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 LVII.

PORTLAND:
LORING, SHORT & HARMON.
1870.

B. THURSTON AND CO., PRINTERS, PORTLAND.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME 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.

ATTORNEY-GENERAL,

HON. WILLIAM P. FRYE.

TABLE

OF THE CASES REPORTED.

ERRATA.

On page 22, the syllabus should read: A complainant in equity cannot compel a hearing at the law term, unless his case has been "marked 'law' on the docket of the county where pending."

Page 54. 6th line from bottom, instead of "in his," read "being in their."

" 211. 25th line, instead of "*Pote* v. *Dill*," *read* "*Pike* v. *Dilling*."

" 290. 5th line, instead of "unequal," read "equal."

" 449. 2d line of last syllabus, instead of "set," read "sit."

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

Bethel Steam Mill Co. *vs.* John B. Brown & others.

A symbolical delivery of large quantities of logs, landed on a stream preparatory to driving, is sufficient.

And a survey of such logs by a person mutually agreed upon by the parties to the sale, and the putting thereon by the vendor the vendee's mark as they are thus landed, constitute a sufficient delivery even as against subsequent purchasers, although, by the terms of the contract of sale, the vendor is bound to deliver the logs at a specified place many miles below the landing.

Trover, for two hundred and thirty-three thousand feet of spruce logs. The taking was not denied, the main question raised being that of title.

From the deposition of James Hamlin, introduced by the plaintiffs, it appeared substantially that he took charge of Bethel Steam Mills in October, 1865, and continued their agent until April, 1868; that on November 2, 1865, as agent of the plaintiffs, he made a written contract with one David Meserve for the purchase of certain timber; that Meserve thereupon arranged with Standley & Evans to put in logs in fulfillment of the contract, on the Chickawalapy stream, a tributary of the Androscoggin; that Meserve applied to the witness for advances with which to pay Standley & Evans; that one Lunt, who was employed by the plaintiffs to scale, was to see that the logs were marked by Meserve; that Lunt was to go upon

the landing from time to time and attend to his duties, and enter his scale upon a log-book; witness understood the logs were to pass when scaled and marked, and made the advances upon that supposition, although no such conversation took place between the parties until about the time of settlement; that Lunt's survey show 605,350 feet spruce logs put into the Chickawalapy by Standley & Evans; that the logs not having been driven out of the Chickawalapy when Meserve first came to settle, witness refused to settle; that the next time Meserve came to settle he brought a letter [read] from Lunt, stating that the logs were all in the drive excepting about 100 M; that witness told Meserve that the logs left back were the plaintiffs', and if they came out the next spring, they probably would not be injured any, but if they lay there two or three years, they would injure a great deal, and probably be very nearly spoiled, and that there would have to be a large reduction made on the logs if they lay back two or three years; that witness then settled with Meserve for 505 M; that witness heard in August, 1866, that the defendants had bought the logs in question and sent a scaler to scale them, whereupon the witness notified the defendants that the logs were the plaintiffs', having their mark, and they would look to the defendants for the pay; that there is a custom on the Androscoggin River that logs landed, scaled, and marked with the purchaser's mark are considered the property of the purchaser.

The terms of the contract sufficiently appear in the opinion.

From the deposition of W. F. Standley, introduced by the plaintiffs, it appeared substantially, that in November, 1865, David Meserve showed the witness a written contract made with Hamlin, agent of the plaintiffs, to deliver logs to them; that Uriah Evans, with whom witness had purchased timber land on the Chickawalapy, was present; that Meserve desired witness and Evans to turn logs in with him under the contract, and witness and Evans assented; that in pursuance of the agreement with Meserve, witness and Evans commenced lumbering, landed logs on the bank of the stream and on the ice, received the plaintiffs' mark from Meserve to put on the logs; that Evans hauled, and witness took charge of, cut up

and put the plaintiffs' mark on each log, understanding this to be done in pursuance of Meserve's contract with Hamlin; put in 605 M, which were surveyed by Isaac Lunt, he having come twice a week at the landing for that purpose; that witness and Evans settled with Meserve, between 10th and 20th June, claiming pay for the whole 605 M, but Meserve would not allow the claim, saying Hamlin would not pay him for the 100 M left; that the settlement embraced 505 M, at $6.24; that witness then sold his interest to Evans; that all the logs left back on the Chickawalapy had the plaintiffs' mark, and were included in Lunt's scale.

From the deposition of A. S. Perkins, introduced by the plaintiffs, it appeared substantially that he had lumbered twenty years on the Androscoggin River, and that the custom prevailed on that river and its tributaries to consider logs as belonging to the purchaser when they were landed, scaled, and his mark placed upon them.

From the deposition of David Meserve, introduced by the defendants, it appeared substantially that he made the contract mentioned, and under it delivered 2100 M in the Androscoggin River in season for the spring drive, at different places, and some from the Chickawalapy, purchased of Standley and Evans; presented the contract to Standley & Evans, and witness was to take all logs they could deliver in the Androscoggin River in season for the drive, and was to allow them the same witness was to receive, provided they would assist him in filling the contract; advanced them $400; all the logs landed were not scaled and run from the Chickawalapy that spring; settled with the plaintiffs in the spring or summer of 1866, through Hamlin, their agent; nothing was said about logs left back until the final settlement, when he objected because some of the logs were left; had Lunt's survey when the settlement took place; Hamlin would not settle until he had an estimate of the amount left in the Chickawalapy; Lunt estimated 100 M and settled with him, deducting that amount; Hamlin refused to take the amount left; pressed him to pay a little money to secure the logs left in the stream, and he refused, saying, if ever he had those

logs he expected to buy them, they might be worth more in the spring, or might be less; Hamlin never paid anything nor offered to pay anything, on account of the logs left, nor has any one in behalf of the plaintiffs; never claimed the back logs of Evans, nor received any delivery or possession of them, but requested him to take them and take care of them himself.

Uriah Evans, deposed,—cannot tell how many logs, scaled by Lunt, were left in the Chickawalapy, something over 200 M according to Nutter's scale made in July or August were left; there were 200 spruce logs that Lunt did not scale, and some 3000 feet of pine; 200 M scaled by Lunt were also afterward scaled by Nutting, the 200 M being the same lot which Lunt had previously estimated at 100 M; logs scaled by Nutter were never given by witness into the possession of Meserve or plaintiffs; they were sold by witness to the defendants, for $6 per M, and cost witness seventy-five cents per M to drive them to the defendants' boom.

It was admitted by the parties that the amount of logs left back in the Chickawalapy, and afterwards purchased by the defendants, was over 230 thousand feet.

The Court were to decide the case according to the legal rights of the parties.

Davis & Drummond, for the plaintiffs, cited *Weld* v. *Crane*, 98 Mass., 152.

W. L. Putnam, for the defendants. The manufacture of an article pursuant to the order of a customer does not transfer the title.

Property does not pass so long as anything remains to be done by the vendor, unless by a sufficient preponderance of evidence purchaser shows that the intention of the parties were otherwise; and not then as against third parties without delivery.

Delivery of a part, as for the whole, is a delivery of the whole. *Boynton* v. *Veazie*, 24 Maine, 286. But delivery of a part, while something remains to be done to the balance by the vendor, is not ordinarily delivery of the whole. *Mason* v. *Thompson*, 18 Pick., 305. *Ropes* v. *Lane*, 9 Allen, 509.

Usage cannot contravene the rules of law relative to the transfer of property. It cannot make that delivery, which by the principles of law is not delivery. *Reed* v. *Richardson*, 98 Mass., 218.

A usage to be binding must be proved to have been uniformly adopted and generally known by those engaged in the particular trade. Arnold on Insurance, 71, and cases cited in notes.

Hence, where parties equally experienced in the trade contradict each other as to the alleged existence of the usage, it is not to be presumed that the witnesses are falsifying, but that the alleged usage has not become sufficiently established and known to be valid.

Where a witness testifies generally to the existence of a usage, but is unable to state a particular instance of the observance of the usage, his evidence should be rejected. Per Lord Mansfield in *Syers* v. *Bridge*, Doug. Rep., 530.

Defendants are three degrees remote from plaintiffs and their claim, because

1st. There was, by the contract, no sale from Meserve to plaintiffs.

2d. There was none from Evans to Meserve.

3d. There was no delivery to plaintiffs which would prevent the sale to defendants.

The first two points involve the same question; as Evans' verbal contract with Meserve was substantially the same as Meserve's with the plaintiffs.

In *Haynes* v. *Hayward*, 41 Maine, 488, the contract was clear to the effect that the title to the logs vested at the landing, and that the driving was an independent contract.

In this case it is equally clear the written contract with plaintiffs was executory for a sale and delivery in the Androscoggin River, and not at the landing. The contract has no reference whatever to any logs not delivered in the Androscoggin.

The common rules cited above apply, in that until they reached the Androscoggin, the driving remained to be done by Evans.

Hamlin admits in substance that the logs left back were at the

vendor's risk; Meserve states it more strongly. It is clear that plaintiffs paid nothing upon them. The fact that property is at vendor's risk, is strong evidence the title has not passed.

Hamlin seems to have had the idea that advances would hold the title to the logs. The authorities are all the other way, unless in peculiar cases with reference to contracts for building vessels. But in this case the advances were not to be made until the logs were put in the main river,—showing conclusively that until that time they were not in any way to be bound to plaintiffs. The fact that advances were in truth made sooner, does not change the contract.

By this contract, plaintiffs were holden to receive only such logs as were boomed in the Androscoggin as soon as the ice was out of the river, from two millions to two millions and five hundred thousand. By it no provision whatever is made for the disposition of logs not boomed at that time. How, then, could they be in any way bound by the contract? And how could Hamlin refuse to pay for the logs remaining back,—logs no way referred to in the contract,—and yet claim them as his property?

From the character of the Chickawalapy—described by all as uncertain—it is clear neither Meserve nor Evans were in fault that they were not run out; how, then, could they be bound and obligated with reference to them, when without fault on their part the plaintiffs had been released?

Plaintiffs urge a usage. The usage, if proved, could not contradict a contract so distinct in its terms as this.

The instances which Perkins knew were different from this. They were like the case of *Haynes* v. *Hayward*, *ubi supra;* as is evident from the fact that if not driven out, he was not to reserve the whole price as Hamlin did, but only enough to cover the driving.

It is plain that the whole gist of this which is called custom, is nothing more or less than that lumber-men, for want ordinarily of better evidence of title, claim everything that bears their mark, and can in practice seldom be successfully resisted.

It would be a reasonable custom that logs when landed under an

executory contract at the place where they are to be delivered, should be deemed the property of purchaser when surveyed and marked; but it would not be a reasonable custom, which would pass title at a point distant from that of agreed delivery, and before by the contract any payment was to be made, or that would bind the vendor to sell, as in this case, after the purchaser was relieved from his obligation to buy.

As to the third point, there has been no delivery of these logs such as must be made as against third parties, and which would prevent defendants from purchasing.

There is not any evidence that those delivered in the Androscoggin were delivered as a part for the whole. They were delivered because they had arrived at the place of delivery fixed in the contract, and not for the purpose of symbolizing the rights of the parties as to other logs. This was the cheese case of *Mason* v. *Thompson*, *ubi supra*.

Neither were marking and surveying a delivery. Lunt was not plaintiffs' agent,—certainly not acting in that capacity; but was acting in an entirely independent character as a surveyor, selected as an indifferent person. Besides, the Chickawalapy was not the place of delivery; and many acts which might by indulgence be construed as meaning delivery, if done at the place of delivery, cannot be so construed when done elsewhere.

But it may be claimed that as a matter of convenience, the title to logs must be considered as passing when the logs are marked and surveyed; that where logs are to go into a common drive the survey at the place of landing is the only way of determining the quantity sold and bought. True; when the landing is the place of delivery! But not true in theory, nor was not true in fact in this case, when the landing and the place of delivery are distinct; as then, of course, the survey at the landing will not necessarily represent what are delivered.

The only injury plaintiffs have received is that, apparently Lunt's estimate of the logs left back in the river proves insufficient. If they have any remedy for that, it would seem to be against Evans

or Meserve for money paid by mistake. Whether or not plaintiffs, in a suit of that sort, would be conclusively bound by Lunt's estimate of what remains back, as testified to by Standley, is not important to discuss in this suit, against parties who bought and paid for logs which had never been delivered, nor sold to any other party.

BARROWS, J. The plaintiffs had a contract with one Meserve, for the purchase of from two million to two million five hundred thousand feet of spruce logs, which, according to the contract, Meserve was to deliver in the Androscoggin River, below Errol dam, as soon as the ice was out of the river in the spring of 1866. The logs were all to be distinctly marked with the plaintiffs' mark on each end, with an axe, and "to be scaled by Isaac Lunt, of Oldtown, and settled according to his survey."

By the same contract the plaintiffs agreed to pay Meserve "$6 per M feet, one-half as cash, May 1, the other half as cash, Nov. 1, 1866, and to make advances from time to time, as the logs are put into the river, as hereinbefore mentioned," interest to be reckoned on the advance payments so made, and four per cent additional on the fulfillment of the contract on Meserve's part, which last-named sum was declared to be in consideration of accepting payments on time for half the logs, and for putting in one-half the amount of the contract full length.

Meserve exhibited the contract to Standley & Evans, who had bought standing timber on the Chickawalapy,—a tributary of the Androscoggin,—and they agreed to become jointly interested in the contract with him, and to turn in their logs in fulfillment of the contract, at the same price that he was to receive, and get them into the Androscoggin in season to go on with the rest of the drive. They cut and landed at one place on the bank of the Chickawalapy, and on the ice in the stream, 605 M, according to the scale and survey furnished them by Lunt, the surveyor named in the contract, who came from time to time to the landing-place on the Chickawalapy, to survey them. He was employed by the plaintiffs, and it was part of his duty to see that the plaintiffs' mark was put

upon the logs. The plaintiffs' mark was put upon each log there landed, as stipulated in the contract, and the plaintiffs made advance payments from time to time, as agreed upon. It so happened that 233 M feet of the logs so landed and marked, on the Chickawalapy, did not get out of that stream in the spring of 1866, in season to go into the drive.

In May of that year, when Meserve first went to settle with the plaintiffs' agent, the logs on the Chickawalapy had not been started out, and the plaintiffs' agent declined to settle "until the drive had taken in all the landings."

In June, 1866, Meserve came again to settle, bringing with him a letter from Lunt to the plaintiffs' agent, in which Lunt states that he had "got the logs all in the drive, except about 100 M on the Walipy."

Thereupon a settlement took place, in which all the logs, including the 605 M landed by Evans & Standley, on the Chickawalapy, and amounting to about two million two hundred thousand feet, are charged to the plaintiffs, with the contract price carried out—"less 100,000 left in Chickawalapy."

In August, 1866, Evans sold the 233 M, which were actually "left in the Chickawalapy," to the defendants, who were notified by the plaintiffs' agent, before they paid Evans for the logs, that the plaintiffs claimed them as their property, and should hold the defendants responsible. The defendants took them notwithstanding this notice; and hence this suit, which must turn upon the question whether the plaintiffs owned the logs which were "left in the Chickawalapy."

The position taken by the defendants is that the contract remained executory until delivery in the Androscoggin River, below Errol dam, the place named in the contract as the place of delivery and that the property in the logs did not pass from the vendors to the plaintiffs for want of a delivery.

To determine whether this property had passed to the plaintiffs, it is necessary to consider not merely the stipulations in the contract itself, but the subject-matter of it, and the attendant circum-

stances also: e. g. the situation of the merchandise contracted for, and the usual course of the trade in it, and the subsequent particular acts and dealings of the parties to the alleged sale in relation to it.

The question of transfer to and vesting of title in the purchaser, always involves a question of the intention of the contracting parties; and it is to be ascertained whether their negotiations and acts are evincive of an intention on the part of the seller to relinquish all further claim or control as owner, and on the part of the buyer to assume such control with its consequent liabilities.

The question is one by no means free from difficulty where, as here, there are acts and stipulations of the parties looking each way.

In general, however, it may be well to premise, the law regulating the delivery of property upon a sale accommodates itself to the necessities of the business and the nature of the property, making a symbolical delivery sufficient, where nothing but a constructive possession can ordinarily be had, and by no means overlooking the possibility that the merchandise sold may remain in possession of the seller for certain specific purposes, among which are transportation and delivery at another place, where the property in it has actually passed from him, and vested in the purchaser, without affecting the validity of the sale. *Boynton* v. *Veazie*, 24 Maine, 286. *Terry* v. *Wheeler*, 25 N. Y. (11 Smith), 520. The fact that the logs had not arrived at the point in the river where, by the contract, Meserve had undertaken to deliver them, cannot of itself be deemed conclusive that the property in the logs had not passed to the plaintiffs. Doubtless it is evidence strongly tending to that conclusion, and unless counteracted by the evidence of the other acts and doings of the parties to the trade, and of the usual course of business among dealers in logs, would be fatal to the plaintiffs' claim.

It is strongly argued that the plaintiffs were not bound to receive any logs that were not boomed in the Androscoggin River below Errol dam, as soon as the ice was out of the river, in the spring of 1866, and that these logs, not being so situated, cannot be looked upon as going into the fulfillment of the contract.

Looking with not a little force to the same result is the fact, that though the whole 605 M of the logs in the Chickawalapy were charged to the plaintiffs in the statement of the account, on settlement, a deduction was made of the whole contract price for 100 M, supposed to be the quantity left back. These are the circumstances which make most strongly against the plaintiffs' title.

If we could accept as true, Meserve's testimony as to what transpired between himself and the plaintiffs' agent, at the time of the adjustment, we should be disposed to hold that the property in the logs in controversy was not intended to pass and did not pass.

But we cannot overlook the fact that Meserve and Evans both must have known, when Evans made the sale of the 233 M feet of logs to the defendants, that they had already received their pay for 133 M of them from the plaintiffs, and we think that the position in which they stand in this particular, tends strongly to discredit their statements as witnesses.

The testimony of the plaintiffs' agent (which we accept as more likely to be true than Meserve's version of this part of the transaction) is: "I told him the logs were ours; that if they came out the next spring, they probably would not be injured any, but if they lay there two or three years they would injure a great deal, and probably be very nearly spoiled; I told him there would have to be a large reduction made on the logs if they lay back two or three years."

Here is no disclaimer of title to the logs that were left back, or of liability to pay for them at the contract price; but it is rather to be construed as a reminder to Meserve that damages would be claimed of him in offset, if there should be a long delay in the fulfillment of his stipulation to have them below Errol dam.

Let us now see what there is which goes to show that it was the intention of these parties that the property should pass, and that it did pass to the plaintiffs, before arriving at the point in the river where the vendor undertook to place it.

We have no doubt that Standley & Evans, by their arrangement with Meserve, and the consequent turning in of these logs to make

up the amount called for by the contract, stood in such a relation to the plaintiffs, that the property in these logs passed to the plaintiffs, if any of Meserve's logs, similarly situated, would have passed. Whether they became partners with Meserve or not (a point we deem it unnecessary to decide), it is clear that they gave him ample authority to dispose of these logs, according to the terms of his contract with the plaintiffs, an authority which could not be revoked, if in pursuance of it the title to the logs had already vested in the plaintiffs. An important stipulation, in its effect upon this question of when the property passed, is the one which declares that the logs are to be settled for according to Lunt's survey. That survey was made as the work of filling the contract progressed, from time to time, at the landings where the logs were delivered, with the knowledge of all parties, and it includes the logs in controversy. It was according to that survey that the plaintiffs were bound to pay. The logs were to be marked as the plaintiffs might direct, and the testimony is that each of the logs in controversy had the Bethel Steam Mill Company's mark placed upon it at the landing. We cannot believe that the parties thus contracting and proceeding, could have had any other intention or understanding than that the property should pass, and be considered as delivered when the marking and survey were completed; and it would seem that if the delivery below Errol dam, in the Androscoggin River, constituted a condition precedent in the contract, it was waived and delivery accepted at the landings, where the survey and marking took place, with the understanding that Meserve would still fulfill his agreement to run them down to the point designated, as a condition subsequent.

A symbolical delivery of property thus situated was sufficient. It was only a constructive possession that could be expected to be taken. Lunt, though mutually agreed upon as the surveyor, was in the employ of the plaintiffs, and it was made his business specially to see to it that all the landings were turned into the river. He was clearly the agent of the plaintiffs for this purpose, and the act constituted as perfect a delivery as the nature and situation of the

property would permit. We think that the survey and marking of the logs in controversy, when they were so placed as to be liable to be mixed with other logs bearing the plaintiffs' mark, must be held to be a sufficient delivery.

How otherwise could there be any security for the seller, or any possibility of ascertaining what he was entitled to receive? How otherwise could effect be given to the stipulation for a settlement according to the survey? The rough estimate by Lunt of "*about* 100 M left back," was plainly no part of the survey. It might serve for a basis upon which to regulate the advance payments, and in conformity with it notes were given in June, covering more than half the amount of the logs in controversy, while apparently the payment for the balance was left unadjusted, until it could be ascertained how much damage the plaintiffs might suffer and be entitled to recoup by the failure of Meserve to bring them into the spring drive.

In fine, when we look at the nature of the business, and the manner in which it must necessarily be conducted, we see no safety for parties engaged in it from perpetual controversies, in which it would be very nearly impossible to arrive at any satisfactory conclusion, if we do not hold that, in the absence of the clearest evidence to the contrary, the making of a survey which is to be conclusive on the parties, and the affixing of the purchaser's mark to all the logs, when they are once put afloat, so as to be liable to be mixed with others bearing the same mark, is to be deemed a sufficient delivery to vest the property in the purchaser.

We think this must be our conclusion, independent of the evidence of custom offered in the case,—a custom eminently reasonable and proper, if not indispensable in the carrying on of the business.

For reasons similar to those above suggested, it would seem, it was held in *Walden* v. *Murdock*, 23 Cal., 540, that a sale of cattle roaming over uninclosed plains with those of other owners, if made in good faith, is not invalid as against creditors of the vendor, for want of delivery, until the purchaser has had a reasonable time to separate and brand them; and that branding the cattle by the pur-

chaser is a good delivery to him, though he allows them afterwards to remain in the same uninclosed range of pasture.

In the view which we take of this case, the fact that the logs were still in the possession of the vendors, for the purpose of being driven to a point lower down on the river than the place where the survey and marking took place, cannot avail the defendants.

If merchandise sold remains in the possession of the vendor for a specific purpose, as part of the consideration, the sale being otherwise complete, the possession of the vendor is to be considered the possession of the vendee, and the delivery as sufficient to pass the title even against subsequent purchasers. *Hotchkiss* v. *Hunt*, 49 Maine, 213. *Judgment for plaintiffs, for $1759.23.*

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

ETHER SHEPLEY & others in Equity *vs.* ATLANTIC & ST. LAWRENCE RAILROAD COMPANY & others.

A complainant in equity cannot compel a hearing, unless his case has been "marked at the law term 'law' on the docket of the county where pending," as provided in R. S. of 1857, c. 77, § 17; or unless he has given the notice provided in Rule IX.*

BILL IN EQUITY.

APPLETON, C. J. The answers of the defendants were filed on January 6th, and the replication thereto on Jan. 24, 1869. The filing of the general replication raised an issue between the parties litigant.

* See opinion.

By rule 13th, "ninety days after filing the general replication will be allowed for taking testimony. And it must be filed within ten days after that time has elapsed," &c. 37 Maine, 585. Either party has a right to this time, for the purpose of taking testimony.

By rule 23d, "notices required by these rules will be in writing and signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases are to be properly directed to him, and placed in the post-office, and postage paid."

By rule 9th, "within thirty days after the answer is filed, unless exceptions are taken, or within fifteen days after it is perfected, the plaintiffs' counsel shall file the general replication, and give notice thereof; or give notice of a hearing at the next term on bill and answer."

By R. S. c. 77, § 17, cases in equity presented on demurrer to the bill, or when prepared for a final hearing "are to be marked 'law' on the docket of the county where pending, and then continued until their determination is certified by the clerk of the district to the clerk of the county." This case is not marked "law" on the county docket.

It is objected that the cause was never set down for hearing as required by the rules of practice established by this court.

If the case had been marked "law," it might perhaps have been presumed that the required notices had then been given or waived; but it was not so marked.

If the plaintiffs were desirous that the cause should have been heard on bill and answer, it was their duty, by the express terms of the rule, to give notice. This was not done, and we do not perceive why the defendants' counsel, in the absence of the required entry on the docket, or of any "notice of a hearing at the next term on bill and answer" could reasonably presume that a hearing would be expected.

In the English practice notice is to be given of the filing of the replication "to the solicitors of all the defendants to whose answer the replication applies." 2 Dan. Ch. Pr. 969. To the same effect

as our own rule was that of Massachusetts. Met. Dig. 90 Chancery. Rule 7. *Bill dismissed from the law docket.*

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

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

P. Barnes and *Howard & Cleaves*, for the respondents.

HENRY O'DONNELL *vs.* DOMINIC O'DONNELL.

One son cannot recover in assumpsit against another, his distributive share of money left by their father at the time of his decease in the possession of their mother, and by her delivered to the defendant, who appropriated it to his own use.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court for this county, who tried the case without the intervention of a jury, but whose ruling in matters of law was subject to exceptions.

ASSUMPSIT for money had and received. The plaintiff claimed to recover $1100 wages and prize-money as seaman of the United States steamer De Soto, alleged to have been received by the defendant in May, 1864. The judge found the facts against the plaintiff. The plaintiff also claims to recover for savings intrusted to the defendant, which was found against the plaintiff on the facts.

It appeared that the plaintiff and defendant are brothers; that their father died in December, 1856, having left $450 in gold in possession of their mother; that she kept it until November, 1860, when she delivered it to the defendant who converted it into

currency and then paid the currency toward a homestead; that the parties have a sister living.

The judge ruled, as matter of law, that the action was not maintainable upon the foregoing facts. And the plaintiff alleged exceptions.

Deane & B. D. Verrill, for the plaintiff, cited *Gray* v. *Farmer*, 55 Maine, 487; *Hearne* v. *Hearne*, 55 Maine, 445; *Frye* v. *Southard*, 54 Maine, 147; *Hall* v. *Marston*, 17 Mass. 576; 2 Greenl. on Ev. §§ 117, 120, 121.

I. W. Parker, for the defendant.

APPLETON, C. J. The plaintiff and defendant are brothers. Their mother is still living. Their father died some years ago, leaving four hundred and fifty dollars in gold in their mother's hands. This she gave to the defendant, who appropriated it to his own use, without taking out letters of administration.

The plaintiff seeks to recover in this suit his distributive share of his father's estate. The action is not maintainable.

The defendant, if he has sold or embezzled any of the goods or effects of his father "before taking out letters testamentary or of administration thereon, and giving bond accordingly," is "liable to the actions of the creditors and other persons aggrieved, as an executor in his own wrong, and also to the rightful executor or administrator for the full value of the goods or effects of the deceased taken by him, and for all damages caused by his acts to said estate," &c. R. S. 1857, c. 64, § 32. He may likewise be cited to appear before the judge of probate upon complaint of any executor, administrator, heir, legatee, creditor, or person interested in the estate, to be examined on oath in relation thereto. § 55. By the Act of 1859, c. 113, "if one conceals, embezzles, or carries away" any of the money, goods, or effects of the deceased, or aids others in so doing, he may be cited before the probate court, and be imprisoned if he refuses to appear or submit to examination. He is at the same time made liable to any injured party, in an action of the case, for all the damage, expenses, and charges arising from such refusal.

If the plaintiff, without taking out letters of administration, were to divide with the defendant the goods and effects wrongfully embezzled by the defendant, he would be an executor in his own wrong, and subject to all the liabilities of such wrongful executorship. He brings this suit to place himself in that position. The court cannot aid him in such attempt. The plaintiff, if he wishes to have the estate of his father administered upon in due course of law, must take out letters of administration, if his mother declines taking upon herself that trust. If the plaintiff were to recover, the judgment would be no bar to an action by the creditor, or by the executor or administrator.

There are other causes of action set forth in the plaintiff's writ, but the presiding judge negatived their existence, and his conclusions as to matters of fact are not the subject of exceptions.

Exceptions overruled.

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

MOSES G. PALMER & another *vs.* WILLIAM P. MERRILL, appellant.

After proceeding to trial and becoming nonsuited, the plaintiff cannot, of his own motion, suggest the bankruptcy of the defendant, and avoid the payment of costs, by striking the bankrupt defendant's name from the suit.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court, for Cumberland county.

ASSUMPSIT, on an account annexed, commenced in the municipal court and by appeal entered in the superior court, where it was tried by the judge without the intervention of a jury, subject to exceptions in matters of law.

At the trial, after the plaintiff had given his own testimony, a

nonsuit was ordered, on motion of the defendant; to which ruling the plaintiff alleged exceptions.

After the exceptions were allowed, the plaintiff filed a written motion "for leave to strike from said suit the name of William P. Merrill (defendant), without costs," because he says the said defendant did, on the 31st day of Dec., 1868, file his petition in bankruptcy, in the U. S. district court for the district of Maine.

Previous to the hearing on the motion, the defendant's assignee appeared and claimed to prosecute.

The judge granted the motion, and struck the name of the defendant from the case without costs; to which ruling the defendant alleged exceptions.

Howard & Cleaves, for the defendant.

Percival Bonney, for the plaintiff, contended

That the action was "pending," and was of "such a character as would be discharged by bankrupt's certificate," within the meaning of the public laws of 1868, c. 157. "When it shall appear" means whenever, during the pending of the suit, and to whomsoever it shall be made to appear on the docket of the court, that the defendant has become a bankrupt, the plaintiff may discontinue without costs.

The appearance of the assignee changed nothing, so far as c. 157 is concerned, but simply made the bankruptcy of the defendant more clearly to "appear." The plaintiff discontinued before the appearance of the assignee.

The judge had no discretion in the premises, the discretion being confined to the plaintiff, who "may" strike the "bankrupt defendant's name from the suit . . . without costs."

Section 16, c. 176 of the U. S. bankrupt act of 1867, applies only to actions commenced by the bankrupt prior to adjudication in bankruptcy, "for the recovery of a debt, or other thing, which might or ought to pass to the assignee," and not to actions against the bankrupt for the recovery of a debt from him.

The State law has full jurisdiction over the subject of costs in

such cases, they not being assets until so declared by judgment of court. Costs do not vest in either party until final judgment. By the nonsuit, no right to recover costs became vested in the defendant or his assignee. *Fales* v. *Stone*, 9 Met. 316. Costs being the creature of the statute, the legislature can take them away. *Oriental Bank* v. *Freeze*, 18 Maine, 109.

APPLETON, C. J. The plaintiff, after proceeding to trial, was nonsuited upon his own showing, by the presiding justice.

By the U. S. bankrupt act, approved March 2, 1867, c. 176, § 21, when the bankrupt has filed his petition in bankruptcy, and there are suits pending against him, "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined: and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy, on the question of his discharge, provided," &c., &c. The provisos have no bearing upon the question under consideration.

By the public laws of 1868, c. 157, it is provided that "In all actions pending in any court, or before any justice of the peace, for the recovery of any debt provable in bankruptcy, or of a character such as would be discharged by bankrupt's certificate, when it shall appear that the defendant, or any one of the defendants, has filed his petition in bankruptcy, either before or after the commencement of the suit, the action shall be continued until the proceedings in bankruptcy are closed, unless the plaintiff shall thereupon strike such bankrupt defendant's name from the suit, which he may do without costs, &c."

It must be presumed that at the time of trial it did not appear of record that the defendant had filed his petition, else, in accordance with the statutes of the United States and of this State, the action would have been continued.

After proceeding to trial and being nonsuited, the plaintiff of his own motion informs the court that the defendant had previously

filed his petition in bankruptcy, and seeks to avoid the payment of costs by striking the defendant's name from the suit. Can he legally do this?

The suggestion of bankruptcy is one to be made by the bankrupt. The continuance, by the bankrupt law, is to be granted "upon the application of the bankrupt." The plea of a discharge in bankruptcy is a personal one, which the defendant may make or not at his own election. If the defendant declines relying upon the privileges granted by the statute, the cause proceeds to trial. If judgment is rendered against him it is a valid judgment, and is unaffected by his discharge, which refers to debts existing "on the —— day of ——, on which day the petition for adjudication was filed." U. S. bankrupt law, § 32. A judgment, recovered after the petition has been filed, and the defendant adjudged a bankrupt, cannot be proved as a debt against such bankrupt, and is not discharged. *Pike* v. *McDonald*, 32 Maine, 418; *Uran* v. *Houdlette*, 36 Maine, 15.

The plaintiff has no more right to suggest the bankruptcy of the defendant than he has to plead his certificate of discharge if he obtains one. He can no more file one plea for him than another. The defendant is the judge of his own defense. The suggestion of bankruptcy is not like the suggestion of the death of a party. In that case no valid judgment can be rendered against the deceased. But notwithstanding the defendant's bankruptcy, a valid judgment can be rendered against him, unless he avails himself of the proceedings in bankruptcy. The very language of the statute of Maine indicates that the law is as above stated. "When it shall appear that the defendant, or any one of the defendants, has filed his petition in bankruptcy, either before or after the commencement of the suit, the action shall be continued until the proceedings in bankruptcy are closed, unless the plaintiff shall thereupon strike such bankrupt defendant's name from the suit;" that is, after it is made so to appear by the defendant to the court. Further, the act of congress expressly provides that the continuance shall be had "upon the application of the bankrupt." It would be a strange course of proceedings, and as inequitable as strange, if a defendant

with a perfect defense was to be deprived of his costs by reason of a defeated plaintiff making for him a suggestion or a plea of which he declined availing himself, for the purpose of ousting him of the costs to which he was justly entitled. If the defendant did not choose to rely on the defense which the bankrupt law affords, the plaintiff, because he has a bad case, cannot compel him to do it.

Upon the facts, as from the report we understand them to be, the ruling of the presiding justice was erroneous.

Exceptions sustained.

CUTTING, DICKERSON, BARROWS, DANFORTH, AND TAPLEY, JJ., concurred.

STATE OF MAINE *vs.* MARGARET KIRBY.

In the trial of an indictment founded on the first clause of § 7, c. 124 of the R. S., the accused will be entitled to an acquittal if it be made to appear that the child was born dead.

ON EXCEPTIONS to the *pro forma* rulings of *Goddard*, J., of the superior court for the county of Cumberland.

INDICTMENT founded on the first clause of revised statutes, c. 124, § 7.

It was proved that respondent was delivered in secret of a still-born full-grown child, March 15, 1869, at Portland, which, if born alive, would have been a bastard, and concealed the same by throwing it immediately and secretly into a privy vault belonging to Martin Tighe, in Portland, where it was discovered some time after, on the same day, by a boy, who reported the fact to the police, who removed it and caused a coroner's inquest to be held upon it, in consequence of which concealment it was not known for several hours whether it was born dead, or was born alive and was mur-

dered; but the testimony of the physicians upon the inquest and on the trial showed that the child had been dead, and decomposition had commenced previous to birth. There was no evidence that the death of the child before its birth was occasioned by any voluntary act of respondent. Her counsel requested the presiding justice to instruct the jury that, it having been conceded by the government that the child was born dead, respondent could not be convicted of the offense charged. But the presiding judge declined to give the requested instruction, and instructed the jury *pro forma* that, by reason of her concealment of the death of her child, it was not known for some time after the discovery of its body whether it was born dead, or was born alive and was murdered, even though that time might not be long, the fact that it was afterwards known that the child was born dead would not relieve the respondent from the penalties of the statute, provided she had been willingly delivered in secret of said child, and said child would have been a bastard if it had been born alive, and she knew of its death and concealed the same.

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

J. H. Williams, for the respondent.

N. Webb, county attorney, *contra.*

Tapley, J. This is an indictment under the first clause of § 7 of c. 124, of the revised statutes, which provides that "if any woman is willingly delivered in secret of the issue of her body, which would be a bastard if born alive, and conceals the death thereof, so that it is not known whether it was born dead or alive, and was murdered, she shall be punished by imprisonment not more than three years, or by fine not exceeding one hundred dollars."

It was proved that the prisoner was delivered in secret of such issue, still born, and concealed the same by throwing it into a vault, where it was discovered the same day and examined by inquest, when it appeared the child had been dead several days before the

birth. These facts being proved, the prisoner contended she was entitled to a verdict of not guilty, but the presiding judge ruled otherwise.

1. The act applies to such issue of the body as was or would have been if born alive, a bastard, viz., issue begotten and born out of wedlock.

2. The offense consists in willingly being delivered of such issue in secret, and concealing the death of it, "so that it is not known whether it was born dead, or alive and was murdered."

Any other concealment is not within the prohibition of the statute. It must be effectual to this end.

It is contended by the government that there being some appreciable time between the concealment of the body and the discovery of the fact that it was dead and born dead, the offense was complete under the statute.

On the other hand it is contended that the fact that the discovery was made that the child was born dead, upon the same day of the concealment, and before these proceedings were instituted, constitute a defense, and entitle her to an acquittal; that the phrase "is not known" means "is not known at any time," instead of is not known at a particular period of time before trial.

The difference between counsel upon the construction of this sentence is of vital importance to the prisoner in this case. To what period of time then does the word "is" refer?

Tracing the statute back to 1696, we then find a provincial statute in these words:

"Whereas many lewd women that have been delivered of bastard children, to avoid their shame and to escape punishment, do secretly bury or conceal the death of their children, and after, if the child be found dead, the said women do allege that the said child was born dead, whereas it falleth out sometimes (although hardly it is to be proved) that the said child or children were murdered by the said women, their lewd mothers, or by their assent or procurement; Be it therefore enacted," &c., "that if any woman be delivered of any issue of her body, male or female, which if it

were born alive should by law be a bastard, and that she endeavor privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, that it may not come to light whether it were born alive or not but be concealed, in every such case the mother so offending shall suffer death as in case of murder, except such mother can make proof by one witness at least that the child whose death was by her so intended to be concealed was born dead." An. Chrs. & Laws, Mass. Bay, c. 38.

Under this act it will be seen that the act of concealment must have been an effectual one; "so . . . that it may not come to light, . . . but be concealed." That is such a concealment that it does not come to light but is concealed, whether the child was born dead, or alive and murdered; and even then if such mother "make proof by one witness at least that the child was born dead," she suffers no penalty.

If the proof of this fact by her entitled her to an acquittal, it would be a strange anomaly of the law if the same proof introduced by the prosecution did not produce the same results.

It is quite apparent that proof adduced at the trial that the child was born dead would, under this act, entitle the mother to an acquittal.

The causes which led to the passage of the act are recited in the preamble. The birth and death of the child could be proved, but the fact that it was or was not born alive in many cases could not be proved, by reason of the concealment of the fact by the mother. Her efforts to conceal the birth and death of the child would oftener prove unsuccessful, than her efforts to conceal the fact that it was born alive and murdered; hence under this statute whenever it appeared that such issue had been born and was dead, and the fact whether born dead or alive was effectually concealed by her acts, she was held responsible for its murder unless she could relieve herself by proof from one witness at least.

While the gist of the offense consists in the concealment of the death of the child, it is such a concealment as prevents

its being known that the child was born dead, or alive and was murdered.

As soon as these facts are made apparent, the futility of the effort to conceal is made apparent.

As before remarked, proof under this act that the child was born dead, entitled the mother to an acquittal, whether introduced by the prosecution or by the prisoner. If introduced by the prosecution the case failed, because it then appeared that the attempted concealment had been unsuccessful.

If introduced by the mother she was acquitted, because the law in its mercy allowed her to remove the veil of concealment and discharge herself from the crime of infanticide and murder. The fact sought was, has there been a murder committed?

The law said simply this, "issue has been born; that issue is now dead; whether it died before or after birth you are now concealing from us, therefore we hold you responsible for its death."

In 1785 a similar act was passed by the general court of Massachusetts, preceded by a similar preamble.

The first section provided for the punishment of a woman who should conceal her pregnancy, and be delivered in secret of such issue.

The second provided that "if any woman shall endeavor privately, either by herself or the procurement of others, to conceal the death of such issue of her body, which if it were born alive would by law be a bastard, so that it may not come to light whether it was born alive or not, or whether it was murdered or not, in every such case the mother so offending shall be set on the gallows with a rope about her neck for the space of one hour, and be further punished by being bound to the good behavior, at the discretion of the court."

The third section provided that these offenses might be embraced in an indictment for murder, and the verdict rendered as the proofs should require. 1 Laws of Mass. 222.

This act was copied into the acts of 1821 passed in this State, except so far as the modes of punishment were provided. Laws of Maine, c. 2, §§ 9, 10, 11.

