that the award estops the respondents from asserting that right. If it was in controversy, then, under these decisions, it is plain that arbitrators under the statute can make no binding adjudication upon such a question. Moreover, the submission not having been acknowledged before a justice, the District Court had no jurisdiction to enter up any judgment in the premises. Their jurisdiction, in such cases, depends upon the statute, and must be exercised in conformity with it. Where the want of jurisdiction is, as here, apparent upon the face of the papers, surely the judgment ought not to be allowed to work an estoppel or to devest a party of his title to real estate. The defects in the submission and record are not matters of form only. The groundwork is wanting.

It does not follow that, because, according to *Snow* v. *Moses*, 53 Maine, 546, the owner of the land, as against whom the statute gives a right to flow upon the payment of damages, may waive his mere pecuniary claim and extinguish it by parol, that a mill owner, who is the owner of the prescriptive right to flow land, acquired by more than forty years adverse user, should be held to have aban-

doned that by parol. *His is not* a mere pecuniary claim, but an interest in the land itself, and falls within the rule enunciated in *School District* v. *Benson*, 31 Maine, 381.

The respondents cannot properly be said to have had their day in Court, or a decision of the issue which they seek here to raise, by any tribunal having jurisdiction of the parties and of the subject matter.

Being at liberty, then, to examine their defence by the light of the testimony, and finding the testimony offered by the respondents to be of a character altogether more satisfactory and conclusive than the vague and uncertain inferences to be drawn from that of the complainant, allowing that the witnesses on both sides intend to state the matter truly, I am of opinion that there should be judgment for the respondents.

J. Warren Estes *versus* Inhabitants of China.

No action can be maintained against a town for neglecting to repair a drain across its highways, *per quod* the water accustomed to flow through it was forced back upon the adjoining land, unless it appears that an obligation to construct the drain was imposed on the town by the statute or common law.

The common law requires a town to build a drain only where its highway would otherwise obstruct the flow of water in its natural channel, or cause it to collect and stand upon adjoining land to the injury of the owner.

To sustain an action against a town, founded on R. S., c. 116, §§ 4 and 9, for damages caused by the want of repair of a drain made since the Revised Statutes went into effect, it must be affirmatively alleged and proved, — that the municipal officers constructed the drain; that the plaintiff, or his predecessor in title, made written application to the municipal officers to enter and connect with it; and that the municipal officers gave the applicant written permit so to do.

Unless the permit be in writing, it will not run with the land.

On Exceptions.

Case, to recover damages suffered by the plaintiff in his

79 Me. 347
82 " 365-355-6-359
85 - 143

land, cellar, &c., in consequence of want of repair of a drain across certain highways in the defendant town.

The declaration contained two counts, one alleging substantially that the plaintiff was, long before Nov. 1866, ever since has been, and now is, possessed of a certain piece of land, with a store and dwellinghouse thereon, situated in China, and bounded on two highways as herein described; that the inhabitants of China, in 185– constructed a good and sufficient drain across said highways and in front of and near the plaintiff's store and house, and thereupon became bound by law to keep the same in good repair so as to afford suitable and sufficient flow for all drainage that ought to pass through it; that they so negligently maintained said drain, that in Nov., 1866, it was, ever since has been, and now is, so out of repair as to be useless for the purpose of drainage; that by reason thereof the large quantity of water accustomed to flow through and be discharged from the drain was checked and forced back upon the plaintiff's land, and into his cellar, and undermined his cellar wall and chimneys, of all which the defendants had notice.

The second count contained the same allegations as the former, down to and including the allegation of the construction of the drain, when it alleged, substantially, that the defendants, for a valuable consideration, permitted the plaintiff's grantor to connect with said public drain, a private drain, leading from the cellar of said store and dwellinghouse; that the said grantor paid the consideration, connected said private drain with the public drain; that thereupon the defendants became bound to maintain said public drain so as to afford sufficient flow for all drainage entitled to pass through it; that, in Nov., 1866, it was, ever since has been, and now is, so out of repair as to be useless for drainage; that, by reason thereof, the water accustomed to pass through was forced back upon plaintiff's land, flowed into his cellar, undermined his wall, chimneys and cistern and inundated his furnace, &c., of all which the defendants had notice, &c.

To the declaration the defendants demurred, and the plaintiff joined the demurrer. The presiding Judge overruled the demurrer and adjudged the declaration good, and the defendants alleged exceptions.

A. Libbey, for the defendants.

W. P. Whitehouse, for the plaintiff, contended that the first count was good at common law, citing *Thayer* v. *Boston*, 19 Pick., 511; *Green* v. *Portland*, 32 Maine, 433; *Peck* v. *Ellsworth*, 36 Maine, 398; Angell on Highways, (ed. 1857,) § 221; *Stone* v. *Augusta*, 46 Maine, 136.

The adjudication on the necessity of the drain is *quasi* judicial and final; but when the discretion has been exercised and the drain built, the duty of repairing is ministerial, and, hence, is imperative and absolute. *Mayor of N. Y.* v. *Furze*, 3 Hill, 612; *Wilson* v. *Mayor of N. Y.*, 1 Denio, 595; *Child* v. *City of Boston*, 4 Allen, 41; *Eastman* v. *Meredith*, 36 N. H., 284; *Montgomery* v. *Gilmer*, 33 Ala., 116.

If the drain had never been built, or, being built, had been kept in repair, the injuries would not have occurred.

No one could repair but defendants, and they are liable for not doing it. *Henley* v. *Mayor of Lyme Regis*, 1 Bing., 222; R. S., c. 16, § 2, similar to N. Y., and to ordinance of city of Boston, referred to in *Child* v. *Boston*, *ubi supra*.

The declaration need not allege that a written application was made. The town officers are presumed to have imposed all the statute conditions.

DANFORTH, J. — This action is founded upon an alleged neglect on the part of the defendants to keep in repair a drain, which they had previously built across a highway; and the only question submitted, is whether the facts set out in either count in the writ are sufficient to maintain the suit.

In this case there can be no actionable neglect unless we first find an obligation to repair, and this obligation depends

upon the prior one to build. An examination of the cases cited by the plaintiff will show that in every one there was an obligation to build the drain, imposed by the principles of the common law, or by statute. In the case of statute drains, the obligation to build is imposed by the proper and constituted tribunal in the exercise of judicial authority, while the duty to construct and keep in repair is a ministerial duty. At common law, the duty to build drains can only be imposed by the fact that the highway would otherwise obstruct the flow of water in its natural channel, or cause it to collect and remain upon land to the injury of the owner.

In this case we find no allegations of the original necessity of the drain. It does not appear that the road was any obstruction to water accustomed to flow there, or caused the water to collect or stand there in any manner different from what it had previously done. There is no allegation inconsistent with the fact that the town, without any obligation whatever, had constructed the drain for the accommodation of the plaintiff, and that he availed himself of the convenience thus afforded to drain his land. Neither does it appear that the plaintiff is in any worse situation than if the drain had not been built. In this state of facts, there can be no reason why the town may not abandon it whenever it chooses. The first count shows no cause of action.

The second count is founded upon the R. S., c. 16, §§ 4 and 9, and would seem to be equally defective with the first. The allegation here is that the inhabitants of the town caused the drain to be constructed. The statute, § 2 as amended in 1860, c. 153, provides that the municipal officers may construct public drains where they shall deem it necessary for public convenience or health; thus requiring the exercise of judicial discretion and judgment on the part, not of the town or its inhabitants, but of those particular officers. True, it does not appear that this drain was not constructed before the passage of the Revised Statutes. But, if it were so, then the Act of 1844, c. 94, was in force, which still more clearly requires the same discretion and judgment.

Again, by the statute, § 4, application to enter and connect is to be made to and the permit given by the municipal officers. It does not appear that any application was made, and it is alleged that the permit was given by the inhabitants. The statute further requires that both the permit and application shall be in writing, and it does not appear that either of them were so. This differs from those cases where it has been held unnecessary, in an action upon a contract within the statute of frauds, to allege the promise in writing. In such a case, the promise, though not in writing, is not illegal, and the defendant waives the statute unless he sets it up in his pleadings. *Lawrence* v. *Chase*, 54 Maine, 199.

This is an action sounding in tort, and the defendants cannot be found guilty, until all the facts necessary to constitute their guilt have been affirmatively alleged and proved.

In this case, the permit was given to the plaintiff's grantor, and, unless in writing, does not run with the land. It clearly follows that these defendants cannot, under the statute, be liable to this plaintiff, unless the application and permit are in writing, and the application, as required by the statute, and for obvious reasons, must "distinctly describe the land to which it applies." *Exceptions sustained.*

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

TAPLEY, J., concurred in the result.

WILLIAM J. PAINE, *Appellant from decree of Judge of Probate, versus* SETH B. GOODWIN, *Ex'r.*

One, who by a will is to have a life estate in land, upon certain contingencies and conditions therein named, may appeal from the decree of the Judge of Probate allowing the account of the executor of the will.

ON EXCEPTIONS.

81 Me 223

Paine *v.* Goodwin.

APPEAL from the decree of the Judge of Probate for this county, allowing the account of the appellee, as executor of the last will and testament of Edith M. Dyer.

It appeared that one Simeon Paine, by his warranty deed, duly executed, acknowledged and recorded, on Feb. 8, 1860, conveyed his homestead farm, situated in Augusta, to his daughter Edith M. Dyer, in consideration of one thousand dollars; that, on the same day, Edith M. Dyer executed and delivered a bond in the penal sum of one thousand dollars, to her father, conditioned for his support during life, &c.; that Edith M. Dyer, by her will, devised unto W. A. S. Paine the use of the farm during his life, provided he should support her father Simeon, as she was bound to do by her bond; that, by another provision in her will, she devised the use of the farm, during his life, to William J. Paine, (appellant,) after the decease of W. A. S. Paine, subject to the same conditions made in the devise to the latter; that the will was duly approved and allowed, the appellee was duly appointed and qualified as the executor thereof; that the executor presented his account, as executor, to the Probate Court for allowance, when the appellant appeared and opposed the allowance of it; that the Judge of Probate allowed such items of it as he saw fit, and the appellant appealed; that, upon the entry of the appeal in this Court, the executor moved to dismiss the appeal, on the ground that the appellant is not a party aggrieved within the meaning of the statute.

The presiding Judge overruled the motion and sustained the appeal; whereupon the appellee alleged exceptions.

S. Lancaster, for the appellee, cited *Wiggin* v. *Swett*, 6 Met., 197; *Smith* v. *Bradstreet*, 16 Pick., 264; *Bryant* v. *Allen*, 6 N. H., 116; *Deering* v. *Adams*, 34 Maine, 41; *Woodbury* v. *Hammond*, 54 Maine, 342; *Veazie Bank* v. *Young*, 53 Maine, 560; *Downing* v. *Porter*, 9 Mass., 386.

G. C. Vose, for the appellant.

KENT, J. — The law discourages and generally denies the right of intervention in litigated cases, by parties not interrested pecuniarily in the questions arising. It is necessary to enforce such a rule to prevent the interference of those merely interested by feeling, sympathy or dislike or aversion, who might be willing to protract litigation between other parties, to gratify such feelings.

On the other hand, the law intends to give every facility for the full investigation of all questions and the settlement of all claims. This is particularly true in relation to the questions arising in the Probate Court, touching the settlement of the estates of deceased persons, and the claims of executors and administrators or guardians.

The rule, in determining who are "aggrieved" within the meaning of the statute, is thus stated in *Deering* v. *Adams*, 34 Maine, 41. "In legal acceptation, a party is aggrieved by such decree only when it operates on his rights of property, or bears directly upon his interests."

In this case, the appellant was very deeply interested in the settlement of this account. By the will of the testatrix, he was to have a life estate in the land, upon a certain contingency. But, if that real estate is required to pay debts of the deceased, the life estate must fail. The executor renders an account, which, it is said, if allowed, will require the sale of the real estate. Indeed, it is claimed that a petition for authority to make such a sale accompanied the account. The appellant claims that he can show that the account should be so reduced, in the amount allowed, that no such sale would be required.

We think it clear that he is not such an unauthorized interloper as to require us to refuse him permission to be heard, on the ground that the decree does in no way "operate on his right of property, or bear directly upon his interests." *Exceptions overruled. — Appeal sustained.*

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

DELANA LUCE, *Compl'nt, versus* HENRY T. BURBANK.

On a warrant, issued April, 1867, upon a complaint under the bastardy statute, and ordering the arrest and return of the respondent before a trial justice, "to find sureties for his appearance at the next term of the S. J. Court to be holden * * * on the third Tuesday of Sept., 1867," the respondent was arrested, July, 1868, when he gave bond in due form for his appearance at the Sept. term, 1868, at which term he seasonably filed a motion to quash the proceedings:— *Held*,

1. That the delay beyond the first term in arresting the respondent did not vitiate the complaint and warrant;

2. That the words, "on the third Tuesday of Sept., 1867," may be rejected as surplusage, and leave sufficient in the warrant to authorize the subsequent proceedings; and,

3. The fact that the arrest was not made until after the birth of the child did not vitiate the warrant issued before the birth.

ON EXCEPTIONS.

COMPLAINT under R. S., c. 97, concerning "bastard children and their maintenance."

The presiding Judge sustained a motion to quash, for certain reasons, which sufficiently appear in the opinion; and thereupon the complainant alleged exceptions.

H. L. Whitcomb, for the complainant.

D. D. Stewart, for the respondent.

The statute provides for two classes of cases,—one, before the birth, and the other after. R. S., c. 97, § 1.

The proceedings are *sui generis*, and the provisions of the statute must be strictly complied with. *Drowne* v. *Stimpson*, 2 Mass., 444; *Fisher* v. *Shattuck*, 17 Pick., 254; *Oakes* v. *Munroe*, 8 Cush., 284.

The remedy "has the incidents of a civil process." *Eaton* v. *Elliott*, 28 Maine, 438; "as much so as if it were a special action on the case." *Wilbur* v. *Cram*, 13 Pick., 289; *Mahoney* v. *Crowley*, 36 Maine, 486; *Smith* v. *Lent*, 37 Maine, 546; and is amendable. *Bailey* v. *Chesley*, 10 Cush., 284; *Hill* v. *Wells*, 6 Pick., 105; *Beals* v. *Furbush*, 39 Maine, 472.

The warrant not having been served until after the return day therein mentioned, was *functus officio*, and the service void. New process must be sued out.

A respondent, under this statute, cannot be arrested after the birth of the child, except upon a warrant issued on a complaint which sets out the fact of the birth. *Knowlton* v. *Rowe*, 16 Maine, 38. Courts will take notice of the ordinary course of nature. *Woodward* v. *Shaw*, 18 Maine, 307.

BARROWS, J. — The complainant, on the 8th day of April, 1867, accused the respondent, before a trial justice, of having begotten her with child, on or about the 30th of September, 1866, alleging that the child, if born alive, might be a bastard, and praying process for the apprehension of the respondent, so that he might be held to answer to the complaint. The trial justice forthwith issued his warrant commanding the officer to bring the respondent before him or some other trial justice, "to find sureties for his personal appearance at the next term of the Supreme Judicial Court, to be holden at Norridgewock, within and for the county of Somerset, on the third Tuesday of September, 1867, and to abide such order or orders as shall be made in the premises."

The officer did not succeed in getting service on the respondent until July 22, 1868, when, on being arrested and taken before a magistrate, he gave bond to appear at the September term, 1868, and, on the second day of that term, moved to quash the proceedings against him, on the ground that the justice's warrant had expired by its own limitation, that his arrest thereon was illegal, and that the process was not sufficient to give this Court jurisdiction; and because, as according to the course of nature the child must have been born before he was arrested, the complaint is defective in not alleging that fact.

He seeks to maintain these grounds here, but we think neither of them tenable. Sections 1 and 2, of chap. 97 of the R. S., provide for the examination of the mother and the issuing of a warrant either before or after the birth of

the child. Section 3 directs that, "when the person is brought before such or any other justice, he may require him to give bond," &c., "conditioned for his appearance at the next Supreme Judicial Court for the county in which she resides, and for his abiding the order of the Court thereon."

This direction was duly and regularly complied with in this case. The respondent was well advised by the terms of his bond when he was to appear.

Although a bastardy process is in substance a civil suit, the initiatory steps are criminal in form. Delay beyond the first term in effecting the arrest does not vitiate complaint and warrant. What is said in the warrant respecting the September term, 1867, may be rejected as surplusage, and the respondent still be rightfully required to give bond to answer at the term next succeeding his arrest. The warrant is not like a writ in civil cases, necessarily returnable at the next term of the Court, which affords sufficient time for legal service. It is returnable before a magistrate when and so soon as the order to arrest can be complied with.

Moreover, if there were substance in the respondent's objection, originally, it should have been taken before the magistrate. By giving bond without objection, according to the magistrate's order, he must be held to have waived it.

The complaint must set forth things truly as they are when the warrant is prayed for and issued. In this case the warrant issued before the birth of the child. The failure to get service until after the birth does not vitiate it. The case can never proceed to trial until a declaration alleging the birth, and sundry other statute requisites, has been filed, and the respondent cannot be prejudiced by being called to answer to a complaint in which the alleged time of conception cannot have been predicated upon the actual date of the birth. *Exceptions sustained.*

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

CHARLES F. HOBBS *& al. versus* MANHATTAN INSURANCE COMPANY.

The members of a corporation are legally presumed to be citizens of the State, by the laws of which it was created and in which alone it has a legal existence.

A suit, in which the amount sued for exceeds five hundred dollars, brought by a citizen of this State against a foreign insurance company, all of whose members are citizens of another State, may, on proper motion, seasonably filed, and good and sufficient surety offered, be removed for trial, from this Court to the U. S. Circuit Court for the District of Maine, notwithstanding the defendant corporation has complied with the provisions of R. S., c. 49, § 39, and service has been made upon the defendants, as therein provided.

None of the provisions of R. S., c. 49, § 39, prohibit such removal, or infringe upon the jurisdiction of the Courts of the United States.

ON EXCEPTIONS.

ASSUMPSIT on policy of insurance issued by Cox & Field, of Belfast, county of Waldo, duly appointed agents of the defendants, pursuant to R. S., c. 49, § 39. The writ was dated Sept. 18, 1867, and served upon Cox & Field, as by § 39, and was made returnable at the March term, 1868, of this Court in this county.

At the time of entering their appearance at the return term, the defendants filed a petition under oath, praying for the removal of the cause for trial to the next Circuit Court of the U. S., to be held in the district where the suit was pending, and, at the same time, offered good and sufficient surety for entering in the Circuit Court on the first day of its session, copies of the process against them, and for doing all other things in the matter required by law, particularly by the U. S. statute of Sept. 24, 1789, § 12, and the surety was adjudged sufficient by the presiding Judge.

The defendants offered no testimony, or proof that the stockholders or members of the defendant corporation, or any of them resided in the State of New York, or that they or any of them, resided in any particular State; nor did they

offer any evidence to support the allegations in their petition for the removal of said action, other than what is contained in the writ.

The presiding Judge found, as a matter of fact, from the allegations in the plaintiffs' writ, by which they are bound,

1. That the plaintiffs are citizens of the State of Maine;

2. That the defendant corporation was incorporated under the laws of the State of New York, and has a place of business in that State; and, —

3. That the sum sued for exceeds five hundred dollars.

The presiding Judge further found, as a matter of fact, —

1. That there was no evidence that all, or any of the members of the defendant corporation resided in the State of New York, or that they did not reside in the State of Maine;

2. That the defendants, by the appointment of agents in this State, had a place of business here.

Upon these facts and findings, the presiding Judge held that the case cannot be legally removed to the Circuit Court of the United States, for the following reasons: —

1. Because, by the appointment of agents in this State, the defendant corporation had submitted themselves to the jurisdiction of this Court, and consented that it should take "like jurisdiction, and have like effect as if the defendant corporation had existed and been duly served with process in this State;" and, —

2. Because the defendants have failed to prove that all the stockholders of their corporation reside in some other State than this State.

And, for the above reasons, he refused to grant the prayer of the petition, but ordered that the case proceed in this Court.

To all which rulings, refusals and order, the defendants alleged specific and several exceptions, whereupon the presiding Judge ordered that the bill of exceptions and the papers making a part thereof be extended in full, as of record in this Court.

W. L. Putnam, for the defendants.

A. P. Gould, for the plaintiffs.

The statement of the presiding Judge, that he found, as a matter of fact, "from the allegations in the writ," &c., that the defendant corporation was incorporated under the laws of New York, was an inadvertence.

I. To entitle the removal, the defendants should "make it appear to the satisfaction of the Court" that they were not citizens of Maine. U. S. statute, c. 29, § 12. The petition must allege sufficient facts accompanied by a bond to secure the entry, and offer competent proofs of the facts. The evidence must be legal. Affidavit not sufficient. The petition must be sworn to, to entitle it to be considered. Conkling's Treatise, [2d ed.,] § 8, p. 300. These facts were in issue and should have been proved. *Gordon* v. *Longest*, 16 Pet., 97, 103.

Correct the inadvertent statement of the presiding Judge, and no presumption of citizenship can stand.

II. The compliance with R. S., c. 49, § 39, gave our courts the same authority over contracts made by the defendants in this State, and the same jurisdiction over all suits growing out of them and with the same effect, "as if the company had existed in this State," i. e., had been incorporated in this State. If incorporated here, our courts would have taken and retained jurisdiction until final judgment. To compel a small policy holder to go into U. S. Courts, and incur expense of litigating his case there, is virtually a denial of justice. R. S., c. 49, § 39, was manifestly intended to remedy such an evil.

Foreign corporations have no powers here, except what our statute gives them. Section 39 authorized them to insure property here, provided they agree to be treated, in all litigation, as though they were domestic. The State had a right to offer such conditions, and the corporation to accept them, and having accepted they must abide. The jurisdiction of the Federal Court is not thereby superseded by the State law, but precluded to the defendants by their own act.

The agreement to submit themselves to the jurisdiction of our courts is part of the contract between the parties.

APPLETON, C. J. — The presiding Justice found "that the defendant corporation was incorporated under the laws of the State of New York, and has a place of business in that State." It does not appear that any inhabitants of Maine are members. When a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence. A suit by or against such corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State creating the corporation; and no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a Court of the United States. *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black., 286. There is nothing disproving or tending to disprove the legal presumption that the members of the defendant corporation are citizens of the State of New York.

The amount sued for exceeds five hundred dollars. The plaintiffs are citizens of this State. The defendant corporation, in the absence of proof to the contrary, is presumed to be composed of citizens of New York.

The case, as presented, is, therefore, within the Judiciary Act of the United States, approved Sept. 24, 1789, c. 30, § 12. The defendants claim the right to remove the suit, and have filed the petition and given the surety required by the statute. In such case the removal is matter of right, which a Judge of a State Court cannot prevent. *Gordon* v. *Longest*, 16 Pet., 97.

The only grounds of objection to the removal of the cause arise from the statute of this State, (R. S., c. 49, § 39,) which is as follows: — "The word foreign, when used herein, designates companies not incorporated by the Legislature of this State. Every person authorized by any foreign fire insurance company to advertise as its agent, or to receive and forward proposals for insurance, shall be deemed its

agent. Such company, insuring property by their agent, shall give him instructions in writing, signed and sworn to by the president and secretary thereof, to accept service of all lawful processes against the company; and shall therein consent and engage that all such service, duly made upon such agent, shall be legal, and give to the Courts of this State like jurisdiction, and have like effect as if the company had existed and been duly served with process in this State. * * * And service upon the agent shall be deemed sufficient service upon the principal."

The State of Maine had an unquestioned right to impose upon foreign corporations the conditions prescribed by § 39. A judgment recovered in the courts of this State, when service was made according to its provisions, would be entitled to full faith and credit. *LaFayette Insurance Co.* v. *French*, 18 How., (U. S.,) 404.

The defendant corporation having complied with the statute of the State, seeks to remove this suit, of which due service has been made, to the courts of the United States, and the statute of this State has been interposed as preventing this removal. It is claimed that the defendant is estopped to remove his suit.

The jurisdiction of the courts of the United States depend upon the Constitution, and the Acts of Congress passed in conformity with its provisions.

Parties cannot, by any agreements, confer jurisdiction where it is not given by Act of Congress. When so given, they cannot oust the courts of the United States of the jurisdiction conferred upon them. Nor can the States by any legislative act limit or enlarge the jurisdiction as conferred by Congress.

But the Act in question does not limit or restrict the jurisdiction of the courts of the United States. It does not do so in terms. Nor does it by implication. The object of the Act was to prevent foreign corporations acting in this State, unless they would submit to its jurisdiction so far as to be sued within its limits. It was not to exclude

the courts of the United States, but enable our citizens to enforce their claims here without resorting to another jurisdiction. To do this, it provides how service of any writ or process may be made, — and, being made, the courts of the State have jurisdiction. Being served, and the parties being before the Court, all the incidents to a suit where one of the parties is a citizen of another State attach. The service thus "made is declared to be legal, and is declared sufficient service upon the principal." It has "the like effect as if the company had existed and been duly served with process in this State." That is, the party defendant is rightly in Court. If the action is not removed, judgment may be rendered. If removed, then judgment is to be rendered in the Court to which the removal is made. But there is nothing prohibitory of removal or infringing upon the jurisdiction of the courts of the United States.

Exceptions sustained.

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

DICKERSON, J., dissented.

JOSHUA DAGGETT *versus* INHABITANTS OF CUSHING.

A person drafted, to serve in the military service "one year, or during the war," who entered and served until regularly discharged, is not within the fair meaning of a vote offering a bounty to men drafted "to serve two years."

ON FACTS AGREED.

ASSUMPSIT, to recover a bounty voted by the defendants. The case is stated in the opinion.

A. P. Gould, for the plaintiff, contended that the gist of the vote was to pay volunteers or drafted men, who should be accepted upon the quota of the defendants, under the

call of the President. The time was fixed by U. S. statute and the call. The purpose of the vote was to fill the quota under the call. The draft fixed the time of service. The time of service answered the purpose.

Counsel cited Laws of 1864, c. 226; Laws of 1865, c. 298; Laws of 1866, c. 59, § 1; Laws of 1869, c. 56; Opinion of Judges, 52 Maine, 595; *Ferrin* v. *Portland*, 53 Maine, 458; *Barbour* v. *Camden*, 51 Maine, 608; *Thompson* v. *Bridgeton*, 54 Maine, 368; *Winchester* v. *Corinna*, 55 Maine, 9; *Hart* v. *Holden*, 55 Maine, 572.

E. Wilson, for the defendants.

APPLETON, C. J. — On July 18, 1864, the President of the United States issued his proclamation, calling for five hundred thousand volunteers for the military service of the United States, and ordering "a draft for troops to serve for one year" in case the amount called for should not be obtained by Sept. 5, 1864. 14 U. S. Stat., 747.

The required number of soldiers not being had, the President of the United States, on Dec. 19, 1864, issued a proclamation calling "for three hundred thousand volunteers to serve for one, two, or three years," and ordering a draft to be made if the troops called for should not be forthcoming before Feb. 15, 1865. 14 U. S. Stat., 750.

In response to this call, the defendants, at a meeting regularly called, "voted to raise the sum of four hundred dollars to each volunteer or drafted man, to fill our town quota, under the last call of the President for 300,000 men. The men to serve two years."

The plaintiff, on 23d March, 1865, was drafted upon the defendants' quota, "to serve one year or during the war." He entered the service of the United States and remained therein until the 10th May, 1865, when he was regularly discharged therefrom.

By the Act of Congress, passed July, 1864, the President of the United States was authorized to issue his proclamation calling for volunteers, for "one, two or three years, for

military service." His proclamation, issued Dec. 19, 1864, was in conformity with the Act of Congress and called for volunteers "for one, two or three years."

The defendant town was under no legal obligation to offer bounties. It might refuse to give any. It might offer bounties only to those volunteering for three years, if it should so determine. In such case, those volunteering for two years would not be entitled to the bounty. It did offer a bounty to volunteers and drafted men "to serve two years." A volunteer for one year most assuredly is not within such a vote of the defendant town and cannot claim its bounty. Neither is a volunteer during the war, for the war might end in less than a year, as it did, within the vote of the defendant town.

But if a volunteer for a year or during the war could not claim the bounty, neither could a drafted soldier. The rule must be one and the same for all. The plaintiff did not serve two years. He was not drafted for two years. He is not in a situation to claim the bounty offered, for his case is not within the fair and obvious meaning of the vote.

The difficulty here is not so much that the soldier did not serve two years, as that he did not contract and was not drafted to serve for that term.

Judgment for the defendants.

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

FIRST NATIONAL BANK OF BRUNSWICK *versus* LIME ROCK F. & M. INS. COMPANY.

The presence of a presiding Judge is essential to constitute a "session of the Supreme Judicial Court," within the meaning of R. S., c. 82, § 1.

A plea in abatement is seasonable, when filed "within two days after" the Judge appeared and organized the Court, the first day on which he so appeared being reckoned as one.

On Exceptions.

Assumpsit. The writ was made returnable at Rockland, in this county, on the second Tuesday of March, 1869, the time prescribed by the statute for a term of this Court to be holden there. No service of the writ had been made and no return was written thereon.

On the second Tuesday of March, no Judge appeared to hold the Court; but he did attend the next day and commenced the session, the sheriff having adjourned the Court in accordance with R. S., c. 77, § 26.

On the following day (Thursday) the defendants filed a plea in abatement, setting out the want of service, which the presiding Judge overruled, upon the ground that it was not seasonably filed. Whereupon the defendants alleged exceptions.

D. N. Mortland, for the defendants, cited Rules 2 and 6, 37 Maine, 568, 569; R. S., c. 82, § 1; 2 Bouv. Law Dict., 579; 1 Bouv. Law Dict., 325; Co. Litt., 58, *a;* R. S., c. 77, §§ 1, 14, 26.

A. P. Gould, for the plaintiffs.

Kent, J.—The Justice of this Court, designated to hold the term, did not attend on the day fixed by law for its commencement. A plea in abatement was filed on the third day,—the Justice having appeared on the second day. The question is whether it was filed in season, within the provisions of the statute and the rules of this Court.

The statute provides (c. 77, § 26,) that, "when no Justice attends on the day for holding a Court, the sheriff, or, in his absence, the clerk, shall by oral proclamation in the court-house, and by notice posted on the door thereof, adjourn the Court from day to day till a Justice attends, and, in case of necessity, without day, and, when so adjourned, actions brought for that term shall be entered by the clerk, and they, with all actions on the docket, shall be continued to the next term."

It is also provided by § 1, c. 82, that "no action can be entered after the first day of the session of the Supreme Judicial Court, without special permission."

The 6th rule of this Court is, that "pleas in abatement or to the jurisdiction, in actions originally brought in this Court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and, if consisting of matter of fact, not apparent on the face of the record, shall be verified by affidavit."

The intent of the rule is manifest. It is to limit the time for the filing of dilatory pleas and for making motions of a like character, but to give two days after entry, for these acts.

Although the first section, of the statute above cited, in terms restricts the right to enter an action after the first day of the session of the Court, yet the section first named clearly provides that the entries are to be made at the final adjournment, when no Justice appears and it becomes necessary to adjourn, and the whole docket is to be continued. In such case the defendant must have the right to file his plea or make his motion, on the first day of the next term, if the Court is regularly held on that day. By the same course of reasoning it follows that the entries cannot properly be made, until a Justice attends. If he attends on the second day, the entries should then be made, and the two days thereafter allowed for dilatory pleas or motions.

It will be observed that the statute, c. 82, § 1, does not say that no action shall be entered after the first day of the term, as fixed by law, but "after the first day of the session of the Court." And the rule of Court does not speak of the first day of the legal term, but of "two days after the entry of the action." Actions are often entered, after the first day of the Court, by leave, and, of course, two days after such entry must be allowed.

When no Justice appears "on the day for holding a Court," no Court can properly be said to be in session, for a session of a Court implies the presence of a Judge to hear and try.

The first day of the session, so far as this question is concerned, may fairly be construed to mean the first day on which the Court is organized and ready to proceed to business. A motion may be sufficient without a written plea, where the defect is apparent on the face of the record. It would be absurd to hold that a party was bound to make such motion, when there was no Court to hear it and to grant or refuse it.

Our conclusion is that, in a case like the one before us, the plea was filed in season, under a fair construction of the statutes and rule of the Court.

Exceptions sustained. — Writ abated.

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

GEORGE W. PRENTISS *versus* ELISHA W. SHAW *& als.*

The plaintiff was unlawfully seized by the defendants, carried thence three miles, and confined in a room several hours, and thence to a town meeting, where he took an oath to support the constitution of the United States, and was discharged. In the trial of an action of trespass, based upon these facts, the plaintiff claimed, (1,) actual damages resulting from his seizure and detention, (2,) damages for the indignity thereby suffered, and, (3,) punitive damages; — *Held*,

1. That the plaintiff was entitled to recover full pecuniary indemnity for the actual corporeal injury received, and for the actual damages directly resulting therefrom, such as loss of time, expense of cure and the like;

2. That the declarations of the plaintiff, made prior to the unlawful arrest and tending to provoke the same, not being a legal justification thereof, are inadmissible in mitigation of the actual damages; but,

3. That such declarations made on the same day, and communicated to the defendants prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest, indicative of the motives, provocations and conduct of both parties, are admissible upon the question of damages claimed upon the other two grounds.

ON EXCEPTIONS.

The writ was dated June 15, 1867, and contained a declaration in

TRESPASS, substantially alleging that, Elisha W. Shaw, (a deputy sheriff,) Putnam Wilson, Jr., Oliver B. Rowe, Hollis J. Rowe and Daniel Dudley, on the 15th April, 1865, at Newport, with force and arms, assaulted, beat and bruised the plaintiff, thereby permanently injuring his hip and back, violently forcing him into and locking him in a room in the Shaw House, subjecting him to remain there five hours, violently taking from thence into a carriage and carrying him against his will to the town-house in Newport.

The plaintiff introduced evidence tending to show, that, in April, 1865, while he was at a blacksmith's shop in Newport, where he was having his horses shod, Shaw, Dudley, Wilson and H. J. Rowe seized him and, forcibly putting him into a wagon, transported him a prisoner three miles distant, to Newport village, and confined him for several hours in a room in the hotel there; that a crowd of men accompanied the four defendants to the shop and from thence to Newport village; that the four defendants inflicted injuries upon the person of the plaintiff; and that threats of extreme personal injuries were made to the plaintiff, both at the blacksmith shop and at Newport village, by some persons.

There was conflicting testimony as to the extent of the injuries to the plaintiff's person.

The defendants, against the seasonable objections of the plaintiff, introduced evidence tending to show that the four defendants seized the plaintiff in the forenoon of the day on which the news of the assassination of President Lincoln was received; that, when the plaintiff stepped into the blacksmith shop, he, addressing one Gilman, (who was a witness in this case) said:—"He that draweth the sword shall perish by the sword, and their joy shall be turned into mourning;" that Gilman (alluding to the assassination of the President,) said to the plaintiff:—"I suppose there are some who are glad of it;" that the plaintiff thereupon replied:—"Yes; I am glad of it; and there are fifty more in town who would say so, if they dared to;" that Gilman rejoined that the plaintiff would be glad to take those words

back; that the plaintiff responded, substantially, that he would not; and that Gilman thereupon informed the plaintiff he should report him.

On cross-examination, Gilman testified that he thought that the plaintiff, when speaking of the assassination, said it might stop the further effusion of blood.

Against the seasonable objections of the plaintiff, the defendants also introduced evidence tending to prove that the blacksmith shop was three miles from Newport village, where three of the defendants were; that Gilman, in about twenty minutes after his conversation with the plaintiff, told it to the defendant Wilson; that Gilman and Wilson went to Newport village and informed the four defendants of the plaintiff's declarations concerning the assassination; that, about two hours afterwards, the four defendants proceeded to the blacksmith shop and did the act proved by the plaintiff; that there was great excitement in the public mind upon the receipt of the news of the assassination.

The plaintiff seasonably objected to the admission of the alleged declarations of the plaintiff, made to Gilman that day; but the presiding Judge ruled that the plaintiff's declarations made that day, concerning the assassination of the President, might be given in evidence *de bene esse*, it having been stated by the defendants' counsel that they should prove the same had been communicated to the defendants before their arrest of the plaintiff.

Against the seasonable objections of the plaintiff, the defendants also introduced evidence tending to prove that, after the confinement of the plaintiff in the hotel, he was taken by them, on the same day, to a public meeting of the citizens, called at the town-house, at which a moderator and clerk were chosen, and acted officially; that, at the meeting, a vote was passed that the plaintiff be discharged upon his taking an oath to support the constitution of the United States; and that the plaintiff voluntarily took such oath and was thereupon discharged.

The defendants also introduced evidence tending to show,

that, before arresting the plaintiff, telegraphic communication, relative to the plaintiff's declarations concerning the assassination, was had with the provost marshal at Bangor, who replied by telegraph, that he should be arrested and held; that thereupon the defendant Shaw, then an acting deputy sheriff, with three other defendants, acting under his orders, proceeded to make the arrest; and that they honestly believed that they had a legal right to do what they did, and had no malice towards the plaintiff.

As to the four defendants proved to have been present, (and the other, if found to have participated,) the presiding Judge instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty; that the only question for the jury was the amount of damages; that the plaintiff claims damages on three grounds;—

1. For the actual injury to his person and for his detention;

2. For the injury to his feelings, the indignity, and the public exposure; and,

3. For punitive or exemplary damages.

That they were bound to give, at all events, damages to the full extent for the injuries to the plaintiff's person and for his detention.

That, as to damages for the second and third grounds, it was for the jury to determine, on the whole evidence, whether any should be allowed, and the amount.

The presiding Judge explained to the jury the nature and grounds of such damage, and instructed them, *inter alia*, that they could only consider the evidence introduced by the defendants under the second and third heads above set forth, and in mitigation of any damages they might find under either or both of said heads, if, in their judgment, those facts did mitigate such damages; but that they could not consider them under the first head.

There was other testimony introduced by both sides, and other instructions given by the presiding Judge.

The jury acquitted O. B. Rowe, and found a verdict of

guilty against the other defendants, and assessed damages in the sum of $6,46. Whereupon the plaintiff alleged exceptions.

W. H. McCrillis, for the plaintiff, contended, *inter alia*, that the language of the plaintiff was not a sufficient provocation. It was not personal to any of the defendants. *Corning* v. *Corning*, 2 Selden, 97; *Ellsworth* v. *Thompson*, 13 Wend., 658.

Sufficient provocation cannot be proved in mitigation when the assault and battery were deliberately committed. The assault must accompany the provocation before the blood has time to cool. The question is, was there time for a reasonable man to reflect, and not whether the defendants continued in a state of passion. *Cope* v. *Sullivan*, 3 Selden, 400; *Avery* v. *Ray*, 1 Mass., 11; *Lee* v. *Woolsey*, 19 Johns., 319; *Willis* v. *Forrest*, 2 Duer, 318.