As in the former statute the concealment must be such "that it may not come to light whether it was born alive or not, or whether it was murdered or not." The term "may not come to light" is the same phrase that is used in the statute of 1696, and is, we apprehend, another mode of expressing the idea "does not come to light." It is quite clear this is its signification in the former statute, and we see no evidence of design to change it in this.

In the revision of our statutes in 1841, it was provided "that if any woman shall willingly be delivered in secret of any issue of her body, which if born alive would be a bastard, and shall conceal the same, so that it may not be known whether it was born alive or not, or was murdered or not, she shall be punished," &c. (c. 160, § 11), and "in the indictment against a woman for the murder of her infant bastard child, she may also be charged with the offense described in the preceding sections; and if the jury on trial acquit her of the charge of murder, and find her guilty of the other offense, sentence shall be awarded against her for the same." c. 160, § 12.

These sections are incorporated into one in the present revision (c. 124, § 7), making no material alteration excepting changing the word "may" to "is," reading "so that it is not known," &c.

It will be perceived that in all the statutes from 1696 down, the concealment must be such "that it may (is) not be known," &c. This is a uniform provision in all of them, and the important inquiry in the case at the bar, namely, to what time does is refer to, we think is made more apparent by the light afforded by those statutes.

It is contended that "is not known" is fully met by any appreciable time during which there is a concealment and such ignorance of the fact. This is literally true; so it may be said if the fact be discovered at later period of time, it is not true. In the case at bar it was literally true for an hour or more it may be, but in an hour after, it was not true, and has not been true since, and "*is*" not now true.

The great end to be accomplished was the prevention and pun-

ishment of child-murder. As there would in many cases be great doubt whether in fact there was murder, if it appeared upon trial there were such doubts that the prisoner could not be convicted, she was not allowed to go unpunished, if these doubts were occasioned by her own machinations. If, however, all doubts were removed by proof that no offense had been committed, there was no occasion to punish. The act of 1696 required this to be proved by at least one witness when offered in defense. None of the acts since have limited the proofs, but have left it to be proved as any other fact by circumstantial evidence or otherwise.

Upon a careful consideration of the statute and its antecedents, we think the phrase "so that it is not known" means so that it is not known at any time past or present.

To hold otherwise would be to very essentially change the act since its origin, and involve the case in many intricacies and embarrassments.

Inquiry would at once arise, how soon must the mother make public the fact? How shall she make public the fact? Is her own declaration sufficient, or must she make an exhibition of the body? If she must make an exhibition of the body, to whom must she make it? To some person who can tell whether it was "born dead, or alive and was murdered," or may she exhibit it to some person who cannot tell these facts by examination? In fine, must she exhibit it at all, or say a single word about it until called upon for explanation? May she not wait until investigation is set on foot, and then state the facts? What good can come of publicity until investigation is desired? Who shall call upon her and require her explanation? Must she answer the first over-curious, meddlesome, inquisitive scandal-monger, or be subjected to the penalty, or may she decline answering until some officer of the law shall require of her an answer? Or suppose she does conceal for a time, but before any knowledge of the birth of the child reaches any one she repents and immediately discovers the truth, has she then become liable to the penalty? Was the offense complete during such time as she alone knew of the birth, so that subsequent information by

her would not save the penalty? A great variety of cases may be supposed which will indicate some of the embarrassments attendant upon a construction which will carry the act beyond its manifest scope in its original form.

We think the exceptions should be sustained.

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

CHARLES F. H. MONTINE *vs.* CHARLES DEAKE.

In cases tried by the justice of the superior court without the intervention of a jury, his finding in matters of fact is conclusive upon the parties.

When answers to questions are favorable, and not injurious to the party objecting thereto, his exceptions to their admission will be overruled.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court, for the county of Cumberland.

ASSUMPSIT on account annexed, entered at the September term, and tried at the October term, 1868, by the justice, without the intervention of a jury, subject to exceptions in matters of law.

Justice Goddard found as a matter of fact that the defendant, in Sept., 1866, employed the plaintiff to dredge mud at the former's wharf, in Portland, at thirty cents a yard; that he dredged six hundred and sixty-six yards; that the defendant paid the plaintiff $200 Sept. 12, 1868; and that nothing is due the plaintiff from the defendant.

The writ showed an assignment of the amount claimed to L. D. M. Sweat, April 4, 1868.

During the trial the defendant asked the plaintiff, on cross-examination, "What was the consideration for which you made the assignment to Sweat?" which question, though seasonably objected to, the plaintiff was permitted to answer; whereupon the witness

answered,—"he had done business for me." He was then asked, "What was the reason you assigned the claim to Sweat?" which, though seasonably objected to, was admitted; and the witness thereupon answered, "I was owing him."

The presiding justice found that the defendant did not promise. Thereupon the plaintiff filed a motion that the finding be set aside and a new trial granted, for the alleged reasons that (1) it was against law; (2) it was against evidence; and (3) it was manifestly against the weight of the evidence.

A report of the evidence having been prepared by the plaintiff and presented to the justice for his certificate, he ruled as matter of law that he had no authority to certify the same.

To this ruling, together with those admitting the evidence mentioned, the plaintiff alleged exceptions.

L. D. M. Sweat, for the plaintiff.

P. Barnes, for the defendant.

APPLETON, C. J. Inasmuch as the answers were favorable to the party excepting rather than otherwise, and at any rate were not injurious to him, it is unnecessary to consider or discuss the propriety of the questions proposed.

By the act establishing the superior court for the county of Cumberland, approved Feb. 14, 1868, c. 151, § 6, when a jury is not demanded by either party, "all other cases except appeals shall be tried by the justice without the intervention of a jury, subject to exceptions in matters of law, in term time, or, if parties desire, at chambers." It is no part of his duty to report the evidence, for no appeal is given from his judgment as to the facts. He should therefore state the facts as he finds them proved, not the contradictory statements of opposing witnesses. He should merely find the facts, as in the case of a special verdict by a jury. To the facts as found by him it is his duty to apply the law. To his rulings in matters of law, the party aggrieved may file exceptions.

The motions for a new trial which by § 7 are to be heard and

determined by the law court, are those only in which there has been a trial by a jury.

Exceptions overruled.

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

ABEL SAWYER & another *vs.* GEORGE W. PARKER.

To authorize the court to declare a chattel mortgage, not stamped as required by the U. S. Stat. of 1866, c. 184, § 9, to be "invalid and of no effect," it must affirmatively appear that the omission was the result of an "intent to evade" the statute.

A chattel mortgage was executed Oct. 4, 1867, insufficiently stamped, and recorded. On the 16th of the same month the mortgaged chattels were attached by the creditors of the mortgager. On the 25th following, the mortgage was re-stamped by the collector, and the record corrected Jan. 30, 1869. In replevin by the mortgager. *Held*, that in the absence of evidence that the omission to properly stamp the mortgage in accordance with c. 184, § 9, was the result of an "intent to evade" the statute, the mortgage was deemed valid, and that the attachment was invalid, although made before the mortgage was re-stamped

ON REPORT.

REPLEVIN for a kiln of brick. Writ dated Oct. 26, 1867. Plea, general issue and joinder, with a brief statement justifying the taking as sheriff of the county, by virtue of certain writs of attachment against one Vital Cassant, whose property the bricks were alleged to be.

The plaintiffs introduced a mortgage of the bricks in controversy, from Vital Cassant to themselves, reciting a consideration of eight hundred dollars. It appeared that when the mortgage was executed and recorded, it bore a single fifty cent United States internal revenue stamp. A certificate of the following tenor was written upon the mortgage, and dated Oct. 25, 1867, viz.:

"Having been made satisfied by the affidavit of James O'Donnell,

Esq., that the omission to place the proper stamp upon the instrument at the time it was signed was accidental, and without intention to defraud the government, I have placed the proper stamp thereon.

NATH'L J. MILLER,
Collector of Int. Rev., 1st Dist., Maine."

This certificate was noted on the mortgage record, Jan. 30, 1869.

It also appeared that the defendant was, Oct. on 22, 1867, duly served with a written statement of the plaintiffs' claim under the mortgage, with a request to pay the claim or release the attachment.

It also appeared that the plaintiffs took possession of the bricks on the day following the execution of the mortgage, and retained the same until the attachment, when a keeper was placed over the bricks by the defendant.

The defendant established the facts alleged in his brief statement.

After the testimony was all in, the case was withdrawn from the jury, continued on report, with an agreement that the full court might enter such judgment as the law and facts would warrant.

Howard & Cleaves, for the plaintiffs, cited *Wolfe* v. *Dorr*, 24 Maine, 104; *Smith* v. *Smith*, 24 Maine, 555. On the question of stamping, *Carpenter* v. *Snelling*, 97 Mass. 455; *Hunter* v. *Cobb*, 1 Bush. (Ken.), 239; U. S. Rev. act of 1867, § 158; 4 Am. Law Register, 571; *Tripp* v. *Bishop*, 56 Penn. 430; *Beebe* v. *Hutton*, 47 Barb.; Am. Law Reg. March, 1869; 5 Am. Law Reg. 241.

Shepley & Strout, and *C. P. Mattocks*, for the defendant, contended that

The rights acquired under the attachment could not be disturbed by the subsequent stamping of the mortgage. U. S. statute of 1866, c. 184, § 9. The case is distinguished from *Dudley* v. *Wells*, 55 Maine, 145, decided under U. S. statute of 1865, c. 78, § 158, which did not protect subsequently accruing rights of innocent third parties, as does the last clause of c. 184, § 9. *Tobey* v. *Chipman*, 13 Allen, 127.

DICKERSON, J. The stamp put upon the mortgage before it was

recorded was insufficient, but the requisite stamp was affixed to it by the collector of the revenue for the district, after it was recorded, and the attachment of the mortgaged goods had been made. Act of congress of July 13, 1866, § 9.

We have decided that the act of congress of March 3, 1865, c. 78, § 158, does not make an unstamped instrument which requires a stamp "invalid and of no effect," unless there is an "intent to evade the provisions of the act;" and that such intent must be made to appear affirmatively, or the instrument will be held valid. *Dudley* v. *Wells*, 55 Me. 145.

The language of the act amendatory of the act of 1865, approved July 13, 1866, upon this point, is identical with that of the act of 1865.

In the case at bar there is not only no evidence of an intent to evade the provisions of the act of congress, but the fact that the requisite stamp was subsequently affixed by the collector, negatives such intent.

Under these circumstances it becomes immaterial whether the creditors of the mortgager attached the mortgaged property between the time of the execution and delivery of the mortgage, and the affixing of the requisite stamp, as the instrument was valid without that stamp.

The last clause of the act of congress of 1866, amendatory of § 158 of the act of 1865, relates to the stamping of the instrument by the collector, and does not render an unstamped instrument invalid when there was no "intent to evade the act of congress" by omitting to affix the proper stamp to it.

The mortgage was duly executed and recorded, and, besides, the plaintiff held possession of the goods replevied at the time of the attachment.

Judgment for the plaintiff.

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

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

ANNA T. JONES, guardian, *in certiorari*, *vs.* CITY OF PORTLAND.

By § 9 of the charter of the city of Portland, the city council have exclusive authority, through a committee therein mentioned, to lay out, alter, or discontinue any and all streets in the city, without petition therefor.

A notice, duly published, reciting a petition, praying that a "survey be made of the westerly portion of Congress street, with reference to straightening and otherwise improving said street," and designating the time and place, when and where the committee will meet the parties interested, and "will adjudge and determine whether the public convenience requires said street to be laid out," is sufficient.

The report of the committee need not contain a detailed recital of the notice given.

The "westerly part of Congress street" is sufficiently definite.

CERTIORARI.

The writ and the return thereon, containing the petition of Royal R. Burnham and others; notice ordered upon the petition by the committee on laying out new streets; and the return of the committee made up the case.

The petition, signed by Royal R. Burnham and nine others, addressed to the mayor, aldermen, and city council of Portland, and dated April 16, 1866, was of the following tenor:

"The undersigned, owners of real estate on the street named below, do most respectfully petition that a survey be made of the westerly portion of Congress street, with reference to straightening and otherwise improving said street."

The notice, dated May 10, 1866, and signed by six persons styling themselves "committee on laying out new streets," after reciting the petition and reference of the same, on May 7, 1866, by the city council to the committee, continues as follows:

"Therefore, notice is hereby given to all parties interested, that the joint standing committee of the city council on laying out new streets, will meet to hear the parties and view the proposed way, on May 21, 1866, at four o'clock, P. M., at the junction of said Congress street with Portland street, and will then and there pro-

ceed to adjudge and determine whether the public convenience requires said street or way to be laid."

So much of the return of the committee as is essential is as follows:

"The undersigned joint standing committee on laying out new streets, to whom was referred by the city council on the 16th day of April, A. D. 1866, the petition of Royal R. Burnham and others, praying that a survey may be made of the westerly portion of Congress street, with reference to straightening and otherwise improving said street, have attended to that duty, and now report to the city council thereon as follows, viz.:

"Said committee gave due and legal notice to all parties interested therein, of the time and place where they would meet to view the proposed public way and hear the parties, by causing an advertisement thereof to be published in two daily papers printed in Portland, viz.: Portland Daily Press and Portland Eastern Argus, for one week at least previous to the time appointed therefor; and having met pursuant to said published notices at the junction of Congress with Portland street, the place of beginning, on the 21st day of May, at 4 o'clock in the afternoon, A. D. 1866, and having personally examined the way proposed, and heard all the parties interested therein, said committee did thereupon determine and adjudge that the public convenience and the necessities of the city required that said street or public way should be laid out and straightened as proposed, and accordingly we proceeded to lay out and did lay out," &c.

Symonds & Libbey, for the plaintiff.

I. That the record does not set forth what notice was given of the meeting of the committee to view the way, but assumes to determine that due and sufficient notice was given. The notice actually given should appear, and the court will then determine whether it is legal or not. *Lancaster* v. *Pope*, 1 Mass. 86.

As in levy upon real estate, general averment that notice was given according to law is insufficient. *Davis* v. *Maynard*, 9 Mass. 242. *Wellington* v. *Gale*, 13 Mass. 483.

II. That the notice actually given was insufficient.

(1) Because the description of the street proposed to be located was wholly indefinite. The only description is "the westerly portion of Congress street," a street three miles long.

There should be a description by courses and distances, else the notice gives no information to parties interested.

Compare the notice required to be given in similar cases by the county commissioners. R. S. c. 18, §§ 1 and 2.

(2) Because it did not appear by the notice that final action was then to be taken in locating the street. The petition was only "that a survey be made." The only action of the city council was to refer that petition to the committee, and the committee had no authority under that vote to locate a street. The city council must initiate action. The committee cannot do it. City Charter, Sect. 9. And the notice which they gave did not indicate an intention to do more than to act upon the petition referred to them. It was no notice to the public that a street was to be located or altered.

See, generally, *Dyer in Certiorari* v. *Lowell*, 33 Maine, 260. When the writ of *certiorari* has been issued, there is no discretion in the court. If errors appear the record must be quashed.

Nathan Cleaves, city solicitor, for the defendants.

APPLETON, C. J. The issuing or the refusing to issue a writ of *certiorari* upon petition therefor, is a matter of judicial discretion. The rights of the parties are usually determined upon the hearing in the petition. If the alleged errors of record are purely technical, the court will not interfere. In the case before us, the writ was allowed to issue without any hearing on the petition.

The errors alleged to exist relate to the proceeding of the defendants in laying out and straightening Congress street. The writ requires the production of the record of the location, alteration, and laying out of the westerly portion of Congress street made in pursuance of the petition of Royal R. Burnham and others, dated April 16, 1866, and contained in the report of the joint standing committee of the city council, called the committee on laying out new streets, and the notices given by said committee of the time and

place of their proposed proceedings in relation to said petition, &c. These papers are all before us at the instance of the plaintiff.

By the charter of the city of Portland, § 9, the city council "have exclusive authority to lay out, alter, or discontinue any and all streets or public ways in the city of Portland, without petition therefor, and as far as extreme low-water mark."

By the same section "a joint standing committee of the two boards shall be appointed, whose duty it shall be to lay out, alter, widen, or discontinue any street or way in said city, first giving notice of the time and place of their proceeding to all parties interested, by an advertisement in two daily papers, printed in Portland, for at least one week previous to the time appointed."

The notice, as appears by the return of the defendants, recites a petition to lay out and re-run the westerly portion of Congress street, with reference to straightening the lines of said street, and designates the time and place where and when the joint standing committee will meet the parties interested, and will adjudge and determine whether the public convenience requires said street or way to be laid out.

It would seem that there could be no misunderstanding as to the meaning of this.

The return of the committee recites the petition for straightening and otherwise improving the westerly portion of Congress street, and states that said committee "gave due and legal notice to all parties interested therein of the time and place when they would meet to view the proposed public way, and hear the parties, by causing an advertisement thereof to be published in two daily papers in Portland, viz.: Portland Daily Press and Portland Eastern Argus, for one week at least previous to the time appointed therefor," &c.

The notice was published in the daily papers as required by § 9. It gave the time and place of hearing, and the purpose and object of the meeting. It was not necessary that the notice should be recited in the return. But by comparing one part with another, it appears that it contained the necessary facts. As the notice given

is, at the instance of the plaintiff, produced, and made part of the case, we think the record sufficiently discloses that it was a legal one.

It is objected that the description of the street is too indefinite. "The westerly part of Congress street" is the part of the street to be straightened and altered. The street is definite. It is not denied there is such a street well defined and legally established. The westerly portion thereof must mean the westerly half of the street, and that is sufficiently clear and definite.

The action of the city council may be had without petition. The petition therefor could do no harm. The notice was to "re-run the westerly portion of Congress street with reference to straightening the lines of the street." The notice gave to parties interested the purpose and object of their meeting. At this meeting, they adjudicated "that public convenience and the necessities of the city required that the said street or public way should be laid out and straightened," &c. The adjudication was upon the subject-matter for which the committee met.

Proceedings of the city government affirmed.

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

WESTON F. MILLIKEN & others *vs.* GEORGE WARREN & others.

At common law, a vender of goods has a lien thereon, so long as they remain in his possession unpaid for according to the terms of the sale,

If the vendee give his negotiable promissory note, payable on time, for the purchase-money, and then become insolvent while the goods yet continue in the possession of the vender, the latter may retain them until the price be paid, provided the note remain unnegotiated in his possession, so that it may be surrendered on discharge of the lien.

ON REPORT.

TROVER, for three thousand and twenty-nine bushels of corn.

The court were to render such judgment as the law and facts required.

The case is sufficiently stated in the opinion.

Shepley & Strout, for the plaintiffs.

1. The corn was purchased on joint account, and the possession of the co-tenant was the possession of Bradley, Coolidge & Rogers. *Cushing* v. *Breed*, 14 Allen, 376. *Beaumont* v. *Crane*, 14 Mass. 400.

2. The corn being stored by a third person, the possession of such third person was the possession of defendants and Bradley, Coolidge & Rogers jointly, and no separation of the corn was necessary to pass both title and possession. *Hatch* v. *Bayley*, 12 Cush. 29. *Taxworth* v. *Moore*, 9 Pick. 347.

3. In either of the above cases no right of stoppage *in transitu*, and no lien for the purchase-money remained in the defendants, the possession as well as the title to the corn vesting in Bradley, Coolidge & Rogers, by operation of law, and no separation of the corn being necessary for this purpose.

4. The defendants had only given their notes to King, Thurlow & Company for the corn in question; Bradley, Coolidge & Rogers had given their notes to defendants for the same purpose. Now, whatever rights King, Thurlow & Co. might have had to retain the corn for payment of price, the defendants had no such right of detention.

5. The defendants, by accepting the one hundred dollars tendered by plaintiffs, became their agents, and cannot now set up a lien for the non-payment of the notes given for the price of the corn by Bradley, Coolidge & Rogers.

6. By giving Bradley, Coolidge & Rogers a fixed credit for two and four months, and taking their notes upon that time, the defendants lose all lien for payment. *Barrett* v. *Goddard*, 3 Mason, 107. 2 Kent's Com. 677.

The defendants assumed complete and exclusive control of the corn, and sold it, and are liable to plaintiffs for the value of their share.

N. Webb, for the defendants, cited *Parks* v. *Hale*, 2 Pick. 212; *Arnold* v. *Delano*, 4 Cush. 33; *Bloxam* v. *Saunders*, 4 B. & C. 941; *Owenson* v. *Morse*, 6 T. R. 64; *Townley* v. *Crump*, 4 A. & E. 52; *White* v. *Wilks*, 5 Taunt. 176; *Wallace* v. *Breeds*, 13 East, 522; *Austen* v. *Craven*, 4 Taunt. 644; *Busk* v. *Davis*, 2 M. & S. 397; *Hodgdon* v. *Lay*, 7 T. R. 446; *Feise* v. *Ray*, 3 East, 93; *Newhall* v. *Vargas*, 13 Maine, 93; *Dixon* v. *Yates*, 5 B. & Ad. 313; *Miles* v. *Yorton*, 2 Cromp. & M. 512; *Gibson* v. *Carruthers*, 8 M. & W. 341; *De Wolfe* v. *Howland*, 2 Paine's C. C. R. 356.

DICKERSON, J. TROVER, on report. On the 30th day of Oct., 1866, the defendants, under the firm of S. T. Raymond & Co., purchased a quantity of corn of Messrs. King, Thurlow & Co., giving their notes in payment therefor, and taking delivery of the key to the building in Portland where the corn was stored.

The plaintiffs claim that this corn was bought on joint account of defendants and Messrs. Bradley, Coolidge & Rogers, and that having purchased one-half of it for a valuable consideration of the latter firm, and demanded the sum of the defendants, they are entitled to maintain this action for that amount.

The defendants deny such joint purchase, and allege that the corn was bought exclusively on their own account; that they sold the half in controversy to Bradley, Coolidge & Rogers, taking their notes therefor on two and four months, without giving any delivery of the corn; that Bradley, Coolidge & Rogers have never paid these notes, but became insolvent Dec. 11, 1866, and that they have a right to retain the corn until the purchase-money has been paid or tendered.

It appears from the evidence that the plaintiffs paid Messrs. Bradley, Coolidge & Rogers a valuable consideration for the corn in controversy. In order further to establish that theory of the case, the plaintiffs rely mainly upon the testimony of Mr. Bradley, the tender by them of $100 for insurance and storage of the corn, and the proper transactions between the defendants and Bradley, Coolidge & Rogers respecting it. Mr. Bradley, of the firm of Bradley, Cool-

idge & Rogers, testifies that Mr. Bickford, one of the defendants, about the 30th day of Oct., 1866, informed his firm "that he knew of a lot of corn that he could buy, and wanted to know if we would take half of it at the price, which was $1.30. We told him we would. He came in and said he had purchased the corn. We told him to have it insured on our account, one-half of it, and he said he would."

While this testimony would seem to indicate a purchase on joint account, it is by no means irreconcilable with the theory that the defendants made the original purchase on their own account, and agreed to sell one-half of the amount to Bradley, Coolidge & Rogers upon the same terms as it was bought. The statement of Bick ford, as testified to by Bradley, that "he knew of a lot of corn that he could buy, and wanted to know if we would take half of it;" and the reply of Bradley, at least, leaves it uncertain whether it was the understanding of the parties that it was to be a joint purchase, or whether the defendants were to make the designed purchase, and Bradley, Coolidge & Rogers were to buy of them.

The tender of the $100 for storage and insurance made by the plaintiffs to defendants, affords very slight evidence of what the real transaction was between the defendants and Bradley, Coolidge & Rogers, as the plaintiffs were not actually cognizant of the facts, but acted, doubtless, upon information, whether true or false, received from their venders.

The coincidence as to date and time of payment, between the notes given by the defendant for the corn, and those received by them of Bradley, Coolidge & Rogers for one-half of it, is such as might naturally be expected in any view of the case taken by the parties. Whether the defendants were in fact joint purchasers with Bradley, Coolidge & Rogers, or subsequently sold to them, on time, a part of their own original purchase without any advance, it is reasonable that they would provide that the notes taken should correspond in date and time of payment with those given by them.

After all, there remains the undisputed fact that the defendants were alone known to King, Thurlow & Co., as the purchasers of

the corn; the other fact, also, that Bradley, Coolidge & Rogers gave their notes to the defendants for half of their purchase, the refusal of the defendants to receive the $100 tendered, as payment for storage and insurance, for any such purpose, and the positive testimony of Bickford that the defendants were exclusively interested in the original purchase, and that he subsequently sold the corn in controversy to Bradley, Coolidge & Rogers.

The plaintiffs assumed the burden of proving a purchase of the corn on joint account of the defendants and the plaintiffs' venders; and we think the evidence is unsufficient to establish that proposition.

It appears that the plaintiffs' venders took no delivery, actual or constructive, of the corn, when they purchased it, and that it has ever since remained in the possession of the defendants. It further appears that the notes given to the defendants for the corn sued for, have never been paid, and that they are still in the hands of the defendants, and have not been negotiated by them. It is also in evidence that the plaintiffs' venders became insolvent after they bought the corn of the defendants and before the plaintiffs demanded it of them.

A vender of goods has a lien upon them at common law, so long as they remain in his possession, and the vender neglects to pay the price according to the conditions of the sale; and if the vendee becomes insolvent, while the goods are yet in the hands of the vender, the latter may retain them until the price is paid. This rule of law is applicable, though a negotiable promissory note has been given for the purchase-money, if it remains in the hands of the vender, and has not been negotiated, so that it may be delivered up on discharge of the lien. *Parks* v. *Hall*, 2 *Pick*, 211. *Arnold* v. *Delano*, 4 Cush. 41.

Under the circumstances of this case, the plaintiffs' venders had no right to a delivery of the corn in controversy, until they had paid, or tendered payment of the notes given for it; and the plaintiffs stand in no more favorable position.

In deciding this case, we have not thought it necessary to deter-

mine whether the legal consequences claimed by the plaintiffs' counsel would follow if the corn had been purchased on joint account. If we have found such purchase, it might have been important to inquire whether, in view of the insolvency of the plaintiffs' venders, and the other undisputed facts in the case, the right of the defendants to retain the corn until it had been paid for, would exist with equal force as it now does. *Judgment for defendants.*

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

ALFRED RICHARDS & others *vs.* ALBERT STEPHENSON.

G. acquired title to a specific part of a schooner incumbered by an antecedent mortgage, and conveyed it, together with another vessel, to the defendant, as security for his indebtedness to the defendant and to a firm of which the defendant was a member. Subsequently, and at G.'s request, the defendant conveyed the schooners thus held by him to the plaintiffs (to whom, also, G. was indebted), and at the same time, the plaintiffs agreed in writing with the defendant, that when they disposed of the schooners, they would satisfy the demands held against the same by the defendant and his firm, and place the balance to the credit of G. Subsequently, the plaintiffs paid the outstanding mortgage, and then sold the vessels for more than the amount paid on the mortgage. *Held*, (1) That the bill of sale of the vessels and the written contract must be regarded as one transaction and be construed together; and (2) That an action cannot be maintained on the covenant of warranty in the bill of sale.

ON REPORT.

COVENANT, on warranty in a bill of sale of seven-eighths of schooner Scioto. The only consideration for the bill of sale was the written agreement executed simultaneously with the bill of sale.

The court were to render such judgment as the law and facts required.

The remaining facts sufficiently appear in the opinion.

Lewis Pierce, for the plaintiffs.

The defendant is estopped from denying the consequence and the consideration by the recitals in his deed. 1 Greenl. on Ev., § 26, n. *Steele* v. *Adams*, 1 Maine, 1. *Powell* v. *M. & B. Man. Co.*, 3 Mason, 351, 357. And because it is over his hand and seal. *Neil* v. *Tenney*, 42 Maine, 322. *Wing* v. *Chase*, 35 Maine, 260. *Page* v. *Trufant*, 2 Mass. 159. And even if the defendant intended to covenant on behalf of a third person, and did not intend to make himself personally liable, and received nothing himself. *Tippets* v. *Walker*, 4 Mass. 595. *Appleton* v. *Binks*, 5 East, 148.

The agreements given to the defendants of themselves make a good consideration, and the covenant of the defendant is not in any way conditional upon the performance of said agreements by the plaintiffs. Whether the plaintiffs have performed them or not, is immaterial and cannot affect this action, nor can the result of this action affect the liability of the plaintiffs to perform said agreements. Whether there are any existing "demands against said vessels" within the description of said agreements does not appear.

It cannot be contended that these agreements operate as a release of the covenant; they contain no reference to the covenant, nor any words which by intendment can be said to cover the mortgage, nor are they instruments of as high a character as the covenant.

"Covenant by deed must be discharged by deed." *Heath* v. *Whidden*, 29 Maine, 108.

The covenant sued on is a covenant of warranty. The incumbrance set forth existed at the date of the covenant, and the covenanter purchased the better title in consequence of the threats of the holders to foreclose and take possession.

The plaintiffs are therefore entitled to recover according to the agreement. 2 Greenl. Evid., § 244. *Tufts* v. *Adams*, 8 Pick, 547. *Cole* v. *Lee*, 30 Maine, 392. *Reed* v. *Pierce*, 36 Maine, 456. *Stoddard* v. *Gage*, 41 Maine, 287. *Estabrook* v. *Smith*, 6 Gray, 572.

W. L. Putnam, for the defendant.

1. The agreement discloses that the plaintiffs were trustees for the defendant and his firm,—namely, to sell the vessel and pay them the

proceeds,—and in that capacity they could not maintain a suit against their *cestui que trust.*

2. After paying any claims which defendant or his firm had against the vessel, plaintiffs had the privilege of applying the balance to their account against Sullivan Green, the equitable owner of the vessel.

Had the claims of Stephenson or his firm been understood as some particular sum, so that the plaintiffs might equitably have relied on the warranties in the bill of sale, as promising for their own advantage and for payment upon their own claims the whole surplus of the vessels over the specified claims of defendant, probably this suit could have been maintained.

But here the mortgage which plaintiffs paid, had it been paid by defendant or should he pay it now, would at once constitute one of the claims against the vessel which the plaintiffs have agreed to pay him.

In other words, they became trustees of this vessel for the payment of this very claim, among others, and became holden to pay it indirectly through defendant.

Appleton, C. J. It appears that one William Folsom, owning seven-eighths of the schooner Scioto, on Feb. 6th, 1857, mortgaged the same to Demond & Robinson, of Boston.

Subsequently, Sullivan Green, having acquired a title to the seven-eighths of the schooner Scioto, thus incumbered, and being indebted to the defendant and to the firm of Davis & Co. of which the defendant was a partner, conveyed the same and the schooner Gloucester to the defendant as security for his indebtedness to him and to the firm of Davis & Co.

On Nov. 23d, 1866, at the request of Sullivan Green, the defendant conveyed the schooners thus held by him as security, to the plaintiffs, to whom said Green was indebted. At the same time the plaintiffs agreed with the defendant to dispose of the property, and after satisfying the demands held against the vessel by Davis & Co. and by the defendant, that "the balance, if any remained, shall be placed to the credit of Sullivan Green."

The bill of sale from the defendant to the plaintiffs, and the agreements from the plaintiffs with the defendant are of the same date, and are to be regarded as part of one and the same transaction, and must be so construed.

The plaintiffs agree that when they have disposed of the property, they will satisfy the demands which the defendant and the firm of Davis & Co. hold against the vessels, and that what remains shall be passed to the credit of Green. The Scioto was subject, in the hands of the defendant, to his claims and those of Davis & Co., as well as to any antecedent outstanding mortgage.

The plaintiffs sold the Scioto for more than the mortgage, having first paid the mortgage. The balance in their hands was to be passed to the credit of Green, who was the plaintiffs' debtor. What was this balance? The plaintiffs took the vessel to sell, and sold the same for more than the mortgage. The balance is what is to be passed to the credit of Green, after paying the defendant's claims and those of Davis & Co. The defendant would have nothing unless the Folsom mortgage was paid. If the defendant paid the Folsom mortgage, the plaintiffs were to account for it to, and pay him the same. He would hold the proceeds of the vessel as security for the amount of such payment equally with the other claims for which the vessel was held. If the plaintiffs paid this debt, they only paid what they would have been obliged to pay the defendant, if he had taken up the mortgage. They advanced the funds instead of the defendant, whom they must have paid had he paid the mortgage. The amount of the mortgage is not to be passed to the credit of Green, or to enure for his benefit as a credit. Yet such would be the effect if the plaintiffs were to recover. Green was bound to pay this debt to relieve the vessel. It is to be a charge on the vessel, not a credit to Green.

The plaintiffs are not damnified the price of the vessel in his hands. They are entitled to deduct the mortgage debt therefrom. The remaining balance they hold, to be accounted for in conformity with their contract with the defendant, of Nov. 23, 1866.

The plaintiffs have neither a legal nor equitable claim to recover the sum paid, nor has Green any right to have it passed to his

credit. It would be grossly unjust to compel the defendant to pay it. It would be against the manifest object and intent of the parties. *Plaintiffs nonsuited.*

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

ORLANDO C. BROWN, petitioner, *vs.* WARREN W. RICE.

After a convict has been duly committed to jail on a warrant of commitment, in pursuance of a legal sentence, the judge cannot revise and increase it, although the punishment, imposed by the latter sentence, be within the limit fixed by law.

PETITION for a writ of *habeas corpus.*

The petition alleged substantially that at the time of its date the petitioner was unlawfully held in custody at Portland, by Warren W. Rice, the warden of the State prison, by virtue of a warrant of commitment from the superior court of Cumberland county, a copy of which was thereto annexed; that at the January term, 1870, of said court, the petitioner was indicted for cheating by false pretences, and, upon being arraigned, pleaded guilty thereto; that on January 11th, he was sentenced by the justice of said court, upon conviction on said indictment, to be imprisoned in the county jail, at Portland, for six months, and on the same day was committed in execution of the sentence; that thereupon he entered upon the term of said imprisonment and was serving the same, when, on January 29th, the justice of said court undertook to revoke said sentence and sentence the petitioner on said indictment and conviction to be imprisoned in the State prison for the term of three years; that the latter sentence was without authority of law; that the warrant under which the petitioner was held was issued in pursuance of such illegal sentence.

The remaining facts sufficiently appear in the opinion.

Davis & Drummond, for the petitioner.

N. Webb, county attorney, for the respondent.

KENT, J. The question presented by the case before us is, whether the sentence to three years' imprisonment in the State prison was legally imposed. It is not objected that such a sentence was beyond the limit fixed for the crime, but it is urged that the court had no power to inflict it, because the same court had passed a prior sentence of six months' imprisonment in the county jail on the same indictment, and had issued a warrant of commitment, which had been executed by the sheriff, by committing the prisoner to the jail, and he had been received by the jailer and entered on the register as such prisoner, and had remained as such for nineteen days of the six months, before he was recalled into court, and the second sentence imposed.

After conviction, if no legal bar is interposed, it is the duty of the court to award sentence, and after such sentence of imprisonment is pronounced and recorded on the docket, it is the duty of the court to issue a warrant to the sheriff or warden, directing him to take the convict into custody, and remove him to the designated place of confinement. When the court has done these acts it would seem to have done all that it had legal power to do, and its power over the prisoner or his destiny, under the proceedings then before it, would appear to be at an end.

If there had been any irregularities or any illegal proceedings, the remedy would be by writ of error, or review, or by *habeas corpus*, or some other new proceeding.

It is clear that a judge cannot pass two sentences, to be in force at the same time. He cannot pass a sentence of imprisonment in the county jail for a specified time, and afterwards add to it a sentence of years in the State prison, to take effect after the expiration of the first part of the sentence.

If there can be any validity in the second sentence, it must be because the first sentence is legally annulled or revoked and made entirely void.

How far does the power of the court in this respect extend? It seems to have been settled by practice and by authority, both in this country and in England, that during the term the court has power over its unexecuted entries or judgments, and may revoke, alter, or substitute new decrees or entries in place of those before made or entered and not executed, both in civil and criminal cases. If, for instance, a default is entered in a civil suit, and a special judgment is ordered and entered on a day before the end of the term, and also that execution issue accordingly, it seems that before the execution is actually issued, the court may revoke and strike out the entry and leave the case without any special entry. But if an execution had been duly issued, and if a levy had been made or commenced, it would clearly be beyond the power of the judge to annul the record by ordering the clerk to erase the entry. So in a criminal case, so long as the sentence remains entirely unexecuted in any part, and no execution of it has been attempted or made, it has been held that it might be revoked, and another sentence be substituted. *Commonwealth* v. *Weymouth*, 2 Allen, 145.

Chief Justice Shaw, in *Stickney* v. *Davis*, 17 Pick. 169, says,—when speaking of a judgment in a civil case,—"where it clearly appears that no action has been had on the judgment, or the execution, if one has been issued, has been returned to the files unexecuted, and where the rights of third persons cannot be affected, there seems to be no reason why the same thing (as an entry of a judgment *nunc pro tunc*) should not be done by vacating the entry of judgment, and bringing the action forward. This ought to be done with great caution, and with strict regard to the rights of others."

These cases certainly are as strong for the respondent as any that can be found, and recognize the right of the court to go as far, at least, as we can find either reason or authority for going. But they stop at the point of execution, and clearly express or imply that after execution or warrant issued and executed, this power of summarily changing the record, or judgment, or sentence, is at an end.

In this case the warrant had issued, had been executed, the pris-

oner had been under sentence, and in prison, under the warrant, and had suffered nineteen days of confinement. This was a legal sentence, and was in process of execution, when, for some reason, doubtlessly one that the judge deemed sufficient, he was brought from the jail, and the former sentence was recalled and revoked and the new one imposed.

If these proceedings were legal, it would seem that this prisoner must suffer punishment under two distinct sentences for the same offence. If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment suffered under it. If now he is to be sent to the State prison for three years more, not counting his time in jail under the first sentence, he certainly must suffer two distinct imprisonments under two distinct sentences, given at a considerable interval of time, for the same offence, and under one indictment.

We think that the sentence in question to the State prison was illegally imposed, and is void and cannot be carried out. We think the first sentence was legal, and should be executed.

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

INHABITANTS OF GORHAM *vs.* BENAIAH H. HALL & others.

After a default of an action of debt on a collector's bond, the defendants cannot have the damages assessed by a jury, especially after an auditor, appointed for that purpose, has heard the parties and presented his report for acceptance.

The duties of the person appointed to assess the damages in such a case are different from those contemplated by R. S. of 1857, c. 82, §§ 59, 60, and 61.

When the terms of such a bond conform to the requirements of the statute, and it has been actually accepted by the selectmen, and both parties have acted under it as a statute bond, it will be regarded as such, although it has not been approved in writing by the municipal officers.

The provisions of R. S. of 1857, c. 6, §§ 103, 104, 121, and 122 are not mandatory, but they are cumulative remedies at the discretion of the municipal officers.

Inhabitants of Gorham *v.* Hall.

Generally, a collector is chargeable for all taxes committed to him, to enforce the payment of which he has not, during the period alloted for their collection, exhausted his authority.

ON EXCEPTIONS.

DEBT on two bonds given by the collector of taxes of Gorham, both bonds having the same sureties.

The action was defaulted at the January term, 1868, when Frederick Fox was appointed to assess the damages, who subsequently heard the parties, and made his report at the April term, 1869.

The report charged the defendants with the gross amount of taxes committed to the collector for the two years, and credited them by the amount paid to the treasurer, as by the treasurer's books, leaving a balance against them of $2301.40.

The remaining facts sufficiently appear in the opinion.

N. Webb, for the plaintiffs, cited *Begg* v. *Whittier*, 48 Maine, 315; *Cummings* v. *Smith*, 50 Maine, 569; *Price* v. *Dearborn*, 34 N. H. 481; *Willson* v. *Willson*, 5 N. H. 240; *West* v. *Whitney*, 6 Foster, 314. That the measure of damages in the report is correct. *Colerain* v. *Bell*, 9 Met. 499; *Scarboro'* v. *Parker*, 53 Maine, 465; *Forel* v. *Clough*, 8 Greenl. 342; *Prescott* v. *Moran*, 50 Maine, 347; *Readfield* v. *Shaver*, 50 Maine, 43.

S. C. Strout & H. W. Gage, for the defendants, contended, *inter alia*, that the sureties are not liable for the whole amount of uncollected taxes; but only for such of them as have been lost by the neglect of the collector, through the insolvency of the persons taxed, or the loss of remedy against real estate by lapse of time or otherwise; *Colerain* v. *Bell*, 9 Met. 499; and in addition to this, such damages as the town has suffered by the delay to collect taxes which are still collectable by means of commitment to another collector, but cannot be enforced by the sureties defendant.

A distress should have issued against the collector (he not having collected within the term allowed by his warrant) the bills taken by the town and collected through another collector under R. S. c. 6, §§ 103, 104, 120, 121.