Words cannot constitute justification. Words can never be sufficient provocation. They may provoke extreme anger, and the anger be admitted in mitigation. But, if the blood has time to cool, the assault is regarded as deliberately done and cannot be mitigated. Any other rule would be subversive of the order of society.

L. Barker, for the defendants.

KENT, J.—The case, as presented to the jury under the rulings was, in substance and effect, one where a default had been entered and an inquisition of damages had been allowed before a jury. The jury had no discretion allowed to them, except as to the amount of damages, to be inserted in a verdict for the plaintiff. The main question is whether the directions given by the Judge to the jury to govern them in the assessment of damages were correct.

The plaintiff claimed damages for several distinct matters, and asked that the jury should found their verdict on these principles, viz.:—

1. The actual injury to his person and for the detention and imprisonment.

2. For the injury to his feelings, the indignity and public exposure and contumely.

3. For punitive, or exemplary damages in the nature of punishment, and as a warning to others not to offend in like manner.

The Judge very unequivocally instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty, and that the only question for them was the amount of damages, — that they were bound to give damages at all events for the injuries to the plaintiff's person, and for detention, to the full extent of said damages; that they could not consider the testimony put in by defendants in mitigation of such actual damages, but must give a verdict for matters named under the first head to the full amount proved, without diminution, on account of any matters of provocation, or in extenuation.

The Judge further instructed the jury, that they might consider the testimony put in by defendants under the second and third heads, above stated, in mitigation of any damages they might find the plaintiff had sustained under either or both of said grounds.

These rulings present the question whether the evidence objected to was admissible for the special purpose to which it was confined. It was not in the case generally, but its consideration and application was restricted to the special grounds of damages set up, beyond what may properly be termed the actual damages. It was entirely excluded as a justification, or as mitigating in any degree the actual damages.

The distinctive points of the rulings, which perhaps distinguish them from some cases in the reports, and some doctrines in the text books, are, first, that they exclude entirely this species of evidence, in mitigation of actual damages, — and, secondly, that they admit it, in mitigation of damages, claimed on the other grounds of injury to the feelings, indignity, and punitive damages, although the evidence related to matters, which did not transpire at the instant of

the assault, but on the same day, and manifestly connected directly with the infliction of the injury complained of.

It is unquestionable that many authorities can be found which seem to negative the proposition that acts or words of provocation, except those done or uttered at the moment, or immediately connected in time with the infliction of the injury, can be given in evidence in mitigation of damages. But most of these cases seem to be predicated upon the idea of mitigation of the actual, positive, visible damages, — those damages to which the party would be entitled on account of the actual injury to his person or his property.

It is important to settle, as well as we can, the general principle which lies at the foundation of the law applicable to damages, occasioned by the illegal acts of the defendant. We understand that rule to be this, — a party shall recover, as a pecuniary recompense, the amount of money which shall be a remuneration, as near as may be, for the actual, tangible and immediate result, injury, or consequence of the trespass to his person or property. But, in the application of this general principle, there has been great diversity in the decisions, and in the doctrines to be found in the text books touching the point of mitigation or extenuation.

In reference to injuries to the person, it was soon seen that this literal and limited rule, if applied inexorably, would fail to do justice. The case is at once suggested, where an assault and battery is shown to have been wanton, unprovoked, and grossly insulting; inflicted clearly for the purpose of disgracing the recipient, and at such a time or place as would give publicity to the act, and yet the actual injury to the person very slight, or hardly appreciable. Shall the law, in such a case of wanton insult and injury, give only the damages to the face or the person, as testified to by a surgeon?

On the other hand, a case is suggested, where the injury to the person was severe, a broken limb or grievous wounds, or permanent or partial disability, and yet the party suffering had been guilty of gross abuse, provoking the assault

by insulting language or false accusations, or most offensive libels upon the defendant or his family, or had outraged the community in which he lived, by a series of acts or declarations which justly aroused and kept alive the indignation, which at last found vent in the infliction of some personal indignity, accompanied by force and violence, which resulted in the serious manner above stated. What is the rule as to such damages, applied to the aggravations in the one case, and the mitigations in the other?

If we take the case of such an assault, which has been provoked by words or acts at the time of the trespass, and so immediately connected therewith that all authorities would agree in admitting the evidence in mitigation, the precise question, then is, for what purpose can it be used, and what damages can it mitigate?

All agree that these facts cannot be a legal justification, and be used in bar of the action. The plaintiff is undoubtedly entitled to a verdict, with damages. It is said these facts may be used to mitigate the damages. But what damages? If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated—that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act? Admit that the defendant was provoked, insulted, irritated and justly indignant at the acts or language of the plaintiff. If those provocations did not reach the point of a legal justification of the assault, then, so far as the question arises for which party the verdict shall be given, they are immaterial, and out of the case. The assault was wholly legal or wholly illegal. There can be no such thing as apportioning the guilt; making the act half legal and half illegal. It is not one of the class of cases where the suffering party contributed to the injury, and thereby lost his right of action. The contribution, to work that effect, must be coöperation in the doing of the

act itself, which is complained of,—i. e., the assault and battery; or whatever the alleged specific act may be.

If, then, the act is confessedly an illegal one, and unjustified in law, why must not the defendant answer for and pay the actual damages to the person? On what principle of law can he be exonerated?

In the case before us, the presiding Judge took this view. He made a distinction, which has not often been attended to, between a recovery for the actual personal damage, and loss of time and other direct injuries, and a recovery for other damages based on injury to the feelings, indignity, insults and the like, and also on the claim for punitive damages.

Is there not such a distinction in law and common sense? Take the simple case of the meeting of two men in a public street. One addresses the other with opprobrious and insulting language, calling him a thief or a liar. The other, at the moment, naturally excited to almost uncontrollable anger, strikes a blow which breaks the arm of his antagonist. The law says the words were no legal justification for the blow. It was therefore a trespass and a wrong. What damages shall be awarded? Can they be more or less, according to the provocation on one side, or the natural anger on the other? There is the broken arm, neither more nor less, with the pain and suffering and expense of cure, and the loss of time, all which are open and appreciable, and are the direct and immediate consequences of the legal wrong. If the law holds, as it does, sternly and unwaveringly, that the words are no excuse or justification, why should it "keep the word of promise to the ear but break it to the hope," by allowing a jury to evade the law, whilst, in form, keeping it, by a verdict for nominal damages, which is in effect one in favor of the defendant? Why not say, rather, that the provocation might be shown in defence of the action, and that, if the plaintiff morally deserved to suffer the injury, by reason of his language, that should be a legal excuse? It seems to be a legal anomaly to say, true, it is an

undefended, naked trespass and wrong, but no real damages or recompense shall be given. It is giving the benefit of a justification to what the law expressly says is no justification. The restriction of the rule to the provocation given at the time of the assault, does not obviate the objection, that it is against a well settled principle, which gives real and substantial redress for every unjustified trespass. Where the trespass or injury is upon personal or real property, it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, in the case before stated, must not the defendant be held to pay the full value of the horse thus rendered useless? Or, in case of trespass on land, can the actual damage be mitigated by showing that it was provoked by unfriendly or unneighborly words? Or, in case of a damage at sea, could an intentional and unnecessary collision be mitigated, so far as the actual injury was in question, by proving that the navigator was insulted and irritated by taunting and exciting language from the deck of the injured vessel?

But there is no doubt that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show, on one side aggravation, and on the other mitigation of the damages claimed. Verdicts for heavy damages have been sustained, where the actual injury to the person was very slight or merely constructive, and other verdicts, for merely nominal damages, have been confirmed, where the actual injuries were shown to have been serious. In the first class of such cases, the plaintiff has not been restricted to proof of the injury to the person, but has been allowed to show the circumstances attending the act, and to have damages for the insult, indignity, injury to his feelings, and for the wanton malice and unprovoked malignity of the deed. And it is now settled, certainly in this State, that he may be allowed, in addition, exemplary damages in the way of punishment or warning to the transgressor and others.

Now this opens a wide field for uncertain or speculative damages for matters not tangible or susceptible of accurate estimation, but based upon principles and considerations different from those which determine the actual injuries as before described. These are such as lie patent, and require only a calculation of time lost, pain suffered, or the value of a permanently injured limb, or the like. But when the injury to the feelings, the insult, the mortification, the wounded pride, or, to sum up all in one word, the indignity, are pressed as grounds for pecuniary indemnity, superadded to the claim for punitive and exemplary damages, they evidently and necessarily require a consideration of all the facts in any way clearly and fairly connected with the trespass, and bearing upon the motives, provocations, and conduct of both parties in the controversy, which has culminated in an assault by one upon the other. How otherwise can a jury fairly estimate what should be awarded by way of punishment, or as a reasonable satisfaction for injured feelings? These damages, as our law now stands, are made up of injuries partly private and partly public in their nature. If evidence of this nature, admitted to enhance the actual damages to the person, may be given, why should not the same kind of evidence be given by way of mitigation of damages claimed on such grounds?

If the plaintiff restricts himself distinctly to the single claim for the actual damages to his person, and the direct, tangible results therefrom, and expressly waives all claim beyond, it would seem that the defendant should be limited to matters strictly in defence or justification of his act, as in other cases of trespass. But if, as in this case, he claims beyond this, for injured feelings and for punishment, the question arises, (which is the main question made by the plaintiff,) what is the limit of the evidence which may be admitted in mitigation or extenuation? It is not denied that some evidence of this nature is admissible. The precise question is whether it is to be confined to what transpired at the time of, or in immediate connection with the

act. If a party claims damages not merely for the naked assault, but for his wounded feelings, and seeks to inflame them by showing that he had been publicly insulted by opprobrious language used with the evident intent to degrade him in the eyes of his fellow citizens, may not the defendant be allowed to show that the complainant had himself been guilty of using like words, or by his conduct and by insults and provocations had really been the cause of the assault? The plaintiff may have been passive and silent at the moment of the assault, whilst the defendant was violent and denunciatory, and, if no facts can be shown beyond those transpiring at that meeting, the plaintiff would present a case, apparently calling for exemplary damages, whilst, if the whole truth was brought out, the defendant would appear the least in fault, so far as regards provocation.

And so, if the plaintiff claims for damages of this nature, for an assault, not by a personal enemy, but by those whose indignation had been aroused in matters of a general and public nature, may not all damages, beyond those actually suffered in his person, be modified or affected by evidence of his acts or declarations, calculated to arouse a just indignation and disgust? Why should the man who has intentionally and grossly outraged decency, or aroused indignation by his violation of common humanity, be allowed to recover for his injured feelings, and the public degradation to which he has been subjected? Or rather, why should not a jury be allowed to know all the facts, directly connected with the act, although not transpiring at the moment, and from them determine, whether any, and if any, what damages should be allowed beyond the actual injury to the person or property. If facts beyond the act are to be allowed to aggravate, why should not like facts be allowed to mitigate this class of damages? If, for instance, a man, had been guilty of frequent, indecent exposures of his person in public streets, accompanied by obscene language and gross insults to females, and had persisted in such a course, until

a body of his townsmen, indignant and outraged, seized him and inflicted punishment, and carried him away and confined him for a day, or other like proceedings; and for this assault and battery and imprisonment an action is brought and a claim set up for recompense for injured feelings, indignity and for punitive damages. At the trial, he proves these acts, — rough handling, and degrading treatment, and personal imprisonment, and makes out a case of apparently inexcusable interference with his liberty and his person, and his sense of self-respect. The defendants cannot show that he did or said anything at the time of the arrest. But are they to be precluded from showing anything in mitigation of such a claim? The law is fully vindicated when it gives such a man his full, actual damages. When he asks for more, he opens a new ground for his opponent, who may well say you have no fair claim for damages on this ground, for your own conduct and language aroused the indignation which led to the acts complained of.

There is an instinct, or, if not quite that, a dictate of common sense, which it is neither wise, or hardly possible for the law to disregard, — that a man should not have pecuniary recompense for injured feelings or public degradation, when he has himself outraged the feelings of another, or so conducted as justly to excite public odium by open contempt of the decencies of life. The old legal requirement, that he that asks for redress "must come into Court with clean hands," at once occurs to us. The law will protect the hand from actual violence upon it, although it may sadly need ablution, but beyond this will require "a show of hands" before it will adjudge damages for an alleged defilement.

The ruling of the Judge, in this case, was preremptory and unqualified, that the evidence made out no legal defence, and that the verdict must be for the plaintiff "to the full extent of the damages sustained by the injuries to the plaintiff's person, and for detention."

If, after this ruling, the defendant had consented to a default, and the case had come before a Judge to determine the damages, and the same claim for cumulative and exemplary damages had been made and pressed, would any Judge have excluded, in the hearing before him, the evidence offered in this case? If he had, how could he determine the degrees of aggravation or extenuation, or come to any satisfactory conclusion on the matter of damages? As before said, the jury in this case were in the same condition, after the ruling, as a Judge would have been after default.

When we consider the nature and the grounds of this claim for exemplary or punitive damages, it is difficult to see why the evidence of provocation or mitigation, if allowed at all, should be restricted to the time of the overt act. What happened then may, and generally would, give a very partial and insufficient view of all the circumstances which in truth belong to the matter in question, and serve to aggravate or diminish the injury to the feelings, or the malice of the act. Every one sees this at a glance.

We think it will be found, on a careful examination of the cases, that where this rule, limiting the evidence to what transpired at the moment, has been enforced, the claim was to diminish the damages for the actual corporeal injury and loss of time, and no distinction was made between those and exemplary damages. The reasoning to be found in this class of cases is very similar to that found in the decisions at common law, where the degree of guilt is lessened, and a different and distinct offence, of a less degree, is found by reason of proof of sudden and provoked anger; as where a homicide is reduced from murder to manslaughter. But, in such trials, these matters of provocation and sudden anger are introduced, not to mitigate a crime found or admitted, but are strictly matters in defence, and modify or give character to the act, in determining what crime has been in fact committed, and are used for that purpose. In such case it becomes important to know whether the act was the result of sudden passion, or whether there had been time

for the passions to cool. But in a civil action for trespass the liability of the party for actual damages does not depend upon the intent or state of mind of the trespasser. He may be liable, if his act was unlawful, although he did not intend to injure any one, and had no anger or ill-will towards the party whose person or property was affected by his illegal act. It is not the motive, or the feelings under which the legal wrong is committed, which determines the character of the act, or the amount of the actual damages resulting from it. It cannot be excused, if legally unjustified, by proof of sudden passion, or the absence of malice or wrong intent.

The analogy, if any, between civil actions and criminal prosecutions, is to be found in the determination of the extent of punishment in the one, and the amount of exemplary or cumulative damages in the other. Although in the trial of criminal cases the evidence may be limited to the time of the occurrence, yet every Judge is aware that, in fixing upon the sentence to be awarded, he does not hesitate to hear evidence or statements as to facts and acts and declarations made or done anterior to such time — in order to ascertain, as well as he can, the mitigating or aggravating circumstances connected with the offence. So, in determining the amount of damages in a civil suit, beyond the tangible, as before explained — when there is no question as to the fact that a trespass had been committed, a limitation of the examination into what transpired at the moment would seem to fall far short of what reason and common sense would prescribe. It seems hardly just to require any tribunal to act and determine such questions, and to award damages in the nature of punishment, and withhold from it all knowledge of the facts which may fairly be said to give the moral character of the act, and the actual guilt of the respondent.

We are aware that great care must be taken to confine the examination to such matters as are clearly and directly connected with the acts, or give color or character to it. Mere evidence of general bad character,—or unpopularity, or of

acts or declarations of ancient date, or not clearly and really part and parcel of the matter in question, must be excluded. But time is not of the essence of the principle, but fairly established direct connection, as cause or effect. It is impossible to accurately define the limits, so as to reach every case. But there can be no greater difficulty in the application of this than of many other rules of law.

In the case at bar, the evidence was limited to the transactions of the day on which the assault was committed, and very evidently was of matters connected directly with the acts done. If it had been excluded, after the evidence on the part of the plaintiff had been heard, how could the jury have properly or understandingly determined what punitive damages should be given in vindication of outraged law, or for the indignity and injury to the feelings? They had a right to know, and the defendants had a right to place before them the true relations of the parties, and to show how far the act was wanton, malicious, vindictive or unprovoked, or how far extenuated by the conduct, declarations or provocations of the complaining party.

On the whole, after a full consideration of the case, and the cases, we think that the rulings of the Judge were not erroneous, but give the rules on this subject which are practical, and in accordance with common sense and the general principles of the law. *Exceptions overruled.*

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

JOHN D. LAWLER *versus* BARING BOOM COMPANY.

A boom company, being without fault or negligence in the erection and management of its boom, is not liable for the flowage of land not taken under its charter, caused by the boom, in cooperation with an unusual accumulation of logs and a large rise of water.

ON MOTION to set aside the verdict as being against law and the weight of evidence.

CASE, for detaining large quantities of logs in the St. Croix River by means of the defendants' boom, in June, 1865, and thereby obstructing the current of the water, and causing it to flow back and upon the plaintiff's land and injuring his crops.

The writ was dated Sept. 2, 1865.

The defendants pleaded the general issue, with a brief statement claiming a prescriptive right to maintain their boom, and also setting out their chartered rights to maintain the same.

It appeared that the plaintiff owned about twenty-five acres of land, part meadow and part intervale, situated in Baring and Baileyville, on the banks of the St. Croix river, and about one and one-quarter miles above the defendants' boom; that this land was generally flowed more or less in time of freshets; that there has been a dam across the river in Baring and mills erected and in operation there for forty years; that there has been a boom there, substantially in the same place as the defendants' boom, for forty years, and kept and managed substantially as in the year 1865 for the same length of time; that the mills required millions of logs to supply them; that, below the plaintiff's land and about a mile above the defendants' boom, the river was about twelve rods wide, while just below Marpole's Island and above the boom, the river was one-half mile wide, and sixty rods wide at the boom; that from sixty to seventy millions of logs are driven into the boom annually for the supply of all the mills; that the defendants obtained a charter from the Leg-

islature in 1848, authorizing the erection and maintenance of their boom; that the St. Croix Log Driving Company was chartered in 1847 and 1849, had the custody and control of all logs, &c., turned into the river to be floated down, until their arrival at the defendants' boom; that there were two freshets in 1865, one in April and the other in the latter part of May or fore part of June, the latter of unusual height; that, in June, 1865, the river was filled "all full" of logs, from the "narrows" to the distance of two miles above the plaintiff's land; that there was an unusual accumulation of logs at the boom, and the defendants had an unusual number of men employed in June, 1865, to turn out logs from their boom; that they could not work for several days during the extreme height of the latter freshet on account of the force of the current; that it was impracticable to prevent the logs from jamming at the narrows; that the plaintiff's land was flowed from May to July, 1865, and at an unusual height, after the freshet had subsided in the river; and that, on July 17, 1865, when the jam was broken below, the water fell off three feet on plaintiff's land.

The verdict was for the plaintiff.

J. Granger, for the defendants.

E. B. Harvey, for the plaintiff, cited *Hooker* v. *Canal Co.*, 14 Conn., 146; *Lyon* v. *Jerome*, 26 Wend., 485; *Pillsbury* v. *Scott*, 1 Penn., 309; *Thatcher* v. *Dartmouth Bridge Co.*, 18 Pick., 502; *Boston & Lowell R. R. Co.* v. *Salem & Lowell R. R. Co.*, 2 Gray, 1; *Boston W. P. Co.* v. *Boston & Worc. R. R. Co.*, 23 Pick., 360; *Baker* v. *Boston*, 12 Pick., 184; *Brown* v. *Chadbourne*, 31 Maine, 9.

APPLETON, C. J.—The defendants are a corporation existing by force of a special Act approved July 26, 1848. c. 129. By § 2, they are authorized to "enter upon, occupy and use any rocks, islands or other lands, which at any time have been covered by the water of the St. Croix river, the banks thereof and the land adjoining, necessary for the purposes" of their corporate rights and duties, &c., and pro-

vision is made for compensation to the owners of all lands and other property so taken.

The erection of the defendants' boom is under the right of eminent domain, by virtue of which the Legislature is authorized, for public purposes of sufficient importance, to take private property upon paying therefor a just and adequate compensation. The Legislature determines the existence of the exigency calling for the exercise of this great reserved power, and makes provision for compensation for property so taken. Under this right, corporate bodies, such as railroad corporations, canal companies, and corporations like the defendants', have been empowered to take private property. The object of the legislative grant is the public benefit to be derived from the contemplated improvement, and it matters not whether the improvement is to be effected by the direct agency of the State itself, or through corporate bodies created by the State for that purpose.

No land of the plaintiff has been taken for the use of the defendant corporation. His complaint in substance is, that, being the owner of certain meadow lands, in Baring and Baileyville, "the defendants, by means of a boom and piers, by them had, used and maintained, in the channel of the St. Croix river, below the said lands of the plaintiff, stopped and obstructed great quantities of logs and timber, and lumber, then and there being driven or floated along the channel of said river, and so, by means of said logs and timber, and lumber, obstructed and dammed up the water of said river, and caused the same to overflow its banks and to flow back upon the lands of the plaintiff, * * and the plaintiff's lands were by said overflow greatly damaged, and the use and profit thereof, to the value of five hundred dollars, was wholly lost to the plaintiff," &c., &c.

The defendants were in the exercise of the powers conferred upon them by the Legislature. There was no neglect, no fault in the building of their boom nor in its management. The question presented is whether a public corporation like the defendants, exercising its corporate rights and

performing its corporate duties carefully and skilfully, without negligence or fault, is liable in damages to all who may incidentally suffer injury and loss from the legitimate use of the privileges and the performance of the duties for which it was created.

"In the absence of all statutory provision upon the subject, railways are not liable for necessary, consequential damages to land owners, no portion of whose land is taken, when they construct and operate their roads in a skilful and prudent manner." 1 Redfield on Railways, c. 13, § 75, 2. The principle thus enunciated as applicable to railroads, is equally applicable to all corporations created like the defendant corporation, to meet some public need and to answer some public want. No public improvement can be made without affecting to some extent the value of private property, by increasing or diminishing its value, or in some way rendering its possession and enjoyment more or less desirable.

In *Spring* v. *Russell*, 7 Greenl., 273, the Proprietors of the Fryeburg Canal were authorized by their Act of incorporation to change the channel of Saco river. The plaintiff was prevented by their action, under their charter, from floating his logs down the river as had been his custom, and brought his action for damages thus sustained, but the Court held the proprietors not liable for consequential damages occasioned by turning the channel of the river, as authorized by their charter. In *Rogers* v. *K. & P. Railroad Co.*, 35 Maine, 319, SHEPLEY, C. J., says,—"for any lawful act done by the defendants, in the construction of their road, the plaintiff will not be entitled to recover damages, although he may have been indirectly injured. The defendants will not, therefore, be liable for any damage suffered by the plaintiff, unless they have exceeded the authority conferred upon them and conducted unlawfully." The same views were expressed by this Court in *Whittier* v. *P. & K. Railroad Co.*, 38 Maine, 27, in which SHEPLEY, C. J., very pertinently remarks,—"If any person entertains the opinion,

that he may not be exposed to injuries by legislative enactment without being enabled in all cases to obtain compensation, that opinion is an erroneous one." The constitution will not protect him against all injurious enactments. *Cushman* v. *Smith*, 34 Maine, 247. When a company only does what, by its charter, it is authorized to, and is free from fault and negligence, it is not liable for consequential damages. *Boothby* v. *A. & K. Railroad Co.*, 51 Maine, 318. These views are in accordance with the entire weight of judicial authority. "Indeed," remarks BRONSON, C. J., in *Radcliff's Ex'rs* v. *Mayor, &c., of Brooklyn*, "an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow." A railroad corporation, which erects a fence on its own land to keep the snow from being blown upon its own road, is not liable for the damages occasioned by the accumulation of snow upon another's land on the other side of the fence. *Carson* v. *Western Railroad Co.*, 8 Gray, 423. "When, then, there is neither negligence nor folly, in doing a lawful act," observes WILLIAMS, J., in *Burroughs* v. *The Housatonic Railroad Co.*, 15 Conn., 124, "the party cannot be charged with the consequences." In the *Pittsburg & Fort Wayne Railroad Co.* v. *Gillieland*, 56 Penn., 445, it was held that there was no liability to a railroad company for not constructing a culvert so as to pass extraordinary floods. "The entry of a company to build its railroad being lawful, it stands as if it were on its own ground, and the maxim applies, *sic utere tuo ut alienum non laedas.* * * The test of exemption from liability for injury arising from the use of one's property, is said to be the legitimate use or appropriation of the property in a reasonable, usual and proper manner, without any unskilfulness, negligence or malice. * * The railroad is not liable for the necessary consequences of its erections, except so far as made liable by its charter." In *C. & R. Railroad Co.* v. *Speir*, 56 Penn., 325, it was decided that canal and railway companies were not liable for consequential damages, in the exercise of

the power of eminent domain derived from the State. Nor will an action at common law lie for a private injury by the execution of legal powers exercised judiciously and carefully. In *Hatch* v. *Vermont Central Railroad Co.*, 25 Vt., 49, it was held that railroad companies were not liable for necessary consequential damages, accruing to premises not taken by them for the construction and operation of their roads.

The defendants only did what was lawful. They erected their boom. It was for the public benefit. They had a chartered right to make these erections. For all property taken, provision was made for compensation. The defendants were guilty of no negligence in their erections. They used all reasonable care in the management of their boom. They did just what they were incorporated to do, and as they were incorporated to do it, — carefully, prudently. The boom was put to its only and appropriate use. If not protected by their charter in doing that for which it was given, what benefit can they derive from it? The defendants have done no wrong, and why should they suffer? *Qui jure suo utitur neminem laedit.*

It is not every one who suffers a loss, who is entitled to recover compensation therefor. A person builds a mill upon his own land. It injures the mill of his neighbor, whose custom is thereby lessened. But the law gives no remedy. One may set a fire on his own land, and, though it spread and burn the woodland of an adjoining proprietor, no action will lie, unless there be negligence on the part of the person setting fire. One by digging on his own land may intercept or drain off the water collected from underground springs in his neighbor's well. He may build on his own land, though it stops his neighbor's lights, nay, for the very purpose of stopping them. In these and similar cases, the loss and inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot be the ground of an action.

Whether the lawful act be by virtue of the ownership of

the soil or under the charter of the State, no action can be maintained for its injurious consequences, unless so done as to constitute actionable negligence.

2. The injury for which damages are claimed were neither the natural nor the expected consequences arising from the erection of the defendants' boom. The boom was not a dam, nor was it built to stop the flow of water of the St. Croix. The injury to the plaintiff did not and could not arise from the boom alone. It arose from the concurrence of other causes over which the defendants had no control and for which they are not responsible — an unusual quantity of logs and the jam consequent upon such quantity. A great rise of water, coöperating with the defendants' boom, produced, without fault on the part of the defendants, and while they were in the prudent exercise of their legal rights, the result of which the plaintiff complains.

In a much stronger case than the present, though in some aspects similar, the respondents were held absolved from liability. In *China* v. *Southwick*, 3 Fairf., 238, one S. erected a dam at the outlet of a pond, and thereby raised a head of water, but not so high as to injure C.'s bridge, at the head of the pond. Afterwards, by great rains and a violent wind, the waters were thrown upon the bridge and it was destroyed. *Held*, that S. was not liable therefor to C. in damages; although, if the dam had not raised the water to a certain height, the rain and the superadded wind might not have done the injury. This case is referred to and adopted in *Smith* v. *Agawam Canal Co.*, 2 Allen, 357, which in principle is like the one under consideration. If one building a dam, which is for the very purpose of stopping the water, is not to be held responsible, as was decided in the cases to which we have referred, much more should the boom company be absolved from responsibility for any unexpected loss arising from the stoppage of water, caused

in part by their erection, which was built for no such purpose and, of itself, could never have operated as a dam.

Motion sustained. — New trial granted.

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

JAMES MAHONEY *versus* INHABITANTS OF LINCOLNVILLE.

At a legal meeting held January 21, 1865, the defendant town voted, under a proper article in the warrant, "to raise $400 to every drafted man entering the service," and that the "selectmen give orders therefor." April 6, 1865, one Churchill, an inhabitant of the defendant town, was drafted, and, on April 10, he reported; and, being thereupon duly examined and accepted, and allowed on defendants' quota, he was permitted to go home on condition that he would return at a specified time. April 11, he received from the selectmen a negotiable town order for $125, which he negotiated to the plaintiff. At the time specified, Churchill reported for duty, when he was informed by the provost marshal that Lee's army had surrendered, that his services would not be needed, and that he might return home and remain there till further notice. He returned home and was finally discharged in December following. In an action on the order, in the name of the indorsee; — *Held*, that Churchill "entered the service" within the meaning of the vote of the town, and that the vote was within the statute of this State.

ON REPORT.

APPLETON, C. J. — This is an action upon a town order, given for a bounty.

At a town meeting duly called, to take measures to fill the town's quota, on Jan. 7, 1865, the defendants voted to raise a certain sum "to each man that is drafted, or procures a substitute or volunteers." This was amended thus, "intended to mean drafted men entering the service."

Elbridge F. Churchill, to whom, or bearer, the town order in suit was payable, being drafted, at once reported himself

to the provost marshal of the fifth district, who certifies as follows: —

"Provost Marshal's Office, — Fifth District, State of Maine, — Belfast, April 10, 1865.

"I certify that the following persons have been drafted into the service of the United States, on the quota of Lincolnville, (sub-district,) in this district, entry of which muster and quota has been upon my records for return to the Adjutant General of Maine.

Names.	Recruit for which Reg.	Date of Muster.	Remarks.
Elbridge F. Churchill,	Drafted.	April 10, 1865.	One year.

"A. D. Bean, Capt. and Prov. Marshal Fifth District, Mustering officer."

The case shows that Churchill, at this time, was examined, passed as an able-bodied man, was accepted, and was then informed that he might go home and report at a certain day for duty; that, at the appointed time, he returned and reported for duty, but was informed that Lee's army had surrendered, and that his services as a soldier would not probably be required further, that he might return home and remain till further notified; that he never received further notice, and that, on Dec. 20, 1866, he received a discharge in the ordinary form from "the service of the United States," upon which was minuted the payment of $10,47.

By the Act approved Feb. 17, 1865, c. 298, the past acts and doings of cities, towns and plantations, in offering, paying, or agreeing to pay, and in raising the means to pay bounties to, and all notes and town orders given by the municipal officers of any city, town or plantation in pursuance of a previous vote, for the benefit of volunteers, drafted men, or substitutes of drafted 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 only questions raised and discussed are, whether the evidence shows that Churchill was "*actually mustered*" into

the military service of the United States, within the meaning of c. 298, § 1, and that he entered the service within the terms of the vote of the town.

The object of the town, by their vote, was to fill their quota. The drafted men answered that purpose, and were allowed on the quota. The certificate of the provost marshal shows that Churchill was drafted into the service of the United States, and the date when he was mustered in. From that date he was liable to the penalties of the law for desertion. He was subject to the orders of the government. His discharge shows that he had been in the service and had been discharged therefrom. He could not be discharged from a service into which he had never entered. He received the wages of a soldier. To those he would not have been entitled had he never been in the service.

No objections are made to the evidence offered. From that evidence we think it satisfactorily established that Churchill entered the service of the United States, and was actually enrolled, and that his case is within the vote of the town and the statute of the State. That his services were not further required is his good fortune, but his claim is none the less within the vote of the town, — or the purview of the statute. *Defendants defaulted.*

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

N. Abbott, for the plaintiff.

W. G. Crosby, for the defendants.

CHARLES P. WELD *versus* HUMPHREY N. LANCASTER.

A written promise to pay a specific sum to, and save harmless, from the post-office department, a mail contractor, in consideration that he will repudiate his accepted proposal for carrying the mail on a specified route, is illegal.

Such a promise cannot be enforced, although the government had a sufficient guaranty and was not pecuniarily injured by such repudiation.

ON REPORT.

ASSUMPSIT upon a written contract, dated July 18, 1853. The writ was dated Dec. 17, 1860, and contained a special count upon the contract, and also a count for $1000, for money laid out and expended at defendant's request.

It appeared on the part of the plaintiff, that, in accordance with an advertisement from the post-office department of the U. S., he, in March, 1853, made a written proposal to carry the U. S. mail on route No. 74, from July, 1853, to July, 1857, for the annual sum of $895; that Henry Morrill and William Arnold became his sureties that the plaintiff would enter into a contract, prior to July 1, 1853, to perform the service proposed, provided said proposal should be accepted by the department; that the postmaster general, on the 25th of the following April, accepted the plaintiff's proposal, and duly notified him of such acceptance; that the plaintiff declined to enter into the contract proposed, and that thereupon the post-office department contracted with the defendant to carry the mail on route 74, at a higher annual rate.

The contract declared on was signed by both parties and was of the following tenor; — "I, H. N. Lancaster, agree to stand between the post-office department and to hold harmless Charles P. Weld, in the contract for carrying the U. S. mail, as per the proposals advertised by the department, on route No. 74, the department having accepted said Weld's bid. The said Weld agrees and has informed the department that he cannot fulfil this contract, and furthermore agrees that he will not perform the contract with the depart-

ment. Said H. M. Lancaster hereby agrees to pay C. P. Weld $100 for so doing, and to hold him harmless from all claims of the post-office department."

The plaintiff put in an assignment of the above contract from himself to Henry Morrill, and copy of a judgment of the U. S. against him and his sureties, Morrill and Arnold, for $419,99 debt, and costs taxed at $24,51, recovered in 1856, and founded upon their proposal to carry the mail and refusal to enter into the contract, as agreed in the proposal, after its acceptance. It also appeared that the surety Arnold paid the execution issued on the judgment, and that the defendant frequently promised to pay and adjust the same.

The case was taken from the jury and reported to the full Court, which was to render judgment by nonsuit or default.

N. G. Jewett, for the plaintiff.

W. G. Crosby, for the defendant.

DANFORTH, J.—The only question involved in this case is whether the contract declared upon is a valid one. It is very evident that its true construction is quite different from that put upon it by the plaintiff's counsel in his argument. The defendant neither does, nor agrees to assume the plaintiff's obligation to the government, whatever that may be, but promises to pay him a certain sum of money, "and to hold him harmless from all claims of the post-office department," in consideration that he "has notified the department that he cannot fulfil his contract," and further, "that he will not perform it." The plaintiff, after notice given by the postmaster general, had made proposals for carrying the mail upon a certain route. These proposals had been accepted, and thereupon he became under obligation to enter into a contract and furnish security for carrying the mail as proposed. The repudiation of this obligation is the only consideration, if there is any, upon which the defendant's agreement rests. Can a promise, resting upon such a foun-

dation, be legally binding? It is clear, both upon principle and authority, that all contracts in violation of law, or contrary to public policy, are void; but it is not so clear in all cases as to whether a specified contract comes within this rule. And, upon this question, there may be an apparent, though, we think, no real conflict in the decisions.

In *Bellows* v. *Russell*, 20 N. H., 427, it is held that an agreement between several persons, that one shall, in behalf of all, bid for a mail contract, is not void "unless made for an illegal purpose affecting public policy;" and to prevent a fair competition is held to be an illegal purpose. The same principle is affirmed in *Huntington* v. *Bardwell*, 46 N. H., 492. So in *Phippen* v. *Stickney*, 3 Met., 384, after a full and able review of the authorities, the same doctrine is adopted. Though in these cases the contract in question is held valid, it is distinctly put upon the ground that no inference could be drawn, either from the contract itself, or from the facts developed, inconsistent with the honesty and pure motives of the parties, but on the other hand both the contract and the facts in each case tended to show that the parties were acting in good faith, and that their acts were consistent with and in furtherance of the object of the sale. All these cases clearly recognize the principle that where the agreement is made for the purpose of preventing a fair competition at public sales, or for the purpose of giving an undue advantage to either party, such a contract is contrary to public policy and void. It will be noticed that the object of the contract involved in these cases was, not to impose an absolute restraint upon one of the parties in relation to bidding, but rather that one should bid for all, thereby making all interested in the purchase, thus tending to secure a fair value for the property sold, rather than to prevent a fair competition in the sale, especially when the amount involved is so large as to be beyond the ability of any one of the parties.

In *Walker* v. *Richardson*, 10 M. & W., 284, a bond given to a trustee, to indemnify him for making a disposition

of the trust property different from that contemplated in the will making the appointment, was held valid, on the ground that the facts not only failed to show that the trustee had in any respect been blameworthy, but were consistent with his fidelity in the execution of his trust. In this case, too, the principle is clearly recognized that, if there had appeared to have been any attempt on the part of the trustee to have wronged third parties, the result would have been otherwise.

There is, however, another class of cases, where contracts apparently similar, have been declared illegal and void. *Gardiner* v. *Morse*, 25 Maine, 140; *Gulick* v. *Wood*, 5 Halst., 87; *Smith* v. *Wilcox*, 35 Barbour, 293.

The same principle is laid down by Story in his Commentaries upon Equity Jurisprudence, vol. 1, § 293. Many other authorities to the same effect might be cited, but these are sufficient.

These cases differ from the others cited, in the single fact, that here the contract in question imposed an absolute obligation upon one of the parties to refrain from bidding, with no provision that he was to be interested in the purchase; simply that he would not be a competitor of the party promising, thereby preventing a fair competition to that extent. This, of itself, is held sufficient to authorize a judicial declaration of the illegality of the contract, upon principles which are recognized as sound in all the cases.

The facts developed in the case at bar would seem very clearly to bring it within these principles. It is true, that, in this case, the bid had been made and accepted, thereby resulting in a contract. But the repudiation of that contract was virtually withdrawing the bid or proposals, as in *Smith* v. *Wilcox* above cited. It had not only a tendency to prevent competition, but was entirely destructive of it. The time for sending in proposals had elapsed, and government was obliged to make the contract without the benefit of an auction sale, as contemplated by law. If the plaintiff had in the first instance refrained from bidding in obedience

to an agreement for that purpose, his conduct would have been certainly no more destructive to the interests of the government; and such a contract all the authorities hold invalid.

The contract in question, upon its face shows an attempted fraud upon the government, and is in violation of the policy of the post-office law. The only possible inducement the defendant could have had for his promise, was the hope and expectation that the plaintiff's repudiation might enable him to obtain greater pay for carrying the mail than had been fixed under the proposals made in accordance with law; that he could deprive the government of the benefit of the contract to which it was fairly entitled; otherwise he would have taken an assignment of the plaintiff's right, and carried the mail according to his proposals. The plaintiff must have had a full knowledge of the defendant's object and motives, — and the contract itself shows clearly a willingness on his part, for a consideration, to lend his aid in the attempted fraud. His assertion to the government that he could not perform the service for the price proposed, was hardly consistent with the bonus he was to receive for his repudiation. It is evident that the parties understood each other. In their confederacy they were aiming at the same result, that of compelling the government to pay a higher price for the service than the original proposal of the plaintiff contemplated; and this result their combination accomplished. If this contract is sustained one of the parties, at least, will reap the intended reward of his wrong. It is true the government has paid the increased price resulting from this combination and if this action is not sustained the defendant, in violation of his agreement, receives the benefit of it. The old adage that "there is honor among thieves" has no place in the law, and if the plaintiff has trusted to the honor of the defendant, to that he must look for redress and not appeal to the law, for, upon legal ground, both stand alike.