All remedies for collection remained in force after Hall's delinquency. *Bassett* v. *Porter*, 4 Cush. 488. *Hartland* v. *Church*, 47 Maine, 169. As between the town and these sureties, the town was bound to take this course, and not attempt to collect the gross amount of sureties who are powerless to coerce the collector. Nearly all the uncollected taxes are now collectable.

Actual damages only can be recovered on bonds except when the statute otherwise provides. *Clifford* v. *Kimball*, 39 Maine, 413. *Eaton* v. *Ogier*, 2 Greenl. 46. *Sargent* v. *Pomeroy*, 33 Maine, 388. *Houghton* v. *Lyford*, 39 Maine, 267. *Carpenter* v. *Doody*, 1 Hilt. (N. Y.), 465. *Lowell* v. *Parker*, 10 Met. 309. *Scarboro'* v. *Parker*, 53 Maine, 252.

Much of the loss resulted from the negligence of the plaintiffs.

The bond for 1860 was not approved by the selectmen as required by R. S. of 1857, c. 6, § 85, and therefore is but a common law bond subject to chancery to the amount of actual damages, independent of all provisions of c. 6.

Defendants were entitled to a trial by jury. The report is that of an auditor, and is governed by R. S. of 1857, c. 82, §§ 27 and 61. *Begg* v. *Whittier*, 48 Maine, 314.

DICKERSON, J. DEBT on two bonds of the collector of taxes for the years 1860 and 1861. The action was defaulted, and Frederick Fox, Esq., was appointed auditor to assess the damages. The presiding judge refused to allow the defendants' request to have the damages assessed by a jury, and ordered the auditor's report to be accepted. The defendants filed exceptions, alleging several grounds of complaint.

1. That the request for a jury to settle the damages ought to have been granted. Whatever may have been the right of the defendants to have the damages assessed by a jury, if they had seasonably applied therefor, they waived their right to a jury trial by neglecting to demand one until an auditor had been appointed, and had made his report. They cannot be permitted to have the double advantage of accepting a favorable report of an auditor, and

setting aside an unfavorable one for a jury trial. After a default, the defendants have no right to a jury to assess damages for them. Though styled an auditor, the duties of the person appointed to assess the damages are essentially different from those contemplated by the statute for the appointment of an auditor "to state the accounts." This appointment is not a proceeding under that statute which gives to either party a trial by jury, if dissatisfied with the auditor's report, and makes that report evidence to the jury upon trial of the cause. R. S. c. 82, §§ 59, 60, and 61. *Price* v. *Dearborn*, 34 N. H. 486. *Begg* v. *Whittier*, 48 Maine, 314.

2. The defendants further allege that the bond of 1860, not having been approved in writing by the selectmen, is not a statute but a common-law bond, and, therefore, subject to a hearing, according to the actual damages. This bond, in terms, conforms to the requirements of the statute, was accepted by the selectmen, and both parties acted under it, as a statute bond. Under these circumstances, a default having been entered, we think the bond must be treated as a statute bond.

3. It is further objected, that the auditor improperly refused to allow the defendants a credit of $869.31. The burden was upon the defendants to show payment of this sum. The evidence was conflicting, and we think the charge was properly disallowed.

4. It is also argued that all uncollected taxes, which might have been collected, if the town had taken the proper steps to do so, are not collectable of the defendants. The powers conferred upon collectors of taxes for towns and cities, and their obligation to account for the several sums committed to them in their warrant to collect, are clearly pointed out in the statute. He may distrain and sell the goods and chattels of a delinquent tax-payer, and for want thereof, he may arrest him and commit him to jail. He is commanded by his warrant to levy and collect of the several persons named in the list committed to him, each one his respective proportion therein set down, to pay the same to the town treasurer, and to make up an account of collections of the whole sum on or before a day stated. R. S. c. 6, § 79.

Another section of the statute enjoins upon him the duty to faithfully obey the directions in his warrant. R. S. c. 6, § 84.

His official bond, also, binds him to the faithful discharge of all these duties. R. S. c. 6, § 85. And he is answerable to the inhabitants in an action for all sums they are obliged to pay by means of his deficiency, and for all consequent damages. § 111.

The provisions for demanding the bills of a delinquent collector, and committing them to another collector, and for issuing a warrant of distress against him are not mandatory, but permissive; cumulative remedies to be resorted to or not, at the discretion of the municipal authorities. It is not for such delinquent collector to complain that he has not been dealt with in a more severe and summary manner. R. S. c. 6, §§ 103, 104, 121, and 122.

In general, a collector of taxes becomes chargeable for all taxes committed to him, in respect to which he has not exhausted his authority to enforce payment during the period allotted for their collection, if the town insist upon his liability, and require payment from him. It is no defense to a suit on a collector's bond for such delinquency, that the individuals against whom such taxes were assessed were not, at any time after the tax-bills were placed in his hands, of sufficient ability to pay the same, and that a levy of a warrant of distress upon them would have been unavailing. *Colerain* v. *Bell et al.*, 9 Met. 503.

It does not appear that the collector took the necessary legal measures to enforce payment of the taxes with which he is charged, within the time mentioned in his warrant. They were, therefore, properly allowed against him by the auditor. The claim of the collector for commissions having been once paid, was rightfully disallowed. *Exceptions overruled.*

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

CHARLES P. TRAUB & another *vs.* WESTON F. MILLIKEN & another.

If a foreign factor sell merchandise in his own name, without disclosing his principal, and receive, in part-payment therefor, his own check and the balance in money, the principal cannot recover the price for the goods thus sold, in an action of assumpsit against the vendees, if they had no knowledge of their vender's representative character.

ON REPORT.

ASSUMPSIT on an account annexed to the writ, of the following tenor:

Messrs. W. & C. R. Milliken,

Jan. 3d, 1867. Bought of Traub, Parkinson & Co.,

64 boxes sugar, ... $2950.20.

After the evidence was all in, the case was continued on report, —the court to enter such judgment as the law and evidence required.

The remaining facts sufficiently appear in the opinion.

J. & E. M. Rand, for the plaintiffs, cited Story on Agency (6th ed.), § 413; *Kinder* v. *Shaw*, 2 Mass. 398; *Parsons* v. *Webb*, 8 Greenl. 38; *Sternermann* v. *Cowing*, 7 Johns. Chan. 275; Story on Agency, §§ 78, 103, a (3).

Shepley & Strout, for the defendants.

TAPLEY, J. On the 3d day of January, 1867, the defendants purchased of one Hosea I. Robinson a quantity of sugar and paid therefor, in part by his own check which they held, and in part by cash paid for duties due upon the sugars.

The plaintiffs now claim to recover pay of the defendants for the same, alleging that they are the owners, that Robinson was their agent, and that being such, he had no power to sell and receive in payment therefor a debt of his own.

From the evidence reported, it appears that Robinson was an importer and dealer in sugars; that June 27, 1866, the plaintiffs consigned to him for sale a quantity of sugar, a part of which is that in

question; that on the 3d of January, 1867, he sold sixty-four boxes of the sugar to defendants at cash rates; that at the time of sale he did not inform the defendants, who owned the sugars; that there was no agreement except the ordinary one when sugars are bought for cash; that he was then "supposed to be in good credit," although as it subsequently proved he was in fact insolvent; that the check which was received in part-payment was given two or three days before for the check of the defendants for an equal amount, and used by Robinson; that Robinson "had no special orders from plaintiffs as to the mode of selling, but was to sell in the usual way and to hold the proceeds subject to plaintiffs' order."

Robinson, called by the plaintiffs, says "defendants have paid the value of these sugars in cash. Their check, given me at the time I gave them mine, paid for the sugar."

The defendants contend, that in fact the sugars were paid for in cash as testified to by plaintiffs' witness; but the plaintiffs contend that the facts proved show this to be untrue.

The view we have taken of this case renders the discussion of this question unnecessary.

The plaintiffs are residents of Havana, on the island of Cuba; Robinson was, therefore, what is denominated a foreign factor. The case shows that he did not inform the defendants who were the owners of the sugars, and there is no evidence showing that the defendants knew that Robinson was acting in the premises as agent for any one.

The plaintiffs, by suing in this form of action, have acknowledged, or at least affirmed the sale. The property in the sugars passed to the defendants. A payment was made by the defendants for the sugar. The only question is whether the plaintiffs can recover pay again, assuming the payment to have been made as the plaintiffs say it was.

In an early English case, *Rabone* v. *Williams*, 7 T. R. 360, Lord Mansfield, C. J., said, "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents

and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled."

This doctrine was affirmed in *George* v. *Clagett*, in 7 Term Rep. 359; 3 Smith's Leading Cases, 187. Many other English cases might be cited to the same point. In *Sims* v. *Bond*, 5 B. & Ad. 393, the rule is thus expressed by the C. J.: "It is a well-established rule of law that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party."

In a note to the case of *Thomson* v. *Davenport*, found in 2 Smith's Leading Cases, 373, it is said, "Where the agent has contracted for an undisclosed principal, and that principal thinks proper to sue on the contract in his own name, he does so subject to those rights which the defendant might have exercised against the agent at the time of disclosure, had that agent been really a principal." Numerous cases are here cited in favor of the doctrine.

In *Kelley* v. *Munson*, 7 Mass. 319, Sewall, J., in delivering the opinion of the court, says, "Where a factor sells in his own name, being responsible for the price of the goods sold, whether collected or not; or where he sells them to his own creditor where there are mutual dealings, the principal cannot interfere to the prejudice of the party dealing with the factor, without knowledge of his agency, and only the balance if any be due to the factor can be reclaimed by the principal."

In *Ilsley* v. *Merriam*, 7 Cushing, 242, the court remark, "The position taken by the defendant is that Field, the agent, having made the contract in his own name, the name of the principal not being disclosed, the defendant is entitled to be placed in the same situation in all respects, as if Field had been the real party in inter-

est. Is this a correct view of the law on this point? There is no doubt that the principal, who thus assumes a contract made by his agent, must take it subject to all the equities that would avail the defendant if the agent were the plaintiff; or, to state the principle in other language, the principal must take therewith all the attendant burdens and subject to all the attendant first counter claims and defense of the other contracting party."

In the case of *Huntington* v. *Knox*, 7 Cush. 371, it is said, "It is now well settled by the authorities, that when the property of one is sold by another as agent, if the principal give notice to the purchaser before payment to pay to himself, and not the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent."

Chancellor Kent says, "If, however, the factor should sell in his own name as owner, and not disclose his principal, and act ostensibly as the real and sole owner, the principal may, nevertheless, afterwards bring his action upon the contract against the purchaser; but the latter, if he *bona fide* dealt with the factor as owner, will be entitled to set off any claim he may have against the factor, in answer to the demand of the principal." 2 Kent's Com. 632.

In Smith's Mercantile Law, 140, it is said, "Thus when a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, the principal; and though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal."

In 1 Parsons on Contract, 53, it is said, "In the case of a simple contract, an undisclosed principal may show that the apparent party was his agent, and may put himself in the place of his agent, but not so as to affect injuriously the rights of the other party."

In Chitty on Contracts, 225, it is said, "It would be unjust to permit the principal to interfere and sue the debtor to his prejudice, in those instances in which the debtor had innocently, and in ignorance

of the claim of the principal, dealt with the agent, he being a factor, upon the supposition that he was the principal; a character which he was allowed by his employer to assume by having the possession of the goods, or being intrusted with the *indicia* of property therein. If, therefore, the defendant has credited and acquired a set-off against the agent under such circumstances, before the principal interposed, the latter will be affected and bound by the set-off in the same manner as the agent would be were he the plaintiff on the record."

In Story on Agency, § 419, it is said, "So if the agent has sold goods in his own name, no other person being known as principal, and the agent agrees, at the time of sale, that the vendee might set off against the price a debt due to him by the agent, that set-off will be as good against a suit brought by the principal, as it would be if the suit was brought by the agent for the price."

"The principal is ordinarily entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally . . . it will make no difference that the agent may also be entitled to sue upon the contract . . . nor that the third person has dealt with the agent, supposing him to be the sole principal. The only effect of the last consideration is, that the principal will not be permitted to intercept the rights of such third person in regard to the agent; but he must take the contract subject to all equities, in the same way as if the agent were the sole principal. Thus, for example, if the agent is the only known or supposed principal, the person dealing with him will be entitled to the same right of set-off, as if the agent were the true and only principal." § 420.

In Paley on Agency, by Lloyd, 325, it is said, "Moreover, if an agent be permitted to deal as if he were principal, the party dealing with him, and ignorant of his representative character, is entitled to the same rights against him as if he were in fact the principal. So that under these circumstances, he may set off against the demand of the principal a debt due from the factor to himself."

We think the case at bar comes fully within the rule stated by

the foregoing authorities. The report discloses no evidence that the defendants knew or had reason to believe that Robinson was acting in a representative character. Robinson says he did not communicate to them the fact that the plaintiffs owned the sugars. This fact is affirmatively stated and proved. In *Baxter* v. *Duren*, 29 Maine, 434, Shepley, C. J., says, "When a person deals with a factor, knowing him to be the agent of some unknown person, the rights of the parties are governed by the rule which prevails when a person, not known to be an agent, deals with another as agent, without disclosing his principal."

Looking at the facts proved in this case, and applying to them these principles of law, we think the defendant is entitled to judgment.

It is quite clear that had the action been brought in the name of the agent, Robinson, as it might have been done, the payment made by the defendants would have afforded a complete defense. There being no satisfactory proof that the defendants knew of his representative character, and it being proved that the agent did not disclose his principal, we think the plaintiffs cannot now come in and avoid the effect of that payment. If a set-off could be now allowed *a fortiori*, a payment made and accepted could be.

Whether being a foreign principal, beyond the seas, and their factor dealing as principal, they can or not sue at all in their own name, where the exclusive credit has been given the agent, we do not find it necessary to decide. It is sufficient for the disposition of this case to say, they cannot put themselves in a better position against these defendants than Robinson, the agent, would have been in had he commenced the action. *Judgment for the defendants.*

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

EBEN COREY & another *vs.* CLINTON RIPLEY.

A discharge duly granted under the United States bankrupt act of 1867, when pleaded in bar to the further maintenance of an action for prior indebtedness, cannot be impeached in this court for any cause which would have prevented the granting of it, under § 29, or been sufficient ground for annulling it under § 24.

The authority to set aside and annul a discharge in bankruptcy, conferred upon the federal court by § 34, is incompatible with the exercise of the same power by a State court; and the former is paramount.

ON REPORT.

ASSUMPSIT on account annexed to the writ dated January 22, 1868.

At the April term, 1869, the defendant pleaded in bar of the further maintenance of the suit, a discharge in bankrupcy in the prescribed form, duly granted under the United States bankrupt act of 1867, and dated March 9, 1869, releasing him from all debts, &c., which existed on May 30, 1868, when he filed his petition.

The plaintiff, by his replication in due form, substantially alleged that the discharge is invalid for the reasons mentioned in § 29, and which would have prevented the granting of the discharge had the same been objected to in the United States court and the allegations proved.

Thereupon it was agreed to submit the case to the law court, with the agreement that if the discharge in bankruptcy cannot be impeached in this case, for any cause which, under said act, would have prevented the granting of the discharge, or would have been sufficient ground for annulling the discharge by the United States court as provided in said act, judgment is to be rendered for the defendant for his costs in the law court only.

Shepley & Strout, for the plaintiffs.

The action was commenced by personal service upon the defendant long before his commencement of proceedings in bankruptcy, whereby this court obtained full jurisdiction. While the cause was

pending in this court, the defendant pleaded his discharge in bar to the further maintenance of the suit, and the plaintiff replied the causes mentioned in United States bankrupt act of 1867, § 29. Is the discharge conclusive in a court having jurisdiction of the person and subject-matter of the suit? When a court has jurisdiction, it has a right to decide every question arising in the cause before it. *Peck* v. *Jenness*, 7 How. 618, 624.

The United States district court has exclusive jurisdiction of "all suits and proceedings in bankruptcy." Suit at bar is not a proceeding in bankruptcy, and although the plea of bankruptcy was interposed by the defendant, this court is as competent to entertain and judge of that plea as of any other. *Peck* v. *Jenness*, *supra*. *Smith* v. *McIver*, 9 Wheat. 632. *Wallace* v. *McConnell*, 13 Peters (S. C.), 136. *The Robert Fulton*, 1 Paine, 621. *Exparte Robinson*, 6 McLean, 355. *Stearns* v. *Stearns*, 16 Mass. 167, 171.

This court obtained jurisdiction prior to the commencement of the defendant's proceedings in bankruptcy, and that jurisdiction must extend to the final determination of all questions arising in the usual course of proceedings in the case. *Beekman* v. *Wilson*, 9 Met. 434. *Judd* v. *Ives*, 4 Met. 401. *Mallett* v. *Dexter*, 1 Curtis, C. C. R. 178. *Kittredge* v. *Emerson*, 13 N. H. 227.

The provisions of § 21 show that the jurisdiction of the State court is not devested by the commencement of proceedings in bankruptcy. Having jurisdiction, plaintiff will have judgment unless a valid defense is shown, which is attempted by putting in discharge.

But by § 29, no discharge "shall be valid, if the bankrupt has sworn falsely," &c. Not that the discharge shall be invalid, if so declared by the court granting it, in a proceeding contemplated by § 34. By § 34 the discharge can be annulled only in certain cases, and only where the petitioning creditors had no knowledge of the causes of opposition, &c., at the time the discharge was granted. There is no such limitation or qualification in § 29.

If this court has jurisdiction to entertain the plea, it may also determine the validity and sufficiency of it; otherwise the parties must resort to a foreign tribunal to settle that question!

The discharge is *prima facie* valid; and when pleaded (if not annulled) the *onus* is upon him who attempts to impeach it, to establish some one of the causes mentioned in § 29.

By § 34 a method is provided whereby a creditor may, within two years, have a rehearing in the district court, and cause the discharge to be set aside and annulled, so that it could not be pleaded. Section 34 covers the cases where, without negligence, creditors had failed to oppose the granting of the discharge in the manner provided by § 31.

There is no provision providing that the discharge shall be conclusive when pleaded in a State court, and none which deprives this court of its jurisdiction to determine the validity of this plea, same as any other matter in defense.

The discharge operates as a "release" when "duly granted under the act," "with the exceptions aforesaid." The discharge is not "duly granted" when the bankrupt has "sworn falsely," or has been guilty of any of the acts which the law pronounces to be a fraud on its provisions.

The power to pronounce judgment upon the validity of the discharge is inherent, and forms a constituent element in the court. It is not derived from the bankrupt act, but from the Constitution. The analogies to be drawn from the decisions under the acts of 1800 and 1841, are in favor of this view.

A discharge, duly pleaded and admitted by the replication or demurrer to be in due form and otherwise valid, is made, by the paramount law of congress, a complete bar, and consequently defeats all liens and attachments which are mere securities for the satisfaction of a judgment to be recovered, but which in this case can never be recovered.

Davis & Drummond, for the defendant, elaborately argued the following propositions:

I. Proceedings in bankruptcy are in a court of record; and all decrees and judgments therein are of the nature of judgments *in rem*, and conclusive upon all, whether parties or otherwise. *Shew-*

shaw v. *Wherritt*, 7 How. 627 (17 Curtis, S. C. R. 328, 330, 331). Judgments *in rem* are conclusive upon everybody. *Voorhees* v. *U. S. Bank*, 10 Peters, 449, and cases *infra*. *Hunt* v. *Columbian Ins. Co.*, 55 Maine, 290, and cases *infra*. No defenses which might have been interposed to prevent the decree granting the discharge, can be admitted now to defeat it. *Rankin* v. *Goddard*, 55 Maine, 389.

II. The act of 1800 expressly provided that the discharge might be impeached by proving the same facts as would have prevented the granting of it, had they been shown in the court of bankruptcy.

III. So with act of 1841, § 4. The discharge granted under that act might be impeached "in all courts of justice," for the causes and in the manner therein stated; but for no other cause and in no other manner. *Chadwick* v. *Starrett*, 27 Maine, 138. See also, *Beekman* v. *Wilson*, 9 Met. 434; *Coates* v. *Blush*, 1 Cush. 564; *Humphreys* v. *Swett*, 31 Maine, 192.

IV. The exceptions to the conclusiveness of the discharge, made in the acts of 1800 and 1841, are not in the act of 1867. The methods given for impeachment in first two and not in the last, but a different method is provided, which alone can be adopted.

V. The discharge is final unless the plaintiff can bring himself "within an exception in the act."

VI. In reply: no question of jurisdiction or ousting of jurisdiction is involved. Defendant has pleaded a judgment which has discharged the plaintiff's original cause of action. The defendant desires to plead matters to avoid, which might have been pleaded to prevent that judgment.

A man is sued for goods furnished his wife at a certain date; he pleads in bar a divorce before that date. If plaintiff admits notice, jurisdiction, and decree of divorce, but replies that the divorce ought not to have been granted, because the libellant had been guilty of adultery, such replication would be no answer.

DICKERSON, J. Assumpsit on account annexed to the writ. The defendant pleaded a discharge in bankruptcy in bar of the further

maintenance of this suit. The plaintiff alleged, in his replication, that the defendant's discharge is invalid for the reasons set forth in § 29 of the bankrupt act of 1867.

According to the agreement of the parties, the law court is to decide whether the defendant's discharge in bankruptcy can be impeached in this court for any cause which would have prevented the granting of the discharge, under the bankrupt act, or would have been sufficient ground for annulling the discharge in the United States court, as provided in that act.

Section 29 of the bankrupt act of 1867, specifies the grounds which will prevent the granting of a discharge, or render one invalid when granted. After enacting that a discharge duly granted under this act shall be a full and complete bar on all suits, . . . and that the certificate of discharge shall be conclusive evidence of the fact and the regularity of such discharge, § 34 contains the following proviso: "Any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge, on the ground that it was fraudulently obtained, may, at any time within two years from the date thereof, apply to the court which granted it, to set aside and annul the same."

The question presented in this case did not arise under the bankrupt act of 1841, as that act made the bankrupt's discharge conclusive "in all courts of justice" (§ 4), unless it should be impeached for one of the causes stated in the act itself, and no tribunal was designated for testing its validity. This provision of the act of 1841, however, was held to restrict the action of courts, in impeaching the validity of the discharge of a bankrupt, to the causes and the manner therein specified. *Chadwick* v. *Starrett*, 27 Maine, 138. *Coates* v. *Bush*, 1 Cush. 564. *Humphrey* v. *Swett*, 31 Maine, 192.

By parity of reasoning, the mode of impeaching the validity of a discharge prescribed in the act of 1867, excludes all other modes; and such, we think, is the true construction of that act. The proceedings in bankruptcy are statutory proceedings. The powers exercised and the remedies provided in bankruptcy, are given by

statute. The impeaching tribunal is specified, and this designation, according to well-established principles of interpretation, forms a part of the remedy, and excludes all others. *Dudley* v. *Mayhew*, 3 N. Y. 10. *Stevens* v. *Evans*, 2 Barr. 1157. *City of Boston* v. *Shaw*, 1 Met. 130.

The act of 1841 made the bankrupt's discharge "full and complete evidence of itself, in favor of such bankrupt . . . . in all courts of justice . . . unless the same should be impeached," for the causes and in the manner stated. That act, moreover, contains no such provision for determining the validity of a discharge in bankruptcy, as is provided in the act of 1867. The difference in the phraseology and the provisions of the two statutes is quite significant, and precludes the construction, so ingeniously contended for by the learned counsel for the plaintiff, that the same mode of testing the validity of the bankrupt's discharge obtains under both acts. Instead of subjecting the bankrupt to the liability of having the validity of his discharge called in question, in any and all suits that should be brought against him, on his debts proved or provable under the bankrupt act, for an indefinite time, the proviso, in the 34th section of the act of 1867, was intended to limit all contestants to the period of two years from the date of the discharge, and to the tribunal therein specified, in respect to the time and mode of annulling his discharge. The act in effect says to all such, "You have had an opportunity to prove your claims, and to show cause why your debtor should not receive his discharge in bankruptcy: you are allowed two years to impeach that discharge, before the tribunal that granted it: at the expiration of that period, you will have had your day in court, and must thereafter be forever silent," *interest reipublicæ est sit finis lititium.* There is but one way of impeaching a discharge in bankruptcy, under the bankrupt act of 1867, and that is the mode expressly provided in the thirty-fourth section of that act. It is by no means improbable that the experience of contesting the validity of such discharges before the State courts, taught congress the wisdom of restricting the jurisdiction over this subject to the federal courts.

But there are still more serious objections to the construction contended for by the plaintiff's counsel. The constitution of the United States confers upon congress the power to establish a uniform system of bankruptcy. This grant of power carries with it jurisdiction over the person and property of the bankrupt, and authority to provide courts, and all other instrumentalities necessary and proper to carry into effect the general purpose of a bankrupt law. The authority of congress over this subject being paramount to State authority, where it has provided a mode of dealing with a bankrupt's estate, that mode only can be pursued, and it would be an infringement of the paramount law, if State courts should adopt another and a different mode. The authority conferred by the bankrupt act of 1867 upon United States courts, to set aside and annul a discharge in bankruptcy, is incompatible with the exercise of the same power by a State court. If the validity of a discharge in bankruptcy may be impeached by a State court, this may be done, though such discharge had been declared valid, in the mode provided in the bankrupt act; and the anomaly would be presented of a discharge, recognized as valid by the courts of the United States, and invalid by a State court. *Sturgess* v. *Crowningshield*, 4 Wheat. 196. *Stetson* v. *City of Bangor*, 56 Maine, 286.

The distinction made by the counsel for the defendant, between actions brought before the debtor petitions to be admitted a bankrupt, and those brought afterward, is unsound. The authority of congress over the subject-matter is the same in both cases; and it has ever used that authority appropriately to reach that class of cases. In respect to the question at issue in the case at bar, the same principles govern in either case.

According to the agreement of the parties there must be—

Judgment for the defendant, for his costs in the law court only.

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

Henry W. Ripley *vs.* William F. Mosely & another.

In an action of debt on a bond conditioned "to fully indemnify and save harmless" the plaintiff "from all loss, damage, and harm whatsoever, by reason of a suit for the infringement of any patent, in selling paper collars which the plaintiff has had or may hereafter have of the defendants;" and to "pay all fair and reasonable charges for expenses in defending said suit," *Held*, that the plaintiff is entitled to recover damages, (1) for the depreciation of his stock of goods while necessarily withheld from sale by the attachment made on the writ in the suit for infringement; (2) for the reasonable debt contracted, though not yet paid, for the services of counsel in defending the suit; and (3) for the reasonable expenses of himself and counsel incurred in relieving his stock from the attachment.

No damages are recoverable in such action for (1) loss of probable profits during the time the plaintiff's stock was under the control of the attaching officer; (2) loss of probable net profits while the store remained closed in consequence of the plaintiff's illness contracted while trying to relieve the stock from the attachment; (3) for the diminution of profits consequent upon the reduction of the stock; (4) for the prospective damages arising from loss of mercantile credit caused by the attachment; and (5) for the expenses of the plaintiff and his counsel in procuring the defendants to enter into the bond in suit.

On Exceptions to the rulings of *Goddard*, J., of the superior court for this county.

Debt on a bond, dated Jan. 10, 1868, given by the defendants to the plaintiff, in the penal sum of $3000. The conditions of the bond appear in the opinion.

The action was tried by the justice of the superior court without the intervention of a jury, from whose report it appears that in 1867, the plaintiff, a dealer in gentlemen's clothing, was also the defendants' agent, in this State, for the sale of paper collars; that the Union Paper Collar Company, claiming that the defendants had infringed their patent, threatened them and their agent with suit, and on Dec. 17, 1867, sued the plaintiff in United States circuit court for this district, for selling the defendants' collars in this State, claiming damages in the sum of $6000, and attached the plaintiff's entire stock of clothing; that the stock remained in the marshal's possession until Jan. 6, 1868, when it was surrendered to the plaintiff on

receipt of a note in the usual form for $3000, signed by Whittier & Avery, of that date, payable to the marshal in case of the non-delivery of the goods on demand: that the plaintiff thereupon went to New York and obtained from the defendants the bond in suit; that he returned home Jan. 16th, but did not in fact open his store until Feb. 1st; that the suit against him is still pending and the attachment remaining; that on Jan. 6, 1868, the plaintiff mortgaged his stock to the signers of the receipt note as security, which mortgage was duly recorded and is still in force; and that the plaintiff went to New York in December, 1867, to consult the defendants relative to the suit in the circuit court.

In addition to the foregoing facts, the presiding justice found, as matter of fact,—

1. That the plaintiff exerted his utmost efforts to obtain the release of his stock from the time of attachment until Jan. 6th, and that he immediately notified defendants of said attachment, and that he was guilty of no laches or negligence in not sooner obtaining said release.

2. That the mortgage was required by Mr. Whittier before signing the note; and that the note was required by the marshal before he would release the goods.

3. That plaintiff's journeys to New York were rendered necessary by said attachment.

4. That plaintiff was guilty of no laches or negligence in not sooner reopening his store, being prevented by severe sickness contracted in his return from New York.

5. That it was reasonable and necessary for plaintiff to employ counsel to assist him on his last visit to New York by reason of said attachment, and that he took counsel with him for that purpose; and that the bond in question was obtained by plaintiff and his counsel on that visit.

6. That plaintiff's personal necessary traveling expenses of said visits were $125.

7. That the reasonable charges of his counsel to and at New York on said business, although yet unpaid, were $100.

8. That plaintiff's store was in the marshal's exclusive possession for eighteen days, exclusive of Sundays, during which period the expense of fuel and gas continued and were necessary, but plaintiff was totally deprived of profit from his business; and I find that he was thereby the loser of his probable gross profits, which I find to have been $9.16 daily, viz., $164.88.

9. That plaintiff's store was closed after redelivery of the key to him, twenty-two days, exclusive of Sundays, during which period plaintiff's expense for fuel and gas ceased, which expense I find to have been daily thirty cents, and that he was, by reason of the same, loser of his probable net profits, which I find to have been $8.84 daily, viz., $194.48.

10. That the reasonable charges of plaintiff's counsel, also unpaid, for retainer and time, fees in defense of said suit in the United States court, up to the commencement of this action, were $150,—also unpaid.

11. That said counsel's reasonable charges for correspondence with defendants, and with counsel of Union Paper Collar Company, in Boston, and efforts to obtain release of said stock before giving of the bond, by getting a receipter in Portland after defendants had failed to do so, and furnishing a receipter, $100.

12. That plaintiff's stock at the time of attachment was worth $2,750, and that $2,500 worth of it has been retained, and is still unsold, by plaintiff, and that the depreciation thereon is twenty-five per cent, viz., $625.

13. That plaintiff did, in fact, retain and withhold from sale said stock, or $2,500 thereof, on account of the mortgage which Mr. Whittier had required him to give as security for his note.

14. That from the reopening of plaintiff's store, Feb. 1st, 1868, until and including this day, Feb. 15th, 1869, a period of 324 business days (excluding Sundays and two holidays), plaintiff's gross profits were diminished an average of $5.39 daily, being a direct loss to plaintiff of $5.00 a day, being, for the period, $1,620.

15. That this loss was occasioned by two causes: the withdrawal of his entire stock from sale, and the total destruction of his credit,

which has prevented him from buying except in very small and unprofitable quantities.

16. That plaintiff's credit was good and ample for all the demands of his business, until the attachment of his stock by the Paper Collar Company, Dec. 17th, 1867.

17. That his credit was, by said attachment, annihilated, and has so remained ever since, is admitted by defendants' attorney.

18. That the total loss of plaintiff's credit as a business man is prospectively a damage to him (exclusive of previous losses, and on the hypothesis of the immediate withdrawal of the attachment and suit against him in the United States court) of $1,000.

19. That the reasonable charges of plaintiff's counsel, unpaid, in this suit, are $50.

20. And I find that plaintiff has been throughout without fault, neglect, or laches, and that said losses have been occasioned him by reason of the cause above named.

The presiding justice ruled as matter of law:

1. That items 8, 9, 12, 14, and 18 were items of "loss, damage, and harm, by reason of" said "action at law" "prosecuted against the plaintiff" in the United States court for the infringement of a patent, in selling collars which the plaintiff had of the defendants.

2. That items 6, 7, 10, and 11 are "fair and reasonable charges for expenses in defending said action."

3. That as such, said items, viz., 6, 7, 8, 9, 10, 11, 12, 14, and 18, amounting to $4,129.36, are covered by said bond to the extent of its penalty.

4. That item 19 is not covered by the bond.

5. That the plaintiff is entitled to recover, for breach of the bond, the sum of $3,000.

To the rulings numbered 1, 2, 3, and 5, the defendant alleged exceptions.

Davis & Drummond, in support of the exceptions, cited 2 Greenl. on Ev., § 256; *Marble* v. *Worcester*, 4 Gray, 395; *Benson* v. *Malden & Melrose G. L. Co.*, 6 Allen, 149; *Smith* v. *Way*, 6 Allen,

212; *Brown* v. *Cummings*, 7 Allen, 507; *Watson* v. *Ambergate Railway Co.*, 3 Eng. L. & Eq. 497; *Gee* v. *Lancashire & Yorkshire Railway Co.*, 6 Hurl. & Norm. 211; *Gen. Mutual Ins. Co.* v. *Sherwood*, 14 Howard, 351; *Barrett* v. *Blanchard*, 13 Gray, 429; *Ingledew* v. *Northern Railway Co.*, 7 Gray, 86; *Livil* v. *Johnson*, 12 East, 653; *Longfellow* v. *Quimby*, 29 Maine, 196, 205; *Armstrong* v. *Percy*, 5 Wend. 535, 538; *Blanchard* v. *Ely*, 21 Wend. 342; *Griffin* v. *Colser*, 16 N. Y. 496; *Boyd* v. *Brown*, 17 Pick. 453, 461; *Smith* v. *Candey*, 1 How. 28; *Brown* v. *Smith*, 12 Cush. 366; *Berry* v. *Dwinel*, 44 Maine, 255, 268, 269; *Griffin* v. *Colser*, 16 N. Y. 689; *Masterton* v. *Brooklyn*, 7 Hill, 62; *Hadley* v. *Braxendale*, 26 Eng. L. & Eq. 398; *Worcester* v. *Great Falls Manf. Co.*, 41 Maine, 159; *Bridges* v. *Stickney*, 38 Maine, 361; *Fox* v. *Harding*, 7 Cush. 516; *P. W. & B. R. R. Co.* v. *Howard*, 13 Ken. 307; *Cram* v. *Dresser*, 2 Sandford, 127; *Loker* v. *Damon*, 17 Pick. 288; *Sibley* v. *Hoar*, 4 Gray, 222; *Thompson* v. *Shattuck*, 6 Met. 615; *Waite* v. *Gilbert*, 10 Cush. 177; *Brown* v. *Smith*, 12 Cush. 366; *Warner* v. *Bacon*, 8 Gray, 397; *Willey* v. *Frederics*, 10 Gray, 357; *Adams* v. *Barry*, 10 Gray, 361; *Baldwin* v. *Western R. R. Co.*, 4 Gray, 333; *Parker* v. *Lovell*, 11 Gray, 353; *Cutting* v. *Grand T. Railway Co.*, 13 Allen, 321.

L. D. M. Sweat, for the plaintiff, elaborately advocated the correctness of the rulings, *inter alia*, from the intentions of the parties indicated by the facts and circumstances as they existed at the time the bond was executed; and cited 2 Kent's Com. (11th Ed.), 555, 256; *Gennings* v. *Norton*, 35 Maine, 308; *Gennings* v. *Norton*, 4 N. H. 497; Bouvier's L. Dict., Damages.

Barrows, J. The condition of the bond here in suit provides that the defendants shall pay to the plaintiff "the just and full sum of three thousand dollars or so much thereof as shall be necessary to fully indemnify and save harmless the said Ripley from all loss, damage, and harm whatsoever, by reason of any suit or action at law or in equity that has been, or may hereafter be, prosecuted against

the said Ripley by the Union Paper Collar Company of New York, or others, for the infringement of any patent, in selling paper collars which the said Ripley has had or may hereafter have of said Moseley & Tynberg," and also that the said Moseley & Tynberg "shall pay to said Ripley all fair and reasonable charges for expenses in defending said suits or actions."

The bond was given Jan. 10th, 1868.

The presiding judge in the court below, before whom the case was tried without the intervention of a jury, finds that, in 1867, the plaintiff, a dealer in gentlemen's clothing, was the agent of the defendants in Maine for the sale of paper collars; that the Union Paper Collar Company commenced a suit against the plaintiff for an alleged infringement of their patent in the sale of these collars, and on Dec. 17, 1867, attached upon their writ in that suit the plaintiff's entire stock of goods of the value of $2,750; that plaintiff immediately notified defendants of the attachment, and used his best efforts to procure the release of his stock from attachment, but was unable to do so until Jan. 6, 1868, when he succeeded in procuring receipters only by mortgaging the stock to secure them; that plaintiff incurred reasonable and necessary expenses in two visits to the defendants at New York, the last time with counsel, resulting in the giving of the bond in suit; that plaintiff contracted a severe illness on his return from New York, in consequence of which his store remained closed until the first of February, 1868; that his business credit which was previously good was destroyed by the attachment; that he has been obliged to retain the greater part of the goods mortgaged to secure his receiptors, and that the goods have depreciated twenty-five per cent; that he lost the profits of his store during the time it remained closed, and that they have been greatly diminished since on account of the reduction of his stock caused by the attachment and mortgage and the consequent loss of credit.

The suit of the Union Paper Collar Company against the plaintiff is still pending and undecided, and plaintiff has actually paid nothing as yet on account of it, except as above stated, though he has become liable for counsel fees to a considerable amount.

Hereupon the judge assessed the damages accruing from all the matters and things above recited, in detail, and, including an additional item of $1,000 for the prospective injury to him in "the total loss of the plaintiff's credit as a business man exclusive of previous losses, and on the hypothesis of the immediate withdrawal of the suit," found the sum total to be $4,129.36, and ordered judgment and execution for $3,000, that being the amount of the penalty named in the bond and of the ad damnum in the writ.

The defendants excepted.

The language of the bond is general and comprehensive, and the plaintiff is entitled to recover all damages which he can legally be deemed to have suffered by reason of the suit, together with the expenses incurred in defending it so far as they are found "fair and reasonable,"—these last being expressly provided for.

We think that under the latter clause in the condition, the debt contracted by the plaintiff to counsel for services in defending the suit against him, though not yet paid, is a proper subject for allowance in making up the damages. The course pursued was undoubtedly contemplated by both parties. The defendants do not appear to have employed any counsel to defend the suit; and they bound themselves to pay "all fair and reasonable charges for expenses in defending." Ripley was to be saved harmless not only from any judgment that the Union Paper Collar Company might recover against him for damages and costs, but also from expense in defending the suit. He has not been saved harmless in the matter of these expenses, but has been forced to incur an indebtedness which the defendants should have provided means to discharge. So in *Lyman* v. *Lull*, 4 N. H. 495, where the bond was conditioned to save harmless and indemnify a town "from all manner of expenses, damages, costs, and charges which should be imposed upon said town by reason of the maintenance, education, and support of" an illegitimate child; the overseers being called on for support, agreed with a person to take care of the child for a certain sum per week, and the child had been supported several weeks under the agreement, but nothing had been actually paid by the town; and it was held, that

there was a breach of the bond, and that the support promised but not paid for should be reckoned in assessing the damages.

Nor do we think it can be maintained that the depreciation of the plaintiff's stock, while it has been necessarily withheld from sale on account of the attachment, is not a legitimate subject of damages recoverable here. The attachment of the stock was a natural and common incident of the suit. The plaintiff did his best to procure its release, but was unable to effect it upon any terms which permitted him to make sale of the goods. Their depreciation is a matter capable of being definitely ascertained. The loss is neither speculative nor dependent upon contingencies, and is one of the natural and direct results of the suit. The plaintiff's stock was taken from him. In the natural course of things it is diminished in value by the lapse of time. It is a loss to him as much as if a portion of it were sold. If the defendants would have relieved themselves from a liability for such loss they should have prevented the detention.

And we are of opinion that the reasonable expense of himself and counsel incurred by the plaintiff in the effort to release his property from attachment, is also recoverable,—but not that which was incurred for the purpose of procuring the defendants to enter into the contract of indemnity.

And with regard to all the other items which go to make up the damages assessed, we think them either too remote and uncertain, or too much complicated with other intervening efficient causes, to be allowed in this suit.