It does not alter the case that the government had a suf-

ficient guarrantee and was not pecuniarily injured. The end accomplished is not the test by which we are to judge of the validity of the contract, but rather the end aimed at by the parties. That this end was a violation of the spirit of the law, which provides that mail contracts shall be open to fair competition and awarded to the lowest bidder, and that no contract for the transportation of the mail shall knowingly be made with any person who shall have entered into combination * * * to prevent the making of any bid for a mail contract by any other person," would seem to be too clear to admit of a doubt, that it was the result of a combination between the parties, to get more than a fair compensation for the service to be performed, or at least, to deprive the government of the benefit of a contract to which it was justly entitled, is quite as evident. By all the authorities as well as upon sound principle such a contract cannot be sustained. *Plaintiff nonsuit.*

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

LEVI MORRILL *& als. versus* JOSEPH C. NOYES.*

The Y. & C. Railroad Company, in 1851, issued bonds for the purpose of completing and equipping their railroad, and secured them by a mortgage, in trust, of their railroad and franchise, together with all "cars, engines and furniture, that have been or may be purchased by said company." In 1853, the company purchased an engine and certain cars, which they subsequently mortgaged to the plaintiffs. In 1859, a bill in equity was commenced by the holders of the bonds against the company and the assignees of the former mortgage, to compel the execution of the trust, and the defendant was appointed a receiver by consent, who took all the property of the railroad from the possession of the company, to hold the same under the direction of the Court *pendente lite.* The plaintiffs thereupon demanded the engine and cars of the receiver, and, upon his refusal to deliver the

* This case did not come into the possession of the present Reporter until Nov. 6, 1869.

67 Me. 391

67 " 384
71 " 426
72 " 75
93 " 435
60 " 323

property, they commenced an action of trover, and obtained leave of Court to prosecute it: — *Held*,

1. That there had been no conversion by the defendant;
2. That, if the property belonged to the plaintiffs, they should have tried the title by a suit for the possession, but could not maintain trover.
3. That under the former mortgage a lien was created upon the rolling stock to be subsequently acquired, which attached as soon as it was afterwards purchased and placed upon the railroad by the company; and,
4. That the plaintiffs acquired no title under their mortgage which they could maintain against those holding under the former mortgage.

On Report.

Trover to recover the value of one locomotive, one passenger car, four platform cars, one box and two donkey cars. The writ was dated Sept. 25, 1860. Plea, general issue and joinder.

To sustain their title, the plaintiffs put in a mortgage of the property in controversy, dated Dec. 3, 1853, duly executed and recorded, from the York & Cumberland Railroad Company to the plaintiffs.

In behalf of the plaintiffs, it appeared that the property was purchased and put upon their road by the company in different months in 1853; that, on Oct. 26 and 31, 1859, the plaintiffs took nominal possession of the property for breach of the condition of their mortgage, but did not remove it, but notified the defendant that they had taken possession and left it in the possession of the defendant, who continued to use it as before; that, on Sept. 24, 1860, the plaintiffs demanded the property of the defendant, who refused to surrender it, and the plaintiffs obtained, on their petition in the suit of *Mason, in Eq., versus Y. & C. R. R. Co.*, an order from this Court granting them leave to prosecute this suit.

On the part of the defendant, it appeared that, on Feb. 6, 1851, one Myers entered into a contract with the Y. & C. R. R. Company to build and equip their railroad for certain considerations therein expressed, and was to receive, among other things, a certain amount of the bonds of the company; that, on the same day, the Y. & C. R. R. Company, in consideration of the contract made with them by

Myers, conveyed to "said Myers and his assigns, who shall become the holders of the bonds and coupons hereinafter mentioned, each in the ratio of the bonds so held by him, the franchise of said corporation with all its privileges and immunities, as the same exists by virtue of said Act of incorporation and the laws of the State, together with all personal and real property * * however situated, and as the same has been or may be purchased, * * meaning to include herein all iron rails, road bed, track and other structures, of said corporation, now completed or in the process of being furnished and constructed, or that may be acquired, and as the same shall be when finished, be the same more or less, and throughout the whole line of said road, and including all cars, engines and furniture, that have been or may be purchased by said company. To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Myers, his heirs and assigns, and to the holders of said bonds and coupons, to their use and behoof forever.

"*Provided*, nevertheless, that if the said corporation, or their agents or assigns, pay to the said Myers, or his assigns, who shall become the holder or holders thereof, the amounts specified in the several bonds and coupons that shall be issued concurrently with these presents, and such also as shall hereafter be issued by the directors of said corporation, according to and to satisfy the terms of the contract existing between said corporation and said Myers, dated Feb. 6, 1851, for the construction and equipment of said railroad * * then this deed shall be null and void thereafter," &c.

It also appeared that *Mason & als.*, bond-holders, in 1859, filed a bill in equity against the *Y. & C. R. R. Company*, and others to whom the Myer's mortgage had been assigned, to compel them to execute the trust thereby created; that, at the Jan. term, 1860, the defendant in this action was appointed receiver to take possession of, hold, and manage the entire property of the railroad company during the

pendency of the bill; that the engine and cars in controversy were found by the defendant in the possession of the company, in daily use upon the road; and that he took possession of them with the other property of the company, in March, 1860, by virtue of his commission as receiver, and claimed to hold them under that authority alone.

The full Court were to order a nonsuit or default according to the legal rights of the parties.

E. & F. Fox, for the plaintiffs.

Rand, for the defendant.

DAVIS, J. — This is an action of trover against the receiver of the York & Cumberland Railroad, to recover the value of a locomotive and several cars. The property in controversy was purchased in 1853, at different times, and mortgaged to the plaintiffs in December of that year.

Feb. 6, 1851, the Railroad Company mortgaged to John G. Myers, their railroad, then in process of construction, with all their real and personal property, franchises, &c., "including all cars, engines, and furniture, that have been, *or may be* purchased for or by said company." This mortgage to Myers was *in trust*, to secure the payment of bonds to be issued for the purpose of finishing the construction and equipment of the railroad; and it was afterwards assigned by Myers, and came into the hands of Churchill and others, who now hold it, in trust, to secure the bonds issued in accordance with its provisions. The papers in the equity suit, with which this is connected, show that the mortgage was duly recorded in the registry of deeds for the county, and also in the city registry of mortgages of personal property. The copy in this case has no certificate of registry by the city clerk, but no question is raised by counsel on this point.

In 1859, certain holders of the bonds commenced a suit in equity against the company and Churchill and others who now hold the mortgage, to compel them to execute the trust created thereby; and Noyes, the defendant, by consent of

the parties, was appointed a receiver, to take possession of, hold, and manage the entire property, while the bill should be pending. The engine and cars in controversy were found by him in possession of the company, in daily use upon the railroad; and he took possession of them, with the other property, in March, 1860.

After he had been in possession of the railroad about six months, the plaintiffs demanded the engine and cars mortgaged to them in 1853, and he refused to deliver them. They thereupon commenced this suit, charging him with a conversion of the property on the day of the demand, and claiming to recover the value of it of him personally.

There is no evidence that they had ever taken the property into their actual possession. By their agent, they nominally took possession of it, while it was in use on the railroad track, in October, 1859. But they did not remove it, or attempt to interfere with the possession of the company. They left it as it was before; and they must have known that the company continued to hold and use it. They must be presumed to have consented to such possession and use. If the company had been strangers, it might have been otherwise. But so long as the mortagees of such personal property leave it in the possession of the mortgagers, without forbidding them to use it, they certainly cannot be trespassers for so doing.

The counsel for the plaintiffs is undoubtedly correct in saying that, if a receiver should take possession of property not embraced in the order by which he is appointed, or in the commission under which he acts, he would be personally liable to the owner. If he exceeds the authority conferred upon him, he can show no justification as an officer of the Court.

But, in the case at bar, the property in controversy was embraced in the receiver's commission. It was in the possession of the railroad company, and constituted a part of their rolling stock. It was mortgaged to the plaintiffs; the right of redemption, unless the forfeiture had been waived,

was lost. But the possession of the company was not wrongful. The receiver succeeded to the rights of the company. As *they* were not trespassers, *he* was not.

Nor do the plaintiffs claim that the defendant came wrongfully into the possession of the property, in March, 1860. They ground their suit upon a subsequent demand made by them, and a refusal by him to deliver it. They allege in their writ a conversion by such refusal, Sept. 24, 1860.

A receiver is not merely an agent of the complainants, in the suit under which he is appointed. He represents the Court, for all the parties interested in the property, and acts, instead of the Court, for the benefit of all. He is the servant of the Court. His possession is the possession of the Court; and any attempt to interfere with it, without leave of Court, is a contempt. 2 Story's Eq., 829; *Green* v. *Bostwick*, 1 Sandf. Ch., 185; *Angell* v. *Smith*, 9 Vesey, 335.

It is the duty of the receiver to take possession of the property. If the person who has possession refuses to deliver it up, if he is a party to the bill, he may be proceeded against for a contempt. If he is not a party, he may be made one for that purpose. Or the receiver, by leave of Court, may proceed to recover possession by a suit at law. *Parker* v. *Browning*, 8 Paige, 388; *Wynne* v. *Newborough*, 3 Bro. Ch., 88; *Green* v. *Winter*, 1 Johns. Ch., 60.

After the receiver has taken possession, any person claiming the property, or any interest therein, may present his claim to the Court. He may be made a party to the suit in order to establish his claim. Or he may petition to have it heard before a master. Or he may, by express permission of the Court, bring a suit for the possession, care being taken to protect the receiver. But the receiver will not be ordered to deliver the property to a claimant until his right is established, in one of these modes. Nor can any claimant bring a suit against the receiver, except by leave of Court, without being liable for a contempt, if the property is a part of the subject matter in controversy. 2 Story's Eq.,

833; 3 Daniel's Ch., 1982; 6 Ves., 287; *Noe* v. *Gibson*, 7 Paige, 513; *Albany Bank* v. *Schermerhorn*, 9 Paige, 372; *Howell* v. *Ripley*, 10 Paige, 43.

These general principles are decisive of the case before us. The receiver came rightfully into possession of the property. It was his duty to retain possession until ordered otherwise by the Court. The plaintiffs had leave to bring this suit, but they chose the form of their action. They have mistaken their remedy. Their action is not a suit for the possession, but is an attempt to hold the receiver personally liable for the value of the property. Such an action cannot be maintained under the circumstances of this case. Whether in any case an action of trespass or trover can be maintained against a receiver, when he rightfully takes possession of the property, is a question upon which it is unnecessary for us to express any opinion. If the property is real estate, so that the title can be tried in an action of trespass, without changing such title, or rendering the receiver liable for the value, perhaps there would be no objection to its maintenance. Or, if he has received the rents of real estate, or has sold personal property, by order of the Court, perhaps the amount in his hands may be claimed in a suit at law. But in the case at bar, the plaintiffs, if the owners, can only recover the possession, in an appropriate action therefor.

But if, for this reason, the plaintiffs cannot recover in this suit, still it may be well for us to examine their title to the property, in order to save further litigation. The question has been fully presented and argued. The plaintiffs claim that the engine and cars sued for could not have been conveyed by the mortgage to Myers, of Feb. 6, 1851, because not in existence at the time. They were not purchased by the railroad company until 1853. As the mortgage to the plaintiffs was made after the purchase, their title is good unless the title passed to Myers, in trust, by the first mortgage.

The question whether a mortgage of personal property

not in existence, or not owned at the time by the mortgager, can be made available by the mortgagee, as a lien upon property afterwards acquired, has been discussed in many recent cases, with some apparent difference of opinion.

Some of the courts have denied that any difference exists, and have attempted to reconcile the cases on the ground that such a mortgage, though void at law, is valid in equity. But this is a loose use of language, that tends more to confuse than to reconcile. If such a mortgage is absolutely void, for want of any subject matter to support it, then it should be so held in equity, as well as at law. But, if not thus void, to what extent, and in what sense, is it valid? It is only by conceding its validity, that it is pertinent to inquire whether the remedy is in equity, or by a suit at law.

In other cases the reasoning is syllogistic and summary. "*Qui non habet, ille non dat.*" A mortgage is a grant. Therefore a mortgage of what one does not own, or of what is not *in esse*, is void.

But a mortgage is a grant, to be defeated upon a condition. This makes it merely the creation of a lien, with certain rights to secure and enforce it. A lien may be created without a grant. And sometimes a contract intended as a grant, but ineffectual as such, will be upheld in equity as a lien. So that the syllogism is by no means certain to dispose of the question.

As a general proposition it may be said, that a mortgage of such goods as may be in a store on a future day, — or of such furniture as may be in a house, — or of such machinery as may be in a mill, — or of such stock as may be on a farm, — when no particular property is referred to, will not convey any title to, or create any lien upon, such property subsequently acquired, which can be upheld or enforced in a suit at law. *Head* v. *Goodwin*, 37 Maine, 181; *Barnard* v. *Eaton*, 2 Cush., 294; *Codman* v. *Freeman*, 3 Cush., 306; *Otis* v. *Sill*, 8 Barb., 102; *Gardner* v. *McEwen*, 19 N. Y., (5 Smith,) 123; *Tapfield* v. *Hillman*, 46 Eng. C.

L., 243; *Lunn* v. *Thornton*, 50 Eng. C. L., 379; *Gale* v. *Burnell*, 53 Eng. C. L., 850. In Connecticut, a mortgage of a shifting stock of goods in a store, was held to create the same lien upon goods subsequently purchased as upon those owned at the time. *Holly* v. *Brown*, 14 Conn., 255. A similar decision was made in this State, in the case of *Head* v. *Goodwin*, 37 Maine, 181. But that case was questioned in *Jones* v. *Richardson*, 10 Met., 481; and it was substantially overruled in *Pratt* v. *Chase*, 40 Maine, 269. The question is therefore no longer an open one in this Court.

It should be noticed, however, that in nearly all the cases cited, the mortgages were exceedingly indefinite. Some of them described no particular property which could be identified; but they were mortgages of mere contingencies of such property as the mortgagers might purchase, if they should purchase any. They were void for uncertainty, if for no other reason. *Winslow* v. *Merchants' Ins. Co.*, 4 Met., 306. Except the case of *Otis* v. *Sill*, 8 Barb., 102, they probably would not have been upheld in equity, any more than at law. *Mogg* v. *Baker*, 3 Mees. & Welsb., 195; *Moody* v. *Wright*, 13 Met., 17.

We can understand these cases better by referring to another class in which conveyances of property, not in existence at the time, have been upheld, either at law or in equity. And we think it will be seen that sales or mortgages of such property have been sustained when within the following rules.

1. The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be, and, if the sale is absolute, what, with reasonable certainty, taking the ordinary contingencies into consideration, is the present value?

2. The vendor or mortgager must have a present, actual interest in it, or concerning it. As is said in illustrating

Rule 14, of Bacon's Maxims, "the law doth not allow of grants, except there be the foundation of an interest in the grantor." There must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract.

The application of these principles to the multifarious affairs of a business people, may sometimes be difficult. And in the various enterprises that are likely to be undertaken in a country distinguished for its manufactures, and its domestic and foreign commerce, new applications of them from time to time may be required. But the illustrations to be found in the decided cases will he sufficient for our present purpose.

Thus, one may sell all the wool which shall grow for a term of years on sheep owned by him at the time; but not the wool to be grown on so many sheep, if he does not own them. *Grantham* v. *Hawley*, Hobart, 132; *Smith* v. *Atkins*, 18 Verm., 461. So he may sell the grass, or any crop that does not require annual renewal, that shall grow upon his farm for a term of years. *Jencks* v. *Smith*, 1 Coms., 90; *Bank of Lansingburg* v. *Crary*, 1 Barb., 542; *Milliman* v. *Neher*, 20 Barb., 37.

If one contracts for the construction of a carriage, or a vessel, for himself, and pays therefor, he acquires no title until it is completed and delivered. *Mucklow* v. *Mangles*, 2 Taunt., 318; *Comfort* v. *Kiersted*, 20 Barb., 472. But if he *buys* a chattel in process of construction, and it is delivered to him, though afterwards to be finished, the title passes, and the additions made to it for the purpose of completing it become his property from the time when they are attached to it. The only reason why the conveyance of a vessel on the stocks was not upheld as a mortgage, in *Bonsey* v. *Amee*, 8 Pick., 236, was because there was no delivery, and the registry law had not then been enacted, which renders a delivery unnecessary. *Call* v. *Gray*, 37 N. H., 428. A mortgage of unfinished chattels gives the

mortgagee a good title to them when finished. *Harding* v. *Coburn*, 12 Met., 33; *Jencks* v. *Goffe*, 1 R. I., 511; *Perry* v. *Pettingill*, 33 N. H., 433.

So the owner of a ship may assign the freight of a voyage which has been commenced. *In re ship Ware*, 8 Price, 269; *Douglas* v. *Russel*, 1 M. & K., (7 Eng. Ch.,) 488. Or he may sell the oil and cargo to be brought home from a whaling voyage then being prosecuted. *Mangton* v. *Horton*, 1 Hare, 549; *Fletcher* v. *Morey*, 2 Story, 555. And a laborer, employed by another, may assign his wages afterwards to be earned; but not unless they are to be earned under an existing contract. *Mulhall* v. *Quinn*, 1 Gray, 105; *Twiss* v. *Cheever*, 2 Allen, 40; *Lannan* v. *Smith*, 7 Gray, 150.

In the case at bar, the subject matter of the contract was sufficiently definite and certain; its subsequent existence was reasonably sure; and the mortgagers had an existing interest in, and title to, the other property then mortgaged of which this was to be an essential part, necessary for its use, to be added to it for the purpose of finishing it. It is entirely unlike the case of a changing stock of goods.

The mortgagers had a charter for a railroad, with all the necessary franchises and rights for its construction, equipment, and operation. The mortgagee had previously contracted to construct and equip it for the company; and the work had been commenced. He was to be paid partly in the bonds of the company, which would sell in the market. Thereupon they mortgaged to him, and in trust for the holders of the bonds, their franchise, road, rights of way, materials, buildings, completed, or in process of construction, "including all cars, engines and furniture, that have been or may be purchased for or by said company," to secure the contract "for the construction and equipment of said railroad," and to secure the payment of the bonds to be issued to the mortgagee, to him, "or to his assigns, who shall become the holders of said bonds."

A large part of the numerous railroads in this country

have been constructed by the aid of mortgages, to individuals, or to trustees. Many of these mortgages, perhaps most of them, embrace, specifically, engines and cars, to be subsequently acquired. As they are made to secure bonds not to be due for many years, and the rolling stock is perishable, unless such future acquisitions can be mortgaged, as incident to, and essential to the use of, the railroad itself, the security is liable to be greatly diminished. The question is one of great importance in respect to the interests involved in its determination. Nor is it a new one. It has been considered by several courts of the highest respectability; and such mortgages have been sustained, not only as to existing property, but as to that subsequently acquired. *Pierce* v. *Emery*, 33 N. H., 484; *Seymour* v. *C. & N. F. Railroad Co.*, 25 Barb., 286; *Trust Co.* v. *Hendrickson*, 25 Barb., 484; *Coe* v. *Hart & al.*, 6 Am. Law Reg., 27; *Pennock* v. *Coe*, 23 Howard, 117; *Phillips* v. *Winslow*, 18 B. Monroe, 531.

In nearly all these cases the question is discussed with much research and force of reasoning. And, in the absence of contrary decisions, they constitute a weight of authority not to be disregarded, unless it can be clearly shown that they are erroneous.

In some of them, the companies were specially empowered by legislative acts to mortgage their property and franchises. In the case of *Howe* v. *Freeman*, 14 Gray, 566, such a mortgage was upheld on the subsequent confirming statute, with an intimation that otherwise it would have failed. But the general question was not considered by the Court. The power of a corporation, without any legislative act, to mortgage its franchises with other property, to secure its liabilities, has never been questioned in this State, though such mortgages have been common for many years, and rights under them have been determined in this Court. The weight of authority in this country is in favor of the doctrine that the power to mortgage is incident to the rights granted by the Act of incorporation. Even if the franchise

to be a corporation cannot be assigned, "the franchises to build, own and manage a railroad, and take tolls thereon, are not necessarily corporate rights; they are capable of existing in and of being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable." CURTIS, J., in *Hall* v. *Sullivan Railway*. At most, it would seem that an assignment can only work a forfeiture. And if the State waives such forfeiture, the question cannot be raised collaterally by other parties. The cases on this subject are cited and reviewed in Redfield on Railways, § 235, notes 19 and 20. The mortgage, in the case at bar, of all the franchises and property of the corporation, is as effectual between the parties to it, as if, like those in some of the cases cited, it had been made under a special Act of the Legislature. Whether the assignees of the mortgage, without any further proceedings, legislative or judicial, will have all the corporate rights of the company, is not a question now presented. The subsequent statute of 1852, prohibiting any company from assigning any rights under its charter without the consent of the Legislature, expressly excepts mortgages made to secure debts of the corporation, and recognizes their validity. R. S., c. 51, § 31.

In the case of *Trust Company* v. *Hendrickson* it was held that, as between mortgagers and mortgagees, the engines and cars were fixtures, so that, without any express grant, they would have become the property of the mortgagees by being attached to the railroad. If they were fixtures, that result would follow, although they were not in existence when the mortgage was given. That they have some of the qualities of fixtures cannot be denied. They are fitted to the gauge of the road, and are adapted to the particular use upon it. In the modern cases, whether an article is a fixture is determined more by such considerations, than by its being actually attached to the land. Without the rolling stock, the road is not only worthless to the company, but it

ceases to be of any public use. Important public interests are therefore involved in the question.

But, if the engines and cars are not fixtures, they are so connected with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property not *in esse* cannot be conveyed. We do not mean to intimate that rolling stock to be subsequently acquired could be mortgaged without the railroad. But when the railroad itself is mortgaged, with the franchise, the rolling stock to be acquired for the purpose of completing or repairing it is so appurtenant to it, that the company have a present, existing interest in it, sufficient to uphold the grant of both together, — the one as incident to the other. Their title to the railroad is "the foundation of an interest" in the cars and engines to be acquired for its use.

"If the rolling stock on the road should be removed," says McLean, J., in the case of *Coe* v. *Hart*, "it would defeat the liens of creditors to many millions of dollars, and put an end to the construction, if not to the maintenance of railroads." In the case of *Ludlow* v. *Hurd*, 6 Am. L. Reg., 493, Storer, J., remarks: — "It is very clear that we must regard it (the rolling stock,) as appurtenant to a railroad; it is necessary for the working of it that all this species of property should become a part of the road itself. It is essential to its use; and if denied, it is destructive to the purpose for which it was built." And in the case of *Phillips* v. *Winslow*, before cited, the Court say that, in order to render the mortgage of the railroad effectual, "it is necessary that it should embrace all such future acquisitions of the company as are proper accessions to the thing pledged, and essential to its enjoyment."

That a mortgage of a railroad and the franchises of the company, with all the rolling stock then owned and to be afterwards acquired and placed on the road, will create a valid lien upon cars and engines subsequently purchased,

there would seem to be no longer any doubt. Redfield on Railways, § 235, notes 21 to 24. Pierce's Am. Railroad Law, 531; Am. Law Reg., July 1863, 527.

The decisions sustaining such mortgages are not understood to be in conflict with those in which other mortgages of such property have not been upheld. The general rule, that property not *in esse* cannot be conveyed, is not abrogated. Nor will such mortgages be upheld in equity, any more than at law, unless they are within some of the exceptions to the rule. But, if a mortgage is within any of the exceptions it will be sustained, and the parties will be entitled to appropriate remedies.

What remedies will be open to them must depend upon the circumstances of each case. In *Holroyd* v. *Marshall*, 9 Jur. N. S., 213, recently decided by the House of Lords, a registered mortgage of machinery in a mill, together with all that should afterward be placed therein in addition to, or in substitution for that which was there at the time, was held to have created a valid lien upon the portion afterwards purchased, from the time when it was brought within the terms of the grant. And the rights of the mortgagee were sustained in equity, on the ground that the mortgager, as soon as he purchased the additional machinery and put it into the mill, held it in trust for the mortgagee. Whether we should uphold such a mortgage, is a question upon which it is unnecessary to express any opinion. The case seems to be in conflict with that of *Moody* v. *Wright*, 13 Met., 17. But in those cases in which a mortgage of such property is valid, there would seem to be no doubt that it can be enforced in equity as a case of trust.

It has been suggested by counsel that, if the mortgage in the case at bar can be supported in equity, it cannot be in this suit at law. We have already seen that this action of trover must fail, because it is not an appropriate one in which to try the question of title. But, if it were otherwise, the mortgage being sustainable in equity, the result would be the same. The property was in the custody of the

Court, upon a bill in equity, which is still pending, brought for the purpose of determining the rights of all persons to all the property mortgaged. The suit at law is incidental to the bill in equity, having been brought by special permission of the Court. It cannot be permitted to defeat the proceedings in equity, in regard to any property embraced in the mortgage. If the equitable title is in the assignees of the mortgage, and they, or the *cestuis que trust*, are seeking to enforce their rights by a bill in equity, the property being in the hands of a receiver, it would be strange indeed if the whole proceedings could be defeated by the assertion of the legal title subject to the mortgage. The bill in equity having been commenced first, and the property taken possession of under it, all incidental claims, whether by a suit at law or otherwise, are merely interlocutory. Upon whatever property the bill is finally sustained, it will operate to convert *equitable* into *legal* titles. Therefore no suit at law, however appropriate, could be sustained for the possession of any property to which the trustees have an equitable title.

Upon the whole case, we are of the opinion that the mortgage to Myers created a valid lien upon the engines and cars as they were purchased and placed upon the road for the purpose of equipping it; and that the holders of the bonds secured by that mortgage will be entitled, if they claim it, to have the trust enforced, not only against the railroad, but against the rolling stock subsequently acquired.

Plaintiffs nonsuit.

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

AUGUSTUS O. BAILEY *versus* HOPE INSURANCE COMPANY.

An insurance company, chartered by the Legislature of Rhode Island, appointed an agent in accordance with R. S., c. 49, § 39, to do business in Portland. Upon receipt of a letter from the plaintiff, residing in N. H., asking for a policy upon a hotel belonging to the plaintiff and his partner, situated in N. H., the agent issued and sent a policy dated at Portland, to the plaintiff as directed. In an action upon the policy; — *Held*, that the place of the contract was in this State, and that the laws of this State must govern it.

A condition in such a policy requiring that the assured, in case of a loss, shall procure a certain "certificate under the hand of a magistrate or notary most contiguous to the place of the fire," being in conflict with § 5 of c. 34 of Public Laws of 1861, is void.

A letter from the secretary of an insurance company, written to the assured upon receipt of the preliminary proofs of loss, making objection to the magistrate who signed the certificate, but not to the form of the certificate, may be regarded as a waiver to any defect in the form.

An insurance, *prima facie*, has reference only to the legal interest of the insured.

ON EXCEPTIONS, to the ruling of GODDARD, J., of the Superior Court.

ASSUMPSIT on a policy of insurance against fire, effected upon a hotel, and connected outbuildings, situated in Gorham, New Hampshire, and owned by the plaintiff and his partner, both of whom resided in Gorham. There was other insurance to the same amount in another company.

The presiding Justice instructed the jury that the plaintiff had a right to insure the whole of his insurable interest; [but that his personal insurable interest did not exceed one-half of the value of the insured property, and therefore he is not entitled to recover in this action more than one-quarter of the value of the insured property destroyed by the fire, with interest from the date of his writ.]

To so much of this instruction as is included within the brackets, the plaintiff alleged exceptions.

The following, among other instructions, were also given:

1st. That any misrepresentations of the title or interest

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of the plaintiff, if any such were made, would not prevent his recovery on the policy to the amount of his insurable interest, unless such misrepresentations were fraudulent, and that the defendant could not avoid payment of loss by fire by reason of any incorrect statements of value or title as erroneous description by the insured in the contract of insurance, if the jury should find that the difference between the property as described, and as really existing, did not contribute to the loss or materially increase the risk, and also—

2d. That it was not necessary that proof should be made before a justice of the peace, but that a notary was sufficient.

3d. That it was not necessary that he (the certifying magistrate) should be the most contiguous to the fire.

That the form of the proof is sufficient.

4th. That the jury were to judge whether there is any defect in its substance.

To these latter instructions the defendant alleged exceptions.

The verdict was for the plaintiff.

James F. Miller, for the plaintiff.

I. Preliminary proof sufficient.

1st. That the certificate attached to the proofs of loss was made by such a magistrate as the laws of Maine contemplate. Acts of 1861, c. 34, § 5; Webster's Unabridged Dictionary, 685; R. S., c. 32; R. S., c. 107, §§ 2, 11, 29, 102; 1 Black. Com., 145, c. II, second paragraph, Lippincott's ed. of 1866; *Scanlan* v. *Wright*, 13 Pick., 528, 529.

2. That the certificate is proper in form. See certificate and Acts of 1861, c. 34, § 5.

3d. The compliance to conditions of policy is for the Court as to form, and the jury as to sufficiency. *Wetherell* v. *Maine Ins. Co.*, 49 Maine, 200—205; *Columbia Ins. Co.* v. *Lawrence*, 10 Peters, 507.

II. Contract made in Portland.

1st. The law of the place where the contract is made, and not where the action is brought, is to govern in enforcing and expounding the contract, unless the parties had in view its performance elsewhere. *Cox* v. *U. S.*, 6 Peters, 172; 2 Parsons on Con., § 5 of c. II; *Duncan* v. *U. S.*, 7 Peters, 445.

III. Place of performance at Portland.

1st. A policy of insurance executed in one place and transmitted to the insured in another place, and where the property insured is located, is a contract of the place where it was executed, unless otherwise agreed upon by the parties. There was no such agreement in this case. *Daniels & als.* v. *Hudson River Ins. Co.*, 12 Cush., 416; *Hyde* v. *Goodenow*, 5 Coms., 266.

2d. The validity and construction of a policy of insurance, as of other contracts, are governed by the laws of the place where it is made. 1 Phil. on Insurance, § 121, and reference.

Reed & Smith, for the defendants.

I. As to preliminary proofs.

(1.) We are in condition to take advantage of this objection, having pointed out the non-compliance as soon as the proofs reached us.

(2.) The preliminary proofs (which in our use of the term includes the magistrate's certificate) must comply either with the policy or the statute, either with the contract which the parties have made or the contract which the law forces them to make. Compliance is a condition precedent, without which there can be no recovery. *Leadbetter* v. *Ætna Ins. Co.*, 13 Maine, 265; *Worsley* v. *Wood*, 6 T. R., 710; *Mason* v. *Hervey*, 8 Exch., 819; *Spring Garden Ins. Co.* v. *Evans*, 9 Md., 1; *Kimball* v. *Hamilton Ins. Co.*, 8 Bosw., N. Y., 495; *Battaille* v. *Merchants' Ins. Co.*, 3 Rob., La., 384; *Welcome* v. *Peoples' Ins. Co.*, 2 Gray, 480; *Smith* v. *Haverhill Ins. Co.*, 1 Allen, 297; *Roper* v. *Lendon*, 1 Ell & Ell (102 E. C. L. R,) 825.

But, (3,) the proofs do not comply with the policy (condition No. 11,) because the certificate is not from the most contiguous magistrate; nor with the statute, because the magistrate does not certify that the statement is true, &c., but that he has met with a *bona fide loss, &c.*, which is a fact entirely different. The statute (c. 34, 1861) being very much in derogation of common law, must be construed strictly. Whoever seeks to avail himself of a statute to avoid his own contract, must pursue that statute exactly.

(4.) The sufficiency of the compliance was for the Court, not for the jury.

"They (the proofs) are conditions precedent and for the Court, and being in writing, the question of sufficiency is to be determined by them." *Commonwealth Ins. Co.* v. *Sennett*, 41 Penn., 161, 169. See also all the cases cited above, in no one of which is there any hint that this is matter for the jury. The case of *Wetherell* v. *Ins Co.*, 49 Maine, 200, 205, from which, perhaps, in the haste of *nisi prius*, the instruction of the Court was derived, is not at all in conflict with this view; for that case refers to the statement of *amount* of loss, and that only, as will be seen by the context. There the question was as to the disputed fact of fraud, here the question is one of law. The proofs being in writing speak for themselves. There were no facts to be determined, and where the facts are entirely undisputed, the decision is for the Court. Broom's Legal Maxims, [77.] "It is of the greatest consequence," says Lord HARDWICK "to the law of England and to the subject, that these powers of the Judge and jury be kept distinct, that the Judges determine the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England."

II. As to the Law of Contract which is to govern the case.

(1.) The contract was made in New Hampshire and *lex loci contractus* must govern. *Prentiss* v. *Savage*, 13 Mass.,

23; *Thompson* v. *Ketchum*, 8 Johns. 146; *Austin* v. *Imus*, 23 Vt., 286; *Cox* v. *United States*, 6 Pet., 172, 202.

All the letters and particularly those of July 29, 30 and 31 show that New Hampshire was the place of contract. The first policy was not treated by either party as a contract, because not accepted by the insured. Nor was the second to be so treated till accepted. When it was accepted and the contract completed, it was at Gorham, N. H. If Bailey had sent the money to Portland and the agents had sent the policy back, there might be some color for saying that the contract was made in Maine. Suppose the policy had never reached Bailey, could he have been made to pay the premium? The cases *Huntley* v. *Merrill*, 32 Barbour, 626; *Western* v. *Genesee Ins. Co.*, 2 Kern., 258; *Hyde* v. *Goodenow*, 5 Comstock, 266, which will be cited by plaintiff, are cited also by us. They are all cases where the premium note was forwarded to New York with the application and the policy returned, consequently the Court held that the contract was "consummated by the final assent on the part of the company" at New York. So in this case, we say the contract was consummated by the final assent of Bailey at Gorham. The case of *Daniels* v. *Hudson Ins. Co.*, 12 Cush., 416, is not in point; for there the property was situated in Massachusetts, the negotiations were carried on and the contract consummated there by assent of all parties. In the present case the property was real estate in New Hampshire, the negotiation by letter, and the contract consummated by the final assent of Bailey at Gorham.

But, (2,) even if Portland is to be deemed the place where the contract was made, still the law of New Hampshire governs, because the contract related to property in New Hampshire and was to be performed there. *Austin* v. *Imus*, 23 Vt., 286; *Fanning* v. *Consequa*, 17 Johns., 511; *Andrews* v. *Pond*, 13 Pet., 65. Contracts of Marine Insurance, wherever made, are supposed to be made with reference to the usages of the place to which the ship belongs. *Cobb* v. *N. E. Mut. Marine Ins. Co.*, 6 Gray, 192, 200;

Tidmarsh v. *Ins. Co.*, 4 Mason, 439; *Hazard* v. *N. E. Marine Ins. Co.*, 8 Pet., 557.

(3.) The law of New Hampshire is the common law, and the insured must comply with the conditions of the policy as to title, preliminary proofs, &c. *State* v. *Rollins*, 8 N. H., 550.

III. Instruction excepted to by the plaintiff was right. *Converse* v. *Citizens' Mut. Ins. Co.*, 10 Cush., 37, 38; *Finney* v. *Redford Ins. Co.*, 8 Met., 348; 3 Kent's Com., 258, and cases *infra*.

APPLETON, C. J. —The defendant corporation was chartered by the Legislature of Rhode Island, and has its place of business at Providence in that State. It has an agent or agents at Portland, and has fully complied with the provisions of R. S., c. 49, § 39, in reference to the agents of foreign insurance companies.

The premises insured were owned by Bailey & Mitchell. It appears that a policy was issued to the firm, but Mitchell declined to have anything to do with it. The plaintiff thereupon, on July 29, 1867, wrote to Messrs. Dow, Stackpole & Co., the agents of the defendant corporation at Portland, advising them that his partner Mitchell did not wish to be insured, and requesting a policy to be made out to him.

On July 30, 1867, Dow, Stackpole & Co., forwarded the policy in suit to the plaintiff. It is dated at Portland, and countersigned by the agents of the defendant.

The plaintiff's hotel was in New Hampshire, where he resided. The Insurance company was chartered by the Legislature of Rhode Island. The policy was issued at Portland.

The defendant corporation is carrying on business in this State by its duly authorized agents. In all the contracts the agents make, in the course of such agency, the case is the same as though the principal were present and made them. The principal is constructively present in the

agents' person. The contract is to be regarded as if made at the place where the business is transacted by the agent or agents.

The negotiation in this case was by letter. The plaintiff requested to be insured, and that a policy, the terms of which were understood by their previous correspondence, should be sent him. The agents of the defendant forwarded the policy the next day. The contract is completed by sending the policy as requested. When the agents of the defendant forwarded their policy, the defendant became liable,—and, as the contract was complete and finished in this State, its laws must govern.

The defendant corporation chose to have an agency in this State. It has made itself liable to suits here. The plaintiff is seeking to enforce his contract here. The defendant having received the profits of insurance,—having agreed to be amenable to the jurisdiction of the courts of this State, and having contracted within it, and subject to its laws, and the suit having been brought here, its rights must be determined by the terms of the contract, except so far as the same may be affected by the paramount legislation of this State. *Emery* v. *Piscataqua F. & M. Ins. Co.*, 52 Maine, 322.

It is objected that the preliminary proofs do not comply with the conditions of the policy. By the 11th condition, the insured were required to give a statement of the loss, &c., to procure a certificate under the hand of a magistrate or notary public, (most contiguous to the place of fire, and not concerned in the loss, &c.,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statement, and knows, or verily believes that the insured, by misfortune and without fraud or evil practice, have sustained by fire such loss or damage, and to the amount therein mentioned. This the plaintiff has not done. If the policy were to control, he would be obliged to pro-

cure such certificate, and if he could not, the action could not be sustained.

But the plaintiff is relieved from the necessity of procuring the certificate of the nearest magistrate, by the Act approved March 15, 1861, c. 34, § 5, which requires only that the statement of the insured should be sworn to "before some disinterested magistrate, who shall certify that he has examined the circumstances attending the loss, and has reason to, and does believe such statement is true."

By the Act of 1861, c. 34, § 5, "all provisions contained in any policy or contract of insurance, in conflict with any of the provisions of this Act, are hereby declared null and void, and all contracts of insurance hereafter made, renewed or extended, in this State, or on property within this State, shall be subject to the provisions of this Act." The policy, in suit, was made and extended in this State. Both parties must be regarded as contracting subject to the requirements of this Act. Whatever is in conflict with the Act is null and void. Its provisions control the terms of the policy. It was not necessary, then, to make the preliminary proofs as required by the policy.

But it is urged that the plaintiff has not complied with the statute, § 5, and therefore he must fail. The statement of the insured is within its terms and is duly sworn to. The magistrate before whom the statement was made and sworn to, certified that he "examined the circumstances of the fire or damage as alleged," that he was "well acquainted with the character and circumstances of the insured," and that he verily believed "that he has by misfortune and without fraud or evil practice, sustained loss and damage on the property insured, to the amount of ten thousand four hundred dollars."

It is insisted that this is not a compliance with § 5, which requires the magistrate to certify "that he has examined the circumstances attending the loss, and has reason to and does believe such statement to be true."

It may be, that this certificate is not strictly a compliance with the requirements of the statute. However that may be, the defendants, by their own showing, have waived the right to insist on this objection. In the notice of the secretary, under date of Dec. 4, 1867, he takes the objection that the certificate of the magistrate nearest the fire has not been produced, and adds, "without this, no claim is payable." But the defendants have become amenable to this jurisdiction and must submit to its laws. No objection, it will be observed, is made to the statement of the insured that it is not sufficiently full, clear and precise. None is made to the form of the magistrate's certificate. Had there been, the objections might have been remedied. The only objection is, that the certificate of the nearest magistrate is not obtained. There is no intimation that it is in any respect insufficient. The complaint is, that the magistrate making it, is the wrong one, and that is all. The defendants' objection is answered by the statute, so far as relates to the magistrate. No suggestion was made that the certificate was defective in substance. The defendants are not to be permitted at this late day to take this objection. They must be regarded as having waived it by the notice before referred to. *Bartlett* v. *Union Mut. Fire Insurance Co.*, 46 Maine, 500; *Lewis* v. *Monmouth Mut. Fire Ins. Co.*, 52 Maine, 498.

The exceptions of the defendants must be overruled.

The plaintiff procured an insurance "on his new three story frame hotel," &c. This insurance in its terms relates only to his legal title, which was one-half. An insurance *prima facie* covers only the legal interest of the insured. 3 Kent, 258. The correspondence refers to the legal title only. Nothing indicates, on the part of the insured, that there was any intention to effect a policy on any equitable interest he might have, as against his partner, on an adjustment of the affairs of the firm. The policy in its terms

covers no such interest, and there is no reason to suppose it was intended to cover such interest.

Plaintiff's and defendants' exceptions overruled.

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

HENRY C. ORR *versus* ISAAC L. SKOFIELD.

Any charge of dishonesty against an individual, spoken of him in connection with his business, whereby his character in such business may be injuriously affected, is actionable.

The plaintiff alleged that the defendant did utter and publish, &c., the following false, scandalous and malicious words of and concerning the plaintiff in his capacity as a shipmaster, and of and concerning the business and calling of the plaintiff in his capacity of shipmaster, to wit, "he (meaning the plaintiff,) sold the consignment of the ship Rising Sun," (of which he was then master,) "and pocketed the money." — *Held*, that the words were slanderous if not true.

ON EXCEPTIONS.

CASE, for that whereas the plaintiff is, and from his youth has been, of good reputation among his neighbors and fellow citizens, for honesty and propriety of conduct, and hath been wholly free from the atrocious crime of stealing, and hath never been convicted or suspected to have been guilty of that crime, and for more than ten years last past hath been master of a vessel, and entrusted by the owners thereof with the command, care and control of the same, and was, during the year 1867, master of a ship called Rising Sun, and had the care, command and control of said ship, and hath always honestly and faithfully discharged his duties as master of said vessels of which he has had command, and especially of said ship Rising Sun, and hath always justly and faithfully accounted for all sums of money received by him, in his capacity of master of said vessel, to

the owners thereof:—Nevertheless, the said defendant, not being ignorant of the premises, but fraudulently, maliciously and wickedly contriving to injure, blacken and defame the plaintiff in his good fame and reputation, and to injure him in his calling and business as a shipmaster, and to impose him to the pains and penalties prescribed by law for stealing and embezzlement, did on divers days and times during the year eighteen hundred and sixty-seven, at Brunswick, aforesaid, in presenc of divers good citizens of this State, and in conversation with the same, with a loud voice did speak, utter, publish and declare in the following false, scandalous and malicious words, of and concerning the plaintiff, to wit, he, meaning the plaintiff, sold the consignment of the ship Rising Sun, meaning the consignment of the vessel of which the plaintiff was then master, in St. Thomas, for seven hundred dollars, and pocketed the money, meaning that the plaintiff was thereby guilty of larceny by embezzling and fraudulently converting to his own use the property of another, and under his care by virtue of his employment as master of said vessel, by means of which false and scandalous words, the plaintiff has been much injured in his good name and reputation, and is now and has been exposed to a prosecution for stealing, and has been much injured in his business as shipmaster, and has been thrown out of employment, suffered great anxiety of mind, and has lost situations and employment in the command of divers vessels which he would otherwise have received, and by which he would have earned and received large sums of money, to his damage, as he says, in the sum of ten thousand dollars.

The plaintiff had leave to amend by adding after the words "in the following false, scandalous and malicious words of and concerning the plaintiff," the words "and of and concerning the plaintiff in his capacity of shipmaster, and of and concerning the business and occupation of the plaintiff in his capacity as a shipmaster." And thereupon the defendant demurred, and the plaintiff joined the demur-

rer. The presiding Judge overruled the demurrer and the defendant alleged exceptions.

W. L. Putnam, in support of the demurrer.

Innuendoes of embezzlement and larceny, there being no proper averments with which they can connect themselves, add nothing to the declaration. *Emery* v. *Prescott*, 54 Maine, 389; *Brown* v. *Brown*, 14 Maine, 317.

The whole legal force of the counts is in the words "sold the consignment of the Rising Sun, in St. Thomas, and pocketed the proceeds."

In no event do these words import a crime; because, if they amounted to an allegation of embezzlement, embezzlement is a crime only by statute law, which it is not shown has any corresponding statute or law at St. Thomas, and besides, there is nothing to show that money received for the sale of the consignment of the ship would be the money of the owners, so that it could be the subject of embezzlement.

The breach of duty, if any, would be in the sale of the consignment, and not in applying to his own use the proceeds, which would not be the property of the owners; though, as a result of his breach of duty, he might be accountable for the same or a much larger amount.

Disregarding, then, the innuendo, is there anything actionable in the words charged?

The innuendo would indicate that the plaintiff considered the language used as equivalent to a charge of fraudulent disposal of property, — that is, an unauthorized sale of the vessel or some portion of the cargo.

Clearly it cannot have any such meaning, — at least not without additional facts alleged on the record.

It may be supposed that it means an unlawful combination with some broker or merchant, by which the accounts of the vessel were placed in his hands.

But the language on record does not thus define it?

Clearly the plaintiff thought it not sufficient, or he would not have attempted to define it, as he did.

But, if the first clause of the allegation, to wit, "sold the consignment," is construed as meaning that plaintiff arranged with some broker or merchant that he should take the ship's account for a consideration, there is nothing alleged to show that that would be improper; and indeed it is a common thing, where there are at particular ports certain fixed percentages for making disbursements, &c., and considerable rivalry among brokers, to agree that the account shall be paid for by return commissions or otherwise, to be credited to the ship by the master.

Nor does the addition of the words "pocketed the money," help the writ. It might be the captain's duty at a foreign port actually to "pocket" money or its representative, as it would also be his duty at some future time to account for it. Had the allegation been that he pocketed the money and had fraudulently not accounted for it, the case would stand differently.

The word "pocketed" is perhaps an equivocal word, which for legal accuracy should be explained by an innuendo or otherwise; but here the innuendo, if considered as used for that purpose, gives to the allegation a meaning it will not bear without something further on the record.

The allegation is more equivocal than it was in *Tibbets* v. *Goding*, 9 Gray, 254; *Carter* v. *Andrews*, 16 Pick., 1; *Brown* v. *Brown*, *ante*; *Bloss* v. *Tobey*, 2 Pick., 330.

Shepley & Strout, for the plaintiff.

APPLETON, C. J.—The plaintiff is a shipmaster, and has brought this action against the defendant for saying of him, "that he sold the consignment of the ship Rising Sun, (of which he was then master,) and pocketed the money," "by means of which false and scandalous words," the plaintiff "has been much injured in his business as shipmaster, and has

been thrown out of employment, suffered great anxiety of mind, and has lost situations and employment in the command of divers vessels which he would otherwise have received, and by which he would have earned large sums of money," &c., &c.

By an amendment, these false and scandalous words are alleged to be spoken "of and concerning the plaintiff in his capacity as a shipmaster," and "of and concerning the business and calling of the plaintiff, in his capacity of shipmaster aforesaid."

As the declaration now is, the words are spoken of and concerning the plaintiff in his capacity as a shipmaster. Words not actionable in themselves become so by being spoken of one filling an office or carrying on a particular vocation, when spoken of him in such office or vocation. So, words in themselves not actionable may become so by reason of some special damage occasioned by them. *Brown* v. *Trundy*, 31 Maine, 321; *Harris* v. *Burley*, 8 N. H., 256. "Whatever words," remarks BAILEY, J., in *Whittaker* v. *Bradley*, 16 E. C. L., 310, "have a tendency to hurt, or are calculated to prejudice a man, who seeks a livelihood by any trade or business, are actionable." The words, which constitute the plaintiff's ground of action, being spoken of here in relation to his business, are calculated to prejudice him in his business, and, as the defendant by his demurrer admits, have so prejudiced him. Any charge of dishonesty against an individual, in connection with his business, whereby his character in such business may be injuriously affected, is actionable. *Fowles* v. *Bowen*, 30 N. Y., 20. "The principle is well settled," observes JEWETT, J., in *Kinney* v. *Nash*, 3 Coms., 177, "that, to maintain an action for words spoken, the words must either have produced a temporal loss to the plaintiff, &c., or they must impute some matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment." Applying to the words spoken their ordi-

nary meaning, we cannot doubt that they are slanderous of the plaintiff in relation to his business, if untrue.

Exceptions overruled.

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

WILLIAM W. STEVENS *versus* IRENE S. RECORD.

In accordance with the terms of a deed of submission, entered into by the plaintiff, defendant and one other, the referees awarded under seal that, of the $100 charged by them for fees, this defendant should pay $80, this plaintiff $13, and the other party $7, these being the several sums charged by the referees respectively. The defendant alone refusing to perform her part of the award, was sued jointly with the other parties to the submission, by the referee who charged the sum awarded for her to pay, and recovered judgment, which was satisfied by the plaintiff, who thereupon sued the defendant in assumpsit to recover the amount of such judgment: — *Held,*

1. That the action was maintainable;
2. That the action being for contribution and not upon the award should be assumpsit;
3. That the submission and award were admissible in evidence; and
4. That the plaintiff recover the full amount paid by him and interest from the time of payment.

ON FACTS AGREED.

APPLETON, C. J. — This is an action of assumpsit in which the plaintiff claims to recover of the defendant the amount paid by him on a judgment, *Calvin Record* v. *William W. Stevens*, (plaintiff,) *Irene S. Record*, (defendant,) and *George M. Stevens*. The judgment was recovered in an action of assumpsit against the above named defendants, and has been paid by the plaintiff, with costs and fees, amounting in all to $100,10.

The plaintiff introduced in evidence a deed of submission between the plaintiff, the defendant and one George M. Stevens, of various disputes between them. In this sub-

83 Me. 342

mission it was agreed that the referees therein named should determine by whom and in what proportions the cost of said reference should be paid. By the award, which is also in the case, it appeared that the defendant was to pay the sum of eighty dollars, being four-fifths of the cost of reference, and certain sums were to be paid by the other parties to the reference. All the parties to the reference have paid the several sums allotted to them, save this defendant. The amount recovered in the action, *Record* v. *Stevens & als.*, was for the fees of the plaintiff therein as referee, it being the amount awarded to be paid by the defendant.

The evidence offered of the terms of the submission and of the award was clearly admissible. The defendant, by her own agreement, must be held liable to pay the costs of reference as awarded by the referees.

When one of several judgment ~~creditors~~ *ex contractu* pays the whole amount, he may recover contribution of the others. If they were all equally liable, the plaintiff will recover of each his fractional share. But there may be cases in which, as between the defendants, one alone is bound to pay the whole amount, as where one is principal and the rest are his sureties, in which case the surety, who pays, is entitled to recover of the principal the amount thus paid. Such is the case of the defendant in her relation to the other parties to the reference. The plaintiff has been compelled to pay the amount awarded by the reference to be paid by her, and is legally and equitably entitled to recover that sum in this suit. The plaintiff, on his part, has complied with the terms of the submission, and should not bear any part of the burden imposed upon the defendant.

It is objected that assumpsit is not maintainable, as the submission and award are under seal. But the action is not upon the submission or award. They are offered in evidence only to show the true relations of the parties. The suit is the ordinary one for contribution, where one has paid

under legal compulsion, for another, what was the duty of the latter to pay.

At the hearing, the coverture of the defendant, as a ground of exemption from liability, was waived. It is not necessary to consider, therefore, what effect that would have on the legal rights of the parties.

Judgment for the plaintiff for $100,10, *and interest from March* 13, 1867.

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

T. H. Haskell, for the plaintiff.

C. Record, for the defendant.

STATE OF MAINE *versus* WILLIAM W. THOMAS, JR.
SAME *versus* ELIAS THOMAS, 2d.
SAME *versus* SAME.

By c. 216, § 1, of the Public Laws of 1868, the original and appellate criminal jurisdiction, and all powers incident thereto, of the Supreme Judicial Court, within and for the county of Cumberland, was transferred to and conferred upon the Superior Court for that county.

The last clause of § 12, c. 151, of the Public Laws of 1868,* providing for the transfer, under certain circumstances, of cases from the docket of the Superior to that of the Supreme Court, has reference to civil cases only.

By virtue of the first clause of § 12, c. 151,* when an indictment has been found against a nephew of the Justice of the Superior Court, any Justice of the Supreme Judicial Court may, at the request of the Justice of the Superior Court, preside in the Superior Court long enough to try the accused on such indictment.

ON REPORT.

INDICTMENTS for assault and battery, found at the May term, 1867, of the Superior Court, and transferred to this

* See opinion.

Court, because the parties defendant are nephews of the Judge of the Superior Court.

There being no terms of this Court for the transaction of criminal business, these cases came up at the April term, 1869, of this Court, which is a term held for the transaction of civil business. And the presiding Judge, not being of the opinion that this Court could take cognizance of or try the respondents on the indictments at this term, and being doubtful whether the indictments could be legally transferred to this Court for the cause mentioned, or whether there is in this Court, under the existing statutes, any power to take cognizance of the indictments and try the same, reported the cases to the full Court for the decision of these questions.

W. P. Frye, Att'y Gen'l, for the State.

Shepley & Strout, for the respondents.

APPLETON, C. J. — This was an indictment found by the grand jury of this county at the May term of the Superior Court, and transferred to this Court because the defendant is a nephew of the Justice of the Superior Court.

By R. S., 1857, c. 77, § 22, civil and criminal jurisdiction is given to the Supreme Judicial Court. But this jurisdiction is to be exercised at different terms. Civil causes could not be tried at terms held "for the transaction of criminal business." Indictments could not be tried at terms held "for the transaction of civil business."

By an Act approved March 6, 1868, c. 216, § 1, the original and appellate criminal jurisdiction of the Supreme Judicial Court for the county of Cumberland was transferred from that Court to the Superior Court, and conferred upon the latter. By § 5, the terms "for the transaction of criminal business" in the Supreme Judicial Court were abolished. By § 2, terms were established for the transaction of criminal business in the Superior Court.

Before these changes of the law, criminal cases could

not have been heard in the Supreme Judicial Court at terms established for "the transaction of civil business." The transference of all criminal jurisdiction from that Court to the Superior Court cannot give the Court the right, at a civil term, to hear and determine criminal cases, which it had not before.

Nor is the authority to try criminal causes given by the last clause of c. 151, § 12, approved Feb. 12, 1868, which provides, "whenever the Justice of said Superior Court shall be disqualified by interest or other lawful cause from trying any cause pending in said Court, said case shall thereupon be transferred to the docket of the Supreme Judicial Court for said county, and disposed of in said Court according to law."

Now this clause cannot refer to criminal cases. It must be construed in connection with existing statutes. The abolition of the criminal jurisdiction of the Supreme Judicial Court prevents the transference of indictments to that Court. There is no docket of criminal causes, and it cannot "be disposed of in said Court according to law." The Supreme Court, therefore, cannot try the prisoner.

Is the defendant, then, exempt from criminal liability? Is there no Court by which he can be tried? By no means. He was properly indicted in the Superior Court. That Court has exclusive criminal jurisdiction, save in matters of exception, &c. By § 12,—"In case the Justice of said Superior Court should, by reason of continued sickness or other cause, be prevented from holding a term or terms of said Court, any Justice of the Supreme Judicial Court may, at the request of said Justice of said Superior Court, hold such term or terms of said Superior Court, in place of the Justice thereof." This section is general, and applies as well to terms subsequently established as to those created by the Act in which it is found. Terms embrace the days of which they are composed. The greater includes the less. The Justice of the Superior Court is authorized to request a Justice of the Supreme Court to hold a term "by reason of

continued sickness or other cause." But, when the cause ceases, a Justice of the Supreme Court is no longer under obligation to render the requested aid. It was not the intention of the Legislature, that this Court should hold a term or a part of a term of the Superior Court when no cause existed for his so doing. When the cause for asking the intervention of a Justice of this Court ceases, it is the duty of the Justice of the Superior Court at once to resume the business of his Court. All obligation to hold in his place ceases. Whenever, therefore, a sufficient cause exists why the Justice of the Superior Court cannot hold a term or a part of a term, a Justice of the Supreme Court may hold the term or part of the term in his place. He may try one indictment or all the indictments of the term, accordingly, as the cause, for which his intervention is asked, may or may not continue.

The case is remanded to the criminal term of the Superior Court for further proceedings.

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

PATRICK HICKEY *versus* WILLIAM HUSE.

A private in the military service of the U. S., who does not rejoin his company or regiment at the expiration of his furlough, may be arrested as a deserter.

The Act of Congress of March 3, 1863, c. 75, § 7, made it the duty of provost marshals to arrest all deserters wherever found.

No warrant is necessary for the arrest of a deserter.

Provost marshals had a right to appoint assistants; and such assistants, while acting within the line of their duty, are entitled to the same protection as provost marshals.

A suit commenced Dec. 11, 1866, for an arrest made Sept. 10, 1864, is barred by § 7, of the Act of Cong., of March 3, 1863, and § 1, of May 11, 1866,

On Report.

Trespass for false imprisonment. The writ was dated Dec. 11, 1866, alleging that the defendant with force and arms arrested the plaintiff, against his will, on Sept. 10, 1864, carried him to Portland, and then and there, as well as in sundry other places, restrained him of his liberty until Oct. 8, 1864, &c.

It appeared that the plaintiff was a private in Co. E, 29 Maine Volunteers, was wounded April 8, 1864, at the battle of Sabine Cross-roads, and was sent to Portsmouth Grove Hospital in R. I., where he received a furlough for twenty days, dated Aug. 19, 1864, which expired on Sept. 8, 1864; that, just previous to its expiration, one Dr. Kimball, a physician and surgeon resident in York County, examined the plaintiff and certified under oath that the plaintiff would not be fit for duty for ten days thereafter, and sent the certificate to the P. G. Hospital; that the defendant met plaintiff on the street in Biddeford, on Sept. 10, 1864, and arrested him, carried him to Portland and thence to Augusta, where he was delivered to Asst. P. M. General Littler. From Augusta, he was sent to Washington, D. C. The charge of "desertion" was removed by special orders from the war department, and the plaintiff was honorably discharged from the service in Sept., 1865.

J. M. Goodwin, for the plaintiff.

Edwin B. Smith, for the defendant.

Appleton, C. J. — The plaintiff was enlisted and mustered into the military service of the United States. Having been wounded he obtained a furlough. After its expiration, he procured a certificate from a surgeon resident in this county, that he was physically unable to return to duty. Regarding that certificate in the light of an extended furlough, he did not return to duty. He was thereupon, on 10th Sept., 1864, arrested by the defendant, acting under the express direction of the provost marshal of the first

district of Maine, by whom he was transferred to the provost marshal of the State, at Augusta.

This action is brought for the arrest thus made. The defendant justifies under the laws of the United States.

The plaintiff was a soldier in the army of the United States. He was thus subject to the laws of Congress and to the army regulations established in pursuance of those laws.

The plaintiff had a furlough. It is not produced. It must be presumed to be within the authority of the officer by whom it was given. By the Act of Congress "for establishing rules and regulations for the government of the army of the United States," approved April 10, 1806, c. 20, art. 12, furloughs may be given to non-commissioned officers and privates "for a time not exceeding twenty days in six months." By an Act approved March 3, 1863, c. 75, § 32, furloughs are allowed to be granted to non-commissioned officers and privates "for a period not exceeding thirty days at any one time." It is immaterial for what length of time the plaintiff's furlough was given, as, by his own showing, it had expired.

The President of the United States has power to establish rules and regulations for the government of the army and navy of the United States, and the rules and orders issued by the Secretary of War and the Secretary of the Navy, who are his constitutional organs in their respective departments, are to be considered as emanating from the Executive. *U. S.* v. *Eliason*, 16 Pet., 291. Mr. Justice WAYNE, in *U. S.* v. *Freeman*, 3 How., (U. S.,) 566, referring to the army regulations, says:—"The President sanctioned those regulations, and, by so doing, delegated his authority, as he had a right to do, to the Secretary of War. The army regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law." In *Gratiot* v. *U. S.*, 4 How., (U. S.,) 117, Mr. Justice WAYNE uses the following language: "As to the army regulations, this Court has too repeatedly

said, that they have the force of law, to make it proper to discuss this point anew, and such of them as were asserted in the case by counsel, as not warranted by law, the Court think as obligatory as any of the rest."

By the Revised Army Regulations, issued Aug. 10, 1861, by the Secretary of War, and approved by the President, the form of a furlough is prescribed by Art. 22. By its terms, at its expiration, the soldier to whom it is granted, "will rejoin his company or regiment at ———, or wherever it may then be, or be considered a deserter."

The plaintiff did not return at the expiration of his furlough. *Prima facie*, he was to be deemed a deserter. Being a deserter, as would appear by the army records, he was liable to arrest, and he was arrested. The rights of the parties must be determined by the condition of things when the arrest was made. Was the arrest, when made, in violation of law?

By the Act approved March 3, 1863, c. 75, § 7, it is made "the duty of the provost marshals to arrest all deserters, whether regulars, volunteers, militia men or persons called into the service under this or any other Act of Congress, wherever they may be found, and to send them to the nearest military commander or military post," &c.

By § 26, the President of the United States was authorized to issue a proclamation for all deserters to return to duty. The President issued the contemplated proclamation calling upon all good citizens to aid in restoring absent soldiers to their regiments.

It is obvious that the provost marshals in the several congressional districts could not attend to their duties in arresting deserters, and in the drafting of soldiers without assistants. Regard being had to their various and onerous duties, the implication is inevitable that they would have the right and that it would be their duty to appoint agents or deputies to aid and assist. Those agents or deputies while acting within the line of their duty would be entitled to the same protection as their several principals.

For the arrest of a deserter no warrant is necessary. The proper officer may do it without a warrant. The appointment of the provost marshal is not questioned. The authority of the defendant to act in the premises is established. *Hutchings* v. *VanBokelin*, 34 Maine, 126.

The arrest, then, was made by a proper officer of one, who, not having returned at the expiration of his furlough, was by its terms to be considered a deserter. It was legally justified by the facts existing at the time it was made.

The plaintiff introduced special order No. 252, dated at Washington, Oct. 8, 1864. It shows that he was on the records of the army as a deserter, and that, for good cause, the charge was removed. But the removal was after the arrest. The arrest was none the less authorized at the time it was made. The plaintiff may be free from moral blame, but he was none the less liable to arrest. The defendant is free from fault. He obeyed the law, and the law, in conformity with which he acted, must be his protection. *Wilkes* v. *Dinsman*, 7 How., (U. S.,) 89. S. C. 12 How., U. S., 390.

The trespass complained of was committed Sept. 10, 1864. This suit was commenced Dec. 11, 1866, a period of more than two years having elapsed since its committal. By an Act approved March 3, 1863, c. 81, § 7, it is provided "that no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses and wrongs done or committed, or are omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any Act of Congress, unless the same shall have been commenced within *two* years next after such arrest, imprisonment, trespass or wrong, may have been done or committed, or act may have been omitted to be done," &c. By § 5, the defence of justification, under the orders or authority of the President, "may be made by special plea or under the general issue." By an Act approved May 11, 1866, all

orders from proper officers, to perform certain acts, are to be a defence to suits on account of such acts, and the Act of March 3, 1863, c. 81, is made in all respects applicable.

Even if the defendant were originally liable, the limitation prescribed by the Acts of Congress, to which we have referred, would constitute a perfect bar to this suit.

Judgment for the defendant.

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

EDMUND S. BARRETT *& al. versus* JAMES E. BLACK.

After verdict, no defects in the declaration can be taken advantage of by motion in arrest.

The lessee of a private wharf, through whose procuration a vessel is hauled along side of his wharf, to be there loaded by him with his cargo, in accordance with a contract of affreightment, is liable to the owners for an injury occasioned to the vessel while loading, by grounding at low tide on rocks in the berth, which was represented by the occupant of the wharf to be safe, and not known by the owners of the vessel to be otherwise.

ON MOTION.

CASE, to recover for an injury to the schooner Eva Belle, while being loaded by the defendant, with ice at "Factory Island wharf," in the Saco river, in Saco, occupied by the defendant.

It appeared on the part of the plaintiffs, that plaintiff Barrett, one of the plaintiffs and owners, and master of the schooner Eva Belle, of 187 tons burthen, in May, 1868, met the defendant at Portsmouth, N. H., and agreed to take the Eva Belle to "Factory Island wharf," in Saco, where the defendant was to load her with ice for Washington, D. C., and pay the plaintiffs $1 per ton, the defendant to load and the consignee to unload; that, in answer to inquiries by Barrett, the defendant said there was plenty of water and

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a good wharf to lie at; that the Eva Belle arrived at Steamboat wharf, Saco, the afternoon of May 10; that one Harvey spoke about rocks in the river near defendant's wharf; that the defendant declared there were no rocks, and told Barrett not to listen to anybody, that there was a good place for his vessel to lie and no rocks; that the next morning Barrett hauled the vessel round to Factory Island wharf, (which was occupied by the defendant under a lease from the proprietors,) and laid her against a shore or piece of timber, extending about eight feet from the wharf; that, soon afterwards, one Loring, defendant's superintendent and foreman, sawed off the shore and ordered the vessel hauled up to the wharf; that Loring declared there were no rocks, whereupon she was hauled in and the defendant commenced sliding in the ice upon a run; that, the next day, about 10 A. M., when about two-thirds of her cargo had been put on board, she began to leak so badly that the pumps could not keep her free, and water came into her as fast as the tide rose; that an engine company tried in vain to pump her out; that the cargo was removed, and a survey had, when she was towed to Portland, where her keel was found to be split for twenty-five feet, her butts opened, caused by strain while grounded on rocks; that the repairs cost $696, and a fair compensation for demurrage was $28 per day; that Barrett was never at Saco before; that the cause of the sinking was the grounding of the vessel on a sharp rock in the river, about six or eight feet from the defendant's wharf.

Nathaniel Fernald, called by plaintiffs, testified, substantially, that he was wharfinger on Factory Island wharf, and had been acquainted with it for twenty years; that, when a vessel lay at that wharf, it was necessary to spar her off eight or ten feet, on account of rocks, and so told the defendant when he first commenced business at that wharf.

David Patterson, called by the plaintiffs, testified, substantially, that he had been a stevedore, at Saco, for five years past, and worked on Factory Island wharf; had been there at all stages of the water; noticed where the Eva

Belle lay; have seen two granite stones about nine feet from the wharf; after the Eva Belle was hauled up to wharf, witness asked defendant if he was going to load along side that wharf, and he answered in the affirmative; that witness told defendant, if he did he would break her in two and have to pay for her; that defendant replied, she was a flat bottomed vessel and could lie along side of the wharf pretty well; that witness told defendant that a sharp vessel would lie there better than a flat one.

The defendant testified, substantially, that he leased the wharf in 1866, raised it three to four feet, put in 3600 tons of ice, chartered several vessels of heavier burthen, and loaded them with ice, contracted with Barrett at Portsmouth to take the Eva Belle to F. I. wharf in Saco, where witness was to load her with ice for Washington and pay $1 freight; told Barrett, river was like all New England rivers, narrow and rocky; that witness would not guarantee Barrett safely in and out of the river; told Barrett he could learn about the river by applying to one Weaver, who was then present; that Barrett then signed and delivered to the defendant a written memorandum of the following tenor: —

"I have this day chartered my schooner, Eva Belle, to carry a cargo of ice for James E. Black, from the port of Saco to the port of Washington, for a freight of $1 per ton, to be loaded and discharged."

Next saw Barrett at Steamboat Wharf. Harvey and Hodgdon present; Barrett said, "Harvey says you have got a bad place to load at;" witness replied, "Harvey, what have you been trying to frighten Captain Barrett for?" Barrett said Harvey told him there were only three or four feet of water at low tide and a rocky bottom; that witness replied there were six to seven feet of water at low tide and no rocks that would do any injury; that witness told Barrett to listen to no one but examine and sound for himself; that Barrett might shove off or lie in to wharf, that witness had loaded vessels there both ways; that witness had sounded all about the wharf but could find nothing which he thought

would injure a vessel; witness never heard of any vessel being injured there before; that witness believed it a safe place when the Eva Belle was there; witness had heard there were rocks there; the wharf had formerly been used as a place where the stone sloops loaded, and there was a rumor that a stone had been dropped from the stone sloops; one stone afterwards taken out by derrick; defendant built the houses on wharf.

The verdict was for the plaintiffs; whereupon the defendant moved that it be set aside as being against law and the weight of evidence.

J. M. Goodwin, for the defendant, contended that no legal cause of action is set out in the declaration, but the view of the Court renders a report of this branch of his argument unnecessary. He also contended that, to be entitled to a verdict, the plaintiffs must prove that the defendant made false representations of existing facts, with intention to deceive and defraud the plaintiffs, the defendant at the time knowing them to be untrue, and that the plaintiffs, relying upon these representations as true, were thereby deceived and damaged. Counsel cited *Parley* v. *Freeman*, 3 D. & E., 51; *Hammett* v. *Emerson*, 27 Maine., 309; *Evans* v. *Collins*, 5 Q. B., 820; *Taylor* v. *Ashton*, 11 M. & W., 401; *Cornfoot* v. *Fouke*, 6 M. & W., 358; *Polhill* v. *Walter*, 3 B. & Adol., 114; *Freeman* v. *Baker*, 5 Barn. & Adol., 797; *Ward* v. *Center*, 3 Johns., 271; *Allen* v. *Addington*, 7 Wend., 10; *Patten* v. *Gurney*, 17 Mass., 182; *Tryon* v. *Whitmarsh*, 1 Met., 1; *Stone* v. *Denny*, 4 Met., 151; *Ewing* v. *Calhoun*, 7 Verm., 79; *Lord* v. *Colley*, 6 N. H., 99; *Larrabee* v. *Larrabee*, 34 Maine, 483; *Brown* v. *Castles*, 11 Cush., 348; *Pearson* v. *Howe*, 1 Allen, 207; *Moens* v. *Heyworth*, 10 M. & W., 147; *Ormrod* v. *Huth*, 14 M. & W., 651; *Smout* v. *Ilberry*, 10 M. & W., 1; *Barley* v. *Walford*, 9 Q. B., 197; *Russell* v. *Clark*, 7 Cranch, 69; *Young & al.* v. *Covell*, 8 Johns., 23; *Gallager* v. *Brunell*, 6 Cow., 346; *Medbury & al.* v. *Watson*, 6 Met., 247; *Hazard* v. *Irwin*,

18 Pick., 95; *Hart* v. *Tallmadge*, 2 Day, 381; *Weeks* v. *Burton*, 7 Verm., 67; *Benton* v. *Pratt*, 2 Wend., 385; *Wheelden* v. *Lowell*, 50 Maine, 505; *King* v. *Eagle Mills*, 10 Allen, 548.

There is no evidence of fraudulent intent on the part of the defendant.

His statements were not positive statements but matters of opinion.

The defendant does not impliedly warrant his wharf and bottom to be absolutely safe. Angell on Highways, §§ 272 and 273, and cases *infra;* Redfield on Railways, (3d ed.,) § 144 and notes; *McGinity* v. *Mayor of N. Y.*, 5 Duer, 674; *Metcalf* v. *Hetherington*, 5 H. & N., 719; *Buzzell* v. *Laconia Man'f. Co.*, 48 Maine, 113; *Townsend* v. *Sus. T. Co.*, 6 Johns., 90; *Gibbs* v. *Trs. of Liv. Docks*, 3 H. & N., 164. Distinction between liabilities of owners of private wharves and public wharves.

The plaintiffs had possession and control of their vessel, and had the rights and were subject to the liabilities arising therefrom. 1 Pars. Mar. Law, 233 and note.

When there is reason to believe the jury have fallen into error in regard to the law, or the nature and force of the evidence, a new trial will be granted; and, if the jury persist in rendering a verdict against the law, the Court will set it aside as often as thus rendered. *Coffin* v. *Phenix Ins. Co.*, 15 Pick., 291; *Cunningham* v. *Magoun*, 18 Pick., 13; *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick., 550.

Edwin B. Smith, for the plaintiffs.

The burden is on the motor to show the error. *Munn* v. *Potter*, 34 Barb., 360; *Dickey* v. *Maine*, 46 Maine, 483; *Mann* v. *Witbeck*, 17 Barb., 388; *McGarthey* v. *Mason*, 4 Ohio, (N. S.,) 575.

Hence "no ground of new trial is more carefully scrutinized, or more rigidly limited," than that set forth in the motion in the case at bar. Hilliard on New Trials, 339; *Detastet* v. *Baring*, 11 East, 265; *Woodcock* v. *Nuth*, 8 Bing.,

170; *Campbell* v. *Spencer*, 2 Binn., 129; *Leeman* v. *Allen*, 2 Wils., 160; *Doe* v. *Strickland*, 8 M. G. & Sc., 742; *Gould* v. *White*, 6 Fost., 178.

To justify setting it aside, the verdict must be "clearly, palpably, decidedly and strongly against the evidence." Hilliard on N. T., 340.

"So much against the weight of evidence as, on the first blush of it, to shock the sense of justice." *Ib.* *Waters* v. *Bristol*, 26 Conn., 398; *Daley* v. *Norwich*, *Ib.*, 591; *Mann* v. *Witbeck*, 17 Barb., 388; *Smith* v. *Richards*, 14 Maine, 200.

The verdict will not be set aside, although the evidence might have brought the Court to a different conclusion. *Gould* v. *White*, 6 Fost., 178; *Wendall* v. *Moulton*, 6 Fost., 41; *Wendall* v. *Safford*, 12 N. H., 171; *Bishop* v. *Perkins*, 19 Conn., 300; *Whitton* v. *Old Colony*, 2 Met., 8; *Bryant* v. *Glidden*, 39 Maine, 458; *Milo* v. *Gardiner*, 41 Maine, 549; *Hill* v. *Nash*, 41 Maine, 585.

Nor where a new trial would probably reach the same result. *Brazier* v. *Clapp*, 5 Mass., 10; Hill. on N. T., 368; *Hunt* v. *Barrel*, 5 Johns., 137; *High* v. *Wilson*, 2 Johns., 46; *Glidden* v. *Dunlap*, 28 Maine, 379; *Handly* v. *Call*, 30 Maine, 9; *Franklin Bank* v. *Pratt*, 31 Maine, 501; *West Gardiner* v. *Farmingdale*, 36 Maine, 252.

There must be evidence of bias, passion, prejudice or mistake on the part of the jury to justify setting aside their verdict, as against the weight of evidence. *Weld* v. *Chadbourne*, 37 Maine, 221; *Sawyer* v. *Nichols*, 49 Maine, 212; *Beal* v. *Cunningham*, 42 Maine, 362; *Hovey* v. *Chase*, 52 Maine, 319.

Black, by his acts, (in hiring wharf, erecting ice houses thereon, &c.,) held out that the place was a suitable one for vessels of the class needed for his ice business to lie at; he induced Capt. Barrett to bring the Eva Belle there for Black's own benefit; these two facts alone would justify the verdict. Defendants held liable in just such a case in Massachusetts. *Carlton* v. *Franconia Iron and Steel Co.*, (re-

ported in the Boston Daily Advertiser of second of March last.) *Gibbs* v. *Liverpool Docks*, 3 Exch., 164; *Wendell* v. *Baxter*, 12 Gray, 464; *Pittsburg* v. *Grier*, 22 Penn., 54.

"Where the testimony is contradictory and the credit of witnesses questioned, the Court will not set aside a verdict as against the weight of evidence." *People* v. *Townsend*, 37 Barb., 250; *Smith* v. *Tiffany*, 36 Barb., 23; *Lewis* v. *Blake*, 10 Bosew., 198; *Rowe* v. *Smith*, 10 Bosew., 268; *Glidden* v. *Dunlap*, 28 Maine, 379; *Williams* v. *Buker*, 49 Maine, 427.

APPLETON, C. J.—It is objected that the plaintiffs' declaration sets forth no sufficient cause of action. If so, the defendant should have demurred, for, after verdict, no defects in the declaration can be taken advantage of by motion in arrest.

The case comes before us on a motion for a new trial as against evidence. As no exceptions are filed, we must presume that proper and needed instructions were given.

It appears in evidence that the defendant, at Portsmouth, N. H., agreed with the plaintiffs to take their vessel to the defendant's wharf at Saco, there to be loaded by him with ice for Washington, D. C.; that the plaintiffs took the vessel there to be loaded, and caused the vessel to be hauled to his wharf; that the wharf was unsafe; that while the defendant was loading the vessel, without fault on the part of the plaintiff, and through the insufficiency of the wharf, the vessel was grounded on the rocks, whereby the same was materially injured, &c.

The plaintiffs contracted with the defendant to take their vessel to his wharf to be there loaded. If the plaintiffs were to pay wharfage, the defendant would be bound to exercise due diligence to keep his wharf safe for all who should have occasion to use it. *Wendell* v. *Baxter*, 12 Gray, 496. In *Chapman* v. *Rothwell*, El., Bl. & El., 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap door to

be open without sufficient light or proper safeguards, in a passage-way through which access was had from the street to his office. The ground of the decision was that the defendant, by holding out the passage as the approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. In *Knight* v. *Portland & Saco Railroad Co.*, *ante*, p. 234, it was held that the railroad company was bound to keep the landing places safe and convenient for those who make use of their cars as a means of conveyance. "The keeper of an inn," observes BIGELOW, C. J., in *Sweeney* v. *Old Colony & Newport Railroad Co.*, 10 Allen, 368, "or other place of resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage, which was held and used as the common proper place of access to the premises." This general principle was again affirmed in *Elliot* v. *Pray*, 10 Allen, 378.