They do not seem to us to be either the direct and natural consequences of the suit, or to be such losses as may reasonably be supposed to have been in the contemplation of both parties at the time the agreement was entered into. No small part of them accrued by reason of other efficient proximate causes, the force and effect of which cannot be estimated; nor can the damages accruing from the combination be apportioned.

The object of the bond was to reimburse the plaintiff for so much property as should be taken from him by reason of the suit and for

the expenses of defending it. It cannot be so extended as to relieve the plaintiff from all the consequences of his own unfortunate or unwise management since, though he may have fallen into the mistakes or met with the misfortunes in consequence of the suit operating as a remote cause..

But the damages thence resulting are consequences of consequences, and not legally computable. Very manifestly, even if there were no other element of uncertainty, this should prevent the allowance made for loss of probable profits during the time that the store remained closed in consequence of the plaintiff's illness contracted on his return from New York; and for the diminution of profits consequent upon the reduction of his stock; and for the prospective damages arising from loss of mercantile credit. Much of the reasoning in *Hayden* v. *Cabot*, 17 Mass. 169 is applicable in this case. See also, *Gee* v. *Lancashire & Yorkshire Railway Co.*, 6 Hurl. & Norm. 211; *Smith* v. *Condry*, 1 How. 28; *Blanchard* v. *Ely*, 21 Wendell, 342; *Griffin* v. *Colver*, 16 N. Y. 491, for rules and principles which should be regarded in assessing the damages here.

It is argued that the judge in the court below found, as matter of fact, that all these results were the necessary and unavoidable consequences of the suit, and that his finding as to matters of fact is conclusive.

Such finding as to a pure question of fact is conclusive; but where the finding necessarily embraces an untenable legal proposition, it must be disregarded.

It is impossible that it can have been legally ascertained that, in addition to the items which we have indicated as properly entering into the computation, there have been losses of probable profits, and losses by destruction of credit, amounting to the sum of $2,979.36, which can be legally said to have occurred by reason of an attachment of goods which still remain the property of the plaintiff, and the total value of which was but $2,750 in the outset.

Exceptions sustained.

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

SAMUEL LEIGHTON *vs.* HENRY KELSEY & another.

The clause in § 14 of the United States bankrupt act of 1867, providing that the conveyance therein mentioned "shall dissolve any attachment made within four months next preceding the commencement" of the debtor's proceedings in bankruptcy, is equivalent to an express provision for the preservation of an attachment made more than four months.

The bankrupt's certificate of discharge duly pleaded in an action pending against him in the supreme judicial court of this State, will not, by virtue of R. S. of 1857, c. 81, § 33 dissolve an attachment made by virtue of the writ in the action, more than four months prior to the defendant's commencement of proceedings in bankruptcy.

The attachment thus made may be enforced by an execution issued upon a special judgment rendered by the court in which the action was entered and prosecuted.

The district court of the United States does not have exclusive jurisdiction in such matters.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note.

The case is fully stated in the opinion.

William Henry Clifford, for the plaintiff, cited *Franklin Bank* v. *Bachelder*, 23 Maine, 60; *Kittredge* v. *Warren*, 14 N. H. 509; *Davenport* v. *Tilton*, 10 Met. 320; *Rowell's case*, 21 Verm. 620; Drake on Attachment, 435; United States Bankrupt Act of 1867, § 14; Pub. Laws of 1868, c. 157, 223; *Lothrop* v. *Abbott*, 21 Maine, 421; United States Bankrupt Act of 1841, § 2; United States Bankrupt Act of 1867 (Avery & Hobbs' Ed.), 108; *Houghton* v. *Eustis*, 5 Law Rep. 505; *Downer* v. *Brackett*, 5 Law Rep. 392; *Peck* v. *Jenness*, 7 How. 612.

Shepley & Strout, for the defendants, elaborately argued the following propositions:

1. The replication is bad in form and substance, praying judgment whether the plaintiff ought to be precluded from having his "action against the said defendants," instead of his action *in rem* against the goods attached.

2. By United States bankrupt act of 1867, § 34, the discharge "releases" the bankrupt, and, when pleaded, is "a bar" to the action, hence judgment must be for the defendant in such case. And by R. S. of 1857, c. 81, § 33, "when final judgment is rendered for the defendant, the attachment is thereby dissolved." And this statute is not repealed expressly or by implication.

3. By the provisions of the bankrupt act no lien by attachment continues so as to be enforced under process from the State courts. Attachments are liens to secure judgments recorded against defendants, and whatever defeats the judgment defeats the attachment, unless saved by some statute. *Peck* v. *Jenness*, 7 How. 623. The United States bankrupt act of 1841, § 2, expressly preserved attachments. Not so with the act of 1867.

The national act has suspended all State legislation touching the matter of bankruptcy. *Sturgis* v. *Crowningshield*, 4 Wheat. 122. *Ogden* v. *Saunders* 12 Wheat. 263. *In re Bellows & Peck*, 3 Story, C. C. R. 428.

The disposition of all liens under the bankrupt act is vested in the district court of the United States. United States bankrupt act of 1867, § 1. The State court has no jurisdiction. The lien is continued, if at all, by force of the United States act, and the United States court should administer it.

If the proper steps had been taken before the proper tribunal before discharge, whatever lien there was could have been enforced. After discharge, the State court cannot modify its effect. *Ex parte Foster*, 2 Story, 157.

A State court once having had jurisdiction, may continue to entertain it for the purposes mentioned in § 21, even after the institution of bankrupt proceedings; but the enforcement of a lien by attachment is not one of the purposes mentioned.

BARROWS, J. To the defendant's plea of a discharge in bankruptcy, the plaintiff replied an attachment of personal property regularly made more than four months before the commencement of the proceedings in bankruptcy, and still subsisting (as he alleges),

and that this suit is prosecuted for the sole purpose of obtaining a judgment and execution which will enable him to perfect that attachment; and to this end alone he prays judgment against the defendants for his damages and costs. Defendants demurred to the replication, and plaintiff joined. The presiding justice overruled the demurrer, and defendants alleged exceptions which have been elaborately argued.

The statutory provisions which are supposed to bear upon the question here presented, are as follows:

1. Section 34 of the act of congress passed in 1867, and entitled, "An act to establish a uniform system of bankruptcy throughout the United States;" which provides that a discharge duly granted under the act shall release the bankrupt from all debts, claims, liabilities, and demands which were, or might have been, proved against his estate in bankruptcy except such as are by said act excepted from the operation of a discharge in bankruptcy; and that such discharge may be pleaded as a full and complete bar to all suits brought on any debts, &c., not thus excepted, and that the certificate shall be conclusive evidence in favor of such bankrupt, of the fact and the regularity of such discharge.

2. Section 14 of the same act; which provides that the conveyance to the bankrupt's assignee shall vest in him, by operation of law, all the property and estate of the bankrupt, both real and personal (with certain specified exceptions), 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.

3. Section 21 of the same act; prohibiting any creditor whose debt is provable under the act from prosecuting to final judgment and suit therefor against the bankrupt, until the question of the debtor's discharge shall have been determined, and commanding the stay of any such suit on the application of the bankrupt for a reasonable time to await the determination of the court in bankruptcy on the question of discharge, with a proviso that if the amount due the creditor is in dispute, he may proceed to judgment by leave of

the court in bankruptcy, for the purpose of ascertaining the amount which shall thereupon be proved in bankruptcy.

4. Section 1 of the same act; extending the jurisdiction of the district courts of the United States to the collection of all the assets of the bankrupt, and to the ascertainment and liquidation of the liens and other specific claims thereon.

5. The defendants claim that under §§ 21 and 34 of the United States bankrupt act, judgment must necessarily be rendered for the defendants upon pleading the discharge with profert of the certificate, which they have done, and that thereby the attachment will be dissolved by force of c. 81, § 33, R. S.; and that in any event, even if an attachment made more than four months before the commencement of proceedings in bankruptcy can be held to create a valid lien capable of being enforced, it must, under § 1 of the bankrupt act, be enforced by proceedings in the district court of the United States, which they insist has exclusive jurisdiction of all matters pertaining to the ascertainment and liquidation of liens upon the bankrupt's estate.

On the other hand, the position assumed by the plaintiff is, that section 14 of the bankrupt act, above quoted, preserves all attachments made more than four months before the commencement of the proceedings in bankruptcy, and that chapters 157 and 223 of our statutes of 1868 harmonize with this view of the bankrupt law; and, taking the whole together, there is nothing in our own legislation or in that of the United States to preclude the rendition of the special judgment and special award of execution which he prays for in his replication.

And we think this position is successfully maintained.

To bar the judgment to which the plaintiff would otherwise be entitled, the defendants rely upon certain statutory provisions. These are all to be combined together, giving paramount force to the act of congress if the State law is found to be in conflict with it, but having due regard for the rules which require that every section and clause shall be expounded with reference to every other, and, if possible, the effect designed by the legislature given to each;

that that which is required or excepted by necessary implication from any of the provisions of the statute is to be regarded in the same manner as if it were done in express terms; and that whenever a right is given by statute, all the means necessary to make the right effectual are given also.

Thus looking at these various provisions we cannot hesitate to say, that an attachment made, as was the plaintiff's, more than four months before the commencement of the defendant's proceedings in bankruptcy, is preserved by necessary implication from section 14, which dissolves only those attachments made within four months from such commencement; that this is equivalent to an express provision for the preservation of such an attachment as we have in the case at bar; that the only mode of preserving the attachment, known to the law, is by the rendition of such a judgment by the court in which the process is pending, as will enable the party making it to perfect the lien thereby acquired; that from this it follows that the provisions in the bankrupt act making the discharge in bankruptcy a good plea in bar, &c., are not to be so construed as to prevent the rendition of such a judgment in cases which are thus made exceptional; that is, in all cases where an attachment was duly made four months before the commencement of the proceedings in bankruptcy, if upon the pleadings or evidence the plaintiff is found otherwise entitled to judgment in his favor, the plea of bankruptcy must not be held to preclude him from having such a judgment as will place it in his power to avail himself of his attachment; for only thus can the due and proper effect be given to that clause in the bankrupt act which was designed to prevent the dissolution of those attachments. A judgment in favor of the bankrupt defendant, such as his counsel here claims, would operate not an ascertainment and liquidation of the lien, but a dissolution of it by virtue of our own statute. R. S. c. 81, § 33.

We see no difficulty in giving full force and efficacy to that clause in the bankrupt act which confers on the district courts of the United States jurisdiction over the ascertainment and liquidation of such liens without supposing that it was intended to defeat them

by taking from the court, under whose process they exist, the power of rendering the special judgments necessary to complete them.

The error into which the defendant's counsel falls, consists in the assumption that the preservation of these attachments by necessary implication from the clause in § 14 of the bankrupt law of 1867, is not equivalent in effect to a provision in express terms for their preservation,—such as was made for the preservation of liens in the bankrupt law of 1841.

Correcting that mistake, we follow, in awarding the judgment claimed by the plaintiff, the same course of proceeding which was pursued in cases arising under the bankrupt law of 1841. *Davenport* v. *Tilton*, 10 Met. 320. *Kittredge* v. *Warren*, 14 N. H. 509. *Kittredge* v. *Emerson*, 15 N. H. 227. *Franklin Bank* v. *Bachelder*, 23 Maine, 60.

It is true that the principal question discussed in those cases was whether an attachment on mesne process constituted a lien within the meaning of that clause in the bankrupt act of 1841, which protected existing liens against the operation of the law; but the questions here presented arose incidentally, and are treated with such fullness of learning and ability, that one can enter the same field now only as a disciple and copyist.

A simple reference, then, is all that is deemed necessary.

Exceptions overruled.

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

Darius White *vs.* Republic Fire Insurance Company.
Same *vs.* Relief Fire Insurance Company.

The damage and expense caused and incurred by removing, with that reasonable degree of care suited to the occasion, insured goods from an apparent imminent destruction by fire, are covered by a policy insuring against "loss or damage by fire," although the building in which they were insured and from which they were thus removed, was not in fact burned.

On Report.

Assumpsit on two policies of insurance against "loss or damage by fire."

The appraised loss upon stock, consisting mainly of bristles and brushes manufactured and in process of manufacture, was $1,728.76; expense of moving, $115.90; and loss on tools insured by Republic Company, $58.80.

The goods covered by the policies in suit were in the third story in Ware's block, on the northerly side of Federal street, Portland, over stores numbered 101, 105, and 107, with the entrance on Federal street. The main building was of brick, three stories high. In the rear of the main building, and within three feet of it, was a two-story brick building, with a wooden roof, connected with the main building by a somewhat flat wooden shed-roof. Stores 105 and 107 extended through the main building under the shed roof into the building in the rear. Store 107 was occupied as a clothing store. Between that part of it in the main building and the building in the rear, there was a light wooden partition. Store 105 was occupied as a grocery. The original brick wall of the main building had been cut through by windows and doors.

The time of the fire was that of the great conflagration, July 4, 1866. The whole eastern portion of the city, including the easterly side of Temple street (which was the first street east of the plaintiff) and the southerly side of Federal street, opposite the plaintiff's property, were destroyed, a heavy wind blowing the sparks and flames

upon the plaintiff's premises, so that the roof of the rear building was repeatedly on fire.

All the tenants in the block removed their goods.

The plaintiff first moved his goods down to the side-walk, where they were somewhat damaged by fire.

There was much testimony tending to show the imminent peril to which the plaintiff's goods were exposed. The stock left in the building was not injured.

The case was withdrawn from the jury and continued on report, the full court to render such judgment in connection with the agreement of the parties as the law and evidence required.

S. C. Strout & H. W. Gage, for the plaintiff.

Davis & Drummond, for the defendants.

1. The loss was not covered by the policies. *Hillier* v. *Alleghany Ins. Co.*, 3 Penn. 470. The building was not injured by fire or water.

2. The injury was not caused by the removal. They were in the same condition when returned. The injury had no necessary connection with the removal. No intrinsic injury; the mixing up of the different qualities of the bristles was not the result of the removal.

3. There was not the requisite care in the removal.

4. If liable at all, the liability is confined to tools and not to the negligent mixing of his stock.

DICKERSON, J. Assumpsit on two policies of fire insurance, submitted on report.

On the night of the conflagration of July 4, 1866, at Portland, the plaintiff, apprehensive that the building known as Ware's block, on the northerly side of Federal Street, the third-story of which was occupied by him for the manufacture of brushes, would be destroyed by fire, removed his stock, consisting of bristles and manufactured brushes, and his tools from the building. The block was not destroyed or injured by the fire; and the plaintiff brings this

action to recover the damages thus done to his stock and tools, and for the expense incurred in removing them.

The important and interesting question is raised whether the plaintiff's loss is covered by the policy. In general, the assured is entitled to indemnity, unless the loss happens from the qualities or defects of the subject insured, his own fault, or some peril for which he is answerable. 1 Phillips on Ins. 639.

It is argued by the learned counsel for the defendants that this is not a loss by fire; that fire was not the proximate cause of the damage, and that therefore the loss is not covered by the policy. While it has been held that a loss by lightning without combustion is not a loss by fire, it has, also, been held that the loss of a building by being blown up by gunpowder, and demolished to stop a conflagration is within the terms of a fire policy. *Babcock* v. *Montgomery Co. Mut. Ins. Co.*, 6 Barb. 637. *Keniston* v. *Merrimack Co. Mut. Ins. Co.*, 14 N. H. 341. *City Ins. Co.* v. *Corlies*, 21 Wend. 367.

Damage done to goods by having water thrown upon them in extinguishing a fire, and a loss of goods by theft after they have been removed from a fire are covered by the policy. *Hillier* v. *Alleghany Ins. Co.*, 3 Penn. 470. *Witherell* v. *Maine Ins. Co.*, 49 Me. 200.

A bolt may be loosened, or a timber started in a storm without causing any loss until the subsequent action of the water or climate or the greater strain of a different cargo has so augmented the injury, as to cause the loss of the vessel; and yet such a loss is a loss by the storm. *Stephenson* v. *Piscataquis Ins. Co.*, 54 Me. 76.

So if after a storm has subsided, the boat is lost by reason of the disabled condition of the ship, in consequence of damage done during the storm, it is a loss by the storm. *Potter* v. *Ocean Ins. Co.*, 3 Sum. 27.

In these and like cases the direct proximate cause of the damage or loss is not to be found in the fire, or the storm, but in the water, the removal of the goods, the action of the climate, or strain of the cargo, or the disabled state of the ship. If courts were required to hold that no loss is caused by a policy of insurance unless the peril

insured against is directly operating upon the subject insured at the time of the ultimate catastrophe, they would deny the right to recover in many cases where it has long been recognized by courts of the highest authority. The legal maxim, *causa proxima spectatur*, is by no means of unusual application in its strict technical sense.

If a loss from demolishing a building with gunpowder to stay the progress of a conflagration, comes within the terms of a fire policy, ought not the damages and expense, of removing such building, to be recoverable if the object in view could be as speedily and successfully accomplished?

In such cases is not the fire, the impending conflagration, the existing operating cause alike of the destruction of the building or of its removal from danger? Is the assured entitled to recover damages for one of the effects of the same procuring cause, and not for the other? If by reason of the immobility of real estate and the necessity of speedy action on such occasions, it becomes necessary to demolish a building, at the cost of the underwriters, to prevent it and other property from being destroyed by fire, does not the analogy of the law require that they should, also, be chargeable for the damage and expense of saving personal property from destruction by removing it to a place of safety? Is not the producing cause of both results the same?

So if the underwriters are liable for damage done to goods by having water thrown upon the building in which they are stored, to extinguish the fire, ought they not, also, to be liable for damage done to goods, in time of imminent peril, by throwing water upon the building containing them to prevent it and them from destruction, though actual ignition has not taken place? In both cases, technically speaking, the water and not the fire is the direct proximate cause of the damage. It is neither the policy of the law nor public policy to make it for the interest of the assured, in case of fire, to postpone the use of the means for extinguishing the fire, and the removal of the goods, until the building containing them is actually on fire? In many, if not most cases, such delay would be tantamount to consigning both goods and building to destruction. Would the interests

of insurance companies or the public morals be subserved by the establishment of such a policy?

The question presented is one of considerable difficulty, and one upon which the authorities are at variance. While the supreme court of Illinois, in a case like the one at bar, have held that the underwriters are liable for the damage to the goods and the expense of removing them, the court in Pennsylvania have denied them liability. *Case* v. *Hartford Ins. Co.*, 13 Ill. 676. *Hillier* v. *Alleghany Ins. Co.*, 3 Penn. 470. We think the liability of the underwriters, in these and similar cases, depends very much upon the imminence of the peril, and the reasonableness of the means used to effect the removal. The necessity for removal is analogous to the necessity that justifies the sale of a disabled vessel by the water. It is not to be determined by the result alone, but by all the circumstances existing at the time of the fire. The necessity for removal need not be actual, that is, the building may not have been actually burned, since this may have been prevented by a change in the direction or force of the wind, the more skillful or efficient management of the fire engines, or the sudden happening of a shower, or a like unforeseen event. But the imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to inspire a conviction that to refrain from removing the goods would be the violation of a manifest moral duty; the damage and expense of removal, too, must be such as might reasonably be incurred under the circumstances of the occasion. Angel on Fire Ins. § 117.

When such a case exists, we think it the better opinion to hold that the underwriters are chargeable for the damage and expense of removing the goods, as this result seems most in accordance with reason, the analogies of the law, and public policy. Such, also, is the conclusion of Mr. Phillips, the learned commentator on the law of insurance. "It seems," he says, "to be the better doctrine, and the one most closely analogous to the jurisprudence on the subject of insurance generally, that the underwriters are liable for such damage and expense reasonably and expediently incurred, as being

directly occasioned by the peril insured against." 1 Phillips' Ins., 645–6.

The doctrine we maintain on this subject is applicable to a large class of cases, recognized by the law of insurance, and is found in that well-established principle of the law of insurance, that insurance against, or an exception of a peril, besides the consequences immediately following it, may include, also, a loss or expense arising on account of it, although what is insured against or excepted does not actually occur, provided the peril insured against, or excepted, is the efficient acting or imminent cause or occasion of the loss or expense. 1 Phillips' Ins., § 1131.

The proximity of the fire to the building occupied by the plaintiff, its rapid progress, terrible intensity and fearful ravages, leave no reason to doubt but the goods were removed through a reasonable apprehension that they would be destroyed by fire if suffered to remain. Their situation, too, in the third story, requiring earlier attention, rendered their condition more hazardous than if they had been on the first floor. A prudent uninsured person could scarcely have omitted the precaution taken by the plaintiff.

In removing the goods the plaintiff was bound to exercise that reasonable degree of care which was suited to the circumstances of the occasion; and, when we consider the situation of the goods, the imminence of the peril, and the terror and consternation naturally excited by the progress and fury of the conflagration, we are not prepared to say that he did not exercise such care.

Under the rule for apportioning the damages between the two defendant companies, agreed upon by the parties, if the court should find that the plaintiff is entitled to recover, the plaintiff is to have judgment against the Relief Ins. Co., for the sum of one thousand two hundred and twenty-nine dollars and seventy-six cents, and interest from the date of the writ; and also against the Republic Ins. Co. for six hundred and seventy-three dollars and sixty-eight cents, and interest from date of the writ.

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

CUTTING and DANFORTH, JJ., did not concur.

GEORGE WARREN & another *vs.* WESTON F. MILLIKEN & another.

A grain elevator company holds grain stored therein, as agents for the owners of the grain.

A transfer of an elevator order, with notice thereof to the elevator company, and a partial delivery of grain under such transferred order, is sufficient to transfer the property in the whole.

Where the defendants, being holders of such an order, permitted the drawers to transfer it to the plaintiffs for value, the defendants are estopped to claim title adversely to the plaintiffs.

ON REPORT.

TROVER for six hundred and seventy-two bushels of corn.

The case is sufficiently stated in the opinion.

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

Shepley & Strout, for the defendants.

APPLETON, C. J. This cause is submitted to the court, upon a report of the evidence. The respective parties were witnesses and differ in regard to some of the facts material to its decision. They respectively derive title from the firm of Bradley, Coolidge & Rogers; but no member of that firm was called as a witness, though it might reasonably be expected much light might be derived from that source.

The corn in controversy was stored by Bradley, Coolidge & Rogers in the Portland elevator, in common with various parcels of grain belonging to others. As evidence of their ownership they held what is called an elevator order, which is in these words:

PORTLAND ELEVATOR.

"PORTLAND, Dec. 3, 1866.

No. 1558.

Mr. John McQueen:—Deliver Bradley, C. & Rogers, thirty-one hundred and seventy $\frac{55}{56}$ bushels corn.

JOHN PORTEOUS, per E."

On the 12th December, before 12 o'clock, Bradley, Coolidge & Rogers delivered this order to the plaintiffs with this indorsement:

"Deliver to D. Brigham & Co.,
B., C. & Rogers, per Small."

The plaintiffs, under this order, received grain from the elevator on the 12th, 13th, 14th, and 15th December, when the defendants forbade the delivery of any more.

The elevator held the corn as agents for the owners. Before the sale to the plaintiff they held for Bradley, Coolidge & Rogers. After the transfer, notice thereof, and delivery of corn under such transfer, they held the corn for the plaintiffs. The plaintiffs had received a portion under the order. There was all the delivery which, in the nature of the case, there could be. *Hatch* v. *Bayley*, 12 Cush. 27. *Hatch* v. *Lincoln*, 12 Cush. 31. *Cushing* v. *Breed*, 14 Allen, 376. *Gibson* v. *Stevens*, 8 How. 384. The plaintiff, upon these facts, is entitled to recover, as there is no question of a conversion by the defendants.

But the defendants claim under a bill of sale from Bradley, Coolidge & Rogers to them, dated Dec. 10, 1866, and evidence tending to prove a delivery under the same on December 11. The defendant, W. F. Milliken, further testifies that this elevator order, under which the plaintiffs claim, was delivered them on the 11th December, by Bradley, Coolidge & Rogers.

But John B. Babb, one of the plaintiffs, testifies that on the morning of December 12, and before 12 o'clock in the forenoon, he went to the office of Bradley, Coolidge & Rogers; that they and Small, their delivery clerk, and, as he thought, both the Millikens were there; that Bradley, Coolidge & Rogers stood at the desk; that Small was the clerk, who always delivered orders to him for the elevator; that he asked for an elevator order in place of the order they had given him the day before; that they had two elevator orders,—printed orders issued by the elevator company; that he could not tell how

much was due on each; that he gave his order for 2,000 bushels, and took the order under which he claims title,—the order was for 3,170$\frac{55}{60}$ bushels; that there had been about 1,900 bushels delivered; that there had been nine deliveries indorsed on the order, the last being dated on 11th December; that this order was indorsed and delivered to him in the presence of Bradley, Coolidge & Rogers,—the indorsement thereon was by Small; that one or both of the defendants was present; that he took and carried away the order, and that under the order he received corn from the elevator on the 12th, 13th, 14th, and 15th which was indorsed thereon by the man having charge of the elevator; that on 17th and 18th he went for corn, which was refused, notice having been given by defendants not to deliver any more.

This testimony is not contradicted by the defendants or either of them. They do not deny that they were present as stated by Babb, and that the order in question was thus indorsed and delivered in their presence and without objection on their part. If the defendants had claim to the order, or to the corn to which it related, by delivery on the 11th, they should have objected at the time of its transfer to the plaintiff, who received it in good faith in exchange of a previous order. As they did not object, the inference is irresistible that they did not *then* claim any title to the corn in question. If they did so claim, it was their duty to have objected to the transfer of the order and to have notified the parties, who were negotiating, of their rights. The defendants say the order was in their hands on 11th December. As it was in the hands of Bradley, Coolidge & Rogers on 12th December, and was transferred by them on that day in the presence of the defendants and without objection, the inference is irresistible that they received it from the defendants and transferred it with their knowledge and assent. If so, they would be estopped from afterwards claiming title adversely to the plaintiff.

It seems that the First National Bank had a bill of sale of the corn in controversy, but there had been no delivery. The assignment of its interest by the bank conveyed no title, as the assigners had none perfected by delivery. Besides, the plaintiffs had a title

prior to the assignment, from the bank to the defendant, which was perfected by delivery on the day of its acquisition.

Judgment for plaintiffs for $792.96, *and interest from Dec.* 18, 1866.

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

SIMON CONNER & another *vs.* CALVIN ATWOOD & others.

In 1854, a saw-mill, owned in common by the defendants, Atwood and one Moor, having been destroyed by fire, Atwood rebuilt the same under R. S. of 1841, c. 86, and in October, 1857, in consideration of the full value thereof, conveyed to the plaintiffs "one-half of the saw-mill privilege and all the mill, subject to the claims of Moor in said mill," and at the same time gave an obligation to procure a release from Moor or fully indemnify the plaintiffs for his claim. In April, 1859, not being able to obtain the release, Atwood gave the plaintiffs the bond in suit, referring to the conveyance conditioned to procure a release from Moor and save the obligees harmless from all claims by Moor or his assignees, and closing as follows: "and it is hereby agreed that the said obligees shall keep a full and correct account of the amount of lumber sawed in the mill, and the expense of all repairs on the mill, and at all times secure and afford to the said Atwood free access to the books of account . . . to enable him to settle his accounts and claims with said Moor, and procure his release." *Held*, that the last clause is not a condition precedent.

ON FACTS AGREED.

In 1853, a saw-mill, owned in common by the defendants, Calvin Atwood and one William Moor, was destroyed by fire. Moor refusing to assist in rebuilding, Atwood, in 1854, proceeded under R. S. of 1841, c. 86, and rebuilt the mill; and on Oct. 5, 1857, conveyed by deed of warranty to Simon Conner, John R. Wyman, and Samuel Gibson, jr., "one-half of the saw-mill privilege and all the saw-mill, subject to the claims of William Moor in said mill;" and at the same time gave his grantees (plaintiffs) an obligation to procure from Moor a quitclaim deed of his interest in the premises, or

indemnify them for Moor's claim. The consideration of the deed was the full value of the property. As a security for Atwood's fulfillment of his obligation, one of the notes given for the consideration of the deed was deposited in the hands of a third person, until Atwood should procure the release or give a bond of indemnity. On April 18, 1859, Atwood not having been able to procure the release, gave the bond in suit, being in the penal sum of one thousand dollars, and containing the following recitals, conditions, and agreements: "That whereas the said Atwood has heretofore, to wit, on the fifth day of October, A. D. 1857, bargained and sold to the said Conner, Wyman, and Gibson one undivided half part of a mill-privilege and mill, subject to the right of William Moor in the same. Now, therefore, if the said Atwood shall procure of, and deliver to, the said Conner, Wyman, and Gibson, their administrators or assigns, the full release and quitclaim of the said Moor to the said mill and privilege, and otherwise hold the said Conner, Wyman, and Gibson, and their assigns, harmless from any and all claims in any way lawfully created and attached to said mill and privileges by said Moor, or his assigns, then this obligation shall be void. And it is hereby agreed and understood that the said Conner, Wyman, and Gibson, are to and shall keep a full and correct account of the amount of lumber sawed in said mill, and the expense of all repairs upon said mill, and at all times shall secure and afford to the said Atwood free access to the books and evidences of such account, so far as the same may be necessary in the judgment of said Atwood to enable him, the said Atwood, to settle his accounts and claims with said Moor, or his assigns, and procure his or their release and quitclaim, as heretofore provided."

John R. Wyman subsequently conveyed his share to Conner and Gibson, assigned to them his interest in the bond and deed. Conner subsequently conveyed to Geo. H. Newhall his part of the property, and assigned to him his interest in the bond, and this action is prosecuted for the benefit of Gibson and Newhall. Newhall and Gibson claiming to hold possession of the mill, as against Moor, he brought a writ of entry against them, and for *mesne profits*, and re-

covered judgment for possession and for *mesne profits*, during the time of their occupancy (*Moor* v. *Gibson*, 53 Maine, 551), amounting to $430, which Gibson and Newhall had paid before the commencement of this action.

Atwood never procured any deed of release as stipulated in the bond, though often thereto requested before the commencement of this action, but did have due notice of the pendency of the real action above mentioned. Gibson and Newhall procured a deed of release from Moor on March 11, 1868, and paid therefor $1,200.

It was admitted that one undivided half of the mill and privilege was worth more than one thousand dollars, at the date of the bond; and that the plaintiffs did not keep any account as mentioned in the bond, or render any account as requested.

The full court to render judgment according to the legal rights of the parties; and if the plaintiffs recover, the damages to be assessed by the judge of the superior court unless the parties agree.

Davis & Drummond, for the plaintiffs.

Defendants concluded by the judgment in *Moor* v. *Gibson*. *Portland* v. *Richardson*, 54 Me. 46. That the agreement to keep account, &c., not a condition precedent. 1 Chit. Plead. 320, 321. 1 Saunders, 320 c., note 3. *Boone* v. *Eyre*, in a note in 1 H. Blackstone, 273. *Campbell* v. *Jones*, 6 F. R. 579. *Davidson* v. *Gewynne*, 12 East, 389. *Ritchie* v. *Atkinson*, 10 East, 295, 558. *Stover* v. *Gordon*, 3 M. & S. 308. *Fothergill* v. *Walton*, 8 Taunt. 576. *Franklin* v. *Miller*, 4 Ad. & E. 599. *Stavers* v. *Curling*, 3 Bing, N. C. 355. *Dallman* v. *King*, 4 Bing. 105. *Newcomb* v. *Brackett*, 16 Mass. 161. *Phil., Del., & Balt. R. R. Co.* v. *Howard*, 13 How. 339. *Bennett* v. *Pixley*, 7 Johns. 249. *Tompkins* v. *Elliott*, 5 Wend. 496. *Dakin* v. *Williams*, 11 Wend. 70.

Damages being more than penal sum of bond, judgment should go for penal sum and interest after six months, that being a reasonable time within which to obtain release.

Bradbury & Bradbury, for the defendants.

Whether or not the stipulation to keep an account, &c., is a condi-

tion precedent, does not depend upon the collocation of the phrases or of any formal words for that purpose, but upon the agreement as evidenced from the nature of the facts and the order of time when they are to be performed. *Hopkins* v. *Young*, 11 Mass. 302. *Mill-dam Foundery* v. *Hovey*, 21 Pick. 437. *Knight* v. *New Eng. Worsted Co.*, 2 Cush. 439. 2 Pars. on Con. 529.

The deed must be considered in connection with the stipulations in the bond. The mill was sold subject to Moor's claims. The right of action reserved is to be reimbursed for rebuilding under the mill act. *Moor* v. *Gibson*, 53 Me. 551. The stipulation as to the account of lumber sawed and expenses of repairs, was for the benefit of Atwood in reference to his right of action. It was to be kept by the plaintiffs and furnished Atwood, to "enable him to settle with Moor," &c. The settlement and procuring of the release was dependent upon the keeping of the account. It was essential to Atwood's settlement. No settlement could be made without it. Upon this settlement depended the amount of Moor's claim, from which Atwood had bound himself to save the obligees harmless. This account necessarily preceded the performance of the condition, and hence was a condition precedent without express words to that effect. *Mill-dam Foundery* v. *Hovey*, 21 Pick. 439. *Caldwell* v. *Blake*, 6 Gray, 402. *Hubbell* v. *Flint*, 13 Gray, 277.

Dickerson, J. Debt on bond. In 1853, the defendants, Calvin Atwood and one William Moor were owners of the saw-mill and privilege mentioned in the bond, each owning an undivided half thereof. The mill was burned, and Moor, refusing to assist in rebuilding it, Atwood rebuilt the same in 1854, claiming to proceed under chap. 86 of the R. S. of 1841.

On the fifth day of October, 1857, Atwood conveyed to Simon Conner, John R. Wyman, and Samuel Gibson, jr., the obligees in the bond, by deed of that date, "one undivided half of the saw-mill privilege and saw-mill, meaning to convey one-half of the saw-mill privilege, and all the mill subject to the claims of William Moor on said mill, and reserving to himself all claim and right of action against the said Moor which he then had."

On the day this deed was given, Atwood gave the grantees an obligation to procure from Moor a quitclaim deed of his interest in the premises for their benefit, or to fully indemnify them for Moor's claim. Failing to obtain Moor's release, Atwood, on the eighteenth day of April, A. D. 1859, in compliance with the terms of the other alternative in his obligation, gave the bond in suit in the penal sum of one thousand dollars, referring to the deed of Oct. 5, 1857, and conditioned "to procure and deliver to the obligees (who were the grantees in that deed), the full release and quitclaim of the said Moor to the saw-mill and privilege, and otherwise hold the said obligees and their assigns harmless from any and all claims in any way lawfully created, and attached to said mill and privilege by said Moor, or his assigns."

This bond, also, contains the following provision, immediately succeeding the words, "then this obligation shall be void," "and it is hereby agreed and understood, that the said Conner, Wyman, and Gibson are to and shall keep a full and correct account of the amount of lumber sawed in said mill, and the expense of all repairs upon said mill, and at all times shall secure and afford to the said Atwood free access to the books and evidences of account so far as the same may be necessary, in the judgment of the said Atwood, to enable him, the said Atwood, to settle his accounts and claims with said Moor, or his assigns, and procure his or their release and quitclaim, as heretofore provided."

One of the grantees of the deed, and the assignee of the other grantee being in possession of the premises, Moor brought a writ of entry and for *mesne profits* against them, recovered judgment against them for possession, and damages in the sum of four hundred and thirty dollars, which sum was paid by them before the commencement of this suit, as was, also, the sum of twelve hundred dollars, expended by them to procure Moor's release. One undivided half of the mill and privilege was worth more than one thousand dollars when the bond was given. The plaintiffs did not keep any account as stipulated in the bond, nor render any when requested.

The defendants contend that the covenant of the plaintiffs to keep an account, is a condition precedent to their covenant to release the estate from incumbrances; and that not having kept their covenant, the plaintiffs are not in a situation to take advantage of a breach by the defendants. The question is thus presented, whether the mutual stipulations in the bond are dependent, requiring the plaintiffs to show performance, or a tender, or a readiness to perform; or independent, not requiring an actual performance, or tender. The rule laid down by Lord Mansfield in *Boone* v. *Eyre*, 2 W. Bl. 1312, which has been acknowledged and affirmed by the highest courts in England and this country, is, that where mutual covenants go to the whole consideration on both sides, they are dependent covenants, the one being precedent to the other. But where they go only to a part, and a breach may be paid for in damages, the defendant has a remedy on his covenant, and cannot plead it as a condition precedent. *Storer* v. *Gordon*, 3 Maule & Selw. 308. *Tileston* v. *Newell*, 13 Mass. 406. *Thompkins* v. *Elliot*, 5 Hend. 496.

When the act of one party must necessarily precede the act of the other party in the order of performance, it will constitute a condition precedent; but when the act of the one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, the performance of the one is not a condition to the obligation to perform by the other, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages. *Stavers* v. *Curling*, 3 Bing. New Rep., 355. *Atkinson* v. *Ritchie*, 10 East, 295–530.

Whether a covenant be of the former or latter description, dependent or independent, depends upon the reason and sense of the thing as it must have been understood by the parties, taking the whole contract into consideration. The conditions in the bond are preceded by reference to the deed of Oct. 5, 1857, thus making that transaction, in the minds of the parties, the moving cause for executing the bond. Though the plaintiffs by that deed acquired title to only a moiety of the mill and privilege, they actually paid

for the whole, taking an obligation from the grantor, Atwood, to indemnify them against Moor's claim to the other half. In the event of Atwood's failure to procure Moor's release, that obligation required him to secure the grantees against Moor's claim; and the bond in suit was given upon the happening of that contingency. The consideration paid for the deed was, therefore, the consideration for the bond also. In giving the bond in suit, the principal defendant, Atwood, incurred no new liability; he simply substituted his bond with sureties for his individual obligation previously given. Nor did the plaintiffs acquire any new rights against Atwood by accepting the bond. There is, moreover, nothing in the case to show that the defendant, Atwood, had any right to exact of the plaintiffs the stipulation to keep and tender an account; or, in other words, that such a clause was contemplated in the obligation for which the bond was substituted.

Viewing the transaction in the light of these antecedent facts, the parties would naturally be expected to make the procurement of Moor's release by the obligors, the first and principal thing to be done. The plaintiffs had previously paid for this release, and took the bond to make sure its forthcoming. Accordingly we find this stipulation inserted in the first clause of the conditions of the bond. Taken in connection with the further obligation to save the plaintiffs harmless from Moor's other claims on the property, this makes a complete instrument, fully conforming to the requirements of the obligation for which it was substituted, and concluding with the formal words, "then this obligation shall be void."

No further act was necessary to be done by the plaintiffs to entitle them to demand performance of the defendants' covenants. The obligation to keep an account is not the consideration for performing these covenants, the plaintiffs having long previously paid the defendants for entering into these stipulations. No such apt words as "if," "on condition," or "provided that" the obligees shall keep an account, are used to indicate that the performance of the covenants of release and indemnity depends upon the plaintiffs' keeping an account. Nor was the keeping of an account

necessary to enable the defendants to perform their covenants. Such account might have been convenient and useful to the defendants in settling their claims with Moor, but it was, by no means, indispensable for that purpose; and the loss and inconvenience, if any, sustained by them on account of the breach of this stipulation, can be compensated in damages in another action. The covenant to keep an account does not go to the whole consideration, and is not, therefore, a condition precedent to the other covenants. *Knight* v. *N. E. Worsted Co.*, 2 Cush. 287.

The plaintiffs, at least, it would seem, acted upon this theory, as it is scarcely probable that they would have omitted to perform so inconsiderable a task as keeping an account, if they had supposed that their failure to do so would defeat their right of action or the defendants' covenants.

The view we have taken is, moreover, in harmony with the equities of the case, as it is not pretended that the defendants suffered any damage by reason of the plaintiffs' failure to keep an account, since whatever claim Atwood had against Moor for reimbursement of expenses for rebuilding the mill, he lost by separating his lien from his security by means of this same conveyance. *Moor* v. *Gibson*, 53 Maine, 551.

Judgment for Plaintiffs.

Damages not exceeding the penal sum on the bond to be assessed by the judge of the superior court, unless agreed upon by the parties.

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

BENJAMIN DUNNING *vs.* MERCHANTS MUTUAL MARINE INSURANCE COMPANY.

Neither the sale of a vessel by necessity, nor the abandonment of her, can be justified, unless it will cost more than half of her value, after deducting one-third new for old, to repair her.

While, as a general rule, the assured cannot convert a partial loss into a constructive total loss, by withholding the means necessary for the repairs of the vessel, this principle is not applicable to cases where the damage is sufficient to justify an abandonment.

To authorize the master to hypothecate his vessel in bottomry, substantially the same necessity must exist as would justify a sale by him.