The same principle is affirmed by the English Courts. In *Indermauer* v. *Dames*, 1 Law Rep., C. C. P. Cases, 275, the defendant left a hole unfenced upon his premises, into which the plaintiff, being rightfully there, fell. *Held*, that inasmuch as the plaintiff was upon the premises in lawful business, in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole was, from its nature, unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced. In delivering his opinion in *Smith* v. *London and St. Katharine Docks Co.*, 3 Law Rep., C. C. P. Cases, 327, BOVILL, C. J., uses the following language; — "The case, then, stands thus; a gangway was provided by the defendants as the only access to their vessel. The defendants were aware that it was dangerous, the plaintiff was not. The plaintiff comes to the spot, finds the gangway there, proceeds upon

it, and falls into the water. The jury have found there was negligence on the part of the defendants and none on the part of the plaintiff. * * The gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go upon it, as was held with respect to the road in *Corby* v. *Hill*, 4 C. B. N. S., 556. The case comes, then, within the principle that persons inviting others on their premises, are answerable for anything in the nature of a trap."

But here the plaintiffs were at the defendant's wharf, at his request and for his benefit. In such case, the rule is clearly laid down in *Carlton* v. *Franconia Iron and Steel Co.*, 99 Mass. 216 "The owner or occupant of land," observes Mr. Justice GRAY, "is liable in damages to those coming to it, using due care, at the invitation, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of." The plaintiffs' vessel was at the defendant's wharf for his benefit and at his request. It was injured without their fault, in consequence of the dangerous condition of the wharf, which the defendant represented as safe and convenient, — for so we must assume the jury to have found the facts.

Motion overruled. — Judgment on the verdict.

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

JOHN SULLIVAN *versus* LEWISTON INSTITUTION OF SAVINGS.

Officers of savings institutions are to be held to the exercise of reasonable care and diligence.

In paying money upon the presentment of a deposit book, reasonable care and diligence do not necessarily require the disbursing officer of a savings institution to demand strict proof of the identity of the depositor.

The plaintiff made a deposit in the defendant institution, received a book of deposit, containing a copy of its by-laws which, in accordance with their provisions, he thereupon "subscribed and thereby signified his assent to," and which provided that "all deposits shall be entered in a book to be given the depositor, which shall be his voucher and the evidence of his property in the institution," and that "the money of any depositor may be drawn either personally, or by witnessed order, in writing, of the depositor, but no money shall be paid to any person without the production of the original book, that such payment may be entered therein," and that "the institution will not be responsible for loss sustained when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment." Subsequently the depositor's book was stolen, presented and paid by the disbursing officer of the institution in good faith. In an action by the depositor to recover the deposit; — *Held*, that, if the disbursing officer, using reasonable care and diligence, but lacking present means of identifying the depositor, pay *bona fide* on presentation of the book by one apparently in the lawful possession of it as the owner thereof, the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim or make known its loss before it is presented for payment.

ON FACTS AGREED.

ASSUMPSIT to recover two hundred and twenty-eight dollars and thirty-eight cents, deposited by the plaintiff with the defendants, Oct. 31, 1866.

The defendant corporation was chartered and organized in 1856. Among their by-laws are the following: —

1. "The trustees having undertaken to conduct the institution solely to promote the interest of the community, shall never receive any emoluments, but may allow a reasonable compensation to the treasurer, and such other officers as may be found necessary."

2. "On making the first deposit, the depositor shall be required to subscribe, and thereby to signify his assent to, the regulations and by-laws of the institution."

3. "All deposits shall be entered in a book to be given to the depositor, which shall be his voucher, and the evidence of his property in the institution."

4. "The money of any depositor may be drawn either personally, or by the witnessed order, in writing of the depositor, or by letter of attorney; but no money shall be paid to any person without the production of the original book, that such payment may be entered therein."

5. "As the officers of the institution may be unable to identify every person transacting business at the office, the institution will not be responsible for loss sustained when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment."

It appeared that the plaintiff, on Oct. 31, 1866, deposited with the defendants the amount sued for, and at the same time subscribed the by-laws and regulations, by making his mark, and received a book of deposit containing the entry of deposit, and a copy of the by-laws and regulations; that one Edward O'Brien stole the book from the plaintiff's possession sometime between Dec. 25, 1867 and Jan. 25, 1868; that on Jan. 25, 1868, one Michael Locklan presented the book at the office of the defendants, and received thereon one hundred and sixty dollars; that on Feb. 8, following, one Timothy Locklan presented the book at the same place, received the balance, and surrendered the book; that none of the officers of the defendants personally knew the plaintiff or either of the Locklans, nor had any of them received any notice that the book had been stolen or lost; that, when payments were made, the disbursing officer supposed he was paying to the plaintiff, who the payees severally pretended to be.

It appeared also, that the plaintiff deposited the book and ninety dollars in money with his boarding house keeper, who kept the same in a trunk under lock and key; that the plaintiff saw it at Christmas, went to see it again sometime in February, and it was not in the trunk; that he did not

give the defendants any notice of the loss before the money was drawn, because he did not know of the loss; but notified them immediately upon learning the fact; that the plaintiff never authorized any one to draw the money; and that the treasurer told the plaintiff he was not in fault, and that the trustees would meet soon and they would probably pay him.

C. Record, for the plaintiff, cited *Wallis* v. *Lowell Inst. for Savings*, 7 Gray, 138; *Makin* v. *Inst. for Savings*, 19 Maine, 128; *same v. same*, 23 Maine, 350.

W. P. Frye and *J. B. Cotton*, for the defendants, cited *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; *Heath* v. *Savings Bank*, 46 N. H., 78; 27 Conn., 234.

BARROWS, J. — When the plaintiff deposited his money with the Savings Institution, he subscribed the by-laws and articles of regulation, by making his mark, and received a book of deposit containing a synopsis of the by-laws, which provide, among other things — that, on making the first deposit, the depositor shall be required to subscribe, and thereby signify his assent to the regulations and by-laws of the institution — that all deposits shall be entered in a book, to be given to the depositor, which shall be his voucher and the evidence of his property in the institution — that the money of any depositor may be drawn, either personally or by his witnessed order in writing, or by letter of attorney, but no money shall be paid to any person without the production of the original book, that such payment may be entered therein; and further, that, "as the officers of the institution may be unable to identify every person transacting business at the office, the institution will not be responsible for loss sustained when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment."

The plaintiff left his book of deposit in the care of the keeper of the boarding house where he lived, and she kept it in her trunk. He saw it on the 25th of December, but,

on his going to look for it sometime in the following February, it was not to be found. It is now ascertained that one Edward O'Brien stole it sometime between the 25th of December and the 25th of January, on which day it was presented at the office of the Savings Institution by one Michael Locklan, who received thereon a portion of the money; and, on the 8th of February, before the discovery of the theft, it was again presented by one Timothy Locklan, who received the balance and surrendered the book.

It is not claimed, on the part of the plaintiff, that the officers of the Savings Institution were guilty of anything like gross negligence in paying the money to the parties presenting the book. None of them had notice of the loss. None of them personally knew the plaintiff or the Locklans, the second of whom artfully and successfully personated the first, and made reference to conversation had by the other with the treasurer when the book was first presented. We see in the special circumstances of the payment, as detailed and discussed in argument, no evidence even of want of ordinary care, unless the failure to require the party presenting the book to produce other evidence of his identity besides the possession of it, is to be so deemed.

In view of the inconvenience which it would be to the numerous depositors, if strict proof of the identity of each were required on every occasion when he might present himself with his book, and of the difficulty, if not impracticability of so perpetuating the proof of identity which might be offered, as to protect the common fund of all the depositors, which constitutes the sole capital of the institution, from depredation, the by-laws, above quoted, were adopted.

Being assented to and subscribed by each of the depositors when he makes his first deposit, they become incorporated into the contract between the depositor and the institution, and must not be overlooked in determining the respective rights and liabilities of the parties.

"The depositor is one party and the corporation another and different party, as well in essence as in name." "The

only connection between them is to be found in the stipulations to which they have mutually agreed." *Savings Inst., in Equity*, v. *Makin & al.*, 23 Maine, 360.

What is the fair construction of these stipulations which are before us? The depositor undertakes to preserve the book which he receives, as the evidence of his claim,—to present or send it whenever he calls for a payment,—to give notice if it shall be stolen or lost,—or, failing to do so, to claim, as against the institution, nothing which shall have been paid in good faith and in the exercise of reasonable care, to any one presenting it.

On the other hand, a payment to the wrong person, upon presentment of the book, even before notice of loss, if it were presented under such circumstances or in such a manner as would tend to excite suspicion or put a man of ordinary prudence upon inquiry, would not exonerate the institution. Its officers are to be held to the exercise of reasonable care and diligence. If these officers, using such care and diligence, but lacking the present means of identifying the depositor, pay, upon presentation of the book by one apparently in the lawful possession of it as the owner thereof, the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or to make known its loss before it is presented for payment. Any other rule would inevitably be productive of much vexation and delay, and not unfrequently of positive expense to many depositors, and would also subject the common fund of all to fraudulent claims that might be produced when the evidence of identity relied upon was no longer accessible. For the security of that fund, in cases like the present, the personal knowledge of the officers of the institution, or conclusive reliance upon the record in the book (where there has been reasonable vigilance upon the part of the officers to avoid deception) seems to be almost indispensable. The gratuitous intimation of the defendants' treasurer to the plaintiff, that, as he was not in fault, the

trustees would probably pay him, cannot avail to sustain the suit.

It would be matter of grave consideration for the trustees, whether they could make such payment from the funds of the institution with justice to the other depositors.

Judgment for the defendant.

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

STATE OF MAINE *versus* WILLIAM BOYINGTON.

An indictment founded on R. S., c. 4, § 61, alleging that, on a certain day named, "at Augusta, in the county of Kennebec, a meeting of the inhabitants of said Augusta, for the election of" certain State and county officers therein specifically named, "and representatives to the Legislature, for said Augusta, was then and there duly held; and, at said election, a list of the voters of said Augusta was necessary; and, further alleging that the respondent "did then and there, at the meeting and election aforesaid, wilfully, knowingly and unlawfully cast and give more than one vote, ballot and list of persons then and there to be elected and chosen into the said offices, at one balloting at the choice and election aforesaid, against the peace," is good.

It is not necessary to negative the exception contained in R. S., c. 4, § 37.

The allegation that the meeting was "then and there duly held" is broad enough to embrace the proof necessary to show the meeting was held "according to the constitution and laws of the State."

INDICTMENT, founded on R. S., c. 4, § 61, alleging (omitting formal parts) "that on the 14th day of September in the year of our Lord one thousand eight hundred and sixty-eight, at Augusta, in the county of Kennebec, a meeting of the inhabitants of said Augusta, in the county aforesaid, for the election of Governor of the State aforesaid, and Representative to Congress for the third Congressional district of said State, and State Senators for the seventh senatorial district of said State, and a Sheriff, Treasurer, County Commissioner, Clerk of the Supreme Judicial Court,

Judge of Probate, and Register of Probate for the county of Kennebec aforesaid, and Representatives to the Legislature for said Augusta was then and there duly held; and, at said election, a list of the voters of said Augusta was necessary:—And the jurors aforesaid, upon their oath aforesaid, do further present, that William Boyington of said Augusta, in said county of Kennebec, did then and there, at the meeting and election aforesaid, wilfully, knowingly and unlawfully, cast and give in more than one vote, ballot and list of persons then and there to be elected and chosen into the said offices, at one balloting, at the choice and election aforesaid, against the peace of said State, and contrary to the form of the statute in such case made and provided.

To the indictment there was a demurrer and joinder.

J. W. Bradbury, jr., in support of the demurrer, contended that the allegations might be true and the defendant not guilty of any offence. He might have voted for representatives on one ballot and for State and county officers on another, as by c. 4, § 37.

The allegation is—"gave in more than one vote, ballot and list of persons," instead of—of *the* persons voted for. Counsel cited *State* v. *Godfrey*, 24 Maine, 232; *Commonwealth* v. *Davis*, 11 Pick., 432; *same* v. *Phillips*, 16 Pick., 213; *same* v. *Brown*, 13 Met., 368; *same* v. *Blood*, 4 Gray, 32.

2. No allegation that the meeting was called or held according to the constitution and laws of the State. *State* v. *Bailey*, 21 Maine, 62.

Harley, County Attorney, contra.

BARROWS, J.—This is a demurrer to an indictment for double voting at a State election, founded on chap. 4, § 61, R. S. The indictment alleges that, "on the fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-eight, at, &c., a meeting of the inhabitants of, &c., for the election of (certain State and county

officers specified,) and representatives to the Legislature for said, &c., was then and there duly held; and at said election a list of the voters of, &c., was necessary;" and then charges that the defendant "did then and there at the meeting and election aforesaid, wilfully, knowingly, and unlawfully cast and give in more than one vote, ballot and list of persons then and there to be elected and chosen into the said offices, at one balloting, at the choice and election aforesaid, against the peace," &c.

All the elements necessary to constitute one of the offences prohibited and punished by § 61, are here set forth with abundant precision and minuteness. The defendant cannot complain that he has not been fully informed of the nature and cause of the accusation against him. His counsel objects to the indictment as insufficient.

1. Because it is provided in § 37 of c. 4, that "in voting for representatives to the State Legislature, in the wards of a city, the names shall be on the same ballot with the other officers to be chosen at the meeting, by voters of like qualifications, *unless* the board of aldermen in their warrant notifying the meeting require a separate ballot or ballots which they may do."

Hereupon it is argued that all the acts and facts here charged may be true and yet no offence may have been committed, inasmuch as the indictment does not negative the requirement by the aldermen of a separate ballot for representatives to the Legislature.

But, while it is true that, in charging an offence created by statute, if there is an exception in the enacting clause of the statute, it must be negatived, — otherwise, no offence is charged, — it is equally well settled that, if the exception is in another substantive clause, the case provided for in the enacting clause may be fully stated without negativing the exception. A perfect *prima facie* case is set forth, and if the defendant relies upon some independent provision as furnishing matter of excuse, he must plead it.

Such is this case. The rule as here stated is fully recog-

nized in *State* v. *Godfrey*, 24 Maine, 232, cited for defendant, although in that case, the indictment, being at common law, and not for any statutory offence, was deemed insufficient.

2. It is objected that there is no allegation that the meeting was called or held "according to the constitution and laws of the State," as it was alleged in *State* v. *Bailey*, 21 Maine, 62. But it is alleged that this meeting, the purposes of which are fully stated, "was then and there duly held." These allegations are fully equivalent. The meeting for these purposes could not have been *duly* held unless it was held according to the constitution and laws of the State. A general allegation broad enough to embrace the proof necessary to show the meeting legal is all that is necessary in this respect. *State* v. *Bailey*, *ubi sup.*

Exceptions and demurrer overruled.

Indictment adjudged good.

Judgment for the State.

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

OAKES ANGIER *versus* BENJAMIN L. SMALLEY *& als.*

In debt on a poor debtor's bond, parol evidence is admissible to prove that the justices, who heard the disclosure of the debtor, "made out and delivered to the debtor" a certificate mentioned in R. S., c. 113, § 31.

And, when the former existence of such certificate is clearly established, parol evidence of its contents is admissible when it is lost.

ON EXCEPTIONS.

DEBT on a poor debtor's bond. Defence, performance of one of the conditions by disclosure and discharge.

The plaintiff read the bond and rested his case. The defendant called Benjamin L. Smalley, the principal defendant, and W. H. McLellan, Esq., and offered to prove by them that Smalley received from two disinterested justices

of the peace and quorum, within and for this county, within six months from the date of the bond, their certificate of discharge, as provided in R. S., c. 113, § 31, in due form of law; that the certificate was put into the hands of McLellan, acting as counsel for the principal defendant at the time of his disclosure; that the certificate is lost, and, after diligent search in all known sources of information, cannot be found. Defendants also offered parol evidence of the contents of the certificate. The presiding Judge excluded the testimony and ruled that the defendants should prove by other evidence that the certificate was issued. Whereupon a verdict was rendered for the plaintiff and the defendants alleged exceptions.

E. K. Boyle, for the defendants.

Joseph Williamson, for the plaintiff.

The discharge was the best evidence. *Bachelder* v. *Sanborn*, 34 Maine, 230; *Granite Bank* v. *Treat*, 18 Maine, 340.

No means taken to procure a duplicate or copy. They might obtain either. Amendment of certificates is allowed even at the trial upon the bond. *Burnham* v. *Howe*, 23 Maine, 489. A new certificate may be substituted for the one originally given. *Ayer* v. *Woodman*, 24 Maine, 196.

The former existence of the certificate should be proved.

(1,) By copy of magistrates' record;

(2,) If such record was never made or has been lost, that fact should be shown by the testimony of the magistrates themselves;

(3,) By the testimony of one or both of the magistrates and not by either of the parties.

Magistrates sitting upon a disclosure constitute a court. *Agry* v. *Betts*, 12 Maine, 415. Minutes of their doings are admissible. 1 Greenl. on Ev., § 513. The intention of the statute was to require more than a simple certificate. R. S., c. 113, § 30, requires the justices to "make a record" of their proceedings when the debtor deposits an assign-

ment of property; and, in § 36, a formal "record" is indicated.

Certiorari is the proper proceeding for correcting errors of magistrates in disclosures. *Dow* v. *True*, 19 Maine, 46; *Lewis* v. *Brewster*, 51 Maine, 108. This presumes a record is always made.

APPLETON, C. J.—By R. S., 1857, c. 113, two disinterested justices of the peace and quorum, after hearing the disclosure of a poor debtor and administering the oath required by the statute, "shall make out and deliver to the debtor a certificate under their hands and seals," the effect of which is, that "his body forever after shall be free from arrest on any execution issued upon the judgment" referred to therein.

The certificate of the magistrates is the result of their judicial action upon the debtor's disclosure. They are not required to issue it but once, nor are they required to keep a copy of it. Its existence being clearly established, secondary evidence of its contents is properly admissible. In *Tyler* v. *Dyer*, 13 Maine, 41, parol evidence of the contents of a complaint and warrant, which had been lost, was admitted in evidence. In *Gore* v. *Elwell*, 22 Maine, 442, it was held that parol evidence should be received to show the contents of a record once existing, but lost or destroyed. The contents of a complaint and warrant in a criminal case, lost after being returned into Court, may be proved by secondary evidence. *Com.* v. *Roark*, 8 Cush., 221; *Sayles* v. *Briggs*, 4 Met., 421. The proof offered should have been received. *Exceptions sustained.*

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

DANIEL COVEL *& al. versus* RUSSELL HART *& als.*
RUSSELL HART *& als. versus* DANIEL COVEL *& al.*

The owner of the land on both banks of a stream, together with the water power created by a dam across it, having a tannery on one side and a saw-mill on the other, conveyed the tannery, together with the land connected with it, and also "a right to draw water from the saw-mill flume sufficient to carry on the business of tanning in said yard," the grantee, "his heirs or assigns to make or pay for one-fourth part of all necessary repairs on the dam;" "to have the right to draw water as aforesaid, sufficient to carry on the tanning in said yard in its various branches in common with" the grantor; "to have the privilege of using more water than aforesaid, when there shall be waste water running over or around the dam;" and the grantor, "his heirs or assigns, is to have the right to increase machinery or mills upon his privilege to any extent that he or they may choose, and to use all the water except what has herein been conveyed for the use of said tanyard, if he or they shall choose." In an action involving a construction of the grant; — *Held*, —

1. That, by the terms of the deed, the grantee acquired an absolute and prior right to the use of the quantity of water named;
2. That the grant was of a fixed measure of power to be used for any purpose, and not to be confined to that of tanning; and
3. That the measure of power was restricted to that used or required, at or about the date of the grant, "in carrying on tanning in said yard in its various branches."

ON REPORT. The first case is

CASE for using more water than the defendants are alleged to be entitled to, and thereby depriving the plaintiffs thereof.

The plaintiffs claim under a deed from Abraham Hill to Nathaniel Rollins, dated Dec. 1, 1836, duly executed and recorded, and represent and have the title of Rollins, while the defendants represent and have the rights and title reserved by Hill in the deed mentioned. This deed conveyed the land on which the tannery is situated, and contained certain clauses of which the following is a copy, viz.: —

"And the said Hill also conveys unto the said Rollins a right to draw water from the saw-mill flume sufficient to carry on the business of tanning in said yard. The said Rollins or his heirs or assigns are to make one-fourth part

82 Me. 172-222

of all repairs necessary on said dam, or pay one-fourth part of all such sum or sums necessary to keep the same in repair. The said Rollins to have the right to draw water as aforesaid sufficient to carry on the tanning in said yard in its various branches in common with said Hill: — and the said Hill agrees that said Rollins may have the privilege of using more water than aforesaid when there shall be waste water running over or around the dam; and the said Hill, his heirs or assigns, is to have the right to increase machinery or mills upon his privilege to any extent that he or they may choose, and to use all the water except what has herein been conveyed for the use of said tanyard, if he or they shall choose."

The plaintiffs allege that defendants, prior to date of suit, June 10, 1867, and within five years prior thereto, have drawn more water than they drew at the date of said deed, and were in the habit of drawing, and did frequently draw water from said flume, in such quantities that the plaintiffs could not work their tannery, and thereby prevented the plaintiffs from using the machinery in their said tannery and carrying on their said business, and that the gate of defendants in the common flume, being two feet lower than that of plaintiffs, they often drew and kept the water to that mark to the great injury of the plaintiffs.

If, on proof of these allegations, the action could be maintained, it was to stand for trial.

The second is a similar action, alleging that the defendants, Covel & al., use more water in carrying on their tannery than they are entitled to, and thereby depriving the plaintiffs of it.

The plaintiffs allege that the defendants have increased the amount, and mode in some respects, of the tanning business, since the date of the Abraham Hill deed; that within the last six years, they have carried on more tanning business and used more water, than was carried on and used when said deed was executed and delivered; which use of water is a damage to the plaintiffs.

If, upon proof of these allegations, the action could be maintained, it was to stand for trial.

Wakefield, for Covel & al., cited *Ashley* v. *Pease*, 18 Pick., 286; *DeWitt* v. *Harvey*, 4 Gray, 486; *Jordan* v. *Mayo*, 41 Maine, 552; *Wyman* v. *Farrar*, 35 Maine, 64; *Kaler* v. *Beaman*, 49 Maine, 207; *Deshon* v. *Porter*, 38 Maine, 289.

J. A. Peters & F. A. Wilson, for Hart & als.

KENT, J.—These cases involve the construction of certain clauses in a deed, conveying rights in the water of a stream. The grantor, owning the whole power created by the dam across the stream, and having a tannery on one side and a saw-mill on the other, sold and conveyed the land on which the tannery was situated, and also conveyed to the grantee "a right to draw water from the saw-mill flume, sufficient to carry on the business of tanning in said yard. The said Rollins, (grantee,) or his heirs or assigns, are to make one-fourth part of all repairs necessary on said dam, or pay one-fourth part of all such sum or sums necessary to keep the same in repair. The said Rollins to have the right to draw water as aforesaid, sufficient to carry on the tannery in said yard in its various branches, in common with said Hill, (grantor,) and the said Hill agrees that said Rollins may have the privilege of using more water than aforesaid, when there shall be waste water running over or around the dam; and the said Hill, his heirs or assigns, is to have the right to increase machinery or mills upon his privilege to any extent that he or they may choose, and to use all the water, except what has herein been conveyed for the use of said tanyard if he or they shall choose."

The first question on which a decision is asked, is as to the priority of right in the use of the water. We have no doubt that this was a grant and conveyance to the grantee of an absolute and prior right to the use of the quantity of water named, whether that was a measured and limited quantity, or indefinite and unlimited. The grant is absolute

of a right to draw water from the saw-mill flume sufficient to carry on the business of tanning in said yard. That quantity, whatever it is, under the construction of the deed, the grantee is entitled to from the saw-mill flume, although, by drawing it, there may be not enough water left to work the saw-mill. This is evident from the reservation at the close, by the grantor, of a right to himself to use all the water except "what has herein been conveyed for the use of said tanyard." The tanyard has a right to the water granted to it whenever there is enough in the whole stream, and to take the whole, if necessary, in preference to the saw-mill or other machinery on the other part of the dam. The gates in the flume must be so constructed that this right may always be exercised by the owners of the tanyard.

But a more difficult question arises as to the extent of the grant, and the quantity of water to which the grantee is entitled by the deed. It is evident that it is either a grant of all the water which may thereafter be found to be necessary to carry on the business of tanning in the yard, however extended and whatever new or additional machinery or vats or other works may be introduced and used, even if they should require all the water of the stream; or it must be limited to the quantity necessary to carry on the business of tanning as it had been carried on and was carried on at the time of the giving the deed. The grant must be limited only by the size and capacity of the yard, and the will of the grantee as to future extensions, or it must be construed to be, in effect, the measure of the quantity to be used, and that measure fixed by the quantity then actually used or required in carrying on the business of tanning in "said yard."

The parties in this hearing have not discussed a question, which is often raised, and may be, perhaps, hereafter between these parties, — viz., whether the grant is of a fixed amount of water, to be used for any purpose, or whether it

is to be confined in the use to a specific object, —to wit, carrying on the tanning business, and no other. But this point may be of some importance in determining what the real intention of the parties to the deed was, as to the amount of power actually granted. Taking each of these views, and considering them in connection with the other provisions of the deed, to which we shall hereafter refer, we may, perhaps, be able to determine with which claim and construction they best agree.

We may well adopt the language of the Court in *Deshon* v. *Porter*, 38 Maine, 293, that "the principal question is what intention of the parties is to be derived from the language of the deed, taken in connection with the situation of their business, and what may be supposed to be their respective objects and wants." "The situation of the parties, the subject matter of their transactions and the whole language of their instrument, should have operation in settling the legal effect of their contract." *Sumner* v. *Williams*, 8 Mass., 162.

Although the language in this deed is at first view somewhat general and unlimited in the grant, yet there are several clauses and conditions, which, taken in connection with the situation of the parties and the property, lead us to think that the parties really intended a measure of power and not an unlimited grant.

There is running through the whole a manifest intent that the grantor should retain a part, if not the greater part, of the power, as a continuing and permanent right. He was the owner of a mill on the same dam, and it would be remarkable, if he had granted a right to an indefinite quantity of water, which might be so exercised as to destroy the value of his mill and privilege.

The right to draw water sufficient to carry on the tannery in said yard, is coupled with the condition that it is to be drawn "in common with said Hill," the grantor. This clause evidently does not refer to a use of the water for a common purpose, or to carry on a joint business, but to a

common right to draw water, which is indivisible, for their separate uses, according to their legal rights. The effect of this language, as bearing on the question before us, seems to be, that it indicates a continuing right in Hill, and negatives the idea that a time might come when the owner of the tanyard privilege would rightfully take all the water; for then there could be no "common" right to use the water. There is no indication that such a cessation of all right in the grantor was contemplated by the parties.

The provision respecting future repairs on the dam, whilst it may not be conclusive as to the amount of the power granted, yet serves to show that it was contemplated that there would always be, at least, two distinct privileges interested in the common dam, which was to be kept up for the use and benefit of both. It is also to be noticed that there is here no limitation as to time, nor any provision looking to a state of facts, when one party might cease to be beneficially interested in keeping up the dam. Nor is there any provision by which the proportions named in the deed should be altered, if the tanyard should claim and use more water than was then required to carry on the business of the yard. If the parties had contemplated a varying quantity, and an indefinite extension of the works, they would have been likely to have provided for a change in the proportion of repairs. It is true that the parties might fix on any proportion, and that such rule would not be at all conclusive as a measure of the power granted, if that was otherwise clearly expressed and accurately defined, as in the case of *Deshon* v. *Porter*, before cited. But it is indicative of the fact that the parties did understand that a fixed quantity was granted, and that in this case, it was, in their apprehension, about one-fourth of the whole power, and not a changing and undefined grant, which might vary from year to year.

Again:—"The said Hill agrees that said Rollins may have the privilege of using more water than aforesaid, when there shall be waste water running over or around the said

dam." Now, if Rollins had, by the grant "aforesaid," a right to extend his works in that yard to any extent, and to use at will whatever amount of water was required, this grant of surplus or waste water would seem to be superfluous or unmeaning. He would not only have a right to this waste water, which would be what was not required by any or all the mills or works on both sides of the dam, but a prior right to all the water required by him. This stipulation in the deed as to waste water, implies that the quantity granted had been fixed and limited, and that this occasional surplus had been thrown in, in the nature of an additional grant. It is true that it was hardly required, if the water conveyed could only be used for tanning purposes, in that yard at the time, because so much had been granted absolutely and at all times, as a prior right, as we have before determined. But, if it was a measure of power and a given quantity, and not necessarily limited to a specific use, then this surplus might be of importance in the change of the mode of using. It would then be the amount of water required to operate the tanyard, as it then was, *plus* the waste water, when it was running over or around the dam, and all might be available if a change was made, from a tanyard, for instance, to a saw or grist-mill. In any view, this clause seems to favor the construction, that it was a measure of power, that the parties had in their minds at the time of the conveyance. *Pratt* v. *Lamson*, 2 Allen, 283.

The last clause seems still more decidedly to point in the same direction. In it, Hill reserves a right to increase machinery or mills on his privilege to any extent he may choose, and to use all the water "except what has herein been conveyed for the use of said tanyard." This reservation is certainly not easily reconciled with the idea of an unlimited grant of the entire power, in a certain contingency. It speaks of "*his* privilege," as a permanent right retained, and contains a distinct reservation of a right to increase his works at his pleasure, and to use all the water except what had been before conveyed in the deed. This is all consist-

ent with the idea that a limited and measured quantity had been specifically granted, but hardly reconcilable with the position, that the grantor had conveyed away the whole power, at the pleasure of the grantee. The right to enlarge is not to depend upon enlargement or non-enlargement of the tanyard. The language is not a right to enlarge his works, and to use all the water not needed for the tanyard, however much enlarged, but to "use all not herein granted for the use of *said* tanyard." This last clause, as well as the first, seems to refer to the existing tanyard and its actual condition and requirements. They speak of "carrying on *the* business of tanning in *said* yard,"—and of "the water conveyed for the use of *said* tanyard."

Viewing the actual state of things, the parties appear to have come to the conclusion that there would be a surplus of water, not required by the yard and the other mill or works on the dam. The excess, whatever it may be, Hill reserves, with a right to erect, at his pleasure and to any extent, new mills or machinery. This right he probably would have retained without the clause of reservation. But its insertion is evidence that he intended to grant only a specific and measured power, and not to deed away the whole, if his grantee chose to extend his yard or his works. The reservation in the latter case would be nugatory. As it stands, it seems to say,—I grant to you enough water for that tanyard, as it now is operated, but all the rest of the water, held by the dam, I reserve for my own use, for my present or future works on the dam. The language of the Court, in *Wyman* v. *Farrar*, 35 Maine, 71, is applicable to this case.—"It can hardly be presumed that a person purchasing" (or reserving) "a privilege on which to establish a manufacturing business, for the constant prosecution of which a constant water power was essential, would consent to the insertion of a reservation" (or grant) "in his deed, which would effectually negative the terms of his grant."

We have been referred to the case of *Deshon* v. *Porter*, (before cited,) as an authority for the grantee. The lan-

guage in that deed was, "likewise a water privilege for tanning purposes in all its various branches." The question raised in that case was whether this was a measure of the quantity to be used, or a grant of water to be used only for tanning purposes. The amount did not seem to be in controversy. The Court, in considering that question, remark, "the grantee is not in the least restricted in his use of the water for that purpose, but could enlarge his operations *ad libitum*." But the decision did not rest at all on this point. It was not the one about which that controversy arose. The question was whether the water granted could be used for any other purpose than tanning. The allusion to the unlimited nature of the grant was to show that there could be no measure of such unrestricted power.

But in that case there was no existing tannery which the parties had in view, or to which the deed referred. It was a naked and absolute grant "of a water privilege for tanning purposes in all its various branches." There were no facts to qualify or limit the generality of the grant. The deed did not, as in this case, contain clauses, reservations and conditions from which any light could be gathered, as to the intentions and meaning of the parties. The grant was left as one which the grantee might use to any extent, in any tanyard which he might establish or extend on the privileges. It was, therefore, a case differing essentially from the one at bar.

Our conclusion is that the grant must be regarded as a measure of power, and be restricted, substantially to the amount of water which was sufficient to carry on the business of tanning in the yard, as it was carried on at the time of the date of the deed from Hill, or at or about that time, when in full operation in carrying on "the tannery in said yard in its various branches." And that the right has priority as before explained.

The case of *Covel & al.* v. *Hart & al.*, as presented, seems clearly to present facts which, if proved, would entitle the plaintiffs to a judgment in their favor, under the foregoing

decision. It affirms that the defendant has drawn water to such an extent that the plaintiffs could not work their tannery. This we understand refers to the tannery as existing at the date of the deed.

The allegations in the other suit, of *Hart* v. *Covel*, also present a case, which, if proved, would seem to entitle the plaintiffs to some damages. Therefore in each case the entry must be: — *Case to stand for trial.*

But the parties will probably be able to adjust all differences and to fix upon a mode of enjoying their respective rights, as herein determined, without further litigation.

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

ABNER W. DOANE *versus* JOSEPH W. COVEL.

An indenture providing that, in consideration of certain services of the apprentice, "to be paid to him or his mother, the apprentice is to board himself," is a sufficient "security to the sole use of the minor," within the R. S. c. 62, § 5.

A contract of apprenticeship, not conformable to the statute, is voidable by the apprentice.

In an action under R. S., c. 24, § 18, for "enticing an apprentice to leave his master," the defendant cannot take advantage of a voidable indenture which has never been avoided.

ON EXCEPTIONS.

ACTION brought under R. S., c. 24, § 18, for enticing an apprentice from his master, and harboring him.

Writ dated Dec. 14, 1869. The case was submitted to the presiding Judge, with leave to allege exceptions in matters of law.

The plaintiff, against the seasonable objections of the defendant, put into the case an instrument, dated April 1, 1867, signed by Anna Kellen, Henry T. Kellen and Abner

W. Doane, with an indorsement thereon, signed by A. W. Doane and Henry Kellen. The following is a copy of the indenture and indorsement.

"This indenture witnesseth, that Anna Kellen of Bangor, in the county of Penobscot and State of Maine, hereby places her son, Henry T. Kellen, a minor, with the consent of the said Henry T. Kellen, expressed by his signature hereto, as an apprentice to learn the trade or art of close plating, (so called,) with Abner W. Doane, of said Bangor; and he is to serve as such apprentice with the said Doane, from the date hereof to the first day of April, 1870, making three years. During which time the said Henry T. Kellen at the said trade or art with the said Doane shall faithfully serve; from the service of said Doane he shall not absent himself, but shall, in all things, and at all times, behave himself as a faithful apprentice ought, during the whole time aforesaid.

"And the said Abner W. Doane agrees to allow the said apprentice to attend the school in the district in which he lives, three months in every winter during the term aforesaid, so that he may be instructed to read, write and cypher; and to learn him, the said apprentice, the said trade or art of close plating; and pay him in money three dollars per week during the first year of said term, (excepting the time said apprentice is attending school,) and four dollars per week during the second year, and five dollars per week during the third year, (excepting the time said apprentice is attending school during the entire term.) And, in consideration of the above services, the said Henry T. Kellen or his said mother to be paid, the said Kellen is to board himself, and furnish his own clothing; and the said Doane is not to be responsible for any of his said apprentice's debts for necessaries, or for any other purpose."

"Bangor, May 2d, 1868.

"It is agreed by parties to the within indenture, that they shall continue and remain in full force according to their tenor; and said Doane is to pay said Kellen seven dollars

per week for the remainder of said term of apprenticeship, instead of sum named in said indenture. Said change of price is not to affect the validity of said within indenture in any other way or manner whatever."

It appeared that H. T. Kellen commenced working for the plaintiff under the indenture, April 1, 1867, and continued in his employ a year; that the plaintiff paid the apprentice the sum named in the indenture; that the apprentice left the plaintiff and worked for the defendant, a short time, and returned to the service of the plaintiff, May 2, 1868, whereupon the agreement indorsed on the indenture was made; that, thenceforward he continued to work for the plaintiff, until August 26, 1868, when he left and went to work for the defendant; that, all the time Kellen worked for the plaintiff, his wages were paid directly to him by the plaintiff.

The presiding Judge ruled that the action was maintainable and awarded judgment for the plaintiff for sixty dollars; whereupon the defendant alleged exceptions.

F. A. Wilson & H. L. Mitchell, for the the defendant.

1. A statute indenture must continue the service until the minor be twenty-one years of age. R. S., c. 62, § 2. "May" is imperative. *Reidell* v. *Congdon*, 16 Pick., 44. It is more advantageous to master and apprentice.

2. Payment to the minor *or* his mother is not "security to the whole use of the minor." R. S., c. 62, § 5. The disjunctive is different in its effect from the copulative. *Dodge* v. *Hills*, 13 Maine, 151.

Charles P. Stetson, for the plaintiff.

APPLETON, C. J. — This is an action brought for enticing an apprentice from his master and harboring him.

The facts were fully proved. Objections were only taken to the indentures produced in evidence.

1. It is insisted that they are not "to the sole use of the minor, and to be paid to him without any control on the

part of the parent or guardian at any time," as is required by R. S., 1857, c. 62, § 5.

By the terms of the indenture, the master agrees to pay the apprentice a certain sum for each week's work,—the sum increasing with each year of his apprenticeship. In a subsequent modification of the indentures, the plaintiff agrees to pay the said Kellen, the apprentice, an increase to June. The payments, as contracted, are to be made to him. By the indenture, the apprentice is to do certain specified services, and, "in consideration of the above services the said Kellen or his mother to be paid," &c. The promise is to pay the apprentice. If it were to be paid the mother, it would be for the use of the son. In *Dodge* v. *Hills*, 13 Maine, 151, the promise was "to pay the said J. H. & J. H., Jr.," the father and minor son, it was held to be sufficient security to the apprentice within the statute. "It is very manifest," remarks WESTON, C. J., "that whatever might be received by the father was in trust for the son, to be applied to his use." And such is the true construction of the indentures in the case before us. The assent of the apprentice is given to the payment of board, &c., to his mother for his use and benefit, and nothing more.

(2.) It does not specifically appear that the binding was "to the age of twenty-one years." If this were required, the defendant cannot take advantage of voidable indentures. A contract of apprenticeship, not conformable to the statute, is voidable only by the apprentice, and cannot be avoided by any other person or party. *Page* v. *Marsh*, 36 N. H., 305. "A voidable indenture," remarks EWING, C. J., in *Bloomfield* v. *Aquacknock*, 3 Hals., (N. J.,) 257, "is valid, subsisting and operative, until it is avoided by those who have power over it."

Further, it seems well settled, that a father may, at common law, assign the services of his minor son, and that indentures, though not in accordance with the statute, may be sufficient to transfer his right to such services. "The statute," observes WESTON, J., in *Emery* v. *Gowen*, 4 Greenl.,

33, "does not, however, make void indentures in assignments of the services of a child, not executed in the manner prescribed. They may be good at common law, during minority; and so they were held to be by PARSONS, C. J., in the case of *Everett* v. *Day*, 7 Mass., 145." So, indentures not under the statute were held binding on the father, though they might not be obligatory upon the son. *Lobdell* v. *Allen*, 9 Gray, 377.

At common law, whoever entices away the servant or apprentice of another is liable in an action of the case. Kellen was the apprentice of the plaintiff. The indentures, whether voidable or not, had never been avoided. It seems that the enticing away a minor, who is a servant *de facto*, from the service of his master, is actionable. *Peters* v. *Lord*, 18 Conn., 337. Much more, then, in a case like the present, when the indentures, whether voidable or not, have not been avoided. It is not for the person who wrongfully entices the servant to set up the defence that indentures are void, when the parties thereto do not claim such to be the case. *Exceptions overruled.*

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

JOSEPH ILLSLEY, *Adm'r, in Eq.*, *versus* THE PORTLAND AND ROCHESTER RAILROAD CO.

R. S., c. 51, § 9, does not authorize the assignee of a judgment of the County Commissioners, recovered in favor of the owner of land against a railroad company, for land damages, to maintain a bill for "an injunction against the use or occupation of" the land taken, and in which the complainant has no interest.

BILL IN EQUITY, heard on demurrer.

The main allegations of the bill may be seen in the opinion. And the bill also alleged:—

That, after his appointment and qualification as administrator of Wood, and, after the organization of the Portland & Rochester Railroad Company, the complainant repeatedly presented his claim for satisfaction of the judgments aforesaid, to the directors of said last named company, and, both formally in writing, by his counsel, and informally, otherwise, has demanded payment of the same from said company. And, for a long time, in the years 1866 and 1867, by the express request of the directors of said company, and upon their express assurance that the said claims should receive their attention, he forbore to prosecute his remedies therefor. But, finding the same to be wholly without avail, he caused a further written notice of his claim and demand for payment of the same, at or before the expiration of thirty days from that time, to be served upon said directors, on the second day of May last past, as he is ready to prove. But the said judgments remain wholly unpaid.

That neither of said companies, to his knowledge or belief, ever denied that said judgments were due, or gave any reason, other than the alleged want of means, for not paying the same, or contended that they, or either of them, had acquired, or could acquire any lawful title to the use of the lands aforesaid, except by satisfying said judgments.

P. Barnes, for the complainant, contended, *inter alia*, that the complainant can maintain the bill.

1. That, as the statute has given the particular remedy in question, only by process in the form of a complaint in equity, and, as the rule of equity pleading forbids the suit to be brought in the name of the assignor, after he has parted with all interest in the claim, — which is, in a certain sense, a technical rule, and otherwise the suit might well be in the name of the judgment claimant, — the Court will look beyond the name of the assignee, to see what were the equitable rights of the assignor. And, if these are clearly made out, and are seen to have been passed over to the assignee, upon good grounds, for just consideration, without

impairment of any rights of the party respondent, and in such manner that the assignee has the means of recovering only what the assignor might have recovered, and nothing more, the Court will not permit the equitable rule, which bound the complainant, to be converted into an inequitable defence by the respondent.

2. It is manifest that the York & Cumberland Railroad Company, upon the facts admitted by the demurrer, would have been estopped from taking this ground of defence.

Nor does the circumstance that this proceeding is in the nature of process in equity prevent the effect of estoppel; for estoppels are fully recognized in equity, as abundant cases show, unless where they would work inequitable results.

The present defendant is bound by that same estoppel, on the ground of privity. It might not be estopped by what its predecessor had declared, or requested, or held out, in regard to an ordinary money debt,—but in respect to a claim of this peculiar kind, which adheres to the fundamental franchise, and which, in its origination, antedated all possible mortgages, the present company can never be in any better position, except by payment, than its constituent predecessor was, and can never make any defence to the person of the complainant, which its predecessor could not have made. In whatever way, upon whatever grounds, the original company acquired the right or the indulgence to use the land in question, the existing company has acquired nothing more. It is only a successor, in full privity, so far as this kind of claim is concerned, with the party which it succeeds. It must be taken to have had full knowledge, when it entered into possession, that the condemnation of these lands had never been compensated for, and that these land owners had never discharged their judgments. It must, therefore, have known that the use of these lands was a continual trespass by the original company, except upon some grounds of indulgence, and that its own possession would be an instant and continuing trespass, unless upon

temporary sufferance of the party controlling the judgment. And it must be held to have ascertained and known what the grounds of sufferance were, and to have intended, when it took possession, to avail itself of such further permissive use of the land as might be voluntarily conceded.

And this accords with the matters of fact, alleged and admitted by the pleadings. The acts and declarations of the present defendant, after it came into possession, and its omission, upon repeated demand, to allege any want of right or equity in the present plaintiff to prosecute this bill, are sufficient to estop the defendant at least from setting up this point of defence, — especially as the plaintiff represented a decedent estate, and was entitled to prompt intimation of a defence of such kind, if any was intended.

3. The terms of the statute are broad enough to give this plaintiff a direct right to the remedy now sought.

The language of the original statute of 1853 is, "the person to whom damages may have been awarded, or who may be legally entitled to receive the same, may file a bill in equity," &c.

The Revised Code says, —"a bill may be filed by the person entitled to recover the damages." It may be that the framer of the Act was thinking of the possible case of the representatives of a deceased land owner, and had the motive to extend the remedy to them. But mere conjecture of the motive of a legislator, while it may sometimes afford a slight aid, in solving doubtful provisions and uncertain phrases, is never to be used to limit the plain meaning of a direct and obvious enactment. This would be to substitute conjecture for interpretation. In the present statute, in both its forms, the language is broad enough and plain enough to include fairly, as well as literally, the case of an assignee of the judgment for damages. And no possible harm can ensue to any respondent in such case, by holding him to answer to such assignee. All facts, all principles of law, and all equities, are as well open between such parties, as upon an issue in the name of the assignor.

And, compare more particularly the statute,—R. S., c. 51, § 9,—where the expression, "*his* land," is to be interpreted in consistency with the broader expression, "any lands," employed in Stat. 1853, c. 41, § 7.

Deane & Verrill, for the respondents.

APPLETON, C. J.—This is a bill in equity by the plaintiff, as administrator on the estate of John M. Wood.

The bill alleges that Nathaniel Haskell, at the June term, 1851, of the Court of County Commissioners, for the county of Cumberland, obtained a judgment and warrant of distress against the York & Cumberland Railroad Company for land damages sustained by him, by reason of the location and building of the railroad of said company over the lands of said Haskell.

That, at the same session, Albion F. Harris and Benjamin F. Harris obtained judgment and a warrant of distress against the York & Cumberland Railroad Company for similar damages sustained by them.

That, at the request of the directors of said railroad company, John M. Wood, on Dec. 7, 1853, for a valuable consideration by him paid, received from said A. F. & B. F. Harris an assignment of their interest in the judgment recovered, and in the warrant of distress,—and, on Dec. 16, 1853, for a full consideration by him paid to Haskell, he received from him an assignment and transfer of his interest in the judgment recovered by him, and in the warrant of distress,—thus said Wood was the owner of said judgments and warrants of distress, and entitled to recover the payment of the same,—and that they still remain due and unpaid.

That the bondholders of the York & Cumberland Railroad Co., in Oct., 1865, organized as a corporation, by the name of the Portland & Rochester R. R. Co,—that said railroad company is subject to all the liabilities of said York and Cumberland R. R. Co., in respect to compensation for lands taken and used by them,—and is now maintaining

and operating its road through the lands of said Haskell and said Harrises.

That said defendant does not deny said judgments, and does not claim that they have acquired or could acquire any lawful title to the use of said lands, except by satisfying said judgments.

The prayer of the bill is, "that this said company, its officers, agents, and servants, and all of them, may be enjoined and restrained from using for the purposes of said road, the lands taken therefor, of the said Haskell and the said Harrises herein mentioned, until the damage aforesaid, with interest and cost, shall be paid, * * and for such other and further relief in the premises as shall be according to equity and good conscience, and to the Court shall seem meet."

To this bill the defendant has demurred.

The complainant insists that he is entitled to the remedy prayed for by virtue of R. S., 1857, c. 51, although the title to the land remains in those from whom assignments of the several judgments for land damages were taken.

The remedy by injunction is given to the party injured in his estates or their enjoyment. It is never a mode for the collection of debts. Neither Haskell nor the Harrises make any complaint of the use or occupation of these lands. John M. Wood never owned the premises nor had any estate therein, and the question is whether his administrator can maintain a bill against the defendant to enjoin them from using or occupying the lands of others.

The complainant's rights depend not upon the general principles of equity, but upon the special provisions of R. S., c. 51.

By § 2, a railroad corporation may purchase land necessary "for the location, construction and convenient use of its road," or they may take it under certain prescribed limitations and conditions.

By § 5, "the damages for real estate taken, are to be estimated by the County Commissioners, on a written application

of the corporation or *owner* of the estate, within three years after the location was filed, and are to be paid by the corporation. When no estimate is made within that time, the *owner* may maintain trespass or have any remedy provided in this chapter. When requested by the *owner*, the Commissioners are to require the corporation to give security for the payment of damages and costs as hereinafter provided."

By § 8, "when the corporation neglects for more than thirty days, to give the security required, the *owner* is entitled to the remedies by injunction provided in this chapter."

By § 9, "when the damages remain unpaid for more than thirty days after they are due and demanded, a bill in equity may be filed in Court, in term time or vacation, by the person entitled to them, praying for an injunction against the use or occupation of his land taken. * * At the second term, if payment has not been made, the injunction may be made absolute, and all rights acquired by taking the land and to whatever has been placed upon it, cease, and the *owner* may maintain any appropriate action for its recovery and protection."

The rights of the owner of the land taken are to be protected by the proceedings in equity. The bill is to be filed by the one owning the estate used and occupied. The injunction is against the use and occupation of *his* land taken, not against the use and occupation of somebody's else land taken. The redress by injunction is given to the owner of the estate used and occupied, and to no one else. If not paid, it is the owner who is to maintain the appropriate action for the recovery of the land taken.

If the estate had been conveyed to the person to whom the damages were assigned, a very different question would have been presented for determination, which it is not necessary to consider or discuss. But, upon a full examination of the statutes, we think this special remedy by injunction is

given to the owner of land, and as owner, and to no one else.

Demurrer sustained.

Bill dismissed with costs.

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

FLORENCE MCCARTHY *versus* EDWARD MANSFIELD.

The finding in matters of fact, by a presiding Judge, in a case referred to him, with the right to except, is conclusive.

When the obligor in a bond for the conveyance of land has conveyed it to a third person by a deed of warranty made "subject to the incumbrance created by the bond," no demand for a conveyance need be made on the obligor prior to the commencement of an action upon the bond.

ON EXCEPTIONS and MOTION.

DEBT on a bond, dated March 14, 1855, given by the defendant to the plaintiff, stipulating that the former would convey to the latter the real estate therein described, on the conditions that the plaintiff should pay him $400 in twelve, $400 in twenty-four, and $200 in thirty months, with interest.

The case was withdrawn from the jury and submitted to the presiding Judge, reserving the right to allege exceptions.

The plaintiff introduced the bond and assignment thereof, dated August 23, 1855, to Dole & Moody, for whose benefit this action is brought; and copy of a deed of the premises described in the bond, bearing same date as the bond, from the defendant to one Patten. Immediately following a description of the premises in the deed, and before the *habendum*, was language of the following tenor:—"subject to the incumbrance alone by my liability this day created by my bond, to give a deed of the same to Florence McCarthy of said Portland, upon said McCarthy's payment of four hundred dollars in one year from this date, and of four hundred dollars in two years from this date, and of two

hundred dollars in two years and six months from this date, and I hereby make over and assign to said Patten all my claim to recover said money from said McCarthy and to demand and recover the sum of said McCarthy as fast as the same becomes due, and to use my name for the collection of the same of said McCarthy, in any legal proceeding therefor."

There was evidence tending to show that, in 1858, Dole & Moody had paid the two four hundred dollar instalments and tendered the remaining payment, but not at the several times stipulated in the bond; and that Patten made no objection to the tender on account of lapse of time or otherwise.

On the part of the defendant there was evidence tending to show that Patten did object to the tender as being made too late.

The presiding Judge found, as matter of fact:

1. That it was proved that a tender of the amount due on the bond was made by Dole.

2. That it was uncertain from the evidence adduced whether or not the amount tendered was received by Patten.

3. That no objection was made to the tender at the time it was made, for any cause.

4. That the evidence satisfactorily proved that there was a waiver by Patten of a strict performance of the bond, as to the *time* of payment upon each of the instalments.

And thereupon ordered judgment for the plaintiff for the amount of the two $400 payments and interest from the time they were made.

No specific ruling upon any point of law was asked for by the defendant.

The defendant alleged exceptions and filed a motion for a new hearing, upon the allegation that the "decision of the presiding Judge was against evidence and the weight of evidence, and erroneous in law."

J. D. & F. Fessenden, for the defendant, contended, that the decision of the presiding Judge was erroneous in law

because the plaintiff has failed to show himself entitled to maintain the action.

That tender alone of the amount due is not sufficient; but a demand for a conveyance must also be made. *Fuller* v. *Hubbard*, 6 Cowen, 2; *Huckett* v. *Huson*, 3 Wendell, 250; *Connolly* v. *Pierce*, 7 Wend., 129; *Pomroy* v. *Gold*, 2 Met., 502; *Hunt* v. *Livermore*, 5 Pick., 397. That the deed to Patten, being made subject to the incumbrance of the bond, thereby reverses the right to convey to McCarthy. McCarthy has never repudiated her contract.

W. L. Putnam, for the plaintiff.

On the finality of the presiding Judge's finding in matter of fact, counsel cited *Hersey* v. *Verrill*, 39 Maine, 272; *Roxbury* v. *Huston*, 39 Maine, 312; *Sampson* v. *Norton*, 45 Maine, 284; *Berry* v. *Johnson*, 53 Maine, 401; *Higbee* v. *Bacon*, 11 Pick., 430; *Stearns* v. *Fiske*, 18 Pick., 24; *Dole* v. *Thurlow*, 12 Met., 159.

Demand not necessary. *Richards* v. *Allen*, 17 Maine, 296; *Newcomb* v. *Brackett*, 16 Mass., 161; Dart's Vendors and Purchasers, 449.

Tapley, J.—Upon all matters of fact found by the presiding Judge, his finding is conclusive. It is contended in this case, that the plaintiff is not entitled to recover upon the facts found, for there was no evidence or finding that a demand was made of the defendant for a deed previous to the commencement of the action, and that it was error in *law* to give judgment for the plaintiff without such proof.

We think this position cannot be sustained, and that there was no error in this particular.

The defendant, by his deed duly executed on the same day the bond was executed, conveyed all his interest in the property described in the bond. From the moment of the execution and delivery of his deed he had no estate or interest in it whatever, that could be reached by any process of this Court. His deed could give no right or interest in it, for he had none to convey. The clauses inserted in the

deed, that it was made "subject to the incumbrance alone by my liability this day created by my bond to give a deed of the same to Florence McCarthy," &c., reserves no interest in the grantor. While it might operate as an incumbrance upon the estate in favor of McCarthy and her assigns, it nevertheless devested Mansfield of all interest therein. He could not convey, and hence no decree would be made requiring an impossibility. The authorities are clear upon this point. Patten having taken, subject to the conditions and provisions of the bond, could have been compelled to convey to McCarthy upon a performance of the conditions of the bond, he having full knowledge of those conditions and having taken the conveyance subject to them. He could however have been compelled to thus convey only at the instance of the party entitled to a conveyance. To such persons it was his duty to convey upon demand after a fulfilment of the conditions of the bond. A demand was made upon him, as the case finds, and he refused to convey. The plaintiffs then had two remedies; one at law for damages, and one in equity to compel the specific performance of the conditions of the bond. The action at law must be against the defendant alone; the bill in equity at least against Patten. He sought the former remedy, and the defendant having placed it out of his power to convey, no demand was necessary to be made upon him, and the exceptions must be overruled. What the remedy of the defendant may be, after he has satisfied the judgment, is not now necessary to be determined and probably will be dependent upon the proof of some additional facts.

Motion and Exceptions overruled.

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

SYLVESTER MARR *& al., Pet'rs for Certiorari, versus* EDGAR R. CLARK *& als.*

The disclosure of a poor debtor, who has procured his release from arrest on *mesne process*, by giving the bond mentioned in R. S., c. 113, § 16, is a statute proceeding.

To be effectual, the provisions of the statute relating thereto and the condition of the bond must be complied with.

If the debtor disclose and show that he has filed his petition in bankruptcy and has been duly declared a bankrupt, and thereupon refuses to "submit himself to" further "examination," and to "make true disclosure of his business affairs and property on oath;" and the justices refuse to hear any other legal and pertinent evidence adduced by the creditor, the debtor will not thereby entitle himself to a discharge.

If a discharge be granted in such case, the proceedings of the justices will be quashed on *certiorari*.

ON EXCEPTIONS.

PETITION FOR CERTIORARI to quash the proceedings of justices of the peace and quorum whereby they gave, to the respondent Clark, the discharge mentioned in R. S., c. 113, § 31, to relieve him from a bond given by him to the petitioners, under R. S., c. 113, § 16, to procure his release from arrest on *mesne process*.

The 3d error assigned was:—

Because said justices improperly restrained the examination of said Edgar by said creditors, and did not require said Edgar to answer pertinent and proper inquiries put by said creditors.

The following is a copy of so much of the justices' record sent up as is essential.

"1st Interrogatory by Emery, one of the justices.

"Have you any real or personal estate?

"*Ans.*—No, sir.

"2d. Have you any private property of any kind, if yes, state what?

"*Ans.*—I have none.

"3d. Have you directly or indirectly sold, conveyed or

disposed of, or intrusted to any person, any real estate or personal property to secure it, or receive any benefit of it to yourself or others since the contraction of the debt upon which you are disclosing?

"*Ans.*—I have not. I have filed my petition in bankruptcy, and have been adjudged a bankrupt and will produce my certificate."

[Certificate of bankruptcy produced.]

"Questions by creditors' attorney.

"1. What was your business during the year 1865; when and how carried on; and what has it been since?"

"*Ans.*—I refuse to answer further, because I have made a full disclosure by the foregoing answers.

"2. I propose to ask in behalf of the creditors numerous questions pertinent to the subject matter of inquiry; do you say you will not answer such questions?

"*Ans.*—I shall answer no further until the question is decided whether I have made a full disclosure by the above." * * * "Edgar R. Clark."

"York, ss., Aug. 7, 1867.

"Then personally appeared Edgar R. Clark aforesaid, and made oath that the foregoing disclosure by him made and subscribed is true.

"Before me, Wm. Emery, Justice of the Peace."

Previously to the administering of the oath the attorney of the creditors filed the following protest:—

"York, ss., Biddeford, Aug. 7, 1867.

"Before William Hobson, William Emery and Gorham N. Weymouth, three Justices of the Peace and quorum in and for said county, hearing disclosure of Edgar R. Clark, of said Biddeford, upon citation to Sylvester Marr and John H. True of Portland, State of Maine. And now, by their attorney, said creditors come and ask leave to interrogate the said debtor fully as to his estate and effects, their disposal and his ability to pay the debt upon which he was arrested; and also ask to be permitted to introduce other legal and pertinent evidence upon that subject; and they protest

against any limitation or restriction of their rights to such examination and procedure, either upon the plea of bankruptcy or any other pretext.

"John H. True and Sylvester Marr,
"By Edwin B. Smith, their attorney."

And, subsequently to the administering of the oath, the attorney of the creditors renewed his protest in the form following:—"And the majority of said justices of the peace and quorum refuse to allow the creditors (by their attorney) to put the questions and introduce the evidence above indicated. They protest anew, and, after said debtor's alleged disclosure was signed and sworn to, said creditors renewed their offer to introduce the evidence aforesaid, and were refused the privilege, and again protest.

"By Edwin B. Smith, Attorney."

"The undersigned, having considered the foregoing requests, have overruled the same, because the debtor, having made answers to certain questions, as appears by this disclosure, and having disclosed that he has been adjudged a bankrupt and presented the legal proof of the same, we consider he has made a full disclosure in compliance with the bond referred to in his application to the magistrates.

"William Emery,
"Gorham N. Weymouth."

Upon inspection of the record certified up, the presiding Judge ordered that the proceedings of the justices be quashed; to which ruling the respondent alleges exceptions.

S. K. & B. F. Hamilton, for the respondent, cited *Haywood, pet'r*, 10 Pick., 358; *Commonwealth* v. *Roxbury*, 8 Mass., 457; *Same* v. *Westborough*, 3 Mass., 406.

Edwin B. Smith, for the petitioners.

DANFORTH, J.—The respondent Clark attempted to disclose under the provisions of c. 113 of the Revised Statutes before the other respondents, for the purpose of relieving himself from a bond he had previously given the petitioners to procure his discharge from arrest on *mesne process*.

This is a statute proceeding, and, to make it effectual, the provisions of the statute as well as the condition of the bond must be complied with. Both the statute and the bond require that the debtor "shall submit himself to examination" and "make true disclosure of his business affairs and property under oath;" "that the justices shall hear other legal and pertinent evidence adduced by the * * * creditor," and that "the creditor may propose to the debtor any interrogatories pertinent to the inquiry." R. S., c. 113, §§ 16, 17, 26 and 27.

In this case, the debtor refused to answer "interrogatories pertinent to the inquiry," and to "make a true disclosure of his business affairs and property," and the justices, refusing to hear other legal and pertinent testimony from the creditor, administered the oath. In so doing, they acted, as the record shows, not only upon wrong conclusions in matters of fact, but also upon erroneous principles of law and in direct violation of the provisions of the statute. *Little, pet'r*, v. *Cochrane & al.*, 24 Maine, 559.

This mistaken view of the law on the part of the justices seems to have been founded upon the fact that the debtor had been decreed a bankrupt. From this they drew the inference that no further disclosure was necessary, for that law disposed of all the debtor's property for the benefit of all his creditors alike. This last proposition may be true and yet afford no excuse from further disclosure.

The simple fact of bankruptcy is not a "true disclosure of his business affairs and property." The statute requires more than that the debtor's property should go to his creditors. It is not enough that the debtor, at the time of his disclosure, has no property liable to be taken to pay his debts. He must be able to show by his own oath, at least, that, since the debt for which he is arrested, or any part of it accrued, he has acted fairly and honestly toward all his creditors; that he has not directly or indirectly disposed of any of his property with intent to defraud any of them. Other-

wise he is not entitled to the oath, though he may not have a single dollar with which to pay the debt. In such case the bond would remain in force and the creditor would have his remedy upon that.

If the bankrupt law will relieve the debtor from fulfilling the conditions of his bond, he may avail himself of that relief in any legitimate way. But he has sought his discharge in a method entirely independent of the bankrupt law. He has elected to rely, not upon a release from his bond, but upon a fulfilment of its conditions.

The only question presented under this process is whether he has done all that his obligation under the statute requires. As already seen, it is clear he has not. The erroneous construction of the law, adopted by the justices, has deprived the creditors of their legal rights.

Exceptions overruled.

Proceedings of the justices quashed.

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

JOSEPH ATKINSON, *Adm'r de bonis non*, *versus* WILLIAM CONNER.

Before a review will be granted on the ground of newly discovered evidence, the Court must be satisfied from the evidence introduced in support of the petition, that the evidence claimed as newly discovered could not have been obtained by diligent inquiry, prior to the trial.

So the Court must be satisfied of the fact of surprise, before it will grant a review upon that ground.

When, from the nature of the issue, a party has reasonable cause to expect that a certain point will be controverted, and when, by proper diligence, he might have obtained the testimony to substantiate the point, he cannot be said to be taken by surprise by the controverting testimony.

ON REPORT.

PETITION FOR REVIEW.

The petition was dated Oct. 15, 1857, and substantially alleged that, on July 5, 1856, Parker Sheldon, as administrator of the estate of Parker C. Sheldon, sued out his writ of trover against the respondent, to recover the value of certain logs therein described, which writ was duly entered in this county; and that, Parker Sheldon having deceased after the entry of the action, the petitioner was duly appointed administrator *de bonis non*, and appeared to prosecute; that the action came to trial at the March term, 1864; that the plaintiff's title to the logs in controversy was based upon a bill of sale thereof, dated Oct. 10, 1850, from one J. W. Larry to Parker Sheldon; that the defence rested mainly upon an unrecorded mortgage, dated April 6, 1850, from the same Larry to White & Norris, the respondent's vendors; that it became material to show that White & Norris received and retained possession under their mortgage, which was attempted by one William Lisherness, who testified that one Heald spoke to him, before leaving the woods, about driving for him, witness told Heald he would and did; that Larry wanted witness to drive, and said if Heald did not pay, he (Larry) would; that witness had charge of the logs; and that Larry said Norris would pay for driving; that he was never paid; that he had ten men on the drive.

The petition further alleges that White & Norris were defendants in interest in said action, and did defend it; that White testified that he arranged with Heald to drive the logs in the spring of 1850, whereas, in truth, Heald was not on the drive and had no part in it; that Larry drove the logs on his own account and hired a crew of men, among whom was one Quint, Grady, Gardner, Pressey, Wat. Lisherness and William Lisherness; that the verdict was for the defendant and final judgment was rendered thereon; that the testimony of Lisherness was material and wilfully false, as the petitioner has since ascertained; that the petitioner was thereby surprised, and had then no knowledge of any means of showing its falsity; that, since the trial, the petitioner has discovered new and material evidence, which is

set out in detail, together with the names of the witnesses by which he can prove it, and the reasons he has for knowing they will so testify.

The testimony, depositions, documents and admissions used in any trial of the cases, *Parker Sheldon, Adm'r,* v. *White & al.*, same, or *Atkinson, Adm'r,* v. *Wm. Conner, Atkinson, Adm'r,* v. *Bridge & al.*, and the printed reports of the evidence in the above cases, were put into the case, reserving certain rights of objection. And, upon so much of all the evidence as should be legally admissible under the stipulations of the report, the case was to be heard and decided by the full Court.

The remaining facts sufficiently appear in the opinion.

Lancaster, for the petitioner.

J. S. Abbott, for the respondent.

DICKERSON, J.—The original action was trover, brought July 5, 1856, by Parker Sheldon, administrator of Parker C. Sheldon, for a quantity of logs cut in Canada, in the winter of 1849 and 1850, and hauled into the north branch of Dead river, in this State.

Both parties claim title to the logs under one J. W. Larry; the plaintiff by bill of sale from said Larry to Parker Sheldon, dated Oct. 10, 1850, and the defendant, by an unrecorded mortgage from him, bearing date April 6, 1850.

On the sixth day of June, 1851, Parker Sheldon sold the logs to Parker C. Sheldon, at whose decease he was appointed his administrator. On the sixth day of Dec., 1855, Parker Sheldon, administrator, sold the logs to William Atkinson, who caused an action of trover to be brought for their value, in Sheldon's name. The case was tried at the March term, in the county of Kennebec, in 1858, and a verdict was rendered for the defendant. That verdict was set aside and a new trial was granted on account of the misdirection of the Judge in matters of law. *Sheldon* v. *Conner*, 48 Maine, 584. Parker Sheldon having deceased, Joseph Atkinson was appointed administrator *de bonis non.*

At the trial of the action, in March, 1864, a second verdict was rendered for the defendant. Exceptions and a motion for a new trial were filed, and the evidence was reported, but the Court overruled both the motion and exceptions, and judgment was rendered for the defendant.

At the August term, 1865, a petition for a review was filed and a hearing had at the following term in November. By agreement of parties, the case was submitted to the law Court on report, and the petition was denied at the May term, 1867.

The material question raised in the action sought to be reviewed was before the Court in 1853, on report, in *Sheldon* v. *White & al.*, 35 Maine, 233, and the Court held that there was no such proof of ownership in the plaintiff as would authorize him to maintain an action of replevin.

Again, the same question arose in the case of *Atkinson, Adm'r,* v. *White & Norris*, which was an action for all the logs, and came on for trial at the November term, 1865. A nonsuit was ordered upon the pleadings and agreed statement of facts, and exceptions were filed, but the Court overruled the exceptions, and rendered judgment for the defendants, at the December term, 1867.

So, also, in *Atkinson, Adm'r,* v. *Bridge & al.*, the same question was raised and a verdict was rendered for the defendants, which was set aside on exceptions to the ruling of the presiding Judge in excluding certain testimony.

After the lapse of eighteen years since the facts in this case transpired, with three verdicts and three judgments against him, and one refusal of this Court to grant a review of this identical action, the petitioner asks to have this controversy reöpened, and his claim reëxamined on the alleged ground that he was taken by surprise at the trial, through certain false testimony which he had not then the means of refuting, but which he now hopes to disprove by subsequently discovered testimony.

Such persistent and protracted litigation, it is believed, has few parallels in the history of jurisprudence in this

State; and, if there is any wisdom in the maxim *interest reipublicae ut sit finis lititium*, the present would seem to be a fit occasion to apply it, if this can be done consistently with the legal rights of the parties.

The petitioner alleges, as ground for review, that a witness, at the original trial, testified falsely to material facts against the petitioner, that the petitioner was taken by surprise at such testimony, and unable to prove its falsity at the trial, but that he has since discovered evidence which, with the evidence before known, is sufficient to satisfy the Court that said witness' testimony was false.

A new trial will not be granted on account of newly discovered evidence, when the party complaining, by proper diligence, might have discovered such evidence, and had it at the trial. The law holds parties to the exercise of due diligence in the preparation of their cases. It is not sufficient that a petitioner for a review or new trial affirms that, with all the diligence in his power, he could not have discovered the evidence sought to be made available; the Court must be satisfied from the evidence in the case, that such evidence could not have been discovered by diligent inquiry, before it will disturb the verdict. *Howard* v. *Grover*, 28 Maine, 97; *Hewey v. Nourse*, 54 Maine, 262; *State* v. *Verrill*, 54 Maine, 581.

The same principle requires that the Court should be satisfied of the fact of surprise, before it will grant a new trial on that ground. Otherwise, there would be no limit to litigation with an unscrupulous suitor but his own perverse will. When, from the nature of the issue, a party has reasonable cause to anticipate that the point to which certain testimony is applicable, will be controverted, and when, by proper diligence, such party might have obtained the testimony, claimed to be newly discovered, he cannot be said to be taken by surprise at the testimony thus introduced. The public welfare, as well as the interest of litigants, requires that suitors should prepare their cases with reference to all the probable contingencies of the trial. The law

affords no remedy for the consequences of neglecting this duty. The same general principles regulate the discretion of the Court in granting writs of review.

The question in the original action, was whether possession of the logs was delivered to, and retained by Messrs. White & Norris, under the Larry mortgage. If it was, the title was in the defendant who was their vendee; if it was not, the title was in the plaintiff in interest who claimed under Larry's bill of sale to Parker Sheldon.

Who drove the logs in the spring of 1850, whether Heald, acting for White & Norris, or Larry in his own behalf, were questions pertinent to the issue, and might be expected to arise at the trial.

In order to show that Larry retained possession of the logs in the spring of 1850, the plaintiff, at the trial of the action, *Sheldon* v. *White & al.*, in 1853, introduced Harrison Stevens, as a witness, who testified that Larry paid him for carrying up men to drive logs for him in the spring of 1850, from the place where the logs in controversy were cut; and this testimony of Stevens, by agreement of parties, is made a part of the case in the preceding trials. On the other hand, the defendants in that action, in order to show that they took and retained possession of the logs under the Larry mortgage, introduced the certificate of Goff M. Manter upon the back of the mortgage, made April 10, 1850, and setting forth that he had that day been on the logs and taken delivery of them according to the terms of the mortgage. They also introduced the deposition of Manter to the same point. This certificate and Manter's deposition are made a part of the case in the other actions for the logs.

At the same trial, in 1853, William Atkinson, plaintiff in interest in the case now before us, testified that he saw Larry in Canada, in March or April of 1850, where the logs were cut; that Larry claimed them, and offered to sell them; that Larry had lived in the county of Somerset since 1849, and was residing in North Anson at the time of the trial. Atkinson was a witness at all the subsequent trials, and tes-

tified at the trial of the original action, in 1864, that Larry drove the logs in 1850. Greenleaf B. White, one of the defendants in *Sheldon* v. *White & al.*, called by the defendant, at the trial in 1864, testified that he and his partner Norris arranged with Heald to drive the logs in the spring of 1850, and furnished him with supplies for that purpose.

It thus appears that the inquiry, who had the control of the logs in the spring of 1850, might not only be expected to arise, but actually did arise at every trial of this question; it had, indeed, come up before the law Court, and once before the jury, prior to the trial of the original action in 1864, and, in both instances, the plaintiff's evidence of title had been found insufficient.

William Lisherness, whose testimony is the cause of the alleged *surprise* of the petitioner, testified that Heald wanted him to drive the logs for him in the spring of 1850; that he drove them for him; that Larry wanted him to drive them, and said if Heald did not pay him, he would; that Norris would pay for driving. That this testimony was pertinent to the issue, and might be expected to be introduced, if known to the defendant, is unquestionable; that Lisherness had an opportunity to know who controlled the logs at that time is proved by the petitioner's witness Orcut; it also appears from the testimony of the plaintiff in interest, at the trial of the original action in 1864, that Lisherness told him, in the winter of 1851, that he was on the drive. Moreover, the petitioner's newly discovered witness Orcut, testifies, that both he and Lisherness were carried on to the drive by the plaintiff's witness Stevens, who testified at the first trial of this question, in 1853, that he carried six men on to the drive for Larry that spring.

Upon inquiry of his witness Stevens, the plaintiff might have learned the names of the persons he carried on to the drive, and ascertained the facts from them. He not only neglected to do this, but also to call Lisherness as a witness, though he had long known that he was on the drive, and had reason to believe, as he has sworn, that he would testify

in his favor. And yet, after the lapse of more than seventeen years since the facts in the case transpired, with verdict after verdict, and judgment after judgment against him, he filed his petition for a review of the same question, on the ground that he was *surprised* at the testimony of Lisherness, and has *since* discovered the evidence of its falsity!

The alleged discrepancy between Lisherness' account of his connection with the drive and Atkinson's recollection of his statement of it is scarcely sufficient to discredit that account, when we consider the lapse of time, Atkinson's interest, and the corroborative evidence contained in the certificate on the mortgage, and the testimony of Manter and White, if it were necessary to consider the question of credibility. It would be an infraction of the principle that testimony should be reconciled, when it can reasonably be done, to regard Atkinson's recollection of Lisherness' account of the transaction, after a lapse of thirteen years, as necessarily irreconcilable with Lisherness' statement of it on the stand. The testimony of both witnesses may be substantially true. Atkinson's testimony is very brief, while Lisherness' is more extended and complete. Atkinson testifies that Lisherness told him that he helped Larry drive the logs and that Larry agreed to pay him. Lisherness testifies that Larry wanted him to drive and agreed to pay him if Heald did not, but he adds, that Heald wanted him to drive for him, and he did drive for Heald. It is not improbable that Lisherness related a part only of the transaction to Atkinson, and that the testimony may be reconciled upon the theory that Heald employed Lisherness, but that Larry, knowing Lisherness, and having an interest in the logs as mortgager, desired him to help run them and agreed to pay him if Heald should not do so.

The original plaintiff must have known that it might become material, at the trial, to show by whose authority the logs in controversy were driven in the spring of 1850. He was, therefore, bound at his peril to use diligence in pro-

curing testimony upon that point. By the exercise of such diligence he might have produced the same testimony at the trial that he claims to have since discovered. There is no evidence that he made any effort in that direction. According to well established principles of law, he is not entitled to a review, either on the ground that he has discovered new and material evidence since the trial, or of surprise at the evidence introduced against him. There is no other ground for a review. *Petition denied.*

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

KENT, J., concurred in the result.

IVORY CHADBOURNE *versus* JOHN HANSCOM.

When a defendant, in his specifications of defence, denies "the purchasing or having any of the articles mentioned in the plaintiff's account" annexed, but makes no mention of their value, he may show their real value.

In *indebitatus assumpsit*, interest on the principal sum may be a subject of charge as one of the items of the account annexed; and it may be recovered in that form of declaration upon proof of specific demand of payment prior to the commencement of the action.

ON EXCEPTIONS.

ASSUMPSIT.

The defendant requested the presiding Judge to instruct the jury that, there being no count for interest, the plaintiff could recover interest only from the date of the writ. The Judge declined to give the instruction as requested, but did instruct them that the plaintiff could, in this form of declaration, recover interest from the time he demanded payment of his claim and before the date of the writ, not exceeding the amount charged in the account annexed.

The verdict was for the plaintiff, and the defendant alleged exceptions. The remaining facts sufficiently appear in the opinion.

Wells & Eastman, for the defendant, contended that, in the absence of a contract to pay interest, it is allowed only in the nature of damages for the detention of the amount due. Damages for a wrong committed by the defendant are not subjects of charge, to be recovered in assumpsit on account annexed.

G. C. Yeaton, for the plaintiff.

A general denial of the purchase of an article cannot be said to be a specific denial of its value, when proved to have been purchased. Rule of Court IX; *Day* v. *Frye*, 41 Maine, 326; *Hart* v. *Hardiman*, 42 Maine, 196; *Clough* v. *Crossman*, 47 Maine, 349; *Skillings* v. *Norris*, 50 Maine, 72; *Cutler* v. *Currier*, 54 Maine, 89.

On the question of interest, counsel cited *Howe* v. *Bradley*, 19 Maine, 31; *Amee* v. *Wilson*, 22 Maine, 120–1; *Hall* v. *Huckins*, 41 Maine, 574; *Robbins Cordage Co.* v. *Brewer*, 48 Maine, 486; *Barnard* v. *Bartholomew*, 22 Pick. 291; *Pease* v. *Barker*, 3 Caines, 266; 1 Chitty on Pl., 338, 356–8, 396, *et seq.*; Sedgwick on Damages, 575, *et seq.*

BARROWS, J.—The account annexed to the writ in this case embraces the following items:—

1861, Oct.	8 days labor, with 4 oxen, $4.	$32,00
	1 Fall and blocks,	15,00
	70 lbs. chain, *a.* 10 cents,	7,00
	Guys,	20,00
	1 stone 8 ft. long, 4½ ft. sq.,	20,00
		94,00
	Interest to March 23, 1866,	22,66

There was a second count upon a *quantum meruit*, for goods sold and labor performed.