The assured is not precluded from recovering as for a total loss under a policy when the master has sold the vessel from necessity, after the owners had abandoned her.

A charterer is not bound to make repairs or incur charges exceeding one-half the value of the vessel, after deducting one-third new for old, for the purpose of prosecuting the voyage, and earning the whole freight, but he may abandon both ship and freight, and recover for a total loss against the respective underwriters.

ON EXCEPTIONS AND MOTION.

ASSUMPSIT to recover the sum of $1,250 insurance on the vessel, and $1,500 on the freight of the bark John Curtis.

It appeared that the vessel was of 539 tons burden, and valued in the policy at the sum of $20,000. The freight was valued at $8,000.

No question was made as to the value of the plaintiff's interest in the vessel and freight, execution of the policy, proof of loss, or the reasonable commencement of the action.

It appeared that in May, 1866, the bark, properly manned and seaworthy, sailed in ballast from New Orleans to Havana, where she effected a charter, wherein it was agreed that she should go to Turk's Island, and take thence a cargo of salt to Boston, or some port adjacent thereto.

That while on her passage to Turk's Island, in fulfillment of her charter-party, she encountered a hurricane, which continued thirty-six hours, during which she was thrown down on her beam-ends,

and, in order to allow her to come up head to the wind, her foretop-mast was cut away, which carried with it the foretop-mast head, with the foretop-gallant-mast, and all the spars, sails, and rigging connected therewith; that her stern windows were driven in, her sails split, and blown out at the gaskets, the jib-boom sprung, bowsprit started, maintop-mast cross-trees split, rudder broken, fifty-five feet of her starboard bulwarks carried away, all her spars and rigging aloft more or less injured, and the vessel badly strained by violence of the sea.

That after the storm abated, she, in this disabled condition, strained, dismasted, and leaking, made the nearest port; that when off Nassau, the condition of the sea prevented her crossing the bar, and while making her way to the leeward of the island, for anchorage, she misstayed, and went upon a coral reef, about five miles from shore; that the master obtained assistance; that she lay on the reef five days, pounding heavily, when she was got off by wreckers, and towed into Nassau.

That during the time she lay on the reef, her remaining masts jumped, her decks rose and fell with the tide, she was chafed and broomed, her keel worn off, her timbers started and gaged, her copper torn, twisted, and wrinkled, her seams opened, and her sheer and shape changed.

That the master called a survey; that no tenders were made, or complete estimate for repairs submitted; that survey were of the opinion "that owing to the size of the vessel it would be impossible to do anything with her bottom at Nassau," and advised the captain to "obtain tenders and estimates, to be laid before the owners, or whoever else it may concern;" that the master took the steamer for the United States, arriving home on Friday, October 27th, when he learned that the owners had abandoned to the underwriters October 24th, of which fact they informed the master, and declined having anything more to do with the bark; that they did not inform the master who the underwriters were; that the master consulted an experienced ship-master and ship-owner, and returned to Nassau by the return steamer, when and where he called another

survey of experienced men, who made a survey, obtained tenders and estimates, by which, vouched for in the sworn testimony not only of those who made them, but by many other witnesses, it appeared that the cost of repairs to the bark would have been over twenty thousand dollars in gold; that the bottom of the vessel could not be repaired without taking her out upon the dry dock at Nassau; that no prudent man would make a voyage, at that season, to any other port, in a vessel so injured; and that repairs were difficult and expensive at Nassau.

That the survey unanimously recommended a sale of the bark at public auction; that the master, in a foreign port, having no instructions from the underwriters, with no funds to repair, sold her, after due notice in the public papers, to the highest bidder.

That she was first purchased by Sawyer & Menendez, of Nassau, with a view of breaking her up; that afterwards, the hulk was purchased by one Saunders, of Nassau, temporarily repaired, sent to Liverpool with a cargo of cotton, and there sold; that the hulk was sold in Nassau for $810 in gold; that Saunders repaired her in Nassau and Liverpool, to the amount of $7,735.46; that she was sold in Liverpool for $6,292 in gold.

It also appeared that on Oct. 24, 1867, the plaintiff abandoned the vessel, then in Nassau, to the underwriters.

There was some verbal testimony drawn from the master on cross-examination, tending to show that he put a bottomry bond on the bark while in Havana; but the testimony was seasonably objected to by the plaintiffs. There was introduced by the defendants, also, the deposition of the United States consul at Nassau, containing a copy of an alleged indorsement upon the bark's register of the bond mentioned, which was seasonably objected to by the plaintiffs.

The verdict was for the plaintiff.

The defendants alleged exceptions to the ruling,

1. That the plaintiff was entitled to recover as for a total loss if the jury were satisfied that the sale by the master was justifiable under the circumstances of the case as proved.

2. That the plaintiff's right to recover, as for a total loss, is resisted by the defendants on another ground. It being in proof that there was what was called a bottomry bond on the vessel, the defendants contend that the plaintiff could not abandon. I instruct you that there is nothing in the evidence to justify you in deciding against the plaintiff's right to recover upon that ground.

3. And also to the refusal of the judge to give the following instruction requested by the defendants, viz.: That where the master, through necessity, sells the vessel after an abandonment by the owners, such sale does not constitute a total loss under the policy, as between the insured and the insurers.

The defendants, also, filed a motion praying that the verdict be set aside as being against law and the weight of evidence.

Rowe, for the defendants, contended that the evidence failed to show that the sale was necessary, and cited *New England Co.* v. brig *Sarah Ann*, 13 Peters, 387, 401; *Hall* v. *Franklin Ins. Co.*, 9 Pick. 466, 478; *Pike* v. *Balch*, 38 Maine, 302; *Stephenson* v. *Piscataqua F. & M. Ins. Co.*, 54 Maine, 55.

In support of the exceptions, the defendants contended that the positions of loss by abandonment and that by necessary sale, are inconsistent with each other. If the abandonment was valid, the loss was total to the plaintiff on October 24, after which he had no interest to be affected by the sale. The master was no longer his agent, and whether the sale was necessary, was a question which could arise only between the master and insurers, or between the insurers and purchaser.

That question can arise between the owners and insurers only upon the assumption, that the damages did not exceed fifty per cent, and that the abandonment was not valid; and on that assumption, the sale, even if justifiable as between the master and owners, does not constitute a total loss under the policy.

The necessity was created by the owners' refusal to furnish funds to repair; and they cannot thus convert a partial loss into a total loss. *Greely* v. *Tremont Ins. Co.*, 9 Cush. 415. *Orrok* v. *Com-*

monwealth Ins. Co., 21 Pick. 426. *Hall* v. *Ocean Ins. Co.*, 21 Pick. 482.

The bottomry bond destroyed the right to abandon. *Gordon* v. *Mass. F. & M. Ins. Co.*, 2 Pick. 249, 260.

The plaintiff can recover nothing for loss of freight. His loss was not occasioned by the perils of the sea, but by the voluntary neglect or refusal of the master and owners to carry out their contract.

It is only freight which the insured have been prevented from earning by the perils insured against, that the insurers contract to pay. *Moss* v. *Smith*, 67 Eng. C. L. 93. *Clark* v. *Mass. F. & M. Ins. Co.*, 2 Pick. 104.

Where loss on the vessel is partial, nothing can be recovered for loss of freight. It matters not if the damages exceed fifty per cent, if the owners have lost right to abandon and are obliged to settle with insurers as for a partial loss.

There should have been an abandonment of freight which the law, and not the policy, regulates.

Shepley & Strout, for the plaintiff, cited *Gordon* v. *Mass. F. & M. Ins. Co.*, 2 Pick. 263; *Mutual Safety Ins. Co.* v. *Cohen*, 3 Gill, 459; *Fuller* v. *Kennebec Ins. Co.*, 31 Maine, 325; *Prince* v. *Ocean Ins. Co.*, 40 Maine, 481; *Stephenson* v. *Piscataqua Ins. Co.*, 54 Maine, 55; *Butler* v. *Murray*, 30 N. Y. 88.

On the necessity of hypothecation. 1 Pars. on Mar. Law, 412; Abbott on Shipping, 210, and cases *infra;* 2 Dall. 194; Curtis, Merchant Seamen, 176; The Aurora, 1 Wheat. 96; 9 Johns. 29; The Packet, 3 Mason, 255; *Huzzy* v. *Huzzy*, 2 Wash. C. C. R. 145. *Keith* v, *Murdock*, 2 Wash. C. C. R. 297; *Fontaine* v. *Col. Ins. Co.* 9 Johns. 29; *Rucher* v. *Conyngham*, 2 Pet. Adm. R. 208; *Gibbs* v. *The Texas*, Crabbe, 236; 2 Pars. Mar. Ins. 119; *Carter* v. *Am. Ins. Co.*, 7 Conn. 564; *Buckman* v. *Com. Ins. Co.* 5 Duer, 342; *Bryant* v. *Com. Ins. Co.* 6 Pick, 131; 2 Phill. on Ins. 342, § 1630; *Graves* v. *Wash. Ins. Co.* 12 Allen, 394.

Dickerson, J. Assumpsit on a policy of marine insurance on

vessel and freight. The verdict was for the plaintiff, and the case is presented on exceptions and motions.

The first instruction complained of is as follows: "the plaintiff is entitled to recover, as for a total loss, if the jury are satisfied that the sale by the master was justifiable under the circumstances of the case as proved." This was equivalent to saying to the jury that there was sufficient evidence to justify a sale by necessity, if the jury should be satisfied of its truth. Whether a sale is justifiable from necessity is a mixed question of law and fact. The facts admitted, it is a question of law; the facts controverted, it is a question of fact under the rules of law applicable thereto. *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick. 553. It is a well-established rule of law, that, in order to justify a sale by necessity, the damage to the vessel must be of such a nature and extent as to authorize an abandonment; and, in general, there can be no valid abandonment, unless it will cost more than one-half the value of the vessel to repair her, deducting one-third new for old. *Crook* v. *Commonwealth Ins. Co.*, 21 Pick. 456. *Hall* v. *Ocean Ins. Co.*, 21 Pick. 472. *Greely* v. *Tremont Ins. Co.*, 9 Cush. 420.

The necessity requisite to justify a sale by the master, though not necessarily actual, must be an apparent moral necessity. In the language of the court in *Stephenson* v. *Piscataquis Ins. Co.*, 54 Me. 77: "Viewed from the master's standpoint, the facts and circumstances must exclude every rational theory that the interests of those he represents would be subserved in any other way than by a sale; or, in other words, to refrain from selling, to a man of ordinary maritime experience and intelligence as a ship-master, must seem to be the violation of a manifest moral duty." *Prince* v. *Ocean Ins. Co.*, 40 Me. 481.

These authorities are equally explicit, that good faith and necessity must concur in order to justify a sale of the vessel by the master, from necessity.

Upon examining the evidence as to the damage actually done to the vessel, the estimated expense of repairing her at Nassau, made by competent persons of that place; the expense and difficulty of

taking her to a port of the United States for repairs; the low figure at which she was sold and resold at the place of repair; the cost of the temporary repairs actually made on her, and the reduced price she brought in Liverpool, we think the jury were authorized in coming to the conclusion that it would cost more than fifty per cent of the value of the vessel to put her in a suitable state of repair, deducting one-third new for old; and that, therefore, there was sufficient ground for abandoning her. If in addition to the valid cause for abandonment, thus established, we consider the master's destitution of funds, his ignorance of the residence of the underwriters, and the unanimous judgment of the second survey in favor of an immediate sale of the vessel, we cannot but conclude that the sale by the master was justifiable. The master's visit to the owners for instruction, his return to the vessel after he learned they had abandoned her, the several surveys called by him, and his other acts indicate, at least, a desire on his part to do his duty. Nor can this result be avoided on account of the negligence of the plaintiff in furnishing the funds necessary to repair the vessel. While, as a general rule, it is not competent for the assured to convert a partial loss into a constructive total loss, by withholding the necessary means to repair the vessel for the purpose of charging the underwriters with a larger amount than they ought to pay under the policy, we do not understand that this principle applies to cases like the one at bar, where the damage is sufficient to justify an abandonment. To hold otherwise would be to make the right of abandonment to depend, not upon the question whether the cost of repairs made exceed half the value of the vessel, but upon the pecuniary ability of the assured, coupled with his opportunity to repair her; in short the application of the principle contended for by the defendants' counsel to this case is in direct conflict with the long-established American rule upon this subject. *The American Ins. Co.* v. *Ogden*, 20 Wend. 286.

The next question reserved in the exceptions is predicated upon the judge's instruction to the jury "that there was nothing in the evidence in regard to a bottomry bond on the vessel to justify them

in deciding against the plaintiff's claim to recover." No bond was offered in evidence. The evidence touching that matter came exclusively from the master; and if that is not too vague and shadowy to show that a bottomry bond was put upon the vessel after the insurance was effected, it utterly fails to show that any such instrument was executed by the master under any such exigency as the law requires in such cases. Substantially the same necessity must exist for hypothecating the ship that is required to justify a sale by necessity. If the master have sufficient funds of his own, or belonging to the owners, or can obtain them on the owners' credit, he cannot bind the ship by giving a bottomry bond. He cannot give such a bond to secure his own private debt, or to pay a debt of the owners; it is only to meet an existing emergency in respect to the employment of the ship that cannot otherwise be provided for, that the master has authority to place such an incumbrance upon her. The case is barren of any evidence of the existence of such exigency, and of the lawfulness of the purpose for which the instrument in question was executed. There is also the same paucity of evidence to show that the master executed a valid mortgage or pledge upon the vessel. 1 Parsons' Mer. Law. 412. 2 Dallas, 194, 9 Johns. 29. 1 Wheat. 96. *Huzzey* v. *Huzzey*, 2 Wash. C. C. 155–297.

The presiding judge very properly instructed the jury to disregard the evidence upon this branch of the case.

3. We know of no rule of law by which the assured is precluded from recovering as for a total loss, under a policy, when the master sells the vessel from necessity, after the owners have abandoned her. If the abandonment was valid, it constituted a constructive total loss; if it was unauthorized, it could have no effect upon the rights of the parties. When, in such cases, there is no abandonment, the master acts both for the assured and the underwriters; when there is an abandonment, he acts for the latter only. It would do violence to the natural instincts of justice, as well as be a perversion of the law, to deny to the assured the right to recover as for a total loss, after abandonment, because the master, acting with-

out his authority, as the agent of and for the benefit of the underwriters, sold the vessel from necessity.

It remains to consider the effect of the sale upon the right of the plaintiff to recover freight. While it is true, as the learned counsel for the defendants contends, that it is only freight which the insured have been prevented from earning by perils insured against, that the insurers contracted to pay, it is also true, that if the owner or charterer is wholly prevented from earning the freight insured upon, by the ship being wrecked, or other perils insured against, it is an absolute total loss. 2 Phillips on Ins. 352. Nor in case of a constructive total loss of the ship by damages over fifty per cent of its value under the American rule, is the assured on freight obliged to waive his right to abandon the ship, and make repairs, or incur charges exceeding half its value for the purpose of prosecuting the voyage, and covering the whole freight; but he may abandon both ship and freight, and recover for a total loss against the respective underwriters on each. *American Ins. Co.* v. *Center*, 4 Wend. 45. In *Herbert* v. *Hallett*, 3 Johns. Cases, Mr. Justice Kent says: "It appears to me that the same peril and to the same extent, ought to exist to authorize a recovery on a policy on freight, as on a policy on the ship." Also, in *Clark* v. *Mass. F. & M. Ins. Company*, 2 Pick. 104, cited by the defendants' counsel, the court say, that if the disaster had terminated the contracts, the owners of the vessel would have been entitled to recover his freight of the underwriters. In that case, the vessel was repaired, and the court held, that the owner of the ship should have retained the cargo, and forwarded it in the vessel, after she was repaired, and thus earned the freight, instead of surrendering it to the shipper, and calling upon the underwriters for his freight. The case of *Moss* v. *Smith*, 67 Eng. C. L. 93, also cited in defense, is inapplicable, as the English courts do not recognize the American rule in respect to the amount of damages necessary to be done to the vessel in order to entitle the owner to the right of abandonment.

In the case at bar, the sale being justifiable, the plaintiff would

be enabled to recover as for a constructive total loss, though there had been no formal abandonment.

Having disposed of the motion in considering the first question raised in the exceptions, we do not deem it necessary to discuss that subject any further. *Exceptions and motion overruled.*

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

JOSIAH B. WEBB, administrator, *vs.* PORTLAND & KENNEBEC RAILROAD COMPANY.

In an action for injuries caused by being thrown from a carriage by a locomotive at a railroad crossing, a variance will, after verdict, be overlooked as immaterial, when there is no dispute or misunderstanding as to the precise spot on the face of the earth where the accident occurred, and when the case declared upon and that proved, do not require or admit different kinds or degrees of proof, or the application of different rules of law.

Facts from which a highway by dedication may be inferred.

Whether a person, injured by a locomotive at a railroad crossing, was or not, at the time of the collision, in the exercise of ordinary care, is a question for the jury to determine from the evidence, under proper instructions.

If a party desires more definite instructions upon any particular point, he should make a request therefor.

A verdict must be clearly against the weight of evidence, in order to justify the full court in setting it aside upon that ground.

A compliance with R. S. of 1857, c. 51, §§ 15 and 19, on the part of a railroad corporation, does not absolve it from observing such other precautions as reasonable and ordinary care may require in crossing a thoroughfare leading to and from a city.

Whether or not a railroad company is guilty of negligence in not employing a flagman at a certain crossing, is a question of fact.

When one railroad company is by permission using the track and easement of another, the former is held to observe such precautions for the safety of the public at a crossing, as shall be fully equivalent to those required by reasonable care and prudence of the latter.

The establishment of a flag station at a railroad crossing is legal evidence of the consent of the railroad corporation to whom the easement and right of passage with trains belong, that the way may be used as such.

Webb *v.* Portland & Kennebec Railroad Company.

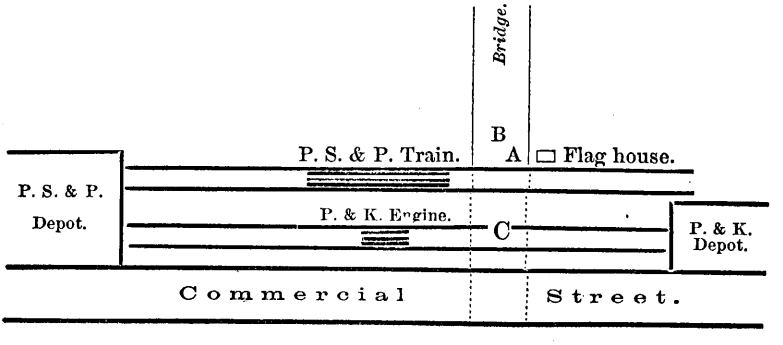
The establishment of a flag station at a railroad crossing, cannot reasonably be construed as an assertion of a paramount right on the part of the corporation.

In the trial of an action for an injury alleged to have been received while passing along a "public street and highway across the railroad track of the defendants," if the evidence of a legal location is wanting, it is proper to instruct the jury, that there was no legal highway by reason of any proper location; but that if the jury should find, that, with the consent of the company owning the track and having the right of passage there with trains, and of the owners of the fee in the land, there had been a thoroughfare in open and continuous use by the public, and all who had occasion to go between the termini mentioned, and that use commenced prior to the running of the defendants' trains there, and continued to the time of the accident without objection made by the company owning the track, or the owners of the fee, or the defendants, they might thence infer the existence of such a way and right of crossing the railroad at grade there, as would bind the defendants to the use of the same precautions, prudence, care, and diligence in running their engines, as they would be bound to exercise if a highway had been located across the track there at grade.

ON EXCEPTIONS AND MOTION.

CASE for injuries alleged to have been received by Nathan Webb, the plaintiff's intestate, on the 28th of March, 1867, while "lawfully passing with his jigger drawn by two horses, along the public street and highway in Portland, leading from Portland bridge across the railroad track of the defendants, into Canal street."

C. C. Thompson, called by the plaintiff, testified substantially that he had been flagman for the Portland, Saco, and Portsmouth Railroad Company at the crossing near their depot, in Portland, for eight years; that he was never employed as flagman by the defendant corporation, but practiced flagging the latter's trains when they were passing that crossing; that he witnessed the circumstances connected with Nathan Webb's attempting to cross, in March, 1867;



that witness, standing at A, saw Webb with two horses attached to an unloaded jigger, coming from the bridge toward Commercial street; that at the same time a P. S. & P. train was moving from the P. & K. depot toward the P. S. & P. depot, whereupon witness swung his flag and stopped Webb at B; that as soon as the train passed, witness drew up his flag, and thereupon Webb started along; that witness could see further down the track than Webb, but could not see defendants' engine because the P. S. & P train intervened; that witness soon heard the bell of both locomotives, and then saw the defendants' engine moving from the P. S. & P. depot toward the defendants' depot on the track nearest Commercial street; that witness, seeing Webb already on the crossing, hallooed to him to hasten; that Webb struck his horses and drove as fast as he could; that when witness first discovered the defendants' engine moving toward the crossing, it would have been more risky for Webb to attempt to return than go forward; that the engine struck the hind wheel of the jigger at C, and threw Webb upon the ground; that both bells were ringing at the same time; and that trains run over that crossing one hundred times a day.

There was other evidence introduced by the plaintiff tending to show that Webb could not see the defendants' engine because of the intervening train when he started to cross; and there was evidence introduced by the defendants, tending to show that he could see the smoke-stack of the engine over the intervening train.

H. B. Hussey, called by the defendants, testified, substantially, that witness was driving the defendants' locomotive which struck Webb's jigger in March, 1867; that witness had been to the P. S. & P. depot with a freight-train, and was returning; that when within ten feet of the crossing, witness first saw the heads of a pair of horses crossing ahead of the engine; that witness immediately reversed his engine to prevent collision, but the bunter caught the rim of the after part of the jigger, and as the locomotive advanced, the team was swung round, and the pole of the jigger came in contact with the back driving-wheel of the locomotive, and the horses were thrown down; that the locomotive stopped at the end of the

planking of the crossing next the P. & K. depot; that bell was ringing all the time; that the brakeman, looking on the side next the bridge, gave no notice of the train, and witness, looking out on the side next Commercial street, did not see it until it was on the crossing; and that the locomotive was moving four to five miles an hour.

Charles E. Barrett, called by the defendants, testified that he was clerk of the P. S. & P. Railroad Company; that the records of the location were burnt; that formerly, the Portland bridge extended from the brow of the hill above the P. S. & P. railroad tracks; that the bridge company occupied the land under the bridge until the location of the P. S. & P. railroad; that the track where the collision occurred, is the P. S. & P.'s track, and is used by the P. & K. company, by consent; that the land covered by the road as now traveled, and extending to the bridge, is the land formerly covered by a portion of the bridge, which extended from the present bridge to Brackett street; that the bridge was altered several years ago; that the P. S. & P. Company never made any objection; the way is a great thoroughfare; that the bridge was surrendered to the county.

All other essential parts of the evidence are recited in the opinion.

The presiding justice instructed the jury, *inter alia*, that if the collision was the result of pure accident, and neither party was in fault, the plaintiff would not be entitled to recover; and that if any want of care on the part of Nathan Webb contributed to produce the accident, the action could not be maintained.

That whether the plaintiff's intestate, at the time of the collision, was or was not in the exercise of ordinary care, was a question of fact for the jury to determine, upon all the evidence.

That if the jury should find that Nathan Webb was in the exercise of due care, they would then inquire whether or not the defendants were in fault in not having their engine flagged, by the flagman stationed at the crossing, and in running their engine out from the P. S. & P. depot, as shown by the evidence in the case; and that it was a question of fact for the jury to determine, whether

it was a neglect on the part of the defendants in not having their engine flagged by the flagman stationed at said crossing.

That if the jury should find that said Webb was in the exercise of due care, and that the collision occurred solely through the default, want of care, and negligence of the defendants in not having their train flagged, or by the unskillfulness or negligence of their engineer in the management of defendants' engine, then the plaintiff would be entitled to recover whatever damages the plaintiff's intestate received by reason of such collision.

That no legal location of any highway at the place of the accident, by the county commissioners, or other proper authority, was shown by the testimony, and that there was not any legal highway at that place by reason of any proper location of the same; but if the jury should find, that with the consent of the P. S. & P. Railroad Company, the corporation to whom the easement and right of passage with trains there belonged, and with the consent of the owners of the fee in the land, there had been a thoroughfare in open and continuous use by the public and all who had occasion to go there, from the end of the structure of the bridge, as newly laid down, to some one of the streets of Portland (that use commencing at a period previous to any running of engines or cars there by defendants), and continuing to the present time without objection made by the P. S. & P. Railroad Company, or the owners of the fee, or the defendants, they might infer from these facts the existence of such a way and right of crossing the railroad at grade there, as would bind the defendants to the use of the same precautions, prudence, care, and diligence in running their engines and trains there, that they would be bound to exercise if a street or highway had been legally located across the track there at grade. And in determining the question as to whether there was such consent on the part of the owners of the fee, the jury might take into consideration the nature and amount of travel there, and the want of evidence of objection made by the owners of the land. And as to the consent of the railroad company, they may consider these facts, and also the existence of a planking at the crossing, if it was for the ac-

commodation of the travel crossing there, and the employment of a flagman by the P. S. & P. Railroad Company to flag their trains at that point, and the erection there of a flag-station box; that if the jury found consent of these parties to the use of the crossing as a public highway, and the subsequent constant use of it by the public as such, it is an end of all claim of paramount right on the part of the railroad to run their trains there without the due and reasonable precautions, prudence, and care which they ought to observe at the crossing of a highway legally located; that it was the end, too, of any claim on the part of the defendants, that Webb was on the track as a trespasser, or as subject to any other duty or obligation than those which rest upon all persons crossing a railroad track at grade in a regularly located highway; that it was not competent for the railroad company to say, by their acts or omissions, to the public, we permit you to use this place on our track for a common crossing to be used by the public, but still to urge, when an accident happens, we are under no obligation to use the ordinary precaution, care, and diligence to avoid collision with those who pass there, that we might be under if there were a legally located street. That the particular question is, whether there was, with the assent of the corporation (which may be inferred from their acts or omissions if they show it), a crossing there in use over the track of the railroad, which would call for a greater degree of caution in the exercise of due care by the defendants and their servants, than at other places on their road, where no crossing existed. That it was not for the defendants to say, that there was no highway there, if there was a crossing which they, and all others interested permitted the public to use as such, and the jury find that it was in fact, in great and constant use.

The defendants contended that as the engineer of a locomotive engine, moving with great momentum, with its direction fixed by the line of its rails, has less power of arresting its course, or changing the direction of its movement than the driver of a vehicle drawn by a horse; that the railroad has superior rights at a crossing, and the driver of a vehicle, drawn by a horse, is under greater obliga-

tion to arrest his course or change his direction than the driver of the locomotive, because he can more easily do so.

The presiding justice did not instruct the jury that the railroad had any superior or paramount rights at a crossing over the travelers by the highway, but did instruct them, that, if they found both parties had rights at the crossing, they could not use the same space at the same time. Each party on crossing or approaching was bound to use his privilege with such due and reasonable precaution, and prudence, and actual diligence at the time, as may enable him to use it with safety to the other party passing, in like exercise of due care. That the degree of prudence, precaution, and care is the same upon each party. The fact that teams can be more easily controlled is a fact to be considered in determining whether the party exercised due care. The plaintiff must show, the burden being on him, his right to be there, and that he was lawfully there, and that on his part he was in the exercise of prudence and care, and that no negligence of his contributed to the injury, but that it occurred solely by the negligence and want of care of defendants. The defendants requested the following instructions:

1. That if the defendants were, under the authority and with the consent of the P. S. & P. Railroad Company, running their train on the location of the P. S. & P. Railroad, as it existed prior to the lowering of the bridge and the conveyance of the rights of the bridge company to the county, the defendants had the same rights and were subject to no greater liabilities in running their trains than the P. S. & P. Railroad Co.

2. That the owners of the fee in the land could not dedicate it to the use of the public for a highway, so as to interrupt the right which the railway had previously acquired, and which were not subject to any right to crossing the same at grade as a highway.

3. That the railroad company, having only an easement, had no right to forbid the use of a highway if the owners of the fee consented; that no consent of the railroad company can be implied from their not objecting, as they had no right to object.

The court gave the first of the above-requested instructions, but

declined to give the other requested instructions, with the remark that the jury understood that they must find the assent of all the parties interested.

The defendants alleged exceptions, and filed a motion to set aside the verdict as being against law and the weight of evidence.

Shepley & Strout, in support of the motion contended that

I. The burden of proof was on the plaintiff to show that he was in the exercise of ordinary care and prudence. The case conclusively shows the contrary. Had Webb used ordinary prudence, he would have looked up to see the approaching locomotive, and the collision would have been avoided. *Warren* v. *Fitchburg R. R. Co.*, 8 Allen, 230. *Meesel* v. *Lynn & Boston R. R. Co.*, 8 Allen, 234. *Butterfield* v. *Western R. R. Co.*, 10 Allen, 533. *Spencer* v. *Utica & Schenectady R. R.*, 5 Barb. 337. *Brand* v. *Same*, 8 Barbour, 368. *Brooks* v. *B. & N. F. R. R.*, 27 Barbour, 532. *Dascomb* v. *Buffalo State Line R. R. Co.*, 27 Barbour. *Gleason* v. *Bremen*, 50 Maine, 222. *Hartfield* v. *Roper*, 21 Wendell, 615.

II. There is a fatal variance between the plaintiff's writ and the proof. The declaration avers that the injury was received by plaintiff in passing over a public street and highway in said Portland, leading from Portland bridge across the railroad track of the defendants, into Canal street. The case finds that the injury was received upon private land rightfully used by trains of the P. S. & P. Railroad, and whilst crossing their track, instead of the track of the defendants. *Shaw* v. *Boston & Worcester R. R. Co.*, 8 Gray, 45.

In support of the exceptions, defendants contended that

I. The instruction to the jury, "That whether the plaintiff's intestate was or was not in the exercise of ordinary care, was a question for the jury to determine upon all the evidence in the case," is excepted to upon the following grounds:

1. The question of ordinary care, where the facts in relation to that question are admitted, or undisputed, and not in controversy, is a question of law and not of fact. *Cooper* v. *Waldron*, 50 Maine,

81. *Spofford* v. *Harlon*, 3 Allen, 179. *Denney* v. *Williams*, 5 Allen, 1.

2. If the question of ordinary care, upon a state of facts not controverted, is not purely a question of law, it is at least a mixed question of law and fact, and one not proper to be left to the jury without any instructions in relation to the principles of law applicable to the facts in the case, and as in this case under a restriction which virtually leads the jury to believe that no rules of law limited or regulated the construction they might see fit to give to the facts.

II. The question, "Whether it was a neglect on the part of the defendants in not having their engine flagged by the flagman stationed at their crossing," was not "a question of fact for the jury to determine," but a pure question of law.

1. The duties and liabilities of railroad corporations at public and private crossings, are regulated by statute. R. S. of 1857, c. 51, §§ 15 and 19. Defendants were under no legal obligations to keep a flagman at this crossing.

2. Whether they were under such obligation is a question of law and not of fact.

3. The evidence shows no flag was displayed by the defendants, no flagman employed by them and no flag station established or maintained by them.

4. The instruction assumes that the defendants did not flag their engine at the crossing; and then, instead of instructing the jury as a question of law, either that it was or was not the defendants' duty to flag their engine at such a crossing, it leaves them to find that question of neglect as one of fact.

5. The error in this instruction, and the injustice of it to the defendants, is readily seen by this.

The legislature prescribes precisely what a railroad should do to prevent accidents at a crossing. If the legislature directs the engineer to ring his bell, and he does so, has a jury a right to find negligence because a whistle was not also sounded? or if the legislature requires a steam-whistle to be sounded, and this is done, can a jury find neglect, as a question of fact, because a bell is not rung

when no law requires it? If the legislature requires either a bell or a whistle, or both, and does not require the exhibition of a flag, the jury have no right to find neglect as a matter of fact, from the want of exhibition of the flag; and an instruction that they may do so is erroneous, and calculated to mislead.

III. The third instruction is erroneous for the reasons given above, because it incorporates the supposed default of defendants in not having their train flagged, as giving a right to recover, when, by law, such omission of a flag was not a default or negligence.

IV. The fourth instruction places the defendants upon the same footing as if there was a highway.

1. If there was a highway, neither the P. S. & P. R. R. Co. nor defendants were obliged to keep a flagman at the crossing. Therefore, the omission of the defendants to flag their engine in this instance, was no default or negligence.

These defendants never did it in any case.

2. If the judge intended to instruct the jury, that if the P. S. & P. Railroad had been in the habit of flagging their engines, and Webb knowing that such was their habit, and relying upon it, had trusted to that mode of warning against the danger, and was misled by the omission of a customary warning upon which he had a right to rely, and was thereby injured by a collision, such an instruction would have been tenable, perhaps, as against the P. S. & P. Road, who had employed the flagman and kept up the flag station.

3. But this instruction could not have been given properly, as applicable to these defendants, who were not in law obliged to employ, and who never, in fact, did employ any person for such purposes. *Fletcher* v. *Boston & Maine R. R. Co.*, 1 Allen, 13.

4. The employment of a flagman to give warning of approaching trains, was an assertion of the paramount right of the railroad, a warning and notice to all people to keep off the track.

Yet the court misconstrued it into a fact, from which the jury might infer dedication and right to cross in front of a locomotive, although it was an express notice to the contrary.

V. The second and third requested instructions should have been given.

S. C. Strout & H. W. Gage, for the plaintiff.

BARROWS, J. Under the motion to set aside the verdict in this case, a new trial is claimed upon two grounds.

1. The defendants insist that there is a fatal variance between the plaintiff's writ and the proof, inasmuch as the declaration avers that the injury was received when the plaintiff's vehicle was passing along a public street and highway in said Portland leading from Portland bridge across the railroad track of the defendants into Canal street; and the proof, according to the defendants' view of it, shows that the injury was received upon private land, rightfully used by trains of the Portland, Saco, & Portsmouth Railroad Co., and while crossing their track, instead of the track of the defendants.

There is no dispute or misunderstanding as to the precise spot on the face of the earth where the accident occurred. It was in the immediate vicinity of the defendants' depot in Portland, between it and the depot of the P. S. & P. R. R. Co., on a track belonging to and laid down by the latter Railroad Co., for the purpose of making a more convenient connection with the former, in constant and rightful use by both roads for their mutual convenience, and at a point where this track (with several others similarly used) intersects a great thoroughfare, hourly accommodating a large amount of public travel, and leading from Portland Bridge into Canal street.

If it was a misstatement to call this thoroughfare a public street and highway, and this track, which the defendants were rightfully using, the defendants' track, it is plain that the variance was not such as could mislead the defendants in the preparation of their defense, and it is entitled to nothing more than its legitimate weight as a purely technical objection, unless the case set forth in the declaration and that which was established by the testimony require or ad-

mit different kinds and degrees of proof, and the application of different rules of law. Unless some substantial cause of this sort is found, under our laws which forbid the arrest of judgment for any circumstantial errors or mistakes which by law are amendable when the parties and the case can be rightly understood, a variance between the declaration and the proof will be overlooked after verdict, and a new trial will not be granted on account of it. Such a variance does not seem to constitute any better reason for delaying judgment and putting parties to the inconvenience and expense of a new trial, than it would for finally arresting judgment in the case.

When the occurrence out of which the controversy arises is the same, and the ground upon which damages are claimed is substantially the same, a casual misdescription of the ownership of the track, misleading no one, is simply immaterial. Moreover it can hardly be accounted a misdescription to speak of the track while the defendants were using it, as the defendants' track. *Pro hac vice*, it was theirs. They were lawfully using it by virtue of an understanding with the other corporation, driving their own engine over it with their own servants. *Quoad* the plaintiff, it is not for them to say the track was not theirs. They were there for the time being with the rights of proprietors, exercising the same powers, subject to the same duties and liabilities, so far as the public were concerned, neither more nor less. But, say the defendants, it was not a public street and highway. The assertion is based upon an alleged failure to show a legal location. But the establishment of a legal location is not the only mode of proving the existence of a public street and highway. Evidence of a long-continued uninterrupted public use, is properly received to establish the existence of a highway by dedication.

The testimony here shows, that for some twelve or fourteen years previous to the trial, this street has been openly and publicly used by any one who chose to go there. There was no testimony tending to show that the proprietors of the land had ever made any objection to the public use of it as a highway, or that the defend-

ants had done so, though they had been running their cars over the tracks of the P. S. & P. Railroad there, under an agreement with the latter company, for some years previous to the accident. Mr. Barrett, an officer of the P. S. & P. Railroad, a witness for the defendants, testifies that the street has been used by the public generally; that it is a great thoroughfare; that the travel to Portland bridge has increased since the bridge was lowered to the grade of the railroad; and that he knows of no objection ever being made by that corporation, which owns the tracks and the right of way for railroad travel there, and has put up the sign-board required by the statute, and established a flag station such as is customary at the crossing of highways which are greatly frequented.

Here was ample evidence from which a dedication by all parties having any right or interest in the land there, or any easement liable to be interrupted by the establishment of a highway, might be inferred.

If, as between these parties, any evidence of assent to the dedication is requisite in order to make the description of this thoroughfare as a public street and highway strictly correct, there are the same *indicia* of assent which were held sufficient in *Hobbs* v. *Lowell*, 19 Pick. 410 to charge the city with liability for non-repair in a suit for damages alleged to have been suffered by reason of a defect in a highway.

In view of the foregoing testimony, it cannot be said that the verdict is against evidence upon this point, or that there is any variance herein between the declaration and the proof.

And even if the evidence fell short of establishing a highway *de jure*, we think that upon the issue presented by these pleadings and upon the state of facts exhibited by this report, a variance in this particular would be an immaterial one, not affecting the rights of the parties or the rules of law or evidence applicable in the trial of the cause, or the inferences to be drawn from the testimony, in any manner. Here was an avenue through which poured the whole tide of travel into and out of the city in that direction, affording the most direct route to the defendants' freight depot and grounds;

used and recognized by all and sundry, as a highway for years before the defendants began to run over the track of the P. S. & P. Railroad located there. We think that the instructions given by the presiding judge with regard to the effect of a finding by the jury that there had been and was a thoroughfare there, in open and continuous use by the public and all who had occasion to go there, without objection made by the owners of the fee, or by the P. S. & P. Railroad Co., which had an easement there, or by the defendants, were strictly correct, and that it was not for the defendants to say in this action that there was no highway there, if there was a crossing which they and all others interested permitted the public to use as such, and which was, in fact, in great and constant use. Under such circumstances, the plaintiff would be there with the rights of a traveler on a highway, and as regarded him and all others traveling there, the defendants would be subject to the same duties and liabilities as if the street had been a highway *de jure* as well as *de facto*. As regards the issue which these parties were litigating then, a variance of this description, were its existence demonstrated, would be immaterial. The defendants, upon this point, rely upon the case of *Shaw* v. *Boston & Worcester R. R. Corp.*, 8 Gray, 45. We do not question the correctness of that decision, as to the materiality of the variance in that case. The variance between the declaration and the proof, as to the place of the accident, changing it from the highway to a point without the limits of the highway, on the defendants' grounds, would necessarily change the whole course of inquiry, and affect all the inferences to be drawn as to the suitableness of the horse, the degree of skill and care in driving exercised by the plaintiff, and other matters vital to the plaintiff's suit. The reasons assigned for holding the variance to be in that case radical and essential, do not exist here. It mattered not (if the plaintiff was at the place of the accident with the rights of a traveler on a highway, and the defendants were there, subject to the duties and liabilities of a railroad crossing a highway at grade, as was assuredly the case upon the testimony adduced here), whether there was or was not error in the

proceedings of the county commissioners, a dozen or fifteen years before. When all parties were proceeding upon the hypothesis that there was no error, it would not change the relations of the parties in this suit to each other, should it be found that all were mistaken in that particular.

2. In connection with this part of the case we will consider the exception taken to the refusal to give the second and third requested instructions.

We fail to perceive the propriety of these requests. The two propositions are manifestly inconsistent with each other, and if the first is correct, as we think it is, the other is clearly unsound. Granted that it would not be competent for the owners of the fee to create a highway by dedication, where it would interrupt the previously acquired right of the railroad to run their trains without being subject to the delays and precautions incident and necessary to crossing a highway at grade, it necessarily follows, that the railroad company would have the right to object to any such interruption of their easement if it were attempted. The instruction given, required the jury to find the assent of the proprietors, both of the fee and the easement, and were correct, and embraced, by necessary implication, all the sound law to be found in either of the requests which were refused.

3. Complaint is made of the instruction requiring the jury to determine upon all the evidence in the case, whether the plaintiff's intestate was or was not in the exercise of ordinary care. It is claimed that that question where the facts relating to it are admitted or undisputed, is one of law and not of fact. The contrary doctrine was maintained in *Patterson* v. *Wallace*, 28 Eng. Law and Eq. 48, where although there was no controversy about the facts, and the only question was whether a certain result was to be attributed to negligence on the one side or rashness on the other, the judgment of the court below was reversed because the judge had withdrawn the case from the jury, and it was held in the House of Lords to be a pure question of fact for the jury.

But if it be conceded that cases may arise where some unques-

tioned fact may afford such conclusive proof of negligence on the part of the plaintiff as would preclude him from recovering and justify a direct ruling to that effect, a glance at the testimony here will suffice to show that this is not one of them.

There were several railroad tracks in close proximity. Webb's precise position with regard to the approaching engine; his actual distance from the track on which the accident occurred when he started; the length of time he had been waiting for the other train to pass, and the time required for him to cross the defendants' track; the degree of speed with which the defendants' engine approached the crossing, and, more than all, the possibility or impossibility of Webb's seeing the smoke-stack of defendants' engine over the other moving train if he had looked in that direction,—all matters, having an important bearing upon the question of negligence, were left too uncertain by the testimony to form the basis of a peremptory ruling upon that question as a matter of law. It was necessary that the jury should pass upon it as a mixed question of law and fact under proper instructions. The counsel for the defendants now complain that such instructions were not given. The exceptions do not show what instructions were given upon this part of the case, nor do they purport to contain all that were in fact given. The presumption is that they were correct. The defendants' counsel seem to have rested satisfied with them at the time, for they requested nothing more definite, as they should have done if they desired rulings applicable to particular hypotheses or contingencies which the judge was omitting to notice.

4. The alleged want of ordinary care on the part of the plaintiff is also relied on in support of the motion to set aside the verdict, forming the second ground on which it is claimed that the motion should be sustained. We are by no means satisfied that the jury erred here,—still less that their decision was so clearly wrong as to justify us in sustaining the defendants' motion.

The injured man was not present to testify to what he did or omitted to do in the way of precaution. What he might have done and did do is matter of inference merely, to be reached by a com-

parison of the not very precise and definite statements of by-standers occupying different points of view. Bailey, the defendants' station agent, says he stood by the side of Thompson, the flagman, and not many feet from Webb, and that he saw the smoke-stack of the approaching engine over the intervening freight-train, and he or some one hallooed a warning to Webb, and he sees no reason why Webb could not see the approach of the engine as well as himself. But he says it was after Webb had started and got the length of his horses that he himself saw it; so that the warning was too late to be effective. On the other hand Thompson, the flagman of the P. S. & P. Railroad, who was apparently nearer to Webb than Bailey, testifies that he could see a little further down the track than Webb could; that the P. S. & P. freight train prevented them from seeing defendants' engine; that neither he nor Webb could see it when Webb started; that he did not see it until Webb was half way across the track. We must remember that Webb's horses, being used to haul goods to and from the depot, were accustomed to see the cars in motion; that they were standing in close proximity to the train which was moving down the other track; that Webb had waited at the flagman's signal until that train was clear of the crossing; that he had no load, and that he was nearly across the track when the collision occurred, the engine striking the hind-wheel of his vehicle; that the defendants' engine had just before been moving in the opposite direction, so that its return to the crossing was unexpected. We cannot say that we see conclusive evidence of a want of ordinary care in his attempt to cross when the flagman of the other road drew in his flag after the passage of his train. The flagman, though employed by the other road, was accustomed to flag the defendants' engine at this crossing, as a matter of accommodation, but did not flag this one because he did not see it nor suppose it was coming until too late to prevent the accident.

5. The defendants do not contend in argument here that the verdict was against the evidence on any other point except those which we have considered, nor that there was not negligence in the man-

agement of their train, the engineer in charge testifying that he did not see Webb's team until the engine was within ten feet of him, and that the brakeman who was looking out on the side from which Webb was approaching, gave him (the engineer) no notice; but they complain that it was left as a question of fact for the jury to determine whether the defendants were guilty of negligence in not employing a flagman and having their engine flagged at the crossing.

If the jury decided the question correctly as we think they did (looking at all the evidence touching the situation of this crossing and the use made of it both by the public and the railroad companies), the defendants ought not to complain because the point was not ruled peremptorily against them.

But the defendants claim that whether there was negligence in this omission was a pure legal question, and should have been ruled in their favor; because they say that the duties and liabilities of railroad corporations at public and private crossings are prescribed and regulated by R. S., c. 51, §§ 15 and 19. But the legislature do not undertake to define or point out all the precautions which reasonable and ordinary care may require a railroad company to observe in crossing a crowded throughfare leading into a city.

A proper regard for the security of human life imperatively requires them to make use of other and greater safeguards in such a locality than those which the legislature have deemed sufficient for ways in general, many of which are little frequented.

In the language of the court in *Bradley* v. *Boston & Maine R. R. Co.*, 2 Cush. 539: "The statute makes certain positive regulations, and the defendants, at their peril, are bound to comply with them; but there are no negative words, and there is no implication that a compliance was to absolve them from any duty which they were under before; and, therefore, if other precautions were necessary, the defendants were still bound to take them."

And in the same case it was held, that the question of negligence in these respects was one of fact, to be submitted to the jury, under all the circumstances of the case, and to be determined by them

upon their view of what skill and prudence and reasonable care and diligence require.

And in *Shaw* v. *Boston & Worcester R. R. Corp. ubi supra*, it was decided that the record of the county commissioners, stating that in their opinion no flagman was necessary at the crossing, was not competent to show due care on the part of the company, when that precaution had been omitted.

Judge Redfield, in his treatise on the Law of Railways, vol. 1, p. 547, *in notis*, after stating a Massachusetts decision, to the effect that it is not competent for the judge to lay down any definite rule as to the duty of the company in regard to proper precautions in crossing highways, that the circumstances attending such crossings are so infinitely diversified, that it must be left to the jury to determine what is proper care and diligence in such case, remarks as follows: "This, we apprehend, is the true rule upon that subject, both as to the company, and travelers upon the highway, and that it will finally prevail, notwithstanding occasional attempts to simplify the matter by definitions."

6. The defendants insist that any instruction authorizing or permitting the jury to find them guilty of negligence, in not having their engine flagged at the crossing, even if tenable as against the P. S. & P. Railroad, who had employed a flagman, and kept up a flag station, and thereby perhaps induced Webb to rely upon the flag, and to be misled by the omission of the warning, is not tenable as against these defendants, because they never employed a flagman. This argument assumes that the P. S. & P. R. R. Co. could be held liable for the omission only on the ground of their having misled the party injured, by their previous practice; but we think that upon the evidence in the case, the jury would be amply justified in finding that the omission of some such precaution in such a locality, is proof of a want of ordinary care, without regard to the previous practice of the corporation.

And we are clear that a railroad company, when using the track and easement of another similar corporation for the purpose of running their own engine and cars, with their own employees, must

be held to observe such precautions for the safety of the public at a crossing, as shall be fully equivalent to those which are required in the exercise of reasonable care and prudence at the hands of the corporation whose road they are using. An omission which would constitute actionable negligence in the proprietor of the track, is equally culpable in any party that is using the track for the same purpose. If they choose to omit such reasonable precautions, they assume the risk, and must abide the consequences of so doing.

7. Finally, it is claimed that the employment of a flagman, to give warning of approaching trains, was an assertion of the paramount right of the railroad, and that it was misconstrued by the presiding judge into a fact, from which the jury might infer an assent on the part of the railroad company, to the dedication and use of the land as a highway. We do not see any error in the use which the jury were allowed to make of the fact. The establishment of a flag station cannot reasonably be construed as an assertion of a paramount right on the part of the railroad company.

On the contrary, it is the well-known and well-understood safeguard adopted by prudent and properly conducted railroad corporations, at the crossings of recognized highways which are much frequented, and the exhibition of the flag is but a notice that they are about to exercise the common privilege.

Upon the whole, we do not see that either law or justice requires us to send this case to a new trial.

Motion and exceptions overruled.

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

SYLVAN SHURTLEFF & others *vs.* PHENIX INSURANCE COMPANY.

Where one of the conditions, in a policy of insurance against fire, is that the policy shall become void "if any other insurance shall thereafter be made upon the property, and not consented to by the company, in writing thereon," and, in case of an action thereon, it appears that at the time of the loss there was an insurance beyond the amount allowed, the insured will not be entitled to recover in the absence of proof of a waiver of the condition.

Whether or not an agent of the company can waive such a condition, *quære*.

ON REPORT.

ASSUMPSIT on a policy of insurance against fire.

After the evidence was all in, the case was withdrawn and reported to the full court who were to determine the case according to the rights of the parties upon the law, and so much of the evidence as was legally admissible.

Davis & Drummond, for the plaintiffs.

Howard & Cleaves and *N. B. Hoxie*, for the defendants, cited Pub. Laws of 1862, c. 115, § 2; *Hutchinson* v. *Western Ins. Co.*, 21 Missouri, 101; *Conway T. Co.* v. *Hudson R. Ins. Co.*, 12 Cush. 144; *Loring* v. *Manf. Ins. Co.*, 8 Gray, 28; *Kimball* v. *Howard F. Ins. Co.*, 8 Gray, 33.

DANFORTH, J. This is an action on a policy of insurance in which we find the following provisions: "And provided further, that if any other insurance has been, or shall hereafter be made upon the said property, and not consented to by this company, in writing hereon, . . . this policy shall be null and void." In the policy is written an assent for $30,000 other insurance. At the time of the loss there was other insurance to the amount of $35,500 on the same property. Under this state of facts the authorities cited by the defendants clearly show the policy to be void. Nor is this view of the law denied by the plaintiffs, but it is contended by their counsel that this condition in the policy was waived, because Dow,

the agent of the defendants, made, as agent of other companies, the additional insurance, and especially because after the additional insurance, he renewed the policy in suit. If the facts were as assumed, it might admit of serious doubts whether Dow, as agent, could waive a provision in the contract thus distinct and explicit. But we are not called upon to decide any question of this kind, for the report of the case shows the facts to be otherwise. It appears that the policy of the Dirigo company bears date April 16, 1866. This was after the last renewal of the policy in suit, nor does it appear that Dow was the agent of that company or had anything to do with, or any knowledge of, the issuing of that policy. The testimony of plaintiff, Sylvan Shurtleff, does not contradict these facts. Referring to the time of his removing his goods he says, "at that time he was agent for all the policies I had on the property," &c. It also appears that subsequent to this time and before the loss, one policy, at least, of $20,000 had expired, and others, making up the amount, had taken its place. How many, or to what amount, through the agency of Dow, does not appear. It does appear that there was at the time of the loss an insurance of $5,500 beyond the amount authorized in the policy, and no proof of any waiver of the condition in the policy by the company or its agent.

Judgment for defendants.

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

ELLEN WILSON *vs.* GRAND TRUNK RAILWAY OF CANADA.

The delivery of a trunk into the possession of a railroad station baggage-master, at his station, for transportation, and his reception of the same for that purpose, impose upon the corporation the obligation of a common carrier.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court for this county.

The case is sufficiently stated in the opinion.

Shepley & Strout, for the plaintiff.

P. Barnes, for the defendants.

APPLETON, C. J. This is an action against the defendant corporation as common carriers, for neglecting to carry the plaintiff's trunk and deliver the same, according to contract. The writ is in the usual form. There is no motion for a new trial. We cannot, therefore, consider the question whether the verdict is against evidence, the defendants not having seen fit to present it. The exceptions taken at the trial only are before us.

The plaintiff was a passenger on board the defendants' cars. Her trunk had been lost while traveling over the Portland & Kennebec Railroad. Some two or three days after she had passed over the defendants' railroad, the conductor on the Portland & Kennebec Road found the trunk and left it in charge of the defendants' baggage-master,—on their platform,—informing him that the plaintiff had passed over the defendants' railroad two or three days before, and requested him to take charge of the same and deliver it at the Empire station, on their line, which he promised to do. Nothing was said about freight nor whether the trunk should go by the passenger or the freight train. The trunk was lost, and this suit is brought to recover its value.

The plaintiff traveled over the defendants' railroad without her trunk. She had no right to require it to be carried subsequently without compensation as the baggage of a passenger. The defendants were under no obligation so to carry it. They were in no way responsible for its loss originally. *Wilson* v. *G. T. Railway Co.*, 56 Maine, 60.

The plaintiff was liable for freight, and the defendants had a right to claim it. It was not necessary for the plaintiff to tender it to render the defendants liable,—unless prepayment was demanded.

It is objected that no checks were given, and that the action of the baggage-master was in violation of the rules and regulations of the corporation. These regulations are not before us. It is said

they were before the court at a former trial, but that cannot avail the defendants in the present case. However stringent they may be, we cannot give effect to them unless they are offered in evidence. If reliance was placed upon them, they should have been introduced and made part of the case.

The defendant requested the presiding judge to instruct the jury "that upon the whole evidence the plaintiff is not entitled to recover, and their verdict should be for the defendant." This instruction was refused, and the jury were instructed that if the testimony satisfied them "of the fact that this trunk was taken into possession of the baggage-master, of the defendants' road, at Yarmouth Junction, he having authority to receive it in behalf of the company, and he did receive it and promised in behalf of the company that the company should carry it safely for this plaintiff and deliver it to her at the Empire station, and the trunk being so received has not been so carried but was lost, and on suitable demand therefor, it has not been delivered to her, and that without a claim for freight on it or any pretense of withholding it for payment of freight . . . the plaintiff is entitled to recover the value of the trunk and its contents."

The trunk was delivered in the custody of the defendants' agent for transportation. It was accepted by him for that purpose. Nothing was said as to the freight or transportation. But the law imposes the obligation to pay. It was left in the custody of the defendants and with their agent for transportation. Neither the plaintiff nor the conductor of Kennebec & Portland Railroad assumed to give directions as to the time or mode, but left the whole to the defendants. In *Mayall* v. *Boston & Maine Railroad*, 19 N. H. 122, it was held, that when the corporation have a general agent, who is employed by them for the express purpose of recovering and transporting merchandise for him, and is held out to the world as invested with authority for this purpose, if goods are delivered to him, to be transported in the way of his duty, the corporation will be liable for the manner in which that duty is performed, and the contract of bailment may be regarded as made by them.

The cases cited by the learned counsel for the defendants are not at variance with these views. In *Elkins* v. *Boston & Maine Railroad*, 23 N. H. 287, Gilchrist, C. J., says, "The articles were such as are usually carried as personal baggage. They were not accompanied by the owner, and, by the printed rule in which the defendants rely and by the practice, no agent was authorized to send them by the express train." But the printed rules of the corporation, whatever would be their effect, are not before us. In *Collins* v. *Boston & Maine Railroad*, 10 Cush. 507, the plaintiff sent by a passenger train a quantity of merchandise, expecting to go with it, but did not. The goods were lost without any gross negligence in the carrier or any conversion by him. Held, the carrier was not liable. But Dewey, J., in delivering the opinion of the court, uses the following language: "To avoid all misapprehension as to other cases, it may be, however, proper to remark, that in this opinion we have reference to the cases where boxes of goods, bales of merchandise, or the like, are, for a compensation to be paid, though received by carriers of persons for transportation by passenger trains, being known and understood not to be baggage. Such carriers may contract for carrying merchandise on these trains, and whenever they do so, they do it with the ordinary liability of carriers of merchandise."

A "passenger's baggage," says the court in this case, 56 Maine, 60, "subsequently forwarded by his direction, in the absence of any special agreement with the carrier, or negligence on his part, is liable, like any article of merchandise, to the payment of the usual freight." The same view of the law was taken by Nelson, J., in the Elvira Harbeck, 2 Blatchford, 339, a case similar to the one at bar, in which he says, "In cases where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery. If the passenger does not accompany it, the carrier may claim compensation in advance, or may postpone his claim till the delivery, and rely on his lien or on the personal responsibility of the owner. I do not see why the rule of responsibility for the safe-

keeping should not be the same in both cases; the actual payment of the freight in one case, and the actual liability and lien for its payment in the other, constitute the consideration for the undertaking."

The instruction given was correct, and the one requested and withheld was rightly refused.

The delivery of a trunk into the hands of the defendants' agent, and the reception of the same by him for transportation, imposes upon the corporation the obligation of common carriers. It is like the delivery of any parcel for freight. The law imposes the obligation to pay on the part of the owner, and to safely carry and deliver on the part of the carrier. There is no evidence that the plaintiff claimed it should be carried without compensation as passenger's baggage, or that the defendants' agreed so to transfer it. It mattered not whether it was a trunk or a barrel of flour. It was received to be safely carried. It was known to be the trunk of a passenger who had previously passed over the road.

The objection that there was a variance between the writ and the proof is without foundation. The evidence fails to show there was any special delivery of the trunk to be carried as passenger baggage and without compensation. The plaintiff was not there, and could not, therefore, make such claim. The conductor of the Kennebec & Portland Railroad merely stated the facts and left the trunk with the defendants' agent to be carried on such of their trains as they might elect, and for such compensation as the law might determine. *Exceptions overruled.*

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

ICHABOD GOODWIN & others, in equity, *vs.* CHARLES HARDY & others.

The funds of a corporation, whenever they accrued, are to be distributed among such as are its stockholders when the dividend is declared.

BILL IN EQUITY.

The case is sufficiently stated in the opinion.

APPLETON, C. J. This is a bill brought under the provisions of R. S., 1857, c. 77, § 8, for the purpose of determining "the mode of executing a trust."

The facts are conceded to be truly set forth in the bill.

It appears that on the 1st day of April, 1847, by deed of indenture of that date, the Portland, Saco & Portsmouth Railroad Company granted to the Eastern Railroad Company and to the Boston & Maine Railroad Company, "the liberty as the general agent and attorney irrevocable of the said Portland, Saco & Portsmouth Railroad Company to maintain, use, operate with, and employ exclusively, the said railroad of said Portland, Saco & Portsmouth Railroad Company, in the State of Maine and every part thereof, for the transportation of persons and property during the continuance of the agreement between the parties, under said indenture, and to receive and take from time to time and at all times during the continuance of said agency and contract under said indenture, all the income, issues, and profits of said Portland, Saco & Portsmouth Railroad Company, and all tolls and fares whatsoever for the transportation of persons, freights, property, and things upon said railroad or any part thereof, which had theretofore been or then were established, or at such reasonable rates, as having in view the best interests of all persons concerned therein, should be caused or procured to be established for the time being," &c. The Eastern Railroad Company and the Boston & Maine Railroad Company on their part agreed, that they "would, during the continuance of said

agency and contract under said indenture, pay, or cause to be paid semi-annually, in the months of June and December in each year, to the treasurer of said Portland, Saco & Portsmouth Railroad Company, the sum of three dollars in gold or silver coin of the currency of the United States for each and every share of the capital stock of the said Portland, Saco & Portsmouth Railroad Company, the first payment to be made in June in the year of our Lord one thousand eight hundred and sixty-seven."

The Eastern Railroad Company and the Boston & Maine Railroad Company made their semi-annual payments according to the times of their contract until June, 1863, when they refused to pay "in gold or silver coin of the currency of the United States," and "claimed the legal right to and did make payment to the treasurer of the said Portland, Saco & Portsmouth Railroad Company for the time being for the use of the stockholders of said Portland, Saco & Portsmouth Railroad Company, in legal tender notes, the sum of three dollars for each and every share of the capital stock of said Portland, Saco & Portsmouth Railroad Company;" said legal tender notes being of less value than the gold or silver coin of the currency of the United States. These payments were received by the treasurer of the Portland, Saco & Portsmouth Railroad Company under protest, he "asserting and insisting upon the right of the stockholders to receive the sum of three dollars in gold and silver coin of the currency of the United States."

The Eastern Railroad Company and the Boston & Maine Railroad Company continued, notwithstanding the protests of the Portland, Saco & Portsmouth Railroad Company, to make their several semi-annual payments in legal tender notes, up to June, 1869; and the sums so received were paid and distributed "to the several stockholders, from time to time, being respectively entitled to have and receive the same in their respective proportions."

The Portland, Saco & Portsmouth Railroad Company claimed of the Eastern Railroad Company, and the Boston & Maine Railroad Company, "payment of the difference between the value of the said several payments in legal tender notes of the United States,

. . . and the value of payments in gold and silver coin of the currency of the United States." On the 4th of August, 1869, this claim was compromised, by the payment, by the Eastern Railroad Company, and the Boston & Maine Railroad Company, to the treasurer of the Portland, Saco & Portsmouth Railroad Company, the sum of $180,000, "in full discharge and satisfaction of all claims for diminution of payments before that time due and payable, by reason of the same having been made in legal tender notes of the United States, instead of in gold or silver coin of the currency of the United States."

The money thus received is in the treasury of the Portland, Saco & Portsmouth Railroad Company. No dividend has been declared. The question presented is to whom this money belongs; whether to the several and respective stockholders owning shares when the several semi-annual dividends were paid, or to those who may be stockholders at the time when a dividend, embracing the sum of $180,000, received by way of compromise, shall be declared.

As to this we have no doubt. The stockholders have no claims to a dividend until it is declared. Until that time, it belongs to the corporation, precisely as any other property it may own. When a distribution of the funds of a corporation, whether of the whole or a part, is ordered, it is to be made between those, who, at that time, are the owners of its stock. The law on this subject is very clearly stated by Mr. Justice Sargent, in *Murch* v. *Railroad*, 43 N. H. 520. "The purchaser of a share of stock in a corporation," he remarks, "takes the share with all its incidents, and among these is the right to receive all future dividends; that is, its proportional share of all profits not then divided; and as we understand the law and the usage of such corporations, it is wholly immaterial at what time and from what sources these profits have been earned; they are incident to the share, to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made."

It is therefore declared,

That the sum of one hundred and eighty thousand dollars,

specified in the bill, belongs to and is the property of the Portland, Saco & Portsmouth Railroad Company, and that it is to be divided among those who may be stockholders at the time when its distribution is ordered by said corporation, and a dividend declared; and the trustees will govern themselves accordingly.

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

W. H. Y. Hackett and *Nathan Webb*, for the complainants.

F. W. Hackett, for certain stockholders.

CUMBERLAND & OXFORD CANAL CORPORATION *vs.* GEORGE F. HITCHINGS.

R. S. of 1857, c. 81, § 105, is a perfect bar to an action of debt to recover the penalty provided for in the Special Laws of 1821, c. 74, § 7,* when the penal act set forth in the declaration occurred more than one year next prior to the date of the writ.

Section 7 imposes no penalty for a continuance of the injurious act complained of.

ON FACTS AGREED.

DEBT under R. S. of 1857, c. 82, § 15, to recover the penalty provided in the Special Laws of 1821, c. 74, § 7.

The action was first commenced against the city of Portland. See 56 Maine, 77.

F. O. J. Smith and *C. P. Mattocks*, for the plaintiffs, cited *Moore* v. *Smith*, 5 Maine, 490; *Baldwin* v. *Collins*, 10 Wend. 179; *Aldridge* v. *Drake*, 10 Mad. 110.

Nathan Cleaves (city solicitor), for the defendant.

APPLETON, C. J. This is an action of debt, for a penalty given by the act incorporating the plaintiff corporation, and approved March 15, 1821. Special Laws, c. 74.

---

* See opinion.

By § 7 it is enacted, "That if any person or persons shall willfully, maliciously, or contrary to law, take up, break down, remove, dig under, or otherwise injure said canal or canals, or any work or works, connected with or appertaining to the same, or any part thereof, such person or persons, for every such offense, shall forfeit and pay to such corporation, a sum not less than fifty dollars, nor more than five thousand dollars, according to the nature and aggravation of the injury done or committed."

The plaintiffs' writ is dated Sept. 24, 1869, and sets forth the injurious acts complained of, and their continuance to its date. It is admitted that the acts set forth in the declaration were done by the defendant, between Feb. 9, 1867, and Sept. 14, 1867, under a contract with the city of Portland to grade Commercial street, and that what was done by him under that contract remains, as it was left, to this time.

The defendant relies upon the statute of limitations, R. S. c. 81, § 105, by which it is provided that "All actions for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year after the offense was committed."

The act of "filling in of the canal," was the injury of which complaint is made. The filling up remains, and it is urged that the defendant is responsible for its continuance, and thus is liable to the penalty given.

But the penalty is given for the injurious act done. No penalty is imposed for its continuance, as is done in some cases. When the act prohibited is done, the right of action accrues. When the right of action accrues, the statute of limitation begins to run. "The filling in of the canal" was before Sept. 14, 1867. The offense was then complete. *Barnicoat* v. *Folling*, 3 Gray, 134. Further, the continuance was not by the act of the defendant. He had no control over the streets, nor was he responsible for their subsequent condition. The statute constitutes a perfect bar.

The case of *Moore* v. *Smith*, 5 Greenl. 490, is not in point. There, by the statute, under which the action was brought, the

penalty was incurred monthly, as long as the will remained without being filed in the probate office. *Plaintiff nonsuit.*

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

STATE *vs.* ORSAMUS SYMONDS.

No citizen of this State can be deprived of the right of suffrage under the act of congress of March 2, 1865, c. 79, § 21, until after conviction and sentence by a court-martial of the United States.

An indictment for illegal voting at an election of State officers based upon a disqualification by reason of desertion from the army of the United States, must specifically set forth the crime of desertion.

Evidence of the defendant's admission of the crime of desertion is not admissible in support of an indictment for illegal voting, not containing any allegation of desertion.

Nor is the unauthenticated roll of the company to which he belonged.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court for Cumberland county, and motion in arrest of judgment.

INDICTMENT alleging that Orsamus Symonds, of Casco, in the county of Cumberland, laborer, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-eight, at Casco, in said county of Cumberland, at the election of State and county officers, then and there in the town of Casco, in the county aforesaid, he the said Orsamus Symonds, then and there having no legal right to vote in said town of Casco, knowingly did vote, he the said Orsamus Symonds, then and there well knowing that he then and there had no legal right to vote in said town, against the peace of said State, and contrary to the form of the statute in such case made and provided.

At the trial it was claimed on the part of the government that the respondent was a deserter from the United States army, and thereby had forfeited his right to vote by virtue of § 21, c. 79 of the act of congress of March 2, 1865.

In order to prove the desertion, a government witness was permitted, against the seasonable objections of the respondent, to testify that the respondent had admitted to him that he was a deserter.

The captain of the company to which the respondent belonged was called as a witness, and produced what purported to be the original roll of the company. It appeared in evidence that the witness had succeeded to the command of the company after the respondent had left. The officer, whose duty it was to make and keep the roll, was not produced. The introduction of the paper in evidence was seasonably objected to, but admitted.

The jury found the respondent guilty, and he alleged exceptions to the rulings admitting the testimony mentioned.

W. H. Vinton & A. B. Holden, for the respondent.

N. Webb, county attorney, *contra*.

DICKERSON, J. The respondent was indicted under c. 4, § 65, of the Revised Statutes, for illegal voting, at an election of State officers held at Casco, on the 14th day of September, 1868.

It was claimed, on the part of the government, but not alleged in the indictment, that the defendant was a deserter from the United States army, and had thereby forfeited his right to vote, according to the 21st section of c. 79, of the law of congress approved March 2, 1865. In order to prove the desertion, the government offered to prove certain alleged admissions of the respondent, and to introduce the roll of the company to which he belonged at the time of the pretended desertion. This evidence was seasonably objected to by the respondent's counsel, but the court overruled the objection, and the evidence was presented to the jury. The verdict was, "guilty," and the respondent filed exceptions to the ruling of the court, admitting the foregoing testimony.

Section 21, c. 79, of the laws of congress passed in 1865 enacts, "That in addition to the other lawful penalties of the crime of desertion from the military or naval service of the United States, all persons who have deserted the military or naval service, who shall

not return to said service or report themselves to a provost marshall within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship, and their rights to become citizens."

If this act of congress undertook to prescribe the qualifications of electors in the States, it would be unconstitutional, since, under the constitution of the United States, that prerogative is reserved to the States. But it attempts no such thing, the object of the section in question being to prevent the offense of desertion by depriving the offender of his rights as a citizen of the United States. It is clearly within the constitutional province of the legislative department of the national government to define and prescribe the rights of citizenship of the United States, and to declare their forfeiture, as a penalty for deserting the army in a death-struggle of the government for the preservation of its nationality. When a person has forfeited his rights of citizenship under this act, he loses his right of suffrage only when this right, under the constitution of the State to which he belongs, is restricted to citizens of the United States. Thus, while a congress cannot directly deprive a citizen of a State of the right of suffrage, it may deprive him of other rights upon which the right of suffrage may depend; it may incapacitate him for exercising the right of suffrage, but it cannot deprive him of the right itself. The act of congress in question goes to this extent and no further. In this State, none but citizens of the United States can exercise the elective franchise: to deprive citizens of this State, therefore, of their rights as citizens of the United States is, in effect, to deprive them of the capacity to exercise the right of suffrage.

The statute of congress is a highly penal one, and must be construed most strictly in favor of the citizen. Section 21 refers to preëxisting laws upon the subject of desertion, and should receive a construction in accordance with, and as if it had been incorporated among these statutes. It in no respect changes or dispenses with the existing machinery for trying and punishing desertion from

the army of the United States, but simply affixes an additional penalty, in certain cases, to that already prescribed. But for previous enactments this section should be imperative, as it provides no mode of trying the offense it proposes to punish by a penalty no less severe than the forfeiture of the rights of citizenship. The previous acts of congress relating to desertion contemplate a regular trial and conviction as preliminary to inflicting the penalties provided in them. For this purpose courts-martial are established.

The crime of deserting the army of the United States is exclusively an offense against the government of the United States, and can only be inquired into and punished through the courts of the United States having jurisdiction thereof. Any adjudication upon this offense, by a State tribunal, would be *coram non judice;* its decision would afford the accused no security whatever from another trial before another tribunal. Courts-martial of the United States have exclusive jurisdiction of this offense, and it is only after trial, conviction, and sentence by such court, and the approval of the same by the proper authority, that a citizen of this State can be deprived of the right of suffrage, or any right of citizenship under the act of congress in question. The record of such conviction is the only legal evidence of the fact of desertion before any tribunal where this is brought in question. *Huber* v. *Riley*, 53 Penn.

If the law were otherwise, any person who belonged to the army while this act of congress was in force, and who should be suspected of desertion, would be liable to be harassed and subjected to great expense and peril if he should apply to be appointed administrator of an estate, or guardian, or to bring a suit at law, or be admitted to any office of profit, honor, or trust to which he had been duly appointed or elected; for it is not only the right of suffrage, but all the rights of citizenship, present or prospective, that this act of congress visits with its terrible disabilities and penalties. Nor would the decision in one such investigation be a bar against others; they might be multiplied to any extent that might suit the interest, caprice, passion, or malice of the accuser. State tribunals were not designed, nor will the constitution of the United States

permit them to become inquisitorial courts for inquiring into, determining, and punishing offenses against the United States.

The constitution of the United States, Art. 5 of the amendments, provides that no person shall be deprived of life, liberty, or property without "due process of law." Due process of law, in criminal cases, requires that the charge should be effectually set forth in writing, and that the accused should have notice of the same, that he may know what he is to be tried for. This indictment calls upon the respondent to answer to the charge of illegal voting. Upon presenting himself for trial, he is at once confronted with evidence to prove that he is a deserter from the army of the United States, an offense of far greater turpitude than that alleged in the indictment, and necessary to be proved before he can be convicted of the charge he was called upon to answer. It is obvious that such procedure is not in accordance with the true intent and meaning of this provision of the constitution of the United States.

It follows that where the alleged disqualification for voting is imposed as a penalty for crime, that offense should be specifically set forth in the indictment charging the accused with illegal voting.

The evidence objected to should have been excluded, and the indictment is defective. *Exceptions and motion sustained.*

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

WALTON and BARROWS, JJ., concurred in the result.

ALBERT MERRILL *vs.* FRANKLIN CURTIS.

Where this court has jurisdiction of the parties and subject-matter in a writ returnable thereto, and the *ad damnum* is fixed at a sum below the jurisdiction of this court, but within the exclusive jurisdiction of the superior court, the *ad damnum* may, before trial, be increased, so as to bring the action within the jurisdiction of this court.

On exceptions.

Assumpsit on an account annexed, for three hundred dollars, and in "another sum of five hundred dollars, for so much money had and received."

The writ was made in Aroostook county, on an Aroostook county court blank, returnable to the October term of this court, in this county.

The plaintiff is a citizen of Portland, and the defendant of Boston.

On the back of the writ was a certificate, made in accordance with R. S. c. 113, § 2, and the officer, a deputy-sheriff for the county of Aroostook, made service on the defendant, by arresting him in Aroostook county, whereupon the defendant gave a bond for his appearance.

It appeared that the writ was made by a clerk of an attorney in Aroostook county, by whom the *ad damnum* was first written "six hundred dollars," and subsequently changed to "five hundred dollars," for the accommodation of the defendant, and without any thought of the superior court, there being no such court in any county in the State other than Cumberland.

On the second day of the return term, the defendant appeared specially, and filed a motion to dismiss the action, for want of jurisdiction; whereupon the plaintiff moved to amend the *ad damnum*. The presiding judge overruled the plaintiff's motion, and ordered the action to be dismissed, as matter of law; to which ruling the plaintiff alleged exceptions.

A. Merrill, pro se.

Davis & Drummond, for the defendant.

1. "The damages demanded do not exceed $500," hence, the superior court has exclusive jurisdiction of the action, and this court, in this county, none. Some statutes give jurisdiction to two courts, but mulct the plaintiff in costs, if he brings his action in the higher court, when it should have been brought in the lower. Here the superior court has exclusive jurisdiction of $500 and

under, and the jurisdiction of this court expressly taken away. Pub. Laws of 1868, c. 151, §§ 5, 13.

2. The court having no jurisdiction, cannot create a jurisdiction by allowing an amendment.

In *McLellan* v. *Crofton*, 6 Maine, 307, the defendant appeared, pleaded generally, and did not object to the want of an *ad damnum* till after verdict.

In *Converse* v. *Damariscotta Bank*, 15 Maine, 431, the court had jurisdiction of the case, but the defect being one of service, was amended. So in *Danielson* v. *Andrews*, 1 Pick. 156, the court had jurisdiction. In *Cragin* v. *Warfield*, 13 Met. 215, there was an appearance, and the amendment made on motion. So in *Ellis* v. *Ridgway*, 1 Allen, 501. *Hart* v. *Waitt*, 3 Allen, 532, is not in point. If the *ad damnum* is beyond the jurisdiction, the court may well go to the extent of its jurisdiction. But a court having no jurisdiction is powerless to give itself jurisdiction.

WALTON, J. By § 5, c. 151, of the Pub. Laws of 1868, the superior court has, within the county of Cumberland, exclusive jurisdiction of all actions of assumpsit not exclusively cognizable by municipal courts and trial justices, wherein the "damages demanded do not exceed five hundred dollars;" and by § 13, the jurisdiction of the supreme judicial court is limited accordingly.

The *ad damnum* in the writ in the action at bar was fixed at five hundred dollars; and it is contended that the "damages demanded do not exceed" the statute limit within which the superior court has "exclusive jurisdiction," and that hence this court cannot take sufficient cognizance of the action to allow such an increase of the *ad damnum* as will give it jurisdiction.

"Jurisdiction," etymologically considered, signifies a declaration of law. But practically, when the books speak of a court having jurisdiction of a personal action, they mean, in general terms, that the court has authority not only to declare the law concerning the subject-matter in controversy, but also the power of enforcing that declaration between the parties. So that the essentials of jurisdic-

tion are power over the parties and the subject-matter of difference between them.

It is not contended that the parties were not within the jurisdiction of this court when the writ was served; for the plaintiff then was and he still is a counselor of this court, resident in this county; and the officer's return shows that personal service was made upon the defendant while commorant in our county of Aroostook. Nor is it contended that this court does not have cognizance, in this county, of actions of assumpsit in which the "damages demanded" "exceed five hundred dollars;" nor that, had the writ been returnable in any county other than Cumberland, this court would not have had jurisdiction. But notwithstanding the parties and the matter of contention between them are within the jurisdiction of this court, and although service has been proper and timely upon the defendant, and he has given a bond to appear before this court and abide its judgment, still, inasmuch as the *ad damnum* was, by the clerk of the plaintiff's attorney, cut down from six hundred to five hundred dollars, to accommodate the defendant by lessening the penalty of his bond, he comes into court, and, instead of pleading to the merits of the action, makes the purely technical objection that the letter of § 5 takes the jurisdiction of the action from the highest court in the State and confers it on the next highest, and he pleads abatement. To obviate this technical difficulty, the plaintiff moves for leave to amend by increasing the *ad damnum*. We think now, as did C. J. Mellen on a similar occasion, that "it would be matter of regret, if not of reproach to our laws, and to the administration of them, if such a motion could not be sustained." *McLellan* v. *Crofton*, 6 Greenl. 307.

In the case just cited, to the complaint that the court had no jurisdiction because the writ contained no *ad damnum*, C. J. Mellen, in pronouncing the opinion of the court, said, "If we are referred to the record, we must look to the whole of it. An account of some thousands of dollars is annexed to the writ, and the verdict which the jury have returned has established the plaintiff's claim to a large amount, showing that legal jurisdiction over it appertained to

the court." Following the path pointed out by that eminent jurist, and looking at the declaration (which is made a part of the case), we find one count on an account annexed for three hundred dollars, and a count "in another sum of five hundred dollars" for so much money had and received, thereby showing that the plaintiff claims to recover eight hundred dollars, an amount over which the legal jurisdiction of this court appertains.

Again; the opinion already quoted from also declares that the total omission of an *ad damnum* in a writ may, at any time before the rendition of judgment, be properly considered as merely a "circumstantial error" and "amendable by law" within the statute of 1821, c. 59, § 16 (R. S. of 1857, c. 82, § 10). And if an entire *ad damnum* can be lawfully supplied, we do not readily perceive why one which is below the amount fixed by the statute as the minimum limit of the jurisdiction may not on the same principle be increased.

So in *Converse* v. *Damariscotta Bank*, 15 Maine, 431, the *ad damnum* in the writ exceeded one hundred dollars; and the service having been made by a constable, the defendant appeared and seasonably pleaded the defective service in abatement; whereupon the plaintiff moved to amend by reducing the *ad damnum* to one hundred dollars, and the full court sustained the motion, thereby making the *de facto* service a service *de jure.*

In Massachusetts there are numerous cases which sustain the amendment prayed for in the plaintiff's motion in this case. The latest one which has come under our notice is *Hart* v. *Waitt*, 3 Allen, 532, wherein it is held that a justice of the peace may, before trial, allow a reduction of the *ad damnum* in a writ returnable before him to an amount which will bring the case within his jurisdiction, if he has jurisdiction of the parties and subject-matter. After reviewing the cases in Massachusetts bearing upon the question, some of which, the court say, "are cases where the jurisdiction was created or sustained by the amendment allowed," the opinion comes to the following conclusion which we adopt as applicable to the case at bar, *mutatis mutandis:* "Where the court, to which the

writ is returnable, has jurisdiction of the parties and of the subject, as in the present instance, and the only objection is that the *ad damnum* is to a larger amount than the court can exercise jurisdiction of, we perceive no legal objection to the allowance of an amendment by the court to which it is returnable, reducing the *ad damnum*. If that is done before proceeding to trial on the merits, the court will then have a case before them within their statute jurisdiction as to amount of damages, and may proceed to adjudicate thereon, and all subsequent proceedings will be the same as if the *ad damnum* had been originally the same as made by the amendment."

We are aware that the early case of *Hoit* v. *Malony*, 2 N. H. 322, decided in 1821, and incidentally approved in *Flanders* v. *Atkinson*, 18 N. H. 167, is an authority against granting the plaintiff's motion. Whether these cases were intended to be modified by *Taylor* v. *Jones*, 42 N. H. 25, it is not necessary for us to inquire; for it is a sufficient answer to those cases to say, that our own court have, in *McLellan* v. *Crofton*, *ubi supra*, settled the question in favor of granting the plaintiff's motion; and that while we may not say with Judge Howe (Howe's Practice, 366) that the opinion in *McLellan* v. *Crofton*, "is the better authority," we do think it the better practice. *Exceptions sustained.*

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

AMOS CHASE *vs.* ENOCH G. WILLARD.