In his specifications of defence, the defendant denied purchasing or having any of the articles mentioned in the account, saying nothing about the value therein affixed to them; and he admitted that plaintiff had done some work

for him, which he alleged to have been done under a special contract different from that set out in the writ.

At the trial, he offered to prove that the stone which constituted one of the items of the account, was of less value than was alleged in the writ, but the presiding Judge refused to receive the evidence, on the ground that the value of it had not been denied in the specifications.

But the defendant had denied that he purchased the stone at all. This was a denial of the contract in all its parts, and could not be reasonably understood by any one as not including a denial of the alleged price and value. The plaintiff had notice that he must come prepared to prove the contract that he had alleged, in manner and form as he had alleged it.

A contract alleged in a writ is not so divisible that, when the making of any contract whatever, in relation to the subject matter between the parties to the suit is denied, any material element of such contract can be considered as admitted, because it is not separately disaffirmed.

All that is required in specifications of defence, is that the grounds of defence relied on should be intelligibly disclosed. *Clement* v. *Garland*, 53 Maine, 427.

The defendant was clearly at liberty to show anything from which a legitimate inference might be drawn that he made no such contract. It certainly was competent for him to prove that the price affixed was exorbitant and unreasonable and disproportionate to the value, in order to fortify his denial that he made such a purchase.

We see no objection to making interest on the principal sum a subject of charge as one of the items of an account annexed, nor to the recovery of it in that form of declaration, upon proof of the circumstances which would entitle the plaintiff to charge it, — such as a general custom of the trade, or a specific demand of payment at a period anterior to the commencement of the action.

The rulings on this point were correct; but, on account

of the exclusion of evidence, which the defendant had a right to offer under the issue which he presented,

The exceptions must be sustained.

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

EBEN D. JORDAN *& al. versus* ISAAC N. PARKER.

Merchandize purchased upon a credit through the fraudulent representation of the vendee, and, after delivery, attached by prior creditors, may be replevied from the attaching officer by the vendor.

ON EXCEPTIONS.

REPLEVIN of a lot of merchandize, of the alleged value of $800.

The presiding Judge ruled that the facts offered by the plaintiffs, if proved, would not be sufficient to maintain the issue on their part; and no other evidence being offered, a nonsuit was ordered, which was to be taken off and the action stand for trial, if, in the opinion of the full Court, the nonsuit was not legal. The facts will be found in the opinion.

C. Record, for the plaintiffs.

N. Morrill, for the defendant.

When a sale of personal property has been effected by the fraudulent representations of one party, it is not *ipso facto* void, but is voidable at the option of the other party. The seller may affirm or disaffirm the contract; the election is with him. *Titcomb* v. *Wood*, 38 Maine, 361; Chitty on Contracts, (10th Am. Ed.,) 430; Hilliard on Torts, c. 1, § 16; *Mason* v. *Bovet*, 1 Denio, 69.

A party who would rescind a sale on the ground of fraud on the part of the purchaser, must act promptly, and claim

the property sold. He must rescind *in toto*, and thus place the other party in the position he was before the sale. 1 Mass. Dig., tit. Contract VI, Recision, § 401; 2 Abbott's New York Dig., page 108, tit. Contract, Recision, § 977; *Wheaton* v. *Baker*, 14 Barb., 594; *Coolidge* v. *Bridgham*, 1 Met., 541; *Cutler* v. *Gilbreth*, 53 Maine, 176.

The evidence offered shows no recision, or notice of recision or claim for the goods.

Replevin for goods sold by reason of fraudulent representations of the purchaser cannot be maintained by the seller until the contract is rescinded. *Thayer* v. *Turner*, 8 Met., 550; *Coolidge* v. *Bridgham*, 1 Met., 547; *Young* v. *Norton*, 3 Greenl., (2d Ed.,) 30, and cases cited in note.

APPLETON, C. J.—This is an action of replevin. The plaintiffs offered to prove that one Alonzo P. Moore, on the eleventh day of April, and on the first day of May, A. D. 1868, purchased a quantity of dry goods of the plaintiffs in Boston; that, at the time of these purchases, Moore falsely and deceitfully represented the amount of his then present indebtedness and the amount of property he was worth, and his ability to pay for the goods thus purchased; that they were induced to sell said goods to him on credit, by means of said false and fraudulent representations; and that the plaintiffs, claiming they had a right, by reason of said fraud and deceit, to reclaim said goods, on the nineteenth day of May, 1868, replevied them from the defendant, who is sheriff of the county of Androscoggin, and who had attached and taken possession of them on writs of divers other creditors of Moore. This evidence the presiding Justice excluded.

The defendant is not a *bona fide* purchaser nor is he entitled to the rights of one. He represents only the rights of Moore. The goods were sold on credit. It does not appear that any note was given therefor. If no note was given, there was nothing to return to effect a recision. Obtaining goods by fraudulent pretenses is a tortious taking, and no demand is necessary to enable the person defrauded

to maintain replevin for the goods. *Ayers* v. *Hewett*, 19 Maine, 281; *Thurston* v. *Blanchard*, 22 Pick., 18. One who, by the form of a sale, fraudulently obtains possession of chattels, with the intent never to pay for them, has no property which his attaching creditor can hold against the vendors. *Buffington* v. *Gerrish*, 15 Mass., 156; *Wiggin* v. *Day*, 9 Gray, 97.

Even if a note had been given, it would have been sufficient if the plaintiffs tendered it at the trial. *Ayers* v. *Hewett*, *supra*. *Exceptions sustained.*

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

JOSEPH J. BOWMAN *versus* LEANDER D. HARDING.

The assignment of a bankrupt's estate, under § 14 of the U. S. Bankrupt Act of 1867, does not dissolve an attachment of his estate made more than four months prior to the commencement of his proceedings in bankruptcy.

When the officer's return shows that an attachment was made more than four months prior to the defendant's commencement of proceedings in bankruptcy, the plaintiff is entitled to a judgment to be satisfied out of the specific property returned upon the writ.

The record is conclusive, and it is not competent for him to show *ab extra* that the attachment has been dissolved.

ON REPORT.

ASSUMPSIT by an indorsee against the maker of a negotiable promissory note.

The writ is dated Aug. 27, 1867. It appears by the officer's return, dated Sept. 2, 1867, that he attached a horse, harness and three carriages, described and valued in the aggregate at the sum of $420, and that service was completed on the following day. The action was duly entered and continued from term to term until the March term, 1869, when the defendant pleaded his discharge in bank-

ruptcy, dated Feb. 24, 1869, wherein, — "It is ordered, that said Leander D. Harding be, and he hereby is, forever discharged of and from all debts and claims which by said Act are made proveable against his estate, and which existed on the twenty-sixth day of February, A. D. 1868, on which day the petition for adjudication was filed."

There was evidence tending to show that the officer did not take the property returned as attached out of the defendant's possession; that the defendant got a receiptor at the suggestion of the officer, and retained possession of the property; that the defendant had other horses which he selected as exempt from attachment; that the receiptor was accepted by the officer; and that the receiptor never attempted to control the property, and ever had possession of it. A copy of the receipt was put into the case.

If, upon so much of the testimony as was admissible, the plaintiff would be entitled to a special judgment for the property attached, the action was to stand for trial.

S. D. Lindsey, for the plaintiff.

J. H. Webster, for the defendant.

U. S. Bankrupt Act of 1867, § 14, saves the lien only by implication. The discharge releases the bankrupt from all "debts, claims, liabilities and demands which were, or might have been proved against his estate." No other limitation by positive provision or by implication in the Act. The discharge is a judgment of a Court having jurisdiction, and cannot be impeached collaterally. *Potter* v. *Webb*, 2 Maine, 257; *Pierce* v. *Irish*, 31 Maine, 254; *Clark* v. *Pishon*, 31 Maine, 503; *Thompson* v. *Tolmie*, 2 Peters, 157. No judgment can now be rendered against the defendant, the basis of which is a "claim or demand" from which he has been "released."

The object of the Act is to put all creditors upon the same level. Sections 14 and 35 should be made to harmonize, and they reconciled with the general scope of the Act. There are several classes of cases in which actions

may be prosecuted to final judgment, notwithstanding the discharge. If attachment be made more than four months prior to proceedings in bankruptcy, in one of the excepted cases, it might be saved by the implication in § 14. By limiting the implication to that class of cases not barred by the discharge, full effect would be given to § 14, and it would harmonize with § 34.

APPLETON, C. J.—By the bankrupt law of 1867, c. 176, § 14, it is provided that, as soon as an assignee is appointed and qualified, "the Judge, or, when there is no opposing interest, the register shall, by instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne process* as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

"Any such attachment" is one made within four months next preceding the commencement of proceedings in bankruptcy. It is dissolved by virtue of § 14, but no other and earlier attachment is thereby dissolved. Not being dissolved, it remains in full force. The attachments within four months being dissolved, the property attached vests in the assignee. When the attachments are made prior to that time, the debtor's title to the property attached passes to the assignee, subject to the creditor's lien acquired by virtue of such attachment.

In the present case the lien is not dissolved by the attachment. The plaintiff therefore claims that judgment be rendered against the property attached. *Kittridge* v. *Warren*, 14 N. H., 509; *Peck* v. *Jenness*, 7 How., 612.

But it is urged that there was no valid attachment, or if

there was one, it has been dissolved by the act of the officer, and the defendant claims to show those facts by proofs *ab extra*. But this cannot be done. The officer is bound by his return. That shows an attachment and consequently a lien upon the property attached. The plaintiff is entitled to the judgment against the property thus shown to be attached. If this property is destroyed or the attachment dissolved in any way without fault on the part of the officer, those questions are to be hereafter determined. In the present position of the case they are not before us for adjudication.

The return of the officer shows an attachment and consequently a lien upon the property attached. The plaintiff is entitled upon the record to a judgment against the specific property returned upon the writ. Whether there was an attachment or whether, being one, it has been dissolved, are questions which we are not now called upon to decide.

The action to stand for trial.

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

HENRY W. LANCEY *& al. versus* PHŒNIX FIRE INS. CO.

A fire policy was issued to L., the owner of the building insured. Subsequently L. sold one-half of the building to a partner, and formed the copartnership of L. & Co. At the expiration of the original policy, a renewal certificate was issued, reciting the receipt of the premium from "L. & Co.," the continuation of the policy for three years, and that the "renewal is made upon condition, that the original policy continues in force, and that there has been no change in the risk since first insured, not noticed on the policy and books of this company, otherwise this renewal is not binding." In an action to recover a loss under the renewal: — *Held*, that the insurers intended to continue the insurance on the property and on the terms and conditions expressed in the policy, but to the parties who paid the premium.

ON REPORT.

Lancey *v.* Phœnix Fire Ins. Co.

ASSUMPSIT, on a policy of insurance against fire.

It appeared on the part of the plaintiffs that, on May 5, 1862, one Procter, being holder of a lease for a term of years, of a certain lot on the corner of Middle and Lime streets, in Portland, leased the same to Lancey, one of the plaintiffs, at a certain rate, on condition that Lancey should erect a brick store thereon of a specified description; that Lancey erected the building in accordance with his covenant, and caused the same to be insured for three years from August 16, 1862, by the defendants, at the office of J. E. Dow & Sons, their agents in Portland; that Dow had full knowledge of the leasehold interest of the insured at the time of issuing the policy; that, in Feb., 1863, Ferguson Haines, the other plaintiff, purchased one-half of the stock in the store and also one-half of the building, and they then formed the co-partnership of H. Warren Lancey & Company; that Dow was notified of the change; that the renewal, of which the following is a copy, was first made to Lancey alone, and, before delivery, was changed to its present form.

"Received of H. Warren Lancey & Co., thirty dollars, being the premium on three thousand dollars, insured under policy No. 262, which is hereby continued in force for three years, to wit, from the sixteenth day of August, 1865, until the 16th day of August, 1868, at noon, but the same shall not be binding on the company until this scrip shall be countersigned by the agent of the company at Portland, Maine.

"Said renewal being made upon condition, that the original policy continues in force, and that there has been no change in the risk since first insured, not noticed on the policy and books of this company, or fully expressed in said application, otherwise this renewal is not binding.

"Philander Shaw, *Secretary.*

"Countersigned at Portland, the 16th day of August, 1865. John E. Dow & Son, *Agents.*"

That the building was destroyed by the great conflagration of July 4, 1866; that no objection was made to the

want of proof of loss; that there were no written articles of co-partnership between the members of the firm of H. Warren Lancey & Co., and no written conveyance of the store, except receipts given for money, showing what it was paid for; that the lease had sixteen years to run, and was worth from $8,000 to $10,000; that Haines paid the premium for the renewal from the funds of the firm.

Upon so much of the evidence as was legally admissible, the Court were to render judgment according to the legal rights of the parties.

Shepley & Strout, for the plaintiffs.

Howard & Cleaves, for the defendants, cited *Am. Ins. Co.* v. *Catlett*, 4 Wend., 82, and cases *infra; Finney* v. *Bedford Ins. Co.*, 8 Met., 348; 1 Phill. on Ins., 75; 2 Phill. on Ins, 583, 607; *Bell* v. *Ansley*, 16 East, 141. The renewal is not a new contract with the plaintiffs, but an agreement to continue in force the original contract, provided there had been no change. No parol evidence admissible. *Higginson* v. *Dall*, 13 Mass., 96; 1 Greenl. on Ev., § 275; 1 Phill. on Ins., 44, 74, (5th Ed.); *Finney* v. *Bedford, sup.*; 1 Phill. on Ins., 46; 1 Duer on Ins., 78; *Irving* v. *Excelsior Ins. Co.*, 1 Bosworth, 507; *Work* v. *Mer. M. F. Ins. Co.*, 11 Cush., 271; *Hutchinson* v. *Western Ins. Co.*, 21 Missouri, 97, 102; *Philbrook* v. *N. E. M. Ins. Co.*, 37 Maine 145.

DANFORTH, J.—On the 16th of August, 1862, a policy of insurance was issued by the defendants to Lancey, one of the plaintiffs. This expired on the sixteenth day of August, 1865, and on the same day a paper called a renewal certificate was issued by the same company for the purpose of continuing the policy for three years from that time. During this period the loss for which this action was commenced, took place. Will the contract sustain the action? This depends upon whether the plaintiffs are the parties insured. The original policy was issued to Lancey alone,

the action is in the name of Lancey & Company. The contract under which the plaintiffs claim and by virtue of which their action must be sustained, if at all, is found in the two papers referred to. The policy to Lancey had expired before the loss, and, of itself, was of no force. The renewal certificate is not complete in itself but refers to the policy and makes it a part of the contract. The two, then, are but parts of the same transaction and must be so construed as to make one contract and the one which was in force at the time of the fire. To whom does this insurance run? The consideration was paid by Lancey & Co. In the absence of any proof to the contrary, it is the legal presumption that the contract was made for the benefit of those who paid the consideration. Reading, then, the two instruments together, we can draw no other inference from the language used, than that the defendants intended to continue the insurance on the same property and on the same terms and conditions expressed in the policy, but to Lancey & Co. who paid the premium. In renewing the contract it was perfectly competent for the parties to make any changes they might see fit, and, if there is any inconsistency in the two papers, the latest must prevail. The former paper would be in force so far as it was adopted by the latter and no farther, and it is doing no violence to the language in the renewal continuing the policy, to understand it as referring to the contract of insurance, rather than the parties, while there would seem to be an inconsistency between the two papers if we refer it to the parties.

If there is any uncertainty as to the meaning of the language used, parol proof is admissible so far as is necessary to put the Court in the place of the parties. Parol evidence is also admissible to show for whose benefit the contract was made. 1 Greenl. Ev., §§ 282, 282 a.

The facts thus proved would seem to render it certain that the construction we have adopted is the correct one. With this view, the proof of loss, so far harmonizes that

we see no proof of fraud, or attempt at fraud, by false swearing or otherwise.

Judgment for plaintiffs for $3000, *and interest from October* 16, 1866.

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

FRANKLIN SMITH *versus* ANSON P. MORRILL *& al.*

During a lumbering operation upon his own land, the plaintiff's servants cut over the well known line between his land and that of the defendants. Thereafterwards, the plaintiff, having learned the facts, intermingled the timber cut from the different lands, put the same mark upon it, drove it, boomed it and rafted it for sale. Thereupon, the defendants, not being able to identify the timber cut from their land, but with a *bona fide* intention to take their own timber, actually took more. In trover, for the value of the excess; — *Held*, that the defendants would not be liable as wrongdoers, until the plaintiff had pointed out his property and demanded it of them.

ON REPORT.

TROVER, for a quantity of logs alleged to have been converted by the defendants in 1860. The writ is dated November 6, 1863.

There was evidence tending to show that, in the winter of 1858 — 9, the plaintiff lumbered on his township, called Holeb, adjoining which was the township called Forsyth, owned by the defendants; that the line between the townships was well marked and known to the plaintiff and his servants; that, during the operation, the plaintiff's servants, having cut all his timber accessible without removal of camps, breaking new roads, &c., intentionally and, without the knowledge or consent of the defendants, went upon the township of Forsyth, finished their operation thereon, hauled the logs to the same landing and marked them with the same mark; that subsequently, after the plaintiff had

learned all the facts of the trespass, together with the quantity of logs cut on Forsyth, from the return of his scaler, he caused the whole quantity to be put into the river, driven to Gardiner, caught, boomed, and rafted for sale, thus intermingling the logs in such a manner as to render it impracticable to separate those cut on Forsyth from those cut on Holeb; that the defendants, having no means of determining the quantity of logs cut on their land, seized a quantity which they deemed sufficient to cover their loss; that the plaintiff never, until the time of trial, informed the defendants of the quantity cut on Forsyth, although he had the means of doing so as early as April, 1859; that the defendants requested such information of the plaintiff, but did not receive it.

The Court were to render such judgment as the legal rights of the parties required, upon the legal evidence reported.

S. Heath, for the plaintiff.

A. Libbey, for the defendants.

APPLETON, C. J.—The plaintiff and defendants were owners of adjacent townships. The plaintiff trespassed upon the defendants' land, — cutting thereon a considerable quantity of logs, which were marked similarly to those cut on his own land, and were run with them to Gardiner.

The defendants having ascertained that the plaintiff had trespassed upon their land, seized a portion of the logs thus commingled, as cut on their premises, and more, as the plaintiff alleges, than were so cut. This action is brought to recover such excess.

As the plaintiff was a trespasser, the defendants had a legal right to seize the logs cut on their land wherever they could find them. Their title thereto was as perfect as if cut by themselves.

It was the fault of the plaintiff that they were so mingled by him or his agents with his logs so that they could not be

distinguished from them. The plaintiff must suffer from the consequences of this confusion.

By the common law, where an intermixture of goods is fraudulently made without the knowledge of the owner, and they cannot be separated and identified, the latter is entitled to the whole property without making satisfaction to the former for his loss. In *Bryant* v. *Ware*, 30 Maine, 295, where lumber was cut upon two tracts of adjoining owners, by a trespasser, and the whole was so intermixed by him, or persons claiming under him, that the part belonging to each owner could not be distinguished, and the owner of one tract seized and took possession of the whole, — it was held, that one claiming under the wrongdoer could not maintain an action of trespass for such taking.

But the defendants seized only a portion of the logs cut by the plaintiff. Waiving, therefore, their right to all, if they had such right in the present case, the question arises, whether they are liable as wrongdoers, if they seize more logs than, as it is ultimately shown, were cut on their land.

It has been repeatedly held that an officer has a right to attach the goods of another, negligently or fraudulently intermixed with those of the debtor, and hold them until they were identified by the owner and re-delivery demanded; that he could not be treated as a trespasser for doing what he had a right to do; and that, if after identification and demand for re-delivery, he refused to give up the goods, he would be liable for their value in trover, but that trespass could not be maintained for the original taking. *Bond* v. *Ward*, 7 Mass., 127; *Shumway* v. *Rutter*, 8 Pick., 443; *Willard v. Rice*, 11 Met., 493; *Lewis* v. *Whittemore*, 5 N. H., 366; *Taylor* v. *Jones*, 42 N. H., 36. So here the defendants had a right to seize their own logs. It was by the wrongdoing of the plaintiff that they were cut, marked and intermingled with his own. The plaintiff knew the number and kind of logs cut on the defendants' land. The defendants were ignorant of all this, and were never informed thereof by the plaintiff, as they testify, till the time of the tri-

al. They seized what they regarded as the number of logs cut on their land. If they seized logs not so cut, the plaintiff should have notified them of such fact and pointed out the specific logs he claimed, if it was in his power so to do. If they took more than they had a right to take, he should have advised them of the exact amount of his own trespass. He cannot claim that they are wrongdoers, when they rightfully seized their own logs, wrongfully commingled by him with those cut on his land. This they clearly had a right to do. *Bryant* v. *Ware*, 30 Maine, 295. The party wrongfully intermingling his goods with another's cannot reclaim them without first pointing them out. *Seavy* v. *Dearborn*, 19 N. H., 351; *Gilman* v. *Sanborn*, 36 N. H., 311. So, too, if the defendants, acting in good faith, took more logs than the plaintiff had cut on their land, having a right to take all logs cut by trespassers, they would not be liable as wrongdoers until the plaintiff had pointed out the property belonging to him, and demanded it of them, which the defendants say was never done. It must be remembered that, if the plaintiff suffers, it is in consequence of his own wrongful acts. The defendants were acting for the protection of their acknowledged rights. *Judgment for defendants.*

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

NATHANIEL BRYANT, JR., *& al.*, *versus* CHRISTOPHER ERSKINE *& als.*

In the trial of a real action wherein the plaintiffs claim title as assignees of the mortgager, and the defendants as assignees of the mortgagee of a mortgage conditioned for the payment of a specified sum or the support of the mortgagee during life, and to allow the latter to occupy a certain part of the house on the mortgaged premises: — *Held*,— That evidence on the part of the plaintiffs is admissible to prove,

1. Which, if either, of the alternative conditions the mortgager had elected to perform;

2. That he had fulfilled the one elected so long as he continued in possession: and,

3. That the assignment of the mortgager was made with the consent of the mortgagee, who was anxious for such assignee to fulfill the condition, which he offered to do.

On Exceptions.

Writ of Entry. The writ dated Sept. 1, 1863.

At the May term, 1865, the death of the original plaintiff was suggested, and the present plaintiffs, heirs of the original plaintiff, appeared and prosecuted the action.

The plaintiffs alleged exceptions to the exclusion of certain evidence offered by them. The facts sufficiently appear in the opinion.

J. S. Abbott and *Ruggles*, for the plaintiffs.

A. P. Gould, for the defendants.

Appleton, C. J.—On the 22d April, 1861, Ephraim Linscott conveyed the demanded premises to Charles H. Linscott by deed of warranty. On Aug. 14, 1862, Charles H. Linscott mortgaged the same premises, and, on Oct. 9, 1862, released his remaining interest therein to the demandant's ancestor.

This would transfer the entire title of Ephraim Linscott, were it not for the mortgage given by Charles H. Linscott to Ephraim Linscott, and Jane Linscott, on April 22, 1861, conditioned to pay "the sum of twenty-five hundred dollars, or well and truly support said Ephraim and Jane, or the surviver 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 the 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 taxes on the farm," &c., &c.

As between mortgager and mortgagee, the mortgager, by the very terms of the mortgage, is to have possession of the premises to enable him to comply with its terms, if he should elect to support the mortgagees. Before the breach of the condition, the mortgagees could not rightfully enter and keep

the mortgagers out of possession. *Bryant* v. *Erskine*, 55 Maine, 153. Neither was the mortgage assignable until after breach of condition. *Ib.* *Bethlehem* v. *Annis*, 40 N. H., 34.

In defence, the defendants introduced an assignment from Ephraim Linscott of the mortgage given by Charles H. Linscott to him and wife, dated Sept. 29, 1862, to one Harriet N. Harris, and another assignment of the same mortgage from said Linscott and wife to said Harris, dated Nov. 13, 1862. This mortgage was assigned to the tenants on April 13, 1863, and they justify their possession under it.

The demandant's title was perfect as against all, save the mortgagees. The validity of the assignments, under which the tenants claim title, depends upon the question whether there had been a breach of the condition or not, when the mortgagees undertook to assign the mortgage to Mrs. Harris. Without a breach there was no debt existing, if the mortgager had made his election. The tenants introduced evidence to prove there had been such a breach as would give the mortgagees a right to enter. This evidence was essential to the defence, for if there had been no such breach, neither Harriet N. Harris, nor her assignees, could have rightfully entered upon the mortgager in possession prior to any breach of condition on his part. Neither could they enter upon his assignee, if the assignee was in the faithful performance of the condition of the mortgage, the assignment having been made with the knowledge and approval of the mortgagees, and they having accepted the assignee of the mortgager, in lieu of the mortgager, to perform such condition. While, and as long as the conditions of the mortgage were fully complied with to the satisfaction of the mortgagees, they would have no ground of complaint, and the mortgager or his assignee, or grantee, with the consent of the mortgagees would be entitled to the possession. *Bryant* v. *Erskine*, *supra*.

The demandants offered to prove that the assignment of Charles H. Linscott's mortgage to Ephraim Linscott, and Jane Linscott to H. N. Harris, was obtained by fraud, in which the defendants conspired with said Harris to obtain

title and possession of the premises by false pretences and misrepresentation; and that Charles H. Linscott did support the mortgagees according to the condition of the mortgage until he left the premises in Nov., 1862, and that Nathaniel Bryant offered to support them from that time afterwards, and fulfil the condition of the mortgage according to its tenor, and to make up and pay any deficiency, which might by possibility exist, and that he notified said Harris to leave the premises and allow him to fulfil the condition of the mortgage, offering to pay all expenses incurred by her in any such support; and that the said Ephraim and Jane were desirous of having Mr. Bryant to take care of them, and not said Harris, and desired her to leave, but she insisted upon staying there against their will.

Also, that the mortgagees consented and approved of the deed of Charles H. Linscott to said Bryant.

This evidence was excluded. Most of it, as will be hereafter seen, was material in many aspects of the case, and should not have been rejected.

The condition of the mortgage was in the disjunctive, and the election was with the mortgager to determine which of two things to be done he would elect to do. The evidence rejected would show that he had made such election, and that it was to support the mortgagees.

The tenants introduced evidence tending to show a breach of the condition by the mortgager prior to the assignment under which they claim title. The evidence offered would negative such breach, and would show an entire performance of the condition until after the assignment.

The evidence that the assignment by Charles H. Linscott to the plaintiff's ancestor was made with the consent and approbation of the mortgagees, and that they were desirous that he should "take care of them," and that he was ready and offered to comply with all the conditions of the mortgage, should, it would seem, have been received. *Bryant* v. *Erskine.*

Whether the facts offered to be proved could have been established, is not the question. If proved, they tended to

negative the title of the tenants and to establish that of the demandants.

This action, it is to be observed, was commenced by Nathaniel Bryant, senior, and the rights of the parties depend upon the state of facts existing at the time of its institution. If the tenants were not entitled to possession, the demandants are. *Exceptions sustained.*

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

TIMOTHY B. GRANT *versus* BENJAMIN T. GRANT.

The defendant loaned a sum of money and received for security thereof a warranty deed of land from the borrower, who being called upon for repayment, negotiated a loan of the plaintiff, and agreed to give him the same security. All the parties met, and thereupon the plaintiff furnished the money with which to pay the defendant, and presented him with, and requested him to sign a deed of warranty from the defendant to the plaintiff, and thus save the expense of two deeds, assuring him that that was "the correct way to do business," and that the bond for re-conveyance, executed by the plaintiff to the borrower, "would clear the defendant from anything." In an action of covenant broken: — *Held*, that the defendant's deed was not obtained by frudulent representation.

ON MOTION, to set aside a verdict for the defendant, as being against law and the weight of evidence, filed by the plaintiff.

The facts sufficiently appear in the opinion.

N. H. Hubbard, for the plaintiff.

F. S. Nickerson, for the defendant, cited *Hazard* v. *Irwin*, 18 Pick., 109; 2 Kent's Com., 482; *Beach* v. *Sheldon*, 14 Barb., (N. Y.,) 66; *Somes* v. *Skinner*, 16 Mass., 358; Chitty on Con., 587.

APPLETON, C. J. — This is an action of covenant broken. It appeared in evidence that the defendant had loaned one Berry the sum of two hundred dollars, and had taken from

18 Me. 126
83 Me. 133

him a warranty deed of the farm on which he lived, as security for the money loaned. He afterwards applied to Berry for re-payment, who negotiated a loan of the plaintiff and agreed that the premises conveyed by him to the defendant should be deeded to the plaintiff as security for its re-payment.

It is manifest, from the testimony of both parties, that they supposed that Berry's title to the land he had conveyed was good, and that they both acted upon that supposition.

As the title to the land was in the defendant, the question arose whether he should convey the same to Berry, to be by him transferred to the plaintiff, or should deed directly to the plaintiff. The defendant testifies that, when the writings were "fixed up, T. B. Grant called me into the counting-room, and says to me, in room of using two deeds I have only written one. * * It will save the expense of doing the writings, and I wrote one right from you to me. Says I, is that the correct way, uncle Tom, to do business. Says he, that is correct. Here is a writing that runs between Joel F. Berry and me, that will clear you. * * My uncle told me I was clear from anything."

It was claimed that the signature of the defendant to the deed was fraudulently obtained from him by reason of the above remarks. The defendant would not originally have loaned the money unless he had regarded the security upon which it was made, as good. Nothing indicates that either party was aware of any defect in Berry's title, but the reverse. The suggestion that the defendant should deed directly to the plaintiff was a natural one. Indeed, it was what any one would have done under the circumstances, and it is not a fraudulent misrepresentation, which should avoid the deed. It was merely the defendant's opinion as to the best way of closing the transaction.

It is in proof that the plaintiff, at the time he received his deed of the defendant, gave Berry a bond to convey the premises deeded him upon re-payment of the amount loaned, which Berry accepted. The defendant ceased there-

by to be under any obligation to Berry. The statement, therefore, was entirely correct.

This is the case as shown by the defendant, and it is entirely devoid of fraud on the part of the plaintiff.

If the plaintiff's testimony is true, the deed was read to the defendant and compared by him with his deed from Berry. He signed it, in that case, with a full knowledge of its terms and he cannot avoid it because he did not know the difference between a deed of warrantry and of quitclaim.

A title by deed would be of little value if it could be avoided by evidence such as was offered in the case at bar.

Motion sustained. Verdict set aside.
New trial granted.

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

DAVID C. PERCIVAL *& al. versus* ROBERT H. HICHBORN.
SAME *versus* A. D. HARLOW *& al.*

A creditor who has assigned his account against his debtor to a third person, in consideration of a sum less than the whole amount due thereon, cannot maintain an action against such third person under R. S., c. 113, § 47, for assisting such debtor "in a fraudulent transfer and concealment of his property," unless he first rescind the assignment and tender back the whole consideration received.

If such assignment be deemed a settlement of the account made through such third person as agent of the debtor, it would be binding until such rescision and tender.

Neither can the creditor maintain assumpsit on the original account after such assignment and prior to such recission and tender.

ON REPORT.

The first action is case founded on R. S., c. 113, § 47. Writ dated June 18, 1868. One count charges the defendant with assisting A. D. Harlow and Charles Hichborn, under the name and firm of Harlow & Hichborn, in a concealment of their goods at Bangor, in the winter of 1867–8;

and the other, with taking from them, Jan. 20, 1868, a transfer of their goods for the same purpose.

There was evidence tending to show that, during the year 1867, the plaintiffs sold to Harlow & Hichborn merchandize amounting, in the aggregate, to $1962,53; that Harlow & Hichborn failed in Dec. 1867, when the plaintiffs, with several other creditors, attached H. & H's goods; that, on Jan. 20, 1868, the defendant negotiated an assignment of several creditors' demands against Harlow & Hichborn to himself, at thirty-five per cent., among which was the plaintiffs' account; that, in effecting the assignment, the defendant made certain statements alleged to be false and fraudulent; that, in consideration of the assignment, the attachments were dissolved and suits discontinued. There was also evidence tending to show that the defendant knew of the failing circumstances of Harlow & Hichborn; that the defendant took from their store, after the attachments and before the assignment, quite large amounts of merchandise and concealed them; and that a settlement at thirty-five per cent. would leave a balance of assets of $13,000.

The remaining facts sufficiently appear in the opinion.

J. A. Peters and *F. A. Wilson*, for the plaintiffs.

The concealment and subsequent sale are causes of action. The statute as it is gives a remedy "in any case," where plaintiff is a creditor. Plaintiffs' attachment was dissolved by fraudulent representation. The actual concealment of the goods prevented them from being "seized on execution."

The settlement of the account against Harlow & Hichborn, whether it was a sale to the defendant or a discharge of H. & H., was avoided by the fraud of the defendant. It was rescinded immediately upon a knowledge of the facts by the creditors, by bringing suits upon the original demands against H. & H.

Consideration need not be tendered back prior to bringing this suit. It is not in the mouth of the defendant to set up that money has not been returned if he has perpetrated a fraud. If the transaction was merely a discharge to the

original debtors, no tender back is necessary. If necessary to the debtors, not to this defendant. No relation between these parties requiring such technicality. *Stevens* v. *Austin*, 1 Met., 557; *Manning* v. *Albee*, 11 Allen, 520; *same* v. *same*, 14 Allen, 7.

The negotiations between the creditors and the defendant constituted a mere settlement. He raised the money and thereby became the creditor of H. & H., who subsequently paid him the amount.

The taking of thirty-five cents for one hundred cents constitutes no consideration for the agreement to release the remaining sixty-five cents. Hence the sixty-five cents are recoverable. *Bailey* v. *Day*, 26 Maine, 88; *Lee* v. *Oppenheimer*, 32 Maine, 253.

R. S., c. 82, § 44, cannot be invoked, because,

1. The claim has not been "settled." The attempted settlement was vitiated by fraud, and hence relation of the parties same as if there were no such statute.

2. The statute does not apply, because settlement was made in Boston. The *lex loci* must govern. The original statute, Pub. Laws of 1851, c. 213, provided that no action shall be maintained "in any Courts of this State," &c. Hence action might be maintained in U. S. Court in the District of Maine, or in Massachusetts Courts.

3. Statute does not inhibit this kind of action.

4. Statute does not affect the contract, but only a particular remedy, not this remedy.

If a tender was necessary, it was waived.

The reason of the rule requiring a tender is "so as not to increase the injury necessarily caused to the other by the rescission," and because the thing a party may have had fraudulently imposed on him may be of more value to the other party. It is also said that to rescind, one must put the other party in as good a position as he can without injury to himself. Neither of these reasons applies to case at bar; for if plaintiffs do not prevail, defendant is uninjured; if they do, the defendant or H. & H. is not injured

merely because plaintiffs have received a portion of their account without a suit.

The reason of the rule applies to other property than money.

Counsel also cited *Martin* v. *Roberts*, 5 Cush., 126; *Pierce* v. *Wood*, 3 Foster, 519.

A. W. Paine, for the defendant.

DICKERSON, J. — The first action is CASE, on § 47, c. 113, R. S. One count charges the defendant with assisting Charles Hichborn and A. D. Harlow, co-partners under the name and firm of Harlow & Hichborn, in a concealment of goods at Bangor, in the winter of 1867 – 8, to prevent their attachment or seizure by Harlow & Hichborn's creditors, and the other count charges the defendant with taking from them afterwards a transfer of their goods for the same purpose.

The case comes before us on a report of the evidence submitted by plaintiffs, under an agreement by the parties, that if we should be of opinion that the action can be maintained, or if a nonsuit could not properly be ordered, the case is to stand for trial; otherwise, a nonsuit is to be ordered.

It appears that, at the time the fraud charged is alleged to have been committed, Harlow & Hichborn were indebted to the plaintiffs in the sum of $1962,32, that they were otherwise involved beyond their ability to pay, and that their property was under sundry attachments, made at the suit of the plaintiffs and other creditors.

It also appears that, in consequence of representations made to the plaintiffs and other creditors, in Boston, by the defendant, in regard to the pecuniary standing of Harlow & Hichborn, they were induced to enter into an assignment of their claims against them to the defendant, Jan. 9, 1868, thereby agreeing, in consideration of $6,400 paid them by the defendant, to deliver to him a transfer of such claims upon conditions which were subsequently complied with.

It further appears that the plaintiffs gave the defendant a bill of sale of their account against Harlow & Hichborn, Jan. 13, 1868, and that the defendant took a bill of sale of

the property of Harlow & Hichborn, Jan. 20, 1868, as per account stated in said bill of sale.

In order to entitle the plaintiffs to maintain this action, it must appear that they were creditors of Harlow & Hichborn, not only at the time of the alleged fraudulent transfer or concealment, but also, that they continued to be their creditors till the commencement of this suit. *Thatcher* v. *Jones*, 31 Maine, 533.

While the defendant's counsel concedes that the plaintiffs continued to be the creditors of Harlow & Hichborn till they transferred their claim against them to the defendant, Jan. 13, 1868, he contends that, by that transfer, the plaintiffs divested themselves of their character as creditors of Harlow & Hichborn, and thus became disqualified for maintaining this suit as such, whatever be the evidence of fraud, as they have not reimbursed the defendant with the consideration received for the transfer, as the law requires them to do, if they would rescind the sale for fraud. To this the plaintiffs' counsel replies, that, under the circumstances of this case, such reimbursement is unnecessary as a preliminary requisite for maintaining this action.

A sale made under false representations is not void, but voidable at the option of the party defrauded. In such case the vendor may insist that nothing passed to the vendee, and may maintain trover or replevin for his property; he may keep the property and affirm the sale, or he may rescind the sale. But, if he elects to rescind the sale, he must restore to the other party the whole of the consideration, whether money, goods, or securities, which may be of any value to either party. The law will not allow him the double advantage of retaining the consideration and bringing his action for the property, thus affirming the sale as to the defendant, and rescinding it as to himself, for the time being. The reason for this rule is, that if the defrauded party would reëstablish the relations of the parties to the property before the sale, he ought to do all in his power to restore that relation by first returning the consideration to the other party,

without putting him to an action therefor, before he undertakes to retain the property sold, or recover it by action at law. If the plaintiff is required to do this, it may happen that the defendant will voluntarily return the property without a suit. The party defrauded loses nothing by this rule, for if he does not choose to rescind the contract, he may recover under the defendant's warranty, if one was made, or, in case, for damages sustained by reason of the defendant's fraudulent representations. *Thayer* v. *Turner*, 8 Met., 552; *Garland* v. *Spencer*, 46 Maine, 528.