On April 30, 1868, the plaintiff, by his agent verbally negotiated with the defendant to sell to the latter 170 barrels and six half-barrels of mackerel, at a specified price, and being all the mackerel stored in agent's store-house. On May 1st, following, the defendant paid the plaintiff's agent $600, and received a written paper reciting the receipt of "$600 on account of mackerel in store No. 10, Long Wharf, at the purchaser's risk as regards fire." The next day the defendant caused each barrel to be examined by a cooper who refilled

with pickle such as needed it, and found two in which the fish had rusted, which were subsequently excepted and carried away by the plaintiff's agent. On or before May 9th, the defendant had paid $2,900 on account of the mackerel. During the night of May 9th, fifty barrels were stolen. Subsequently and at different times the remaining barrels were taken away by the defendant. *Held*, that the sale was complete, and that the loss of the mackerel stolen fell upon the vendee.

On exceptions to the rulings of *Goddard*, J., of the superior court in and for the county of Cumberland.

In addition to the facts stated in the opinion the judge of the superior court found that on June 5th, the defendant sued one Merrow, and two others in trespass for the value of the stolen mackerel, which suit is still pending in the supreme judicial court for this county.

That D. T. Chase, acting as the plaintiff's agent, agreed with the defendant on April 30, that the mackerel were to be delivered to the defendant when he wanted them; that the defendant did not see them nor have the key of No. 10 until after May 9th, and that no bill of the mackerel was presented to the defendant after May 9th. That D. T. Chase, told the defendant that the firm had no use for No. 10, and the fish might lie there as long as the defendant wanted them, and that the defendant should not be hurried about taking them away or for the payment.

That D. T. Chase, on May 16th, sent to the defendant's counting-room the key of No. 10, with a message to take the remainder of the fish if he wanted them; but the key was returned without having been used. That D. T. Chase was absent from his counting-room May 21st, and his son consented that the defendant might take the remainder of the fish, then being fifty-eight barrels and four half-barrels; and that thereupon the defendant returned the key to the plaintiff's son.

The judge further found as matter of fact that the barrels and half-barrels stolen had not been delivered to and accepted by the defendant at the time they were stolen.

As matter of law the judge ruled,

I. That by the terms of the contract as embodied in the receipt

of May 1, 1868, the risk on the mackerel as against thieves, or as regards such taking as is proved in this case, was to remain upon plaintiff.

II. That plaintiff is bound by said receipt of his agent, as fully as if signed by himself.

III. That the commencement of the suit of June 5th, and subsequent action of this defendant thereon, does not estop him from maintaining this defense.

IV. That this action cannot be maintained upon the foregoing facts.

To these rulings the plaintiff alleged exceptions.

Shepley & Strout, for the plaintiff.

1. The title and risk of the fish passed to the defendant. Every element of a complete sale existed.

If the effect of the receipt of May 1st was, when given to prevent the risk passing to the defendant, his subsequent acts were sufficient to change the risk, and he is estopped by his acts from setting up this defense against his vender. *Cragin* v. *Carleton*, 21 Maine, 492.

2. As between the vender and vendee, no actual delivery is necessary to complete the vendee's right of property in the article sold. And the risk follows the property; and does not depend upon possession. *Whitehouse* v. *Frost*, 12 East, 613. *Chapman* v. *Searle*, 3 Pick. 38. *Hatch* v. *Lincoln*, 12 Cush. 31. The receipt of May 1st, cannot be construed as a contract limiting or controlling the plaintiff's rights. The memorandum of risk in the receipt was made by D. T. Chase to limit his personal liability, and formed no part of the contract of sale. *Davis* v. *Moore*, 13 Maine, 424. It could control the change of risk when the title to the property passed.

The risk passed by operation of law, and the presumption which sometimes arises in covenants and conveyances, that the designation of certain property operates to exclude all other property of the same class from the effect of the instrument of conveyance,

does not apply in this case. The conduct of the defendant, after the receipt was given, effectually rebuts such presumption.

Then, if the receipt was a contract of sale, and the strictest doctrine of the rule was invoked, it would not be applicable to this case. The risk of fire and thieves were not of the same class, and the designation of one risk would afford no presumption that the parties intended to exclude the other.

Howard & Cleaves, for the defendant.

The conclusions of the court below, on matters of fact, are conclusive, and the exceptions to the four rulings embrace all that is before this court.

The fifty barrels and two half-barrels in question "had not been delivered to and accepted by the defendant, at the time of the taking, May 9–10." This fact is proved by the judge and is conclusive.

The plaintiff retained the property and possession until removal. The contract of sale was never executed.

The rulings were correct.

1. The mackerel were to remain as the plaintiff claimed, at the risk of the contemplated purchaser "as regards fire." All other risks were to remain upon the owner and prospective vender. The receipt of May 1st establishes this on the principle that *inclusio unius exclusio est alterius.*

2. The plaintiff is bound by the acts of his agent in the negotiation, and by his receipt in furtherance of the sale.

3. The commencement of the suit against Merrow et als., was an experiment for the benefit of the plaintiff as well as the defendant. If anything should be realized therefrom, it would be for future disposition.

4. The plaintiff never having sold or delivered the property in question to defendant, and the latter never having received it, this action cannot be maintained. *Waldron* v. *Chase*, 37 Maine, 414.

In that case there was an admitted sale and payment and delivery according to a custom proved. But not so in this case. And

here was no proof that the delivery of a part was intended by the parties to be a delivery for the whole. But the contrary was found by the judge of the superior court to be the fact. *Pratt* v. *Chase*, 40 Me. 269. *Dixon* v. *Yates*, 5 Barn. & Ad. 313. *Burney* v. *Poyntz*, 4 Barn. & Ad. 568. *Simmons* v. *Swift*, 5 B. & C. 857.

The terms of the receipt of May 1st show that it was not the intention to make the contract of sale absolute and complete.

APPLETON, C. J. The plaintiff being the owner of one hundred and seventy barrels and six half-barrels of mackerel, stored the same in No. 10, Long wharf, a building belonging to D. T. Chase.

On April 30, 1868, D. T. Chase as agent for the plaintiff, who resided in Baltimore, negotiated verbally with the defendant for the sale of all said mackerel, being all the fish in said building, at a specified price.

On May 1, 1868, the defendant paid D. T. Chase $600, and received from him the following paper:

"PORTLAND, May 1, 1868.

Received from Mr. E. G. Willard $600 on account of mackerel in store No. 10, Long wharf, at the purchaser's risk, as regards fire. D. T. CHASE."

On May 2d, the defendant sent a cooper to the building where the fish were stored, who examined each barrel, refilled with pickle such as needed it, and found two barrels in which the fish had rusted, which the plaintiff's agent subsequently agreed to except from the sale and which he carried away from the building in which they were deposited.

On May 5th, the defendant sent an order on D. T. Chase for four barrels, which were accordingly delivered.

On and before May 9th, the defendant had made payments to the amount of $2,900 on account of the mackerel.

During the night, between May 9th and 10th, fifty barrels and two half-barrels were taken from the store-house of D. T. Chase by some persons then and ever since unknown.

After this, and at different times, the remaining barrels have been taken away by the defendant.

Upon whom does the loss of the fifty barrels and the two half-barrels, which were stolen, fall?

The evidence shows a perfected sale. The goods to be sold were agreed upon. The purchaser removed a portion. He examined and refilled with pickle the barrels as far as was necessary. This involves the idea of possession. He paid the agent of the vender a large portion of the price as agreed upon.

The plaintiff had nothing to do with store No. 10. He did not own it. He merely stored the fish there. When sold they remained there at the purchaser's risk or at that of the depositary. As between the depositary and the purchaser the risk of the fire was assumed by the latter. So far as relates to the storage, D. T. Chase was acting for himself, in guarding against the risk of fire, not for the vender. Indeed the receipt presupposes a change of title and that the fish had been sold and purchased. Nothing indicates that either party intended that there should be any risk remaining on the vender in regard to the mackerel after somebody else had purchased them.

After May 1st, the bailee or depositary of the vender became the bailee or depositary of the vendee. *Hatch* v. *Lincoln*, 12 Cush. 31. *Bryans* v. *Nix*, 4 M. & W. 975. In *Tuxwuth* v. *Moore*, 9 Pick. 348, the property sold was with an innkeeper who had a lien upon the same for keeping. The sale was made and the innkeeper was notified by the seller and the purchaser of the sale, and was requested by the latter to keep the ware on his account. "It is objected," says Parker, C. J., "that there was no delivery, and there was none in point of form; but if the contract of sale was *bona fide* and for a valuable consideration, which we take to have been settled by the jury, then if there was a symbolical delivery, or if the plaintiff came to the possession in virtue of the contract, the property passed, not only between vender and vendee, but against everybody." "The law considers it a sufficient delivery by a vender of a chattel to a purchaser, if he regards the holder of it to be a

bailee if such purchaser and parties all assent." *Lane* v. *Sleeper*, 18 N. H. 214.

"When the terms of sale are agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer." 2 Kent's Com. 92. All these elements are found in this case, as fully existing prior to the time when the barrels in controversy were stolen. Indeed, here, there was a removal of part of the barrels, a part-payment, the assumption of control over all, every requirement of the statute of frauds has been complied with,—much more, then, should the risk of the loss be on the purchaser, as between him and his vender.

Exceptions sustained.

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

HOSEA I. ROBINSON *vs.* WILLIAM F. SAFFORD.

The right to set off one demand against another is wholly regulated by statute.

A claim in set-off, to be available, must be due and payable when the plaintiff's action was begun; and the fact that the plaintiff has assigned his property for the benefit of his creditors, does not modify or change the rights of the parties.

A mere liabilty as indorser, existing at the time when, but not discharged till after the plaintiff commenced his action, is not allowable in set-off.

Otherwise, money received by the plaintiff for his authorized transfer of the defendant's shares of stock in a corporation prior to the commencement of the action.

Also, for amount of drafts drawn by the defendant for the accommodation of the plaintiff, and paid by the former prior to the commencement of the action.

Also, for amount paid by the defendant prior to the commencement of the action, to redeem his shares of stock in a corporation, pledged by the plaintiff under a power of attorney from the defendant, to a savings bank as collateral for money loaned to the plaintiff.

Also, for items paid prior to the commencement of the action, for protest.

ON REPORT.

ASSUMPSIT on an account annexed showing a balance of $10,502.97. The defendant filed an account in set-off amounting to $28,749.48, the first three items of which were credited in the plaintiff's account.

On the back of the writ was an indorsement of the following tenor: "This suit is commenced and prosecuted by and for the benefit of John Rand, to whom the within claim was assigned by said Robinson, on Jan. 4, 1867, under R. S., c. 70, for the benefit of his creditors." Writ, dated Oct. 17, 1867.

It was admitted that the plaintiff, on Jan. 4, 1867, made an assignment of all his property for the benefit of his creditors under the statute, and that the defendant duly became a party thereto.

It appeared that on Jan. 4, 1867, the defendant owed the plaintiff $6,119.57; that prior to Jan. 4, 1867, the plaintiff had transferred for his own benefit, under a power of attorney from the defendant, fifty shares of the defendant's stock in the Portland Rolling Mills, par value one hundred dollars each; that this should have been credited to the defendant when the plaintiff received the money; that on Nov. 19, 1866, the defendant indorsed the plaintiff's note for $5,000, and paid it in June, 1868; that on Nov. 22, 1866, the plaintiff accepted two drafts drawn by the defendant upon the plaintiff for $4,500 and $4,000 respectively, in favor of Foster, Candler & Co., which were accommodation drafts loaned to the plaintiff by the defendant as so much money, and paid by the defendant in June, 1867; that on Oct. 1, 1866, the defendant indorsed the plaintiff's note for $2,000, which remains in Merchants Bank unpaid; that on May 22, 1866, the plaintiff gave his note to the Portland Savings Bank for $7,500, and as collateral security therefor, the plaintiff, under a power of attorney from the defendant, transferred one hundred shares of the Portland Company's stock; and that the defendant paid the plaintiff's note to the Portland Savings Bank to redeem his stock on Aug. 28, 1867. Defendant also paid protests on note and drafts paid by him.

After the evidence was all in, the case was withdrawn from the

jury and submitted to the full court who were to determine the balance of accounts as between Robinson's assignee and the defendant, and the amount (if any) on which the defendant is entitled to a dividend from Robinson's estate,—no judgment to be rendered against Robinson or his assignee.

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

By the legitimate debits and credits, as they stood on Jan. 4, 1867, Safford was indebted to Robinson $6,119.57, which amount the assignee claims.

The first three items in the account in set-off are credited in Robinson's account, $590.

Fifty shares in Rolling Mill were not sold, but transferred as collateral. Debt not paid by Safford.

Note of Nov. 19, 1866, not paid until June, 1868, not a valid set-off against the assignee who takes matters as they stood on Jan. 4, 1867, or within three months after.

Drafts liable to same objection. Not paid until June, 1867.

Note to Savings Bank same. Not paid until Aug. 28, 1867.

None of the above claims existed against Robinson when he made the assignment, or within the three months allowed to creditors to become parties to it.

Mere contingent claims. There is no provision in assignment statute for proving contingent claims, as in case of insolvent estates under administration. And no occasion for such, as claims not provable against the estate are valid against the debtor and his future earnings.

The claims filed in set-off are valid against Robinson, notwithstanding the assignment, and Safford's signature to it, but are not available against the claim of the assignee.

The assignee is entitled to judgment for $6,119.57, and interest.

Shepley & Strout, for the defendant.

DICKERSON, J. On the 4th day of January, 1867, the plaintiff made an assignment of all his property for the benefit of all his creditors, under the statutes of this State, and the defendant duly became a party thereto. On account of the conflicting claims of the creditors, the assignee brings this action to obtain an adjudication upon the state of the accounts as between the defendant and himself as assignee of the plaintiff.

The plaintiff testifies, and the assignee claims, that as the accounts stood Jan. 4, 1867, the defendant was indebted to the plaintiff in the sum of $6,119.57. The defendant files his account in set-off in the sum of $28,159.40 over and above the amount credited to him in the plaintiff's account; and the question presented is what items, if any, in the defendant's account in set-off the estate of the plaintiff, in the hands of the assignee, is legally chargeable with.

The right to set off one demand against another, in this State, is wholly regulated by statute. *Call* v. *Chapman*, 25 Me. 128. A claim to be available, in set-off, must be due and payable at the time of the commencement of the plaintiff's action. A mere liability of the defendant for the plaintiff, existing at the time, but not satisfied by the former till after the commencement of the suit, cannot be allowed in set-off. *Houghton* v. *Houghton*, 37 Me. 72.

While it might be desirable for the assignee to have a general adjudication upon the whole subject of the pecuniary relations between the assigner and the defendant, it is only competent for the court to decide the single question presented in this action; to do this the court has only to apply the law of set-off, as above stated, to the facts in the case. The fact that there has been an assignment for the benefit of creditors does not modify or change the rights of the parties under the statute authorizing a set off of mutual claims. The plaintiff gains no advantage, in this respect, nor does the defendant lose any of his rights on this account.

No question arises with respect to the first three items in the defendant's account, amounting to $590.

The charge of Dec. 13, 1866,—"fifty shares stock Rolling Mills,

$5,000," accrued prior to the assignment. This stock was sold by the plaintiff under a power of attorney from the defendant, the amount charged was received by him and he testifies that this sum should have been credited to the defendant at the time of the sale of the stock. This charge is a proper item to be allowed in set-off.

The sum of $5,000, paid by the defendant as indorser of the plaintiff's note of Nov. 19, 1866, was not paid till June, 1868, several months after this action was commenced, and is not allowable in set-off against the plaintiff's claim in this action. The liability was a contingent one, and no actual indebtedness had accrued to the defendant prior to the commencement of this suit.

The drafts drawn on Foster, Candler & Co., by the defendant for the accommodation of the plaintiff, amounting to $8,500, are placed on a different footing from the last item considered. In these cases, though the defendant's liability was originally contingent, it had ripened into an absolute claim against the plaintiff before the commencement of this suit, by reason of the defendant's paying the drafts. It is clear that the statute of set-off allows such claims to be filed.

The plaintiff's note of Oct. 1, 1866, for $2,000, indorsed by the defendant, had not been paid by him when this suit was brought; and that item in the defendant's account cannot be properly filed in set-off in this action.

Under his power of attorney from the defendant, the plaintiff pledged one hundred shares of the Portland Company stock to the Portland Savings Bank, on May 26, 1866, as security for his note of $7,500 upon which he obtained that sum. In order to get possession of his stock the defendant was obliged to pay the plaintiff's note, amounting to $7,653, on the 26th Aug., 1866. This item must be allowed in set-off in accordance with the principles before stated. The two items paid for protest, amounting to $4.63, should also be allowed.

In accordance with the foregoing statement, the amount to be allowed in set-off is ($21,747.63) twenty-one thousand seven hundred and forty-seven dollars and sixty-three cents. From this sum

there is to be deducted the plaintiff's claim of $6,119.57, leaving a balance due the defendant of fifteen thousand six hundred and twenty-eight dollars and six cents; and this is the amount on which the defendant is entitled to a dividend from the plaintiff's estate, so far as that question can be determined in this action.

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

ROBERT O. FULLER & another *vs.* JOHN S. MILLER & another.

To maintain assumpsit for goods sold and delivered against two defendants, the plaintiff must show a joint promise by the defendants.

Proof that the goods were delivered upon the credit of one of the defendants as original promisor is not sufficient to bind both.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court in and for the county of Cumberland.

The action was tried by the judge without the intervention of a jury, subject to exceptions.

Before the trial the defendant's attorney withdrew his appearance for B. B. Miller, one of the defendants, who was thereupon defaulted. The exceptions recite:

"It was proved that the plaintiffs, on Sept. 30, 1868, by their agent, Elliott, sold the quantity of tin mentioned in the writ, of the value of $375.07; that it was received on the next day by B. B. Miller, then a tin-roofer, and by him used; and that early in November payment was demanded of B. B. Miller, but nothing paid.

"The judge found, as matter of fact, that it was also proved that the defendant, John S. Miller, father of B. B. Miller, being in the latter's shop on Sept. 30, 1868, promised the plaintiff's agent, then present, that if they would send the tin to B. B. Miller, he, John S. Miller, would see them paid in thirty days; and that after the expiration of the thirty days after said tin had been delivered

to B. B. Miller upon the strength of said promise, the plaintiffs first demanded payment of B. B. Miller, and soon after and before suit, of John S. Miller.

"And, further, that the tin was delivered to B. B. Miller on the credit of John S. Miller as an original promisor."

The judge ruled as matter of law that,

I. The defendant not having pleaded the statute of frauds, cannot avail himself thereof in defense;

II. That, independent of the pleadings, the foregoing promise of John S. Miller is not within the statute of frauds; and

III. That John S. Miller is liable to the plaintiffs for the price of the tin and interest from the date of the writ.

To all the rulings in law the defendant alleged exceptions.

J. O. Donnell, for the defendant, J. S. Miller.

Davis & Drummond, for the plaintiffs.

APPLETON, C. J. This is an action of assumpsit for goods sold and delivered the defendants. To maintain it the plaintiffs must show a joint promise.

The presiding justice found that the goods were sold and delivered upon the credit of John S. Miller as original promisor. He does not find a joint promise nor facts from which a joint promise could be inferred. Indeed, the finding that the goods were delivered upon the credit of John S. Miller as original promisor, impliedly negatives liability on the part of any one else. Under the facts as found, John S. Miller alone is liable. *Exceptions sustained.*

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

Charles McLaughlin & others *vs.* Atlantic Mutual Insurance Company.

The body of a policy on a cargo of molasses provided that the company were "not liable for leakage on molasses . . . unless occasioned by stranding or collision." The margin contained the following memoranda: "On molasses . . . if by shifting of cargo owing to stress of weather, any casks become stove or broken, and the staves started by each other, so as to lose their entire contents, and the same amount to fifteen per cent on the quantity laden (being five per cent over ordinary leakage), the said excess of five per cent or over on the quantity shipped to be paid for by the company; but this company not liable for leakage arising from causes other than as above mentioned." *Held*, (1) That the company were not liable for any loss by leakage unless occasioned by stranding; nor (2) For any loss by shifting of the cargo unless it amounts to fifteen per cent of the whole quantity laden.

Such memoranda upon the margin of a policy are a part of the contract of insurance.

On facts agreed.

Assumpsit on a policy of insurance upon a cargo of molasses and sugar.

The terms of the policy sufficiently appear in the opinion.

The brig, named in the policy, sailed from Matanzas for Portland, on the 19th of Feb., 1866, with a cargo of molasses and sugar, consisting of 406 hhds., eighty-seven tierces and six barrels. On the voyage she experienced heavy weather, and there was a loss over and above the usual allowance of ten per cent for ordinary leakage of four thousand four hundred and seventeen gallons of molasses, which was from leakage caused by the perils of the sea. The sufficiency of the formal proof of the loss was not questioned. So much of the port-warden's certificate as is essential is as follows:

"Having duly examined and surveyed the storage of the following goods, viz.: 2 hhds., empty, shifted; 2 hhds., empty, leakage; 2 tierces, empty, shifted; 2 tierces, half out, leakage; 1 bbl., empty, leakage; 2 tierces, half out, leakage,—declare that the damage done to the aforesaid cargo of molasses, stated as above, is in conse-

quence of heavy gales, and straining of casks, and leakage on her passage from Cuba to Portland." The cargo was well stored and bedded."

The gauger's certificate show 32 hhds. and 9 tierces empty.

The court to enter judgment according to the legal rights of the parties.

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

The case finds the loss of 11,122 gallons out of a cargo of 67,057 gallons; and that the 4,417 gallons, over and above the ten per cent for ordinary leakage, was "caused by the perils of the sea." The defendants insured against the perils of the sea.

The clause in the body of the policy in regard to leakage refers only to ordinary leakage. To apply it to leakage caused by the perils of the sea, would be inconsistent with the nature and object of the contract itself.

Indeed, the loss of the 4,417 gallons can with no propriety be called a loss by leakage. It is a loss by perils of seas.

By the general terms of the body of the policy the defendants are liable for the loss over the ten per cent. If the marginal clause was intended to, or does upon a proper construction, exonerate the defendants from losses caused by perils of seas, then it should be disregarded as being utterly at variance with the nature, object, and terms of the body of the contract. Few losses could occur which could meet the exact words of this contract.

An utter rejection of the clause is not necessary. It is to be construed in connection with the body of the policy and its object and purpose, which were to protect the insured against losses caused by perils of seas; and that it shall receive such construction as will reasonably uphold, and not unreasonably destroy the policy. The principal object of the clause appears to have been to exonerate the defendants from losses less than fifteen per cent on liquids. This limits, but does not destroy the contract in the body of the policy, and may reasonably be allowed to have its proper effect.

The clause should be construed to mean that upon molasses and

other liquids, if by the perils of the seas a loss of fifteen per cent occurs, the excess over ten per cent will be paid by the company.

Davis & Drummond, for the defendants.

1. The memorandum clause in a policy of insurance, like the body of the instrument, is the language of the underwriter. If ambiguous, it is to be construed most strongly against him; but if not ambiguous, it is to have its usual interpretation and force, as a substantive part of the contract.

The words are to be so construed as to serve the intention, and not so as to defeat it. *Palmer* v. *Warren Ins. Co.*, 1 Story, 360.

2. The object of the memorandum clause is to protect the underwriter from any partial loss on articles that are peculiarly liable to decay, waste, or become damaged from causes other than perils of the seas, where it would be difficult to determine the actual cause; or if several causes combined to apportion the damage. *Hugg* v. *Augusta Ins. Co.* 7 How. 595.

3. In accordance with this principle, in all cases of partial loss of the memorandum articles, unless the case is fairly within the stipulations of the memorandum, though the loss was caused solely by the perils of the seas, the underwriters have been held not to be liable. *Ellery* v. *Merchants Ins. Co.*, 3 Pick. 46. No loss on salt, grains, hides, fish, &c., unless seven per cent, "and happens by stranding or bilging." *Lake* v. *Columbus Ins. Co.*, 13 Ohio, 48. No loss on grain, unless by "stranding."

It should be noticed that the memorandum incorporated into the body of the policy excludes this loss.

Therefore, unless the additional memorandum in the margin affirmatively embraces this case, the plaintiff cannot recover. The question is not, is it excluded? but, is it included in the marginal clause? Most clearly it is not.

TAPLEY, J. This is an action of assumpsit upon a policy of insurance, issued upon a cargo of molasses and sugar.

"There was a loss, over and above the usual allowance of ten per cent for ordinary leakage, of 4,417 gallons of molasses, which

loss was occasioned by the perils of the seas." In the body of the policy it is provided that the company shall "not be liable for leakage on molasses, or other liquids, unless occasioned by stranding, or collision with another vessel."

Upon the margin of the policy it is provided, that, "On molasses and other liquids, if by shifting of cargo, owing to stress of weather, any casks become stove or broken, and the staves started by each other, so as to lose their entire contents, and the same amounts to fifteen per cent on the quantity laden (being five per cent over ordinary leakage), the said excess of five per cent or over, on the quantity shipped, to be paid for by the company; but this company not to be liable for leakage from causes other than those above mentioned."

These memoranda are parts of the contract of insurance, and are alike binding, whether found in the body of the policy or upon its margin.

It will be seen that the liability of the company for leakage of molasses, is limited to that occasioned by stranding, collision, and shifting of cargo by stress of weather. That arising from shifting of cargo is subject to another condition, viz., that it is such as occasioned a loss of the entire contents of the casks stove, and to an extent equal to fifteen per cent of the whole amount laden.

Upon a careful consideration of the whole contract, we find its legal effect the same as if it had been expressed in these terms: "Not liable for leakage on molasses, or other liquids, unless occasioned by stranding, or collision with another vessel; provided, however, if by shifting of the cargo, owing to stress of weather, any casks become broken and the staves started by each other so as to lose the entire contents of such casks, and such loss amounts to fifteen per cent of the whole quantity laden, the company will be liable for so much as shall be thus lost, over and above ten per cent of the quantity laden."

By recurring to the bill of lading, it will be found there were laden on board 406 hogsheads and eighty-seven tierces of molasses, of which, it appears by the certificate of the port-warden and sur-

veyor, two hogsheads and two tierces lost their entire contents by shifting, the other losses being leakage merely, and in but a single instance reaching the "entire contents" of the cask.

The loss occasioned by shifting being less than fifteen per cent of the quantity laden, the defendants are not liable therefor, and there must be *Judgment for the defendants.*

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

GEORGE KNIGHT *vs.* SCOTT DYER.

Two deeds, executed and delivered at the same time by the same grantor to different grantees, one conveying one parcel of real estate with an easement in another parcel, and the other deed conveying the latter parcel but reserving the easement, are to be construed together.

A party claiming an easement in land without right, acquires the right by a deed of confirmation from the owner in which he "confirms, acknowledges, and grants" the easement to be used by the grantee, his heirs and assigns, "without denial, obstruction, or hinderance."

Though a deed of land with an unrecorded bond of defeasance constitutes a mortgage as between the parties, yet as to the public without notice, the grantor is as of record, the owner of the fee.

When such owner conveys an easement in the premises, even without consideration, and his grantee conveys it to a third person for a valuable consideration, the grantees having no knowledge of the bond of defeasance, the last grantor acquires such title as the record gives him.

ON REPORT.

CASE for the obstruction of a way across the defendant's farm, which the plaintiff claimed the right to use.

The facts upon which the decision is based are sufficiently stated in the opinion.

Davis & Drummond, for the plaintiff.

J. D. & F. Fessenden, for the defendant.

The deed of John Trundy expressly describes the cove to which the plaintiff has his right of way; as the deeds under which both

parties claim constitute but one transaction, they must be construed together. And as the way reserved in the John Trundy deed is not the one obstructed by the defendant, the plaintiff cannot complain, unless he acquired rights under the deed from Jordan to Keazer.

But that was merely a deed of confirmation confirming what rights Keazer already had. As he had no rights to the way in question, he acquired none by that deed.

Again, Jordan was only mortgagee. Holding in trust and conveying without consideration, nothing passed by his deed. As to all but Jordan, Trundy was the owner of the fee.

APPLETON, C. J. In 1840, William Trundy, the elder, owned both the plaintiff's and defendant's farms. The plaintiff's farm was on the highway. The defendant's on the sea-shore. Other farms were between these two, over which there was a road leading from one to the other and over the lower farm to the sea-shore. There were three coves on the defendant's farm, named Carty's cove, Fore cove, and Back cove.

On 11th June, 1840, William Trundy, senior, conveyed the plaintiff's farm to his son William, and with it "the privilege at all times of taking from the cove at my lower place, called Carty's cove, sea-dressing, such as may be brought into said cove from time to time by the sea, together with the privilege of passing and repassing with teams and carts or otherwise to and from said cove on the road through said land as it is now travelled."

On the same day, Trundy, senior, conveyed to his son John the lower farm "beginning at the north-east corner of John Johnson's land, thence by said land to the sea at a cove called Carty's cove, thence by the sea to John Peable's land, thence by said Peable's land to the first-mentioned bounds containing twenty-two acres more or less,—expressly reserving a privilege at all times of passing with teams or carts or otherwise to and from said cove and taking therefrom such sea-dressing as may from time to time be brought into said cove by the seas, which privilege has already been conveyed by me to my son William."

These deeds were executed and delivered at the same time. They are to be construed together. The "said cove" in the deed to John Trundy refers to Carty's cove. It can refer to no other. The deed to William Trundy expressly refers to Carty's cove. We think the fair and obvious construction of both deeds leads to the unavoidable conclusion that the right to take sea-weed was reserved in Carty's cove.

But it seems that Fore cove was sometimes called Carty's cove, and the plaintiff's grantor claimed the right to take sea-weed in that cove.

A dispute having thus arisen, Rufus Jordan, 2d, having the title to the farm deeded to John Trundy, gave, on 3d December, 1854, a deed to Reuben Keazer, who then owned the William Trundy, jr., farm, on the following terms: "Whereas, John Trundy, of Cape Elizabeth, in the county of Cumberland, conveyed to one Rufus Jordan, 2d, a tract of land in said Cape Elizabeth, lying on the sea-shore, and including a cove on the easterly side of said lot to which a road has for many years led across said land and traveled for the purpose of getting dressing among other things, which flows in from the sea; and whereas, Reuben Keazer, of said Cape Elizabeth, owns a parcel of land near the above which heretofore had the privilege connected with it for the owner to pass over the road aforesaid for the purpose of getting dressing.

Now I, the said Rufus Jordan, 2d, for the purpose of removing all doubt in regard to the right of said Keazer to use the road aforesaid, do hereby ratify, confirm, and acknowledge and grant unto the said Keazer, his heirs and assigns, in common with myself, my heirs and assigns, and no other persons, the sole right and privilege to pass and repass for himself, his servants and teams, over the road traveled as aforesaid across my said land for the purpose of taking and removing from said cove to which said road leads, the dressing which may flow into the same from the sea, without denial, obstruction, or hinderance," &c.

This gives the right to take sea-weed from the cove and to pass over the road obstructed by the defendant. It grants the right to pass and repass without denial, obstruction, or hinderance.

It is argued that this is simply a deed of confirmation, and that it could only confirm what had been previously granted, but that it could not enlarge the rights of the grantee. But Lord Coke says, "a confirmation is a conveyance of an estate or right *in esse* whereby a voidable estate is made sure and unavoidable; or where a particular estate is increased."

But here is not merely a confirmation, but there is a grant and a right to pass and repass over a designated road "without denial, obstruction, or hinderance." "And here is to bee observed," says Lord Coke, "that some words are large and have a generall extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi* or *consessi*, may amount to a grant, a payment, a gift, a release, a confirmation, a surrender, &c., and it is the election to use to which of these purposes he will." Co. Lit. 301 b.

But it is said that Jordan, at the date of the deed, was only mortgagee, and that the mortgage was paid at the maturity of the note, to secure which it was given.

Although Jordan had, at the date of the deed to Keazer, the record title to the John Trundy farm, it seems that he had given a bond of even date with the deed of Trundy to him to re-convey the premises to him upon repayment of the amount loaned at maturity. It does not appear that the bond was recorded. It does not appear that the deed to Jordan was recorded. The amount due was seasonably paid, and there was no forfeiture of the bond. But the deed from Jordan to Keazer was executed and recorded before the payment and before the release from Jordan to Trundy. As between Trundy and Jordan, this transaction constituted a mortgage. As to the public, so far as was disclosed by the record, Jordan had an estate in fee.

Both Keazer and the plaintiff testify that they were ignorant of any right of John Trundy to redeem. The plaintiff then is to be regarded as a *bona fide* purchaser, and is entitled to hold such title as the record gives him.

On the third of April, 1856, Reuben Keazer conveyed to the

plaintiff the William Trundy farm, using the following words in relation to the right to pass and repass for the purpose of obtaining sea-weed: "Also the privilege of taking at all times from the cove where the road leads to the sea across said Trundy's farm, sea-dressing, such as may be brought into said cove from time to time by the seas, together with the privilege of passing and repassing with teams or carts, or otherwise, to and from said cove into the road as it is now traveled across the Trundy farm,—meaning and intending to convey all the premises, rights, and privileges which are conveyed to me by William Trundy's deed, dated October 6, 1861, recorded in the Cumberland registry book 232, p. 541, to which for any further particulars reference is hereby made. By the privilege above conveyed, I intend only to convey what was confirmed to me by deed from Rufus Jordan, 2d, dated December 3, 1854."

By this deed the plaintiff acquired the right to pass over the road obstructed by the defendant. It matters not that Keazer paid nothing for the deed of Jordan to him. The plaintiff is entitled to hold what the record gives him. His grantor acquired from Jordan, while the fee as of record was in him, the right to pass and repass. That right he conveyed to the plaintiff, and the defendant has prevented his exercising it. *Judgment for plaintiff.*

57 178
94 396

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

WILLIAM H. BAXTER *vs.* ERVIN R. ELLIS & another.

The indorsee of a negotiable promissory note given for intoxicating liquors sold in violation of law, is presumed to be the "holder" thereof "for a valuable consideration and without notice of the illegality of the contract."

The payee is a competent witness to overcome that presumption.

In an action by the indorsee against the makers of such a note, the makers are not competent witness to prove its illegal inception until notice of such illegality or its equivalent is brought home to the plaintiff.

Baxter *v.* Ellis.

The declarations of the payee are not admissible to prove himself the holder after its maturity, unless it affirmatively appears that he held the note when he made the declarations.*

ON REPORT.

ASSUMPSIT on a negotiable promissory note, dated February 13, 1866, signed by Ervin R. Ellis and W. K. Bickford, promising that "on the first day of August, after date, as copartners" "to pay to the order of Isaac Barnum, two hundred and fifty dollars, value received." The note was indorsed by the payee.

Isaac Barnum (payee), called by the defendants, testified substantially, that some time after the great fire of July 4, and before August 1, 1866, he sold the note to the plaintiff, taking the latter's check for $230, which he has never collected; that the note originated from a sale of the witness's victualing stock and trade, including about $1,000 worth of intoxicating liquors, of American manufacture, such as are usually kept in restaurants, to the defendants; that defendants paid part money, and the remainder in two notes amounting to $1,300 or $1,400; that when they became due they were sued, and a settlement took place in which the witness received two notes of the same amount, one of which is the note in suit; that witness did not inform the plaintiff concerning the consideration of the note.

W. K. Bickford (one of the defendants), called by the defendants, testified concerning the origin of the note in suit, substantially as Barnum testified; that witness conversed with Barnum after the note became due and payable, when Barnum told witness that he (Barnum) then held the note, after August 1, 1866.

The plaintiff seasonably objected to all testimony from either Barnum or Bickford tending to impeach the note as given for an illegal consideration, and to all Bickford's evidence relative to Barnum's declarations.

Thereupon the case was withdrawn from the jury and submitted

* Even then they would seem to be immaterial. See *Field* v. *Tibbetts*, on a subsequent page of this volume.

on report to the full court, who were to enter such judgment as the law and facts found by them from the legal evidence may require.

W. L. Putnam, for the plaintiff.

Deane & Verrill, for the defendants, cited *Spring* v. *Lovitt*, 11 Pick. 417; *Sylvester* v. *Crapo*, 15 Pick. 92; *Harris* v. *Brooks*, 21 Pick. 195; *Buck* v. *Appleton*, 14 Maine, 284; *Woodman* v. *Churchill*, 52 Maine, 58; also, Greenl. on Evid., § 385; *Thayer* v. *Crossman*, 1 Met. 416, and cases *infra*. Laws of 1858, c. 33, § 27. *Hay* v. *Parker*, 55 Maine, 355.

DANFORTH, J. The provisions of ch. 33, § 27, Pub. Laws of 1858, do not "extend to negotiable paper in the hands of any holder for a valuable consideration, and without notice of the illegality of the contract." From this limitation in the act referred to, it follows that negotiable paper given for intoxicating liquors, in the hands of an indorsee, is subject to the same principles of law as are applicable to any other negotiable paper to which there is a defense in the hands of the payee.

The indorsee is presumed to be an innocent holder for value until the contrary is proved, or fraud or illegality in the consideration is shown. In the case at bar, Barnum and Bickford being parties to the note, are not competent witnesses to prove its illegal origin, until notice of that illegality, or its equivalent is brought home to the plaintiff. *Thayer* v. *Crossman*, 1 Met. 416. Without their testimony there is no proof as to the origin of the note. The burden of proof, then, is upon the defendant to show that plaintiff is not an innocent holder for value. For this purpose, Barnum is a competent witness; but his declarations as testified to by Bickford, that he sold the note after it was payable, must be excluded, as it does not appear that at the time they were made he had the note in his possession. If he is to be believed, the plaintiff is an innocent holder. If he is not to be believed, as contended by defend-

ant's counsel, then there is no testimony upon this point, and he is entitled to the presumption of law in his favor.

Judgment for plaintiff for the amount due upon the note.

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

JULIA F. COLLEY *vs.* INHABITANTS OF WESTBROOK.

There is no rule of law prescribing for what length of time the continuance of an open visible defect in a highway shall constitute notice of its existence.

An instruction that if the jury should find a legal defect, and that it was open and visible during the whole of a certain month, that such fact would constitute sufficient notice, is erroneous.

ON EXCEPTIONS to the ruling of GODDARD, J., of the superior court for the county of Cumberland.

CASE for an injury caused on the evening of December 24, 1868, at the foot of Graves' Hill, in Westbrook, by being thrown from a sleigh by the covering stones of a culvert across a highway leading to the city of Portland.

It appeared that the earth had worn and washed away from the lower side of the covering-stones, leaving them from four to six and one-half inches above the snow, and the snow two and one-half inches deep.

There was much testimony tending to show the defective condition of the way.

There was testimony, also, that the way was repaired October 6, and that the rains in October washed out the repairs.

The judge instructed the jury, *inter alia*, "that actual notice is not required in all cases. If the defect has existed so long that citizens must be presumed to have known its existence, that notice is sufficient. Open and visible defects, such as could be prevented

by common and ordinary diligence, towns are by law bound to notice and guard against. Chapter 154, of the public laws of 1868, provides that "It shall be the duty of . . . highway surveyors of towns, to go over their several highway districts, or cause it to be done by others, in the months of April, May, June, August, September, October, and November, in each year, and remove the loose obstructions to the public travel, and repair such defects as may occur from time to time, rendering travel dangerous, or give notice of such defect to the municipal officers of the town."

And if you find that the defect which occasioned the injury was open and visible during the whole month of November, I instruct you that that fact is sufficient notice, even though actual notice to the town is not proved.

If you find a legal defect, and that it was open and visible during the whole month of November, I instruct you that that fact constitutes sufficient notice.

To these instructions the defendant alleged exceptions.

N. Webb, in support of the exceptions, cited *Bradbury* v. *Falmouth*, 18 Maine, 65; *Bragg* v. *Bangor*, 51 Maine, 539; *Winn* v. *Lowell*, 1 Allen, 178.

Shepley & Strout, for the plaintiff.

The statute makes it the duty of the surveyor of highways to take notice of the defects in the highways, and give notice to municipal officers. Pub. Laws of 1868, c. 154. The law presumes the surveyor did his duty. The town is estopped to deny it.

The town had notice prior to October 6, when the repairs were made. But repairs were not thorough, and did not remedy the defect. *Horton* v. *Ipswich*, 12 Cush. 488. *Stinson* v. *Gardiner*, 42 Maine, 248.

The instruction goes no further than *Bragg* v. *Bangor*, 51 Maine, 533. In that case the defect was hidden; in this, open, palpable, potent, obvious.

The judge ruled, "that if the defect had existed so long that citi-

zens must be presumed to have known its existence, that notice is sufficient."