We do not understand the counsel for the plaintiffs to controvert the doctrine laid down in *Thatcher* v. *Jones*, that it is indispensable, to the plaintiffs' right to maintain their action, that it appear that they were creditors of Harlow & Hichborn at the time the alleged fraudulent representations were made, and continued such till the commencement of this suit, but they rest the plaintiffs' right of action upon the ground that the rule of law in regard to the rescission of contracts, as above stated, is not applicable in this case. We will consider briefly the several arguments with which it is attempted to establish this proposition.

1. It is contended that, if the transaction between the plaintiffs and defendant was a discharge of the original debtors, the plaintiffs were induced to discharge their claim by the fraud of the defendant, who cannot set up a discharge thus obtained in this suit. The case of *Stevens* v. *Austin*, 1 Met., 557, is mainly relied upon to establish this position.

This argument proceeds upon the theory that the defendant acted in the affair of his own motion and on his own responsibility alone; that the representations he made originated with him, and the money he paid was his own. If a fraud was perpetrated, he committed it; if a sale was effected, he was the purchaser. We are unable to see upon what principle he is precluded from invoking the rule of law in question; nor do we regard his case as distinguishable from the cases in the books, where the obligation to tender back the consideration is held necessary. In *Stevens* v. *Austin*, the action was brought against the party who bought

the property of the fraudulent vendor with a knowledge of the fraud. The plaintiff had received nothing from the defendant, and there was therefore nothing for him to return; and this was the ground upon which the Court held an offer to return the consideration unnecessary.

As to the question whether the plaintiff had made restoration to the fraudulent vendee, the Court say it was *res inter alios* with which the defendant had no concern, and which he could not inquire into. The other cases cited also fail to establish this theory of the plaintiffs' right of action.

2. Again, it is urged that the arrangement being a mere taking of 35 cents for 100 cents, there was no consideration for the agreement to release the 65 cents, and therefore there was no legal contract to be rescinded. It is undoubtedly true that, at common law, a parol agreement by a creditor *with his debtor* to discharge the debt, on receiving a sum less than the amount due, is void as to the balance of the debt, for want of consideration to support a discharge of that part of it. But it by no means follows that an agreement made between a creditor and a third party to transfer to the latter his claim against a debtor for a less sum than the amount due, is inoperative as to the balance. On the contrary, such a contract would be binding upon the parties for the whole claim. By the terms of the bill of sale of the claim of the plaintiffs against Harlow & Hichborn, the transfer was made to the defendant. The transaction does not appear to have been a compromise between debtor and creditor, and is not, therefore, open to the objection made by the plaintiffs. But if it was a compromise of the plaintiffs' claim, made between them and H. & H., as their debtors, it would be valid under Sec. 44, c. 82, R. S. After such a settlement, before the creditor can maintain a suit on the original cause of action, on the ground of fraud on the part of the debtor, he must rescind the contract of settlement, and tender to the debtor whatever sum he had paid in effecting it. *Bisbee* v. *Ham*, 47 Maine, 543.

The language of the statute, § 44, c. 82, is very broad and comprehensive. It makes no distinction between com-

promises made in another State, which are sought to be enforced or repudiated here, and compromises made in this State; it sustains both alike when made in good faith, and inhibits all attempts to set them aside.

3. It is further argued that the arrangement between the plaintiffs and the defendant was really a settlement of their claim against H. & H., effected through the defendant, acting as their agent, and that on that account it is no obstacle in the way of maintaining this action. Without considering the evidence with reference to the question of agency, it is a sufficient answer to this suggestion that even such a settlement would be binding upon the parties until rescinded, and a tender back of the consideration had been made by the plaintiffs. While such settlement remains unrescinded, the plaintiffs cannot be regarded as the creditors of H. & H. It being incumbent upon them to show that they were the creditors of H. & H. at the commencement of this suit, the defendant has a right to insist upon their producing the evidence of that relation. This is a personal right given to the defendant under the statute, and it is not competent for H. & H. or either of them to waive this right for him in this action.

The plaintiffs either sold their claim against H. & H. to the defendant, or compromised it with them through him as their agent. In either case the contract was not void but voidable, even if made in consequence of the fraud of the defendants. They did not elect to rescind the contract, and tender back the consideration before they commenced this action. That contract is binding upon the parties until it is thus rescinded. The plaintiffs, therefore, were not creditors of H. & H., when they brought their action against the defendant, and cannot maintain it. Nor can they for a like reason maintain their action against H. & H. on the original contract. According to the agreement of the parties a nonsuit must be entered in both cases.

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

APPENDIX.

RESOLUTIONS

OF THE BAR OF THE COUNTY OF SOMERSET,

ON THE DEATH OF THE

HON. JOHN S. TENNEY, LL.D.,

LATE CHIEF JUSTICE OF THIS COURT.

At September term of this Court, A. D. 1869, held at Norridgewock in the county of Somerset, DANFORTH, J., presiding, HON. S. D. LINDSEY, chairman of the committee selected for that purpose, presented the resolutions of the bar, prefaced with the following remarks: —

MAY IT PLEASE YOUR HONOR: — Since the last term of this Court in this county, death has removed from this bar its oldest and most distinguished member, the late CHIEF JUSTICE TENNEY. And it seems most suitable and appropriate that, before entering upon the real business of the session, this bar, in which our deceased brother ministered so long and established an illustrious reputation, should give expression to its deep sorrow for the loss it has sustained, and its appreciation of the character, services and virtues of its lamented member.

Entertaining this view, the bar have adopted a series of resolutions pertinent to the occasion, and have been pleased to assign to me the duty of presenting them to this Court and requesting that they be extended upon the records of the Court.

It would not become me, in this presence, to attempt any detailed history of the life, or extended analysis of the character of Judge TENNEY. All who knew him will concede that the resolutions I am about to read, contain but a

fair and impartial statement of the qualities of mind and heart which distinguished him.

I cannot recollect the time when I did not look upon him as an extraordinary man. He had attained his high reputation at the bar, and had been raised to the Bench so long ago that most of us have no personal knowledge of the great power he exhibited in the trial of causes. It was my good fortune to hear him in two or three of the most important causes in which he was engaged, just prior to his going upon the Bench. Though too young to fully appreciate, I was old enough to feel the convincing power of his arguments, and their impression remains vivid upon my mind today. I have heard advocates of wider reputation since, but none whose arguments impressed me with such a sense of power as his.

The junior members of this bar, those who came to it while Judge TENNEY was on the Bench, will cherish his memory with peculiar pleasure. His kindness, his indulgent forbearance towards youth and inexperience, his words of encouragement and advice can never be forgotten.

And, when he left the Bench and came so gracefully back to the bar, "full of years and full of honors," with unabated interest in the good name of the bar, with no reserve and no austerity, placing himself in sympathy with the youngest, giving to all the benefit of his large experience and discriminating judgment, we all felt that the man was greater than the lawyer, the advocate and judge.

The loss to this bar of such a member cannot well be measured. This audience room without his imposing presence can hardly seem what it was.

The loss to this community and his neighbors can only be appreciated by those who understood how he lived among them, and who were acquainted with his "daily walk and conversation."

Let us indulge the hope that the lesson of his life will keep us true to the high traditions and grave duties of our profession.

With the permission of your Honor, I now present the resolutions unanimously adopted by the bar, and move that they be spread upon the records.

Mr. Lindsey then presented the following resolutions: —

Resolved, — That the members of the Somerset Bar have learned with profound sorrow of the death of Hon. JOHN S. TENNEY, late Chief Justice of this Court.

Resolved, — That his eminent learning, his power of analysis, his sound and solid judgment, and his clear and accurate discrimination, were equalled only by the breadth and comprehensiveness of his intellect, and by the purity of his character as a magistrate and a citizen.

Resolved, — That, in his death, this community of which he has been a citizen for nearly fifty years, the Bench, of which he was an honored and most eminent member for more than twenty years, and the bar, at which he acquired that broad and brilliant reputation which finally raised him to the highest position in Maine, have alike sustained an irreparable loss.

Resolved, — That we tender our heartfelt sympathy to the members of his family in this great affliction; and that a copy of these resolutions and proceedings be transmitted to them by the secretary of the bar.

Thereupon Hons. D. D. Stewart and John S. Abbott seconded the resolutions in appropriate remarks, when J. H. Webster, Esq., addressed the Court as follows: —

MAY IT PLEASE YOUR HONOR: — Although the remarks of my brothers who have preceded me have been quite full, and have left little to be said, I cannot let this occasion go by without adding my tribute to the memory of our lamented brother, the late Chief Justice TENNEY.

He was one of the strong men of our State. I have been intimately acquainted with him during my whole professional life. He was the first professional acquaintance that I made after my admission to the bar. From that time so long as he remained at the bar, I knew him in Court,

was sometimes associated with him and sometimes opposed to him. I knew him well. I have practiced before him, while he was on the Bench.

. Those who have preceded me have spoken of his efforts at the bar, of his judicial character and his social qualities. All of these I have observed and fully appreciated.

One characteristic, which Judge TENNEY possessed in a preëminent degree, and one more important in our profession than almost any other, has not been alluded to, that is, the extreme carefulness with which he examined a client's case before advising him to run the hazard of a lawsuit.

The want of this care can seldom, if ever be compensated by any amount of ability displayed in the trial. The legal profession is one of great responsibility. To its hands are entrusted the fortunes, character, and sometimes the lives of clients. With such responsibilities, a lawyer has no right to advise the institution or defence of a civil suit until he has carefully examined the case and satisfied himself that, in view of human weakness and imperfections, there are not only reasonable grounds to expect success, but more especially, that he has justice on his side. If he do less than this, he violates the oath he took when admitted to the bar, his engagement with his client, and his duty to himself, and his country. How does he know that he does no falsehood nor consents to the doing of any, that he does not promote or sue any false, groundless, or unlawful suit, without examining his client's case with extreme care, before advising a resort to the law?

Clients have a right to expect a thorough examination of their case, a deliberately formed and honestly expressed opinion of their rights and liabilities in the case presented. Every client, who is worthy of upright and honorable counsel, does expect it, and will be content with nothing less. When applying to counsel for advice, clients understand such to be the contract they make with him. Nothing less can satisfy a proper self-respect on the part of the counselors themselves. Nothing less is consistent with upright-

ness and integrity. Without these no man is entitled to the esteem of his fellow citizens, or can even respect himself.

The advocate owes a duty not only to his client and himself, but a higher and more important one to his country. It bestows on him important privileges and requires of him in return important services and imposes important duties. It claims of him to discourage groundless and unlawful litigation and to present his client's case truthfully and fairly. The best lawyers and the brightest ornaments of the profession have ever been extremely careful to avoid engaging for a client, who had a wicked cause, however flattering may have been the prospect of success or however high the prize to be gained. The attorney moulds and in a great degree gives character to its jurisprudence. And, although he may never fill any judicial station, he belongs to a profession from which Judges are always taken, and his character and influence must inevitably affect more or less the character and habit of thought of those who are to occupy the Bench. He moulds, too, very much the character of the community in which he lives. It will become more or less litigious as he encourages or discourages unnecessary litigation. Its character for integrity and honest dealing will be sensibly modified by the character of the advice he gives. Standing at the fountain head of justice, it is required of him to see that the spring be not corrupted, and that it flows forth in streams clear and pure. In an unjust civil suit, he should never engage, nor resort to unjust means to succeed in such as he does undertake. Defences in criminal cases differ somewhat from civil suits. They require the same rigid examination and care in advising, the same uprightness and integrity in the trial. But the vilest criminal, although by his fault and wrong, comes into court against his consent. His liberty, perhaps his life is at stake. The laws of his country throw around him certain safeguards and protections. To the entire benefit of those he is as fully entitled as his more innocent fellow citizens. His guilt differs from the best of the community only in degree. Were they all known to their fellow men

as well as they are to the Almighty, who could look his neighbor in the face!

These safeguards are provided on account of the weakness and imperfections of human nature and the extreme uncertainty of the results of the most careful of human investigations. To the benefit of these and the explanation of the facts to the jury most favorable to him, the accused is entitled. When his counsel has fairly procured for him the full benefit of these, his duty ends. His duty to his country allows him to go no further. If these entitle his client to an acquittal, he should be acquitted; if not, he should suffer the punishment he has merited.

Judge TENNEY, while at the bar, possessed this characteristic in a preëminent degree. No man ever investigated a client's cause with more care and patience. No man was ever more cautious in advising to commence or defend a suit; and, unless called suddenly into a case to assist some younger counsel, he never engaged in either, until, by the most rigid examination, he was satisfied his client had reasonable grounds to hope for success.

When once engaged, he guarded and promoted his client's interest with unwavering fidelity and indomitable perseverance.

In preparing his cases, which is the most important part of a trial of a cause, he was indefatigable and thorough. Every source of information he caused to be explored by himself or client, and investigated thoroughly every point; and so he came to trial fully prepared for every contingency.

The ability with which he tried causes has already been largely spoken of. I, too, have seen much of it; have often observed the wonderful tact with which he would foil the most artfully laid schemes of an adversary, and the admirable manner in which he would develop his case to the jury in examining his witnesses, and the ability with which, in his arguments, he would gather his facts together and seem to roll them into a ball and hurl them at his adversary with resistless and crushing force. I, too, can bear

witness to the dignity and ability with which he presided in Court.

But he is gone. His place among us is now vacant. We shall see his face no more. We feel his absence and mourn his loss. But there is another place where his absence is more keenly felt and his loss leaves a more aching void than with us. That is the bosom of his family, to whom he was endeared by his eminent social qualities and domestic virtues; by the parental care and solicitude with which he watched over and promoted their interest; by the affection felt for them, and by his efforts for their happiness. To that family, we tender our most heartfelt sympathy for their bereavement and our best wishes for their future welfare.

Judge DANFORTH responded as follows:—

I fully concur in the resolutions which have been read as also in the remarks which have been made, to which I have listened with much interest. That a man of extraordinary powers of mind and of the highest moral character has passed from us none will deny. In such a case it is well that those who are left, especially those of the same profession and who have been so long associated with him, should review his life and dwell somewhat upon his character, that the lessons to be derived therefrom, and the rich, intellectual and moral legacy left by him should be duly treasured up and have their legitimate effects upon our lives.

The subject of this notice was born January 21st, 1793, in the old town of Rowley, now Byefield, in the Commonwealth of Massachusetts. His earliest days were spent upon a farm, and in the district school where he laid the foundation of that vigorous physical and mental health which lasted him through life. After a thorough preparation, in 1812, he was admitted to Bowdoin college, where he took a high stand as a scholar, but was more especially distinguished in the Greek classics. In this department he was equalled by few, excelled by none. He graduated in 1816, among the first in his class, and spent the most of the subsequent year in teaching the academy at Warren, in this

State. He then went to Hallowell, where he entered the office of the late Mr. Bond, under whose tuition he was prepared to enter upon the practice of his profession. When a student, as in later life, he was distinguished not so much for the number of the books which he read as for the thorough manner in which he read them; though he went over but little ground, he completely and entirely mastered all he attempted. To the superficial observer he appeared somewhat indolent and idle. While, to one who more carefully watched his course, it was known that, whether he had his book in hand or otherwise, his mind was constantly employed in thinking over and thoroughly digesting those fundamental principles upon which the law rests. He thus became a perfect master of the groundwork of his profession and laid the sure foundation of his future successes. In this respect his example is well worthy of the imitation of all who hope to succeed in this most arduous profession. This practice gave to him, as it will to all who fully adopt it, a discipline of mind which gave him the complete control and use of all his intellectual powers, and enabled him to concentrate them upon a given subject, until, however abstruse it might be, the darkness surrounding it would give place to the light of the noontide sun. With this thorough preparation, he commenced his professional life in this town, in the year 1820. At that time, the practice of the law was somewhat different from what it has become in more recent times. For certain reasons, the litigated cases were in the hands of but few persons, and those few the most eminent of the profession. The ablest men in the State were in the habit of travelling the circuit of all the counties, and monopolized all the more important business of the courts. Special pleading was then in vogue, and the learning, *acumen* and accuracy, required by this system became necessary to the successful practitioner. The labor imposed by this necessity, and the mental discipline which was the result of it, added very largely to the native ability of the advocate of that day. This county was no exception to the general rule, and when Judge TENNEY came to the bar

he found the contested cases in the hands of a comparatively few persons indeed, but those few were giants. They were men of strength, learning and experience. They had already acquired the confidence of the community, and had such a complete control of the business as left but little opportunity for a beginner. It was with such men that Judge TENNEY was obliged to contend in his early struggles. In addition to this was the obstacle imposed by his own diffidence, the great distrust of his own powers, which constantly weighed him down. Few men possessed this characteristic in a greater degree than he. Notwithstanding this, however, he had a consciousness of the power within him, and a determination to bring it out. Time was necessary to accomplish this. He very soon entered upon a somewhat profitable office business, and, in a comparatively short time, acquired the reputation of being a sound and safe counsellor. His reputation as an advocate was of a much later origin. He must have been in practice some ten or twelve years before making any attempt in this line which attracted attention, and even then, as tradition runs, he was forced into it by the stratagem of a friend who had known him long and known him well, and was unwilling that so much legal ability and so much sound logic should be permitted to waste away in the dull routine of the mere drudgery of a lawyer's office. Whether this is literally true, or otherwise, I cannot assert, but it is undoubtedly true that it was in some measure owing to the urgent solicitations of his friend, Mr. Boutelle, of Waterville, that he was finally induced to overcome his fears and enter upon the life of an advocate. His first case of any importance was one which, at the time, attracted considerable attention, and was tried in this county in or about the year 1832. The Hon. Peleg Sprague, then a senator in congress from this State, and one of the most eloquent men in the nation, as well as a sound lawyer, was opposed to him. The case, as might well be supposed, was closely contested, but Judge TENNEY was successful. Such was the ability he manifested in this trial, and such the im-

pression made upon the public, that he at once took a high stand as an advocate as well as a sound lawyer. From that time onward until he left the bar no cases of importance, and but few of any kind, were tried in this county without his assistance upon one side or the other. During this time his attention was given almost exclusively to his profession. It is true that he was not forgetful of the political issues of the day, and to them he gave sufficient attention to enable him to form an intelligent opinion upon the merits of the various questions presented. Such opinions he did form, and in them was both open and decided. But with him politics was always subordinate to the law. The practice of the law was his chosen profession; to that his tastes led him, and in that he found his greatest pleasure. As this was his first and best love, so he ever guarded its practice with a jealous eye, allowing nothing, so far as he was able to prevent, to enter there which could in any way mar or stain its purity. His standard of professional honor and integrity was so high that it admitted of no dereliction whatever from perfect rectitude. The obligations of his professional oath were constantly present with him; they were in him a living, controling source of action. His clients were sure, not only of his entire fidelity, but that his best ability would be exerted in their behalf. But his zeal for them, great as it was, and though it was never permitted to suffer any diminution, did not for a moment lead him to forget the respect due to himself, or the fidelity due to the Court.

In his practice at the bar, he was not so much distinguished for any one particular trait as for all those qualities which go to make up the sound, strong lawyer, and the able advocate. The same habits of study which characterized him as a student, he carried with him into his professional life. In the preparation of his cases, though he was not neglectful of the books, his efforts were mainly devoted to the facts and legal principles involved in the case before him, and upon these he would dwell until they were thoroughly systematized and digested in his mind, and he

was complete master of them. In this way were all his cases prepared, and without this preparation he probably never entered upon a trial. The apologies for a want of preparation so often addressed to the Court or jury by smaller lawyers, were never heard from him. Thus prepared, he was enabled to anticipate the grounds of his antagonist. Knowing perfectly the law applicable to his case, as well as the facts upon which it rested, he was able to draw those facts in the order in which he wanted them, both from his own witnesses and those of the other side, and so to draw them out as to leave none behind which might be valuable to his cause. In this respect he manifested great skill, a skill that is equalled by few. As a speaker, he was not distinguished for the graces of oratory, either in manner or matter. Still he was ready and fluent with a good command of language. His arguments were specimens of close, compact logic, as well as clear and forcible statements of his cause, and he never failed to secure the attention of the Court and jury. He was always courteous to those with whom he was brought in contact, and never sought to prejudice his opponent's cause by attacks upon the personal character of the counsel engaged. His obligations to his client were too sacred to permit him to lose sight of or endanger his cause by stooping to personal vituperation and abuse. Nor did he permit himself to become so excited as to lose his self-possession, or allow his clearer reason to be obscured by the ravings of passion. During a close observation of his practice for many years, I never, to my recollection, saw him in anger but once. That was caused by an opposing counsel repudiating an agreement he had fairly made. The scene which followed I shall never forget, and I presume the remembrance of it went with the victim to his grave, though I doubt not he would have been glad at any time of his life to have buried the memory of it forever, for he certainly learned to his cost, that however courteous Judge TENNEY might be, he had in store weapons of keen-

er edge and sharper point, to be used when occasion demanded.

With such powers and such diligence he pursued the duties of his profession. Although he might have taken high rank at any bar, his practice was confined principally to his own county. This, however, was from choice rather than necessity. Applications for his services in other counties were not uncommon, but were invariably declined unless made by some person who had special claims upon him. In such instances he would yield, though with great reluctance. He deemed it more profitable, as it was certainly more in accordance with his tastes, to confine himself to his business at home. Thus his ambition and his loves were bound up in his profession. Still, as already remarked, he was not forgetful of his country or its demands upon him. He felt and manifested great interest in its welfare, and had very decided opinions upon the political issues of the day. He acted with the whig party while that had an existence, and at one time was put in nomination for congress. But, as the party was in a minority in his district, he was defeated, though, as an indication of his popularity, he was largely ahead of his ticket.

In the fall of 1837, he was elected a member of the House of Representatives for this State, and took his seat in the January following. This was to him a new and untried field of labor. From the fact that his professional labors had been confined mainly to his own county, he was less known throughout the State, and his reputation less than from his real merits he would be entitled to. Hence, he went into the Legislature comparatively as a new man. Here, too, his natural diffidence attended him and prevented his taking any active part in the proceedings of the House until his power and sound judgment were discovered by his associates, and he was compelled, in spite of himself, to take the part due to his ability. It so happened that, on the election for Governor for this year, the votes of the two parties were so nearly equal as to leave it in doubt as

to which had prevailed. And when the official count was made, it was found that the result must depend upon whether the returns from certain towns, alleged by one party to be erroneous, were to be received or rejected. The validity and conclusiveness of these returns became the engrossing topic of conversation, and the all important question to be settled by the Legislature. So much importance was attached to this question that leading members of each political party held caucuses and private meetings to consult and decide upon the proper grounds to be taken, and the course to be pursued. At one of these private meetings, Judge TENNEY was present, and after others, of greater political reputation than he, had expressed their views, or rather their doubts, for they all left the question involved in the same uncertainty in which they found it, he was called upon for his judgment. That he had a clear perception of the question, the result left no doubt. He complied with the request, and the doubts of those present were removed. They were astonished at the appearance of so much light where it had not been looked for, and wondered why they had not seen it before. Such was the impression made upon their minds, and such their conviction from what they had just heard, of Judge TENNEY'S ability to make the same impression upon the minds of others, that they at once insisted upon his expressing the same views in the House the next day. This he at first refused, but on urgent solicitation he finally promised to do so. The next day came and he shrunk from the task. But he had made a promise, and that to him had a meaning. But for this, as he himself told me, he would have remained in his seat content to have given a simple vote. He did, however give his views in a speech replete with his usual sound logic and clear and forcible statements. The effect upon the House was the same as upon his audience the night before. The question was settled. The argument was not and could not be answered. The speech was printed, and the reputation which he had before enjoyed in his own county now extended throughout the State, and when a vacancy occurred upon

the bench pointed him out as the person fitted to fill it. The position thus won he maintained to the end of the session, when he again returned to the practice of the profession he so dearly loved. In October, 1841, he received his appointment as associate Justice of the Supreme Judicial Court. This appointment was entirely unsolicited on his part,—a voluntary offering to his fitness for the place. It was, nevertheless, received by him with pleasure and with gratitude. It did not require the abandonment of his chosen profession; all its duties were but a continuance of his favorite studies, and were in all respects congenial to his tastes and his habits of life. Hence, his official labors absorbed, in a great measure, all his time, his thoughts and the best powers of his mind. Into this position he carried the same sterling unflinching integrity; the same nice sense of honor that had characterized his professional life. Here, too, was exhibited that same self-possession, the same patience under trying and difficult duties, by which he had been hitherto distinguished. His courtesy toward the members of the bar never failed. In his courtesy, however, he never forgot his dignity, or rather that never forgot itself. His dignity needed no continual watching lest it might become soiled unawares. It was natural to the man,—a part of his very being; existing within him, the result of native force, and an innate sense of the right and proper, ever present, regulating and controling all his conduct without effort, and almost unconsciously to himself. This true dignity Judge TENNEY possessed, or rather it possessed him in an eminent degree as was manifest on all occasions.

He was sometimes accused of partiality. I do not understand, however, that any unfairness was ever imputed to him, but simply that his charges to the jury were such that it was not difficult to infer which party he thought to be in the right. He never denied this, but fully believed that the performance of his duty required it. It is not easy to imagine a case where one of the parties is not in the wrong, and, where truth led the way, Judge TENNEY was never ashamed or unwilling to follow. With unusual quickness of

perception he did not easily mistake falsehood for truth, and in his analysis of the case he never hesitated to present it to the jury in its true light. It would not be strange if the party in the wrong might feel the force of such a presentation somewhat unpleasantly. This was the partiality of which he was guilty, a partiality for the truth and the right, a partiality arising from his keen sense of justice, and his strong desire and determination that it should be done. If this was a fault, it was one he had no wish to conceal, nor would he care to have it forgotten.

In his opinions upon questions of law, he manifested the same conscientious carefulness, the same accurate thought and painstaking labor that was devoted to all his duties. The style of his composition was not always lucid; his sentences were occasionally involved and sometimes heavy, — but the thought was always well digested, the logic clear, strong and conclusive. His opinions bore the marks of much labor, and were never hastily thrown off, nor laid aside until the subject matter was exhausted.

Such was the entire satisfaction which he gave, that at the end of his term he was re-appointed without any opposition, and, at the end of his second term, with universal approbation, he was made Chief Justice. This was the height of his worldly ambition. This place was higher in his estimation than any other the State could bestow. His reverence for the law was unbounded; his respect for the position of him who administers the law, was equal in degree. He would have considered it as the deepest disgrace to have been unfaithful to such a trust, and. how well he discharged that trust the present generation and his works will alike bear testimony.

At the expiration of his term of office as Chief Justice, having served the State upon the Bench longer than any other person, with perhaps one exception, he retired in good health and in full vigor of mind, with the ermine unsullied, and with the universal respect of his associates, the members of the bar, and the people of the State.

In the fall of 1863, and again in 1864, he was elected to

a seat in the State Senate. This placed him in a position requiring habits of thought very different from those to which he had been accustomed, and much less congenial to his tastes. Still, he entered upon this task with conscientious zeal, and discharged his duty with credit to himself and usefulness to the State. At the close of his senatorship he retired entirely from public office. After this, for a time, at the urgent solicitation of friends, he gave legal counsel to such as asked it, and occasionally lent his assistance in cases litigated in the courts. This, however, through the growing infirmities of increasing years and declining health, soon became irksome to him, and he gave up all employment for others, spending his time in the care of his own affairs and in social intercourse. This course of life continued for two or three years, his health still slowly but gradually declining until, on the 23d day of August last, death somewhat suddenly closed the scene, and he passed forever from our sight.

In private life, Judge TENNEY was genial and affable to all. He recognized to its fullest extent the great truth that "all men are created equal." In this respect, he recognized no inferior and no superior. This truth was to him a living, practical reality, and was plainly manifest in all his intercourse with society. His conversational powers were very great. He equally interested all classes of men. He was not only a good talker himself, but could also draw from others whatever stores of knowledge they might possess, whether little or much. In this respect, he had in private life the same skill that was so manifest in the examination of witnesses upon the stand, and whatever information was thus obtained, was thoroughly digested, and laid up in his capacious memory, was at all times ready for use. His social powers were at once to him the great means of recreation, and the source of that information which gave him so eminent a reputation for sound judgment and great practical common sense. An event which occurred soon after his appointment to the Bench is a good illustration of this. From his place of residence his opportunities for becoming

acquainted with the manufacture of lumber were limited. While at Machias, holding a term of Court, he improved a leisure moment to visit the mills in that place. Here he observed the working of the machinery, and sitting upon a log entered into a familiar conversation with the men employed there in relation to their business. He soon acquired all the knowledge they had of their own peculiar art, and ever after this was able, in any cause involving the manufacture of lumber in any of its branches, to weigh and appreciate the testimony better than most men who had been in the business for years, nor did he by this act lose anything in position. He left upon the minds of those men a very decided impression, not only of his affability, but also of his ability and dignity, for subsequently they expressed very decided opinions upon these points. He was also a man of delicate sensibilities and tender feelings. I have not unfrequently observed tears in his eyes, caused by scenes which much weaker men would have witnessed unmoved.

Judge TENNEY was sometimes charged with indolence. A sufficient refutation of this charge would seem to be found in the pains-taking labor bestowed upon all his work; his thorough preparation of his cases while at the bar, his patient hearing and careful thought given to cases on trial, when he was the presiding Judge, his elaborate opinions upon questions of law, and thorough conscientious discharge of all his duties. Procrastination may have been one of his failings, but not indolence. He undoubtedly sometimes delayed longer than he should have done, but when the time came in which the work must be done, it was accomplished, and when done it was well done. He spared no labor necessary to make it perfect. Though he might reluctantly enter upon a new work, though all his leisure moments were not devoted to books, still, his mind was constantly busy either in seeking new information or in analyzing, digesting and classifying that which he already had. He was a man of thought, not a builder of air-castles,

but one whose thoughts were constantly employed upon practical matters, and the great problems of life.

But he is gone. This court room, the place hitherto so familiar with his majestic form, the scene of his earliest professional triumphs, and his latest professional labors, where his voice has so often been heard impressively pleading for the right, shall know him no more forever. We who have for so long a time had the benefit of his wisdom and counsel, — who have so often met and listened to him in this room, shall hereafter miss him in his accustomed place, and sad would it be were all his wisdom and learning to go too. But how little of such a man can die. We shall indeed see him no more. His active, working brain is still; his large heart has ceased to beat, but the thoughts which originated in that brain, the noble impulses of that heart, his words of wisdom and kindness are still with us and of us; they have become a part of the constitution of society and shall never perish. His works were not of the noisy kind, which like the meteor flash suddenly upon us, and then like the meteor disappear forever, but rather like the forces of nature which operate unseen, though not unfelt, causing alike the tender flower and stately oak, and the grain in the field to develop and perfect itself in beauty, strength and usefulness, moving the material world with an irresistible power, and diffusing a health-giving perpetual influence. So the labors of Judge TENNEY in the moral and legal principles developed by him, shall penetrate unseen, it may be, into the most secret recesses of the human mind, and with controlling effect, shall modify the business and character of society to the latest generations. Therefore, the best and most enduring monument which we can erect to his memory, — the memorial most grateful to him, will be to cherish those principles so that they shall have their legitimate effect upon our lives and character. To aid in this, I order that the resolutions offered be spread upon the records of this Court.

INDEX.

ABATEMENT.

1. The pendency of a statute submission of all demands between the parties, duly pleaded in a subsequent suit between them, founded on a cause of action included in the submission, will abate the suit.
Fahy v. *Brannagan*, 42.
2. Such a plea in abatement must not only set out the name of the referee, but allege his acceptance; and conclude with "praying judgment of the writ." *Ib.*
3. The presence of a presiding Judge is essential to constitute a "session of the Supreme Judicial Court," within the meaning of R. S., c. 82, § 1.
First National Bank of Brunswick v. *Lime Rock F. & M. Ins. Co.*, 424.
4. A plea in abatement is seasonable, when filed "within two days after" the Judge appeared and organized the Court, the first day on which he so appeared being reckoned as one. *Ib.*

ACCORD AND SATISFACTION.

1. There was a controversy between the parties as to the right to the possession of a certain lot of land, and the dwellinghouse thereon, which one of the defendants helped to erect, and in which he had some personal effects. The plaintiff declared that the defendants broke and entered his dwellinghouse, destroyed his stove, assaulted and expelled him from the premises. The defendants asserted a previous trespass by the plaintiff, as well as the first assault in this case, and a subsequent mutual compromise and adjustment of the whole matter. Upon this last issue there was conflicting testimony, but the jury found it for the defendants. On a motion to set aside the verdict as being against the weight of testimony: — *Held*, that the verdict in such a case will not be disturbed when it affirms nothing that is positively incredible *Doyle* v. *Donnelly*, 21.
2. The jury were instructed, that, if the matter was all settled up by the parties and they so understood it, each party presenting a claim against the other, and the asserted settlement was not a myth, but a reality, it constituted a defence. To this the plaintiff excepted, upon the ground that the instruction did not require the jury to find that the specific matters embraced in the declaration were settled: — *Held*, that where it appeared that the "matter was all settled up" in good faith, this Court will not inquire whether every matter of mutual aggravation in a personal conflict was canvassed in the adjustment. *Ib.*
3. Where a controversy has been adjusted by the parties to it, by an offset, mutually agreed upon, of the claims which each sets up against the other, and there is a reciprocal agreement not to sue on either side, courts should

See ACTION, 3.

ATTACHMENT.

See BANKRUPTCY. EQUITY, 8.

Bankrupt 223

BANKRUPTCY.

BANKS.

BASTARDY.

BILLS AND NOTES.

BOND.

BOUNTIES TO SOLDIERS.

BREACH OF PROMISE OF MARRIAGE.

CERTIORARI.

See POOR DEBTOR, 9.

CONTRACT.

DISSEIZIN.

See SEIZIN AND DISSEIZIN.

DONATIO CAUSA MORTIS.

DRAINS.

EQUITY.

ESTOPPEL.

See MORTGAGE, 1. REAL ACTION, 2. REPLEVIN, 2, 3.

EVIDENCE.

FLOWAGE.

FRAUD.

GUARDIAN AND WARD.

See INSANE PERSONS.

INDENTURE.

INDICTMENT.

INDORSEMENT OF WRITS.

INFANT.

LOGS AND LUMBER.

LORD'S DAY.

MILLS AND DAMS.

MORTGAGE OF CHATTELS.

NEW TRIAL.

OFFICER.

PAUPERS.

PAYMENT.

See MORTGAGE, 5.

PENAL ACTION.

PLANTATIONS.

PLEADING.

POOR DEBTORS.

PRACTICE.

PROBATE BOND.

RAILROAD.

REAL ACTION.

RECOGNIZANCE.

Reference 142

REPLEVIN.

REVIEW.

SAVINGS BANKS.

SEIZIN AND DISSEIZIN.

SET-OFF.

To an action in the name of an insolvent bank, prosecuted by direction of the receivers against an indorser of a promissory note, the defendants filed in set-off certain bills of the bank, some of which he held when the bank failed and passed into the hands of the receivers, and the others he purchased subsequently: — *Held*,

1. That the amount of such of the bills as he held when the bank became insolvent and passed into the hands of the receivers should be allowed in set-off; but

2. That upon those purchased by him subsequently, the defendant must seek his remedy under R. S., c. 47, §§ 70, 71, 72, 73 and 74.

American Bank v. *Wall*, 167.

SHIPPING.

The lessee of a private wharf, through whose procuration a vessel is hauled along side of his wharf, to be there loaded by him with his cargo, in accordance with a contract of affreightment, is liable to the owners for an injury occasioned to the vessel while loading, by grounding at low tide on rocks in the berth, which was represented by the occupant of the wharf to be safe, and not known by the owners of the vessel to be otherwise.

Bassett v. *Black*, 498.

See PAYMENT, 2.

SLANDER.

1. Any charge of dishonesty against an individual, spoken of him in connection with his business, whereby his character in such business may be injuriously affected, is actionable. *Orr* v. *Skofield*, 483.

2. The plaintiff alleged that the defendant did utter and publish, &c., the following false, scandalous and malicious words of and concerning the plaintiff in his capacity as a shipmaster, and of and concerning the business and calling of the plaintiff in his capacity of shipmaster, to wit, "he (meaning the plaintiff,) sold the consignment of the ship Rising Sun," (of which he was then master,) "and pocketed the money." — *Held*, that the words were slanderous if not true. *Ib.*

STATUTES CITED.

PUBLIC LAWS OF MAINE.

SPECIAL LAWS.

MASSACHUSETTS STATUTES.

ACTS OF CONGRESS.

STATUTE OF FRAUDS.

See BREACH OF PROMISE, 1. INSURANCE, 6.

SUPERIOR COURT.

SUPREME JUDICIAL COURT.

TAXES.

TENANCY AT WILL.

TENANTS IN COMMON.

See TROVER.

TOWN ORDERS.

TOWNS AND TOWN MEETINGS.

TRESPASS.

See MILLS AND DAMS, 2. OFFICER, 3. TENANCY AT WILL, 5.

TROVER.

1. Tenants in common of certain timber lands entered into a written contract, wherein it was agreed that the one owning two-thirds of the common estate should, in consideration of certain payments to be made at specified times, sell his interest to the other owning the remainder, and "all timber or lumber to be holden to the" vendor, "either on the landing at the river, or at the mill," and the vendor to give the vendee "a deed as soon as convenient or possible, said timber to be holden for said payments to all intents and purposes." The vendee did not make all the payments as agreed, nor demand or receive any deed, but sold the timber on the stump to the defendant, who caused it to be cut and hauled to the landing; and, while rolling it into the river for the purpose of driving it to market, the vendor appeared and claimed it, showing his contract, and forbade the defendant's turning in any more; but the defendant persisting, the vendor immediately brought trover for the logs before they had arrived at their destination: — *Held*,

1. That the lien created by the contract attached only to the plaintiff's two-thirds interest in the logs;

2. That the defendant's purchase made him a tenant in common with the plaintiff; and

3. That, as between tenants in common, the facts do not constitute a conversion. *Kilgore* v. *Wood*, 150.

2. During a lumbering operation upon his own land, the plaintiff's servants cut over the well known line between his land and that of the defendants. Thereafterwards, the plaintiff, having learned the facts, intermingled the timber cut from the different lands, put the same mark upon it, drove it, boomed it and rafted it for sale. Thereupon, the defendants, not being able to identify the timber cut from their land, but with a *bona fide* intention to take their own timber, actually took more. In trover, for the value of the excess; — *Held*, that the defendants would not be liable as wrongdoers, until the plaintiff had pointed out his property and demanded it of them. *Smith* v. *Morrill*, 566.

See Equity, 12.

TRUSTEE PROCESS.

See Mortgage of Chattels.

TRUSTS.

1. Where a judgment is recovered upon a negotiable promissory note after indorsement, in the name and with the consent of a nominal party without interest, the judgment creditor is merely the trustee of the equitable owner, and cannot control the judgment to the prejudice of his *cestui que trust* or to the oppression or injury of the debtor. *Pratt* v. *Dow*, 81.

2. And payment of such a judgment to the satisfaction of the equitable owners thereof is a good defence to an action thereon, although some of the

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