It is evident that the defendants had notice, and if the ruling was wrong, a new trial will not benefit them. A different verdict could not have been found under correct instructions. *Noyes* v. *Shepherd*, 30 Maine, 173. *Copeland* v. *Copeland*, 25 Maine, 525.

Instruction was not erroneous. *Savage* v. *Bangor*, 40 Maine, 176. *Reed* v. *Northfield*, 3 Pick. 94. *Bragg* v. *Bangor*, 51 Maine, 533. Pub. Laws of 1868, c. 154. *Drury* v. *Worcester*, 21 Pick. 44.

APPLETON, C. J. This is an action on the case against the defendant town, for an injury occasioned by a defect in an highway, which they were bound to keep in repair.

To entitle the plaintiff to recover, notice to the town of the defect must be proved. It may be proved directly or inferentially. It may be proved by actual notice to one of the inhabitants, or facts and circumstances may be shown, from which notice may be inferred. But the inference is not of law, but of fact. It is one for the jury to draw.

The presiding justice instructed the jury that if they found that the defect, which occasioned the injury, was open and visible during the whole month of November, that that fact was sufficient notice, though actual notice was not proved, and that if they found a legal defect, and that it was open and visible during the whole month of November, that that fact constituted sufficient notice.

There is no rule of law prescribing for what length of time the continuance of a defect shall constitute notice of its existence. There is no presumption of law on the subject. Whether there was a defect, the length of time it had continued, and whether from its continuance, notice to the town of its existence could be inferred, were alike questions to be determined by the jury, and not by the court. The ruling of the presiding justice was erroneous, in withdrawing from the jury one of the very questions which it

was their province to determine, and in determining it for them, instead of submitting it to their decision. *Exceptions sustained.*

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

TAPLEY, J., dissented, and submitted his views as follows:

This is an action against the defendant town, to recover for injuries sustained by reason of a defect in one of its highways. The case is before us on a motion to set aside the verdict, as against the evidence, and because of alleged excessive damages; exceptions also were taken to instructions given by the presiding judge, in his charge to the jury.

The cause was tried before the superior court of the county of Cumberland. Upon a careful examination of the evidence as it appears upon paper, we are not led to the conclusion that the motion should be sustained for either cause. Whether the way was or not defective, and the amount of injuries sustained were matters of fact for the determination of the jury, we cannot substitute our judgment for theirs, if it were admitted to be different; their conclusions upon these questions should not be disturbed, unless the case presents evidences of clear injustice being done by some erroneous course of proceeding by the jury.

There is more difficulty concerning the rulings of the court in matters of law, and if it clearly appeared that the instructions were understood according to their strict, literal import, we think the exceptions would have been well taken.

The matter complained of relates to the law appertaining to notice, and when the instructions upon this point are all taken and considered together, with the illustrations given, we are not satisfied the jury were misled by what may be found to have been an incorrect form of expression, in one or two instances. In order to justify setting aside a verdict rendered in a trial occupying so much time of the parties and the court, as this case did, it should clearly appear there has been in fact a mistrial, an erroneous apprehension of the law of the case, by which the excepting party has been injured.

The presiding jndge gave certain instructions upon this point. which were unexceptionable, and gave the law clearly and distinctly, In the course of his remarks he said to the jury, "Did the town have reasonable notice of the deficiency in question? This is distinctly denied by defendants, and therefore must be proved by plaintiff. . . . The law authorizing a private suit like this requires proof of reasonable notice to the town of the defect or want of repair. It is therefore an essential and indispensable element in determining the liability. . . . It is enough if the town have such notice of the exact condition of the road. . . . Of the facts tending to show notice, or to negative notice to the town, you are the exclusive judges." These are expressions which the jury could not misapprehend. They state repeatedly the necessity of notice, and that it is indispensable in this class of cases.

At a later period in the charge, and for aught that appears, following immediately these instructions, came the exceptionable phrases and expressions, which it is claimed entitle the defendants to a new trial.

The first we notice is in these words, "And I further instruct you, that actual notice is not in all cases required. If the defect has existed so long that citizens must be presumed to have known its existence, that notice is sufficient."

This is objected to as dispensing with notice in certain cases, and inconsistent with the majority opinion in the case of *Bragg* v. *Bangor*, 51 Maine, 532.

The proposition and illustration taken together, I think, do not convey the idea that actual notice is dispensed with. The sum of this instruction is this, "actual notice is not in all cases required, that is to say, if the defect has existed so long that citizens must be presumed to have known its existence, that notice is sufficient." This instruction proceeds upon the ground of notice being required, and states that if such circumstances are shown, as raises the presumption that citizens knew of its existence, that is sufficient notice. Not that notice is not required, but that such facts furnish sufficient evidence of its existence. This, it must be remembered, followed

immediately after explicit instructions that notice was necessary and indispensable.

Strictly speaking, this instruction relates to the proof of notice, and states the law in the identical language used by this court in the case of *Savage* v. *Bangor*, 40 Maine, 171. I think this instruction did not mislead the jury. The illustration used in it gave the leading and controlling idea to the jury, and qualified the first sentence. The term "actual notice" was used as indicating a notice proved by a citizen who actually saw the defect in contradistinction of a notice proved by inference from circumstances. It is the same identical form of expression used by Justice Tenney in the case of *Savage* v. *Bangor*, 40 Maine, 171.

The next instruction was upon the same subject-matter following up the idea that notice may be inferred from circumstances, and need not be proved by the person who actually saw it.

In this instruction the judge said, "and if you find that the defect which occasioned the injury was open and visible during the whole month of November, I instruct you that that fact is sufficient notice even though actual notice to the town is not proved. If you find a legal defect, and that it was open and visible during the whole month of November, I instruct you that that fact is sufficient notice, and I am prepared to go further in my instructions upon this point if counsel deem it necessary." I think the idea designed to be conveyed was "that that fact was sufficient" evidence of "notice." This is consistent with all that had preceded it and stated in pursuing the statement of the proofs of notice. There would be no propriety in saying such fact would be notice of itself. That proposition would have been stated by saying that "when such circumstances are proved, no notice is necessary." What would be notice, and what would be reasonable notice, had before been discussed and stated by the judge. The evidences of notice were the particular matter under discussion in the latter instructions, and if the facts stated were such as would warrant a finding of notice, the verdict should not for that cause be set aside.

Looking at the evidence in the case, I think there can be no

reasonable doubt that the defendants did have reasonable notice of the defect, if "it was open and visible through the whole month of November." Whether it was or not thus open and visible was a question for the jury. If it was, I think they might well find a notice, if it was not, the instruction became immaterial and inapplicable in the case.

In view of all the facts shown by the evidence in the case, I think that if the way was defective, substantial justice has been done between the parties. An apparently full, fair, and exhaustive trial has been had, and twelve men have concurred in the finding, and although we may find in the charge expressions which may be subject to some unfavorable criticism, if found in a deliberately drawn opinion, I do not feel that the jury have been misled by them to the injury of the plaintiff.

Another form of presenting the case will perhaps present it in as clear a light as any, viz.: suppose the jury, with their verdict, had returned a special finding, That they find the defect was open and visible during the whole month of November, and do not find any other evidence that any citizen of the town knew of the defect. Should the verdict, accompaaied by such a finding, for that cause be set aside? Could it be said that the verdict was against law and the evidence? Considering the other evidence in the case, showing the location of the way, the travel over it, the residence of citizens near and upon it, its relation to other towns and cities, &c., &c., I think such a finding, in regard to notice, would be sufficient to sustain a verdict.

The effect of the instruction could have been no greater than to produce such a finding. It is by no means clear that it did produce such a result, but in no event could it have done more.

If, then, they did find that the defect was thus open and visible, we think they might reasonably conclude that the defendants had the notice required by law; if they did not find this state of facts, there was nothing for the instructions to attach to. *Holt* v. *Inhab. of Penobscot*, 56 Maine, 15.

New England Express Company *vs.* Maine Central Railroad Company.

Where the Maine Central Railroad Company let to the Eastern Express Company, for four years, the exclusive use of a certain separate apartment in a car attached to each of their passenger trains, for the purpose of transporting the express company's messenger and merchandise, and agreed that they would not, during the continuance of such contract, let any space in any car on their passenger trains, to any other express carrier; and the railroad company, before the expiration of such contract, but after reasonable notice to them, refused to receive, upon any terms, from the New England Express Company, when and where they received the Eastern Express Company's freight, such packages as are usually carried by express companies, to be transported by their passenger trains, *Held*, that the railroad company were liable, under c. 193 of the Public Laws of 1868, to the New England Express Company, in an action of damages.

It seems that an action at common law would lie against the railroad under the same circumstances.

On facts agreed.

Case for refusing to carry the plaintiffs' express freight from Bangor to Portland, on one of their passenger trains.

The writ is dated Sept. 5, 1868.

The case is sufficiently stated in the opinion.

W. L. Putnam, for the plaintiffs.

Davis & Drummond, for the defendants.

The defendant corporation have all the powers, &c., of the two corporations of which it was composed. Laws of 1856, c. 651, § 4.

Those two charters are alike in respect to powers, &c., conferred, and duties, &c., imposed. By § 6, "The transportation of persons and property . . . and all other matters and things in relation to said road shall be in conformity with such rules, regulations, and provisions, as the directors shall, from time to time, prescribe and direct."

The powers and duties being thus defined in the charter, if the

contract with the Eastern Express Company was valid when made, it cannot be affected by the statute of 1868, enacted since it was made.

It has been already decided that these charters vest in the directors the power to prescribe the times and places at which the companies will receive persons and freight for transportation. *State* v. *Noyes*, 47 Maine, 189.

The charter requires the defendants to receive freight, &c., "at all proper times and places;" but in that case the court hold that these must be fixed by the directors; *a fortiori* under section six is the making of rules for the transportation vested in the directors.

Accordingly, the directors have prescribed as a rule that freight must be carried on merchandise trains; and this rule has been adhered to in all cases in which the defendants have undertaken to transport freight through their own agents.

No basis for the plaintiffs' claim can be found in the charter. We were not bound by that to carry the offered goods as requested. We had the right to say, we will carry them upon our merchandise trains.

The plaintiffs do not deny our right to make such rules; but claim that we became common carriers of express matter, by our voluntary acts, by carrying for the Eastern Express Company; and that we are therefore bound to carry parcels for everybody, upon the passenger trains, and in their writ allege that the defendants assumed to be and were common carriers of parcels upon their passenger trains. The case does not so find. The defendants do not receive, by any of their agents, any parcels for transportation. The express company are common carriers of parcels, and the defendants furnish transportation; they take no charge of the parcels, have no possession of them, but lease to the express company a part of a car, which they draw in their passenger train. The plaintiffs tendered to the defendants parcels to be carried by themselves, to be taken charge of by them; acts which they did not perform for the Eastern Express Company. The question narrows to this: Does a corporation, which contracts to do the trans-

portation for a common carrier, thereby become a common carrier itself?

Suppose A. becomes a common carrier of parcels in a vehicle between two places, and B. contracts to furnish the motive power, and draw the vehicle; does B. thereby render himself liable to furnish the motive power, and draw the vehicle of every other party who desires to engage in the business between those places? Or render himself liable as a common carrier, to transport articles for all who apply? Or suppose a truckman contracts with a common carrier of parcels between two places, to furnish, for a round sum per year, horses and vehicles for such carrier's business; does he thereby make himself a common carrier, or become liable to furnish transportation for all other carriers between the same places? And does it make any difference if he pursues a legitimate business in traveling at the same time?

Yet this is what the plaintiffs claim. They do not claim that the defendants are bound by their charter to do what they require; they do not deny that our rules are reasonable; they lay out of account the fact that we are common carriers of merchandise on proper trains; but, finding us hauling cars about our legitimate business, and that we have contracted for the mere hauling of property for a common carrier, they claim that we thereby become common carriers of property ourselves. Suppose that we were not required to transport property at all, but only persons, and should contract with a common carrier of property, to draw the car containing his parcels, would that make us a common carrier?

What, then, is a common carrier? Or rather what and for whom is a common carrier bound to carry? He is bound according to his public profession. He may undertake to carry what he pleases. If he holds himself out as a common carrier of coal, no one will pretend he is thereby under any obligation to carry money. A person may become a carrier of money for banks only, and, if such is his profession, he cannot be compelled to carry anything else, or for anybody else. If he makes no professions otherwise than by his acts, he can be held to profess to do only what he actually does.

2 Redfield on Railways, § 165, 1. *The Citizens Bank* v. *Nantucket Steamboat Co.*, 2 Story, 16, 33.

"At common law, a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession."

By Parke, B., in *Johnson* v. *Midland R. R. Co.*, 4 Exch. 367. The case finds that all we do or profess to do, is to draw such articles for the Eastern Express Company as they choose to put in that portion of the car of which they have sole control and possession; we receive no articles from any one to be forwarded; we take no risk as common carriers; we have no possession of any of the articles carried; the agents of that company do all the business of the carrying, except the mere hauling.

The Eastern Express Company is not our agent for any purpose; its agents are not our agents. In *The New Jersey Steam Nav. Co.* v. *The Merchants Bank*, 6 How. 344, it was held by all the judges that under a contract between an express company and the navigation company, somewhat similar to the one in this case, the latter are not liable as common carriers; though a majority of the judges held, that they were liable for gross negligence. They are agreed, that carrying under a contract for an express company, did not make the navigation company a common carrier.

If carrying as we do for the Eastern Express Company does not make us common carriers, the plaintiff's case fails, for such are the sole allegations in their writ; that it does not, the case last cited is conclusive.

If carrying for one, with a positive agreement not to carry for others, a refusal to carry for others, and carrying for that one as a private carrier, make us common carriers, it is difficult to perceive how any person or corporation can contract for transporting a single load without becoming a common carrier.

Suppose we should let a portion of a car under a similar contract for a man to assume the duties of an innkeeper therein, and he should proceed to do so, would that compel us to let a similar space to everybody who might wish to keep a hotel on our train? or

make us innkeepers ourselves? Yet we are no more bound to carry freight on our passenger trains, unless we so choose, than we are to keep a hotel; and we may let a space in our cars for persons to do either without being ourselves either innkeepers or common carriers thereby.

Again; if we are common carriers by doing what we do, are we not so precisely in the manner alleged through the Eastern Express Company, and must not the articles to be carried be tendered to them or their agents? If we hold ourselves out as common carriers of express matter at all, it is only by and through that company. But the last thing the plaintiffs were to have their freight carried by that company.

But it is said by the plaintiff's counsel, that being a corporation allowed to take private property for a public use, we are bound to treat all alike. As to duties imposed by our charters, that is true, to a certain extent; but as to those voluntary matters which we assume for our own benefit or the public convenience, it is not true. As to those we stand precisely as a natural person. When we have fully complied with the provisions of our charter, and do all that is required by that, we have performed our full duty. Whatever we do in addition, we do voluntarily, and may do it in our own way, and no one has a right to complain. If we give the public reasonable accommodations at reasonable rates, there is no ground for complaint if, in particular cases, we go further.

Some English and Pennsylvania cases have been cited in support of the doctrine the plaintiffs maintain. But as said in *Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 393, they "are chiefly commentaries upon the special legislation of parliament, regulating the transportation of freight on railroads constructed under the authority of the government there." They are, both in England and in this country, founded upon special statutes in every case. We had no statute of any degree of similarity till 1868, and if that changes our liabilities and duties, it is well settled that it is not binding upon us. *State* v. *Noyes*, 47 Maine, 189.

If this claim of the plaintiffs is valid, we could in no case make

special contracts for the transportation of freight. Accordingly, the right of such corporations to make such contracts has been tested, but was fully sustained. *Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 393; *Same* v. *Tudor*, 12 Gray, 399 (note).

We maintain, and those decisions fully sustain us, that if we should advertise that in special cases and upon special contracts in every case, we would carry freight upon passenger trains, we should not be obliged to do it, except upon those very terms.

And in the case at bar, we do not carry freight ourselves at all, but transport goods in the possession and under the control of others, and so doing cannot make us common carriers any more than if the owners of the goods thus took charge of them, and we merely furnished the motive power.

If the act of 1868 is invoked, we say that if that imposes any new liabilities or obligations upon us, it is in violation of our chartered rights, and therefore, as to us, absolutely void.

APPLETON, C. J. On the first of January, 1865, the defendant corporation contracted with the Eastern Express Company to give them a certain specified space in the car attached to the passenger train, and "devoted to the carriage of the United States mail and the baggage of passengers transported upon said passenger trains," and to transport the agents and the property they may carry on certain conditions; especially agreeing that they would not "grant or let any similar space in any car or cars attached to the passenger trains, or run with them upon the defendant road, to any other persons as express carriers during the continuance of that contract," and until its termination, Dec. 31, 1869.

The plaintiffs, a corporation duly organized, and similar in its objects to the Eastern Express Company, made application to the defendants for privileges or rights similar to those granted said company, and on Aug. 27, 1865, "after seasonable notice of their intentions, offered at Bangor packages and other property such as is usually carried by express companies, to the proper persons in charge of the passenger trains upon the defendant road, and at the time

and place, when and where the Eastern Express Company load their freight, to be transported upon said road in their passenger train, and were ready to pay or secure the payment of a reasonable sum for such service, and to comply with all usual and reasonable terms applicable to the transportation of express matter, and the defendants refused to receive and transport said parcels and property upon said passenger train," though they were transporting express matter for the Eastern Express Company, on their passenger train at that time.

It is admitted that the defendants are common carriers of passengers and merchandise. It is obvious that the contract with the Eastern Express Company is one conferring upon it a monopoly.

Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. For similar equal services, they are entitled to the same compensation. All applying have an equal right to be transported, or to have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action, if they refuse to carry freight or passengers without just ground for such refusal.

The proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal. And it is not a lawful excuse, that they run their coach in connection with another coach which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place on certain days, unless they come in his coach. *Bennett* v. *Dutton*, 10 N. H. 481.

It is true, that by the rules and regulations adopted by the directors of the defendant corporation, passengers and their baggage only (except the United States mail) are to be transported in passenger trains, and merchandise is to be transported in merchandise trains.

No one can complain of these rules if adhered to. They are entirely unobjectionable. The complaint is of their continual violation, or rather of the interposition of a special and exceptional rule in the shape of a contract, by which they agree to carry the baggage of the Eastern Express Company, and contract not to take that of any other express company. If they can carry for one company and refuse to carry for another, they may equally and as well justify the carrying of A., and the refusal to carry B., both being unobjectionable as passengers, being ready to comply with all their requirements, and they having ample space for the accommodation of both.

The defendants cannot escape their common-law liabilities or avoid the performance of their duties to the public by fencing off a part of a car for the Eastern Express Company. They none the less carry the merchandise, though apart by itself. If this was for the purpose of mutual convenience, it would not increase nor diminish the duties or liabilities of a common carrier. If it was for the purpose of evasion, and to enable them thus evasively to give unjust preferences, the court will long hesitate before it will give effect to shifts and evasions for the sole purpose of eluding the law.

The charter of the Androscoggin and Kennebec Railroad Company was approved March 28, 1845; that of the Penobscot and Ken. R. R. Co., April 7, 1845. The act authorizing their consolidation was approved April 1, 1856, and the defendant corporation composed of the above railroad companies, was duly organized September 24, 1862. By the act of consolidation the new corporation is made subject to the liabilities, and is obliged to perform the duties of the two corporations of which it is the consolidation.

By § 6 of the charter of each of the original corporations, "A toll is hereby granted and established for the sole benefit of said corporation, upon all passengers and property of all descriptions, which may be conveyed or transported from time to time by the directors of said corporation. The transportation of persons and property . . . the weights of loads, and all other matters and things in relation to said roads, shall be in conformity with such rules,

regulations, and provisions as the directors shall from time to time prescribe and direct."

A toll is granted. But a toll implies uniformity of compensation for equality of service. It is for the sole benefit of the corporation and not to enable the corporation to give discriminating preferences. It is to be upon "all passengers and property of all descriptions," thus negativing the right to confer special favors on one or more, or to refuse to some what has been granted to others similarly situated. All passengers and property upon tendering the established toll have a right to the services for which it is the prescribed compensation. It is true, the directors may establish rules and regulations. But rules and regulations imply uniformity of action in relation to the subject-matter to which they apply, not the right to give exclusive and peculiar privileges to some, which are denied to others.

So by § 12 of the charter of the original corporations they each, "after they shall commence receiving tolls, shall be bound at all times to have said railroad in good repair, and a sufficient number of suitable engines, carriages, and vehicles for the transportation of persons and articles, and be obliged to receive at all proper times and places, and convey the same, when the appropriate tolls shall be paid and tendered." The language is most general. The right to prefer and discriminate, and by discrimination to benefit one and ruin another, is not given. When "the appropriate tolls are paid or tendered," the corporation is obliged to receive and convey, not whomsoever or whatsoever they may choose, but "persons and property" indifferently, coming within the prerequisite of the payment or tender of "appropriate tolls, and within just, impartial, and uniform rules, which alone the corporations were authorized to make.

The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application. The defendants derive their chartered right from the State. They owe an equal duty to each citizen. They are allowed

to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select from those who may apply, some whom they will, and reject others whom they can, but will not carry. They cannot rightfully confer a monopoly upon individuals or corporations. They were created for no such purpose. They may regulate transportation, but the right to regulate gives no authority to refuse, without cause, to transport certain individuals and their baggage or goods, and to grant exclusive privileges of transportation to others. The State gave them a charter for no such purpose.

Such is the common law on the subject. The legislation of the State has been in accordance with and in confirmation of these views.

By c. 193, § 1, approved Feb. 29, 1868, "all express-men and all persons engaged in express business shall have reasonable and equal terms, facilities, and accommodations, for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon any railroad owned and operated within the State, and for the use of the depot and other buildings and grounds of such corporation, and at any point of intersection of two railroads, reasonable and equal terms and facilities of interchange."

The defendants cannot object to this statute, unless they had, before its passage, an unlimited right to impose unreasonable and unequal terms, to give special privileges, to confer monopolies, selecting from the great public, from whom they acquired their powers and franchise, who shall be the special and selected objects of their bounty, and who shall not. The wildest and most extravagant supporter of vested rights will hardly claim this. It would imply madness or crime on the part of a legislature granting such rights. If, then, the defendants have no such right, the grant of a monopoly to one corporation at the expense of the general public is alike a violation of the common as of the statute law, and cannot be upheld.

The plaintiffs were willing and offered to pay reasonable freight for the services demanded, and to comply with all just and reason-

able rules and regulations the defendants had or might establish; but the defendants refused to receive and transport the freight offered, in accordance with the plaintiffs' request.

The defense is not that there was want of room or inability to transport the plaintiffs' freight as desired; or that the accommodation granted the Eastern Express Company was exceptional, granted only on a special occasion, or urgent necessity, and afforded only to meet such accident or to supply such necessity; but it is that they may lawfully select one individual or corporation upon whom they may confer exclusive and valuable privileges to the exclusion and injury of the rest of the community.

It is argued that the contract between the defendant corporation and the Eastern Express Company, it being made before the passage of the act of 1868, is a bar to the plaintiffs' right to recover. But such cannot be the case, unless the defendants had the right to grant "terms, facilities, and accommodations" unreasonable and unequal as between the different express companies desiring the transportation of their goods, merchandise, &c., over their railroad. But this cannot be claimed. Further, if such a contract were to be held an answer to the plaintiffs' claim, on the ground that the legislature had no right to impair its validity, then it would follow, that they might be ousted of their control and jurisdiction during the whole existence of the defendant corporation; for the defendants might have made their contract coextensive in time with their corporate existence.

Provisions similar to those of 1868 exist in England, and the courts have ever held all acts of undue preference void, while they have sustained the railroad corporations, when they have only the interests of the proprietors and the legitimate increase of the profits of the railway in view. It is not a legitimate ground for giving preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distant from, and unconnected with the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of a railway thinks proper

or not to bind himself to employ the company on other and totally distinct business. *In re Baxendale* v. *The G. W. R. R. Co.* 94, E. C. L. 308. But in that case a difference of charge was sustained upon goods from and to the same places, between persons who sent large quantities at a time, and stipulated to send given large quantities every year, and others who declined to do so. "The advantages there stipulated for and by the company," observes Willes, J., "related to the carriage of the goods upon the same line, and directly affected the rate at which they could be probably carried. In fact those advantages made a difference similar to that between the selling of goods wholesale and retail, the profit of carrying goods in large quantities and at the less rate at which they were carried, equalling or exceeding the profit upon the goods sent in smaller quantities at the greater rate at which they were carried." *In re Garton* v. *Bristol & Exeter R. R. Co.* 95, E. C. L. 655, Willes, J., says, "As to the third branch of the case, viz., that a lower charge is made by the company to persons residing at Bridgewater for the carriage of goods, than is made to the complainants, no satisfactory reason seems to me to have been given for that reduction. It is not shown that it is rendered necessary for the purpose of meeting and overcoming competition. . . . The inequality of charge cannot be without a reason; and I am at a loss to see any other possible reason than a desire on the part of the defendants to displace the complainants as carriers, so that they themselves may become the sole carriers on their line of railway." Where a statute requires a railway company to carry for all who may apply and upon equal terms, they have no right to impose increased prices upon express carriers who send freight by the company's trains, in aggregate quantities made up of small parcels directed to different individuals. *Pickford* v. *Grand Junction Railway*, 10 M. & W. 399. Much less have they a right to carry for one express company and refuse to carry for another, when they have the ability to carry for both.

In re Mariott v. *The London & South-western Railway Co.*, 87 E. C. L. 498. The defendant railway company made arrangements

at one of their stations with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodations for all passengers by their trains to and from K., and allowed A. the exclusive privilege of driving his vehicle into the station-yard for the purpose of taking up and setting down passengers at the door of the booking-office. "I am of opinion," observes Cockburn, C. J., "that in giving an undue and unreasonable preference to and in favor of Williams, brings the company within the provisions of the statute in question. (18 Vict. c. 31, § 2.) I see no reason why this preference should be given to one omnibus and to the exclusion of another. . . . I therefore think the rule should be made absolute, to the extent of enjoining the company to admit the complainant's omnibus into the station of this railway at all reasonble times, for the purpose of receiving and setting down passengers and goods, in the same manner, and to the same extent as other public vehicles of a similar description are admitted into the yard for that purpose." In *Piddington* v. *S. E. Railway Co.*, 94 E. C. L. 109. The defendants made an increased charge upon "packed parcels." The jury negatived that they incurred an additional risk or expense on the carriage thereof. "Here," remarks Byles, J., "the defendants charge double for certain packages, though the goods are of a like description, and the jury have found there is no increased risk or expense incurred by them in the carriage of them. That seems to me to be an express violation of the 17th section." In *Sandford* v. *Railway Co.*, 24 Penn. 378, it was held that express companies had as good a right to the benefits of a railroad as the owners of the packages which they carried personally had, and that a contract giving to an express company an exclusive right of transportation on the passenger trains was illegal and void, both at common law and by the statutes of the State. "Whenever," observes Lewis, C. J., "a charter is granted for the purpose of constructing a railroad, the corporation is clothed with the power to take private property, in order to carry out the object, it is an inference of law from the extent of the power conferred, and the subject-matter of the grant, that the road is for the public accommodation. The

right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages, it results from the nature of the right that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men, and denied to others. The special stipulations inserted in charters, for the purpose of securing these rights, are placed there in abundance of caution, and affirm nothing more than the common right to equal justice, which exists independent of such provisions. . . . The supposed necessity for such provisions, in charters granted in this country and in England, proves nothing more than that the law-makers in both countries were aware of the difficulty in holding large corporations to those common obligations of justice which individuals feel bound to acknowledge without legislative enactment."

The plaintiff is entitled to maintain his action.

Defendant defaulted.

Damages to be assessed by the judge at nisi prius.

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

CUTTING and WALTON, JJ., did not concur.

CHARLES W. GODDARD *vs.* THE GRAND TRUNK RAILWAY OF CANADA.

A common carrier of passengers is responsible for the wilful misconduct of his servant toward a passenger.

A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train, has a remedy therefor against the company.

If a brakeman, employed on a railway passenger train, assault and grossly insult a passenger thereon, and the company retain the offending servant in their service after his misconduct is known to them, they will be liable to exemplary damages.

The plaintiff, a highly respectable citizen, and a passenger in the defendants' railway car, on request, surrendered his ticket to a brakeman authorized to demand and receive it. Shortly after, the brakeman, without provocation, approached the plaintiff in his seat, and, accosting him in a loud voice, denied, in the presence of the other passengers, that he had seen or received the plaintiff's ticket, and, in language coarse, profane, and grossly insulting, called the plaintiff a liar, charged him with then attempting to evade the payment of his fare and with having done so before; and leaning over the plaintiff, then in feeble health and partially reclining in his seat, and bringing his fist down close to his face, violently shook it there and threatened to split the plaintiff's head open and to spill his brains right there on the spot, with much more to the same effect. The defendants, although well knowing the brakeman's misconduct, did not discharge him, but retained him in his place, which he continued to occupy at the time of the trial. The jury was instructed that the case was a proper one for exemplary damages, and they returned a verdict for $4,850, which the court declined to set aside.

ON EXCEPTIONS and motion to set aside the verdict as being excessive.

TRESPASS for an alleged assault by a servant of the defendants, in one of their first-class passenger cars, upon the plaintiff, a respectable and well-known member of the legal profession, having been county attorney, several times State senator, president of the senate, and representative of the country abroad, and being, at the time of the trial, judge of the superior court for the county of Cumberland.

Upon the question of the defendants' liability, the presiding judge instructed the jury *inter alia*,—

That if, when Jackson approached the plaintiff, he believed the latter was fraudulently attempting to evade the payment of his fare, and his purpose was to ascertain whether or not his belief was well founded, he was acting within the scope of his authority; and if, in the discharge of that duty, he assaulted the plaintiff in the manner testified to by him, the defendants were responsible for the assault.

On the subject of damages, the presiding judge instructed the jury,—

That, in the first place, if the plaintiff was entitled to recover any damages, he was entitled to such damages as he had actually suffered; and, in estimating the amount, they would not be limited to what he had lost in dollars and cents; that they might properly consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering occasioned by the assault, and the feeling of degradation that necessarily resulted from it; that a man's feelings, self-respect, and pride of character are as much under the protection of the law in such case as his property; that, in estimating the damages for a personal assault attended with opprobrious and insulting language, the jury have a right to consider the character and standing of the person assaulted, and the injury to his feelings, as well as the injury to his person, and then to give him such damages as, in view of all the circumstances, would be a just compensation for the injury actually suffered; that, if the injury was wanton, malicious, committed in reckless and willful disregard of the rights of the injured party, the law allows the jury to give what is called punitive or exemplary damages; that the law blends the interests of the injured party with those of the public, and permits the jury not only to give damages sufficient to compensate the plaintiff, but also to punish the defendant; that they should be very cautious in the application of this rule; that the law does not require them to give exemplary damages in any case; that when the damages which the plaintiff is entitled to recover, in order to compensate him for the injury he has actually

suffered, are sufficient to punish the defendant and serve as a warning and example to others, the jury ought not to give more; if they think such damages are not enough, then the law allows them to add such further sum as will make it sufficient for that purpose; but they should be careful, in fixing the amount, not to allow more than is just and reasonable, and not to allow their judgments to be swerved by passion.

The defendants requested the presiding judge to instruct the jury, that, if they found that the acts and words of Jackson were not directly nor impliedly authorized nor ratified by the defendants, then the plaintiff was not in any event entitled to recover vindictive or exemplary damages against the defendants, nor damages in the nature of smart-money. But the presiding judge, having already instructed the jury upon what state of facts the plaintiff would be entitled to such damages, declined to comply with the request.

The jury returned a verdict for the plaintiff for $4,850. And the defendants alleged exceptions.

The facts in the case are sufficiently stated in the opinion.

G. F. Shepley, for the plaintiff.

I. Are railroad corporations exempt from accountability for the improper, violent, and unlawful acts of their servants or agents, when acting in the scope of their employment?

1. "A master is liable for the tortious acts of his servants, when done in the course of his employment, although in disobedience of the master's orders." *Phil. & Reading R. R. Co.* v. *Derby*, 14 Howard, 468.

Certainly, in all cases where an individual master would be responsible. *First Baptist Church* v. *S. & T. R. R. Co.*, 5 Barbour, Ct. Rep., N. Y. 79.

Respondeat superior, is the universal rule whether the act is one of omission or commission, if done in the course of the servant's employment.

2. The fact that the master did not authorize or even know of

the tortious act, or did not ratify it, or if he even disapproved of and forbade it, makes no difference. 14 Howard, p. 488. Story on Agency, § 452. Smith on Master and Servant, 152.

If a master directs his servant to drive slowly, but is disobeyed, and an injury results, he is nevertheless liable, because he has put it in his servant's power to mismanage the carriage by intrusting him with it. *Heath* v. *Wilson*, 9 Car. & Payne, 607, by Erskine, J.

3. The maxim must not be qualified, lest it be nullified. It is specially important to the public interest that railroad corporations should be held to the utmost strictness of it. The original blame, the *causa causans* of the mischief is in the corporation, by intrusting the lives and persons of their passengers to unsuitable persons, who will not submit to control; the proximate cause, the *ipsa negligentia*, is the disobedience of the servant so intrusted. 14 Howard, 487, by Grier, J.

4. By so doing, the master warrants the fidelity and good conduct of his servant. Story on Agency, p. 465, chap. 17, § 452.

And just the same, though the servant's conduct was contrary to orders and against the master's interest. Ibid., note 2.

5. And this, too, where the conductor, whose disobedience occasioned the injury, had the reputation of a careful and competent person, had received express orders, had never before disobeyed, and was discharged instantly for his misconduct. 14 Howard, 470.

If a coachman, driving his master and being ordered not to drive so fast, disobeys and thereby occasions an injury, the master is responsible, because he is still driving for his master, though driving badly. *Brown* v. *Copley*, 7 Mann. & Granger, 566; E. C. L., 566, by Cresswell, J.

The case *Wright* v. *Wilcox*, 19 Wendell, 343, is not good law. *Howe* v. *Newmarch*, 12 Allen, 52, cited by defendant on p. 1 of his exceptions. Reeve on Domestic Relations, 357, 358. Redfield on Railways, 384, note. Smith on Master and Servant, 172 et seq.

6. The instruction given toward the end of p. 5 is certainly favorable enough for defendants. 12 Allen, 52, cited by defendants.

7. The distinction between trespass and case, occasioned much of the difficulty on this subject. Same case.

8. Where the business implies the use of force and violence to the person of another, and the servant commits a trespass in the course of his employment, the master is liable, although the trespass consists only in the use of excessive force. *Moore* v. *Fitchburg R. R.*, 4 Gray, 465. *Hewett* v. *Swett*, 3 Allen, 420.

In such case, it is left to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, and the master is liable, if in the execution of the order the servant uses force in a manner or to a degree unjustifiable. 12 Allen, 57, by Hoar, J., defendant's own case.

9. And that, too, whether the wrongful act was one of negligence, or was the effect of a wanton or reckless purpose to accomplish the master's business in an unlawful manner. Ibid.

And this is precisely the present case.

Jackson was not only brakeman but vice-conductor in charge of the rear car where plaintiff was imprisoned, with all the power of the chief conductor, Whitney, the full exercise of which was required of Jackson until Whitney arrived. See letter of Superintendent Bailey; Whitney's testimony; Bailey's testimony. Jackson was thus usually in command as conductor until after passing Falmouth; evidence of Whitney and Bailey; and, on this occasion, Jackson commanded in Whitney's absence until after passing Cumberland. See Burleigh's deposition and plaintiff's testimony,

Accordingly, Jackson was authorized to use force and violence as conductor, and did exercise all Whitney's power at Falmouth by demanding, receiving, and delivering to Whitney plaintiff's ticket at Falmouth station; and between Falmouth and Cumberland, perpetrating, as conductor, the outrage in question. See evidence of Burleigh and of plaintiff.

The authority of a conductor implies the use of force and violence to passengers attempting to ride without tickets or paying their fare, leaving it to the conductor's discretion to decide

when the occasion arises, and the nature and kind of force to use.

A plaintiff, put off a freight car by a conductor while the train was in motion, could not have maintained an action against the conductor, if he had been ejected by the use of reasonable force when the train was at rest, because the conductor had a right so to do; hence the corporation is liable for the unlawful force and violence of the conductor. *Holmes* v. *Wakefield et als.*, 13 Allen, 580, by Judge Hoar.

That is to say, as Jackson, representing conductor Whitney, might lawfully have confined plaintiff in his seat until the arrival of Whitney for non-payment of fare or non-production of ticket, using reasonable force, therefore the corporation that employs him is liable for his unlawful exhibition of force to plaintiff, when in fact he had paid for and surrendered his ticket.

10. The jury were properly instructed, as matter of law, that under a given state of facts, the servant was in the course of his employment. *Drew* v. *Sixth Av. R. R.*, 40 N. Y. 429.

II. Of the rule of damages.

1. Plaintiff should be fully compensated for the injury received, —the injury to his feelings, for his wounded pride, mental pain and sufferings, and the feeling of degradation resulting from such a public, brutal, unprovoked, and prolonged assault. *Wadsworth* v. *Treat*, 43 Maine, 143.

2. Punitory, exemplary, or vindictive damages are allowable when the injury is wanton, malicious, and committed in reckless disregard of the rights of the injured party. *Pike* v. *Dilling*, 48 Maine, 539; A. D. 1861.

The opinion of the present chief justice, sustaining the ruling of Mr. Justice Cutting, contains so thorough and exhaustive a review of the decisions in England and in this country, that a reference to earlier authorities would be a work of supererogation.

Since that time, however, Messrs. Sedgwick, Hilliard, and other leading elementary writers, who have published new works or new

editions, as well as the federal courts, and those of nearly all the States, have steadily maintained the principle of exemplary damages. Sedgwick on the Measure of Damages, chap. 18.

That this is the main element in all actions of *per quod servitium amisit*, is demonstrated with great force and clearness in *McBride* v. *McLaughlin*, 5 Watts, 375.

Also, that evidence of defendant's wealth can be allowable only on the same principle. Ibid.

That corrective damages may be given for the sake of example, is as old as the law itself. Sedgwick, p. 530, ed. of 1868.

Do not all *qui tam* actions, and those where, as in the statute against gambling-houses, the whole penalty goes to the successful informer, rest on the same basis?

The instruction on this point was in strict conformity to law, and extremely well guarded. 7th Circ. O., 1842, *Peck* v. *Neil*, 3 McLean, 22.

III. Such being the law, shall these defendants be permitted to escape its salutary provisions?

1. If it be said that the outrage was committed by Jackson, and not by defendant corporation personally, this is only true in a physical sense; because a corporation has no material body with which to perpetrate its crimes, any more than it has a soul to suffer for, or a conscience to be ashamed of them. In reality the assertion is false, because a corporation can act only through its servants, and its servants' acts are its only acts, its servants' will its only will, except, perhaps, in the case of the votes of its members at a stockholders' meeting.

The Grand Trunk Railway Company of Canada was personally present in the rear car of that passenger train, in the person and only in the person of its recognized representative, vice-conductor Jackson,—and his will and his acts were, in law and in fact, its will and acts, and its only will and acts on that occasion.

If, therefore, an individual master, perhaps personally innocent of positive evil intent, is liable to punishment by exemplary dam-

ages for the malice of his servant, for a much stronger reason ought a soulless corporation to be held responsible for the wicked and wanton acts of its sole representative.

Besides, if corporations cannot be reached in exemplary damages for the malice of their servants, they escape entirely, and thus stand infinitely better than citizens, who are liable in punitory damages, not only for the malicious acts of their agents, but for their own personal acts, which latter it is obvious a corporation can never be guilty of, in the strict sense.

Corporations are subject to the same liability as common individuals. Angell and Ames on Corporations, ch. 11, p. 333. Redfield on Railways, vol. 2, § 187, p. 331, note 1.

And the disobedience of the agent makes no difference, if he was acting within the scope of his employment. Ibid. § 164, p. 116, clause 8.

These very defendants have been taught this principle in their own proper person by the supreme court of N. H. *Hopkins* v. *A. & St. L. R. R.*, 36 N. H. 9. Redfield, vol. 2, § 183, p. 220, note 2.

IV. The damage considered as punitory was not only not excessive, but it is now at this hearing apparent to the court to be insufficient. It has not produced the effect of causing the corporation to discharge from its service the offending servant, who is still in its employment, and has been promoted. The court is not informed, the public and the injured party are alike ignorant of the grounds of this unprovoked assault. This corporation, with its immense capital, defies the court, the jury, and the public, by its obstinate neglect and refusal even after verdict, to apologize for, or explain the transaction. It produces in court the assailant, still an employee of the company, neglects even to call him as a witness or any other witness to disprove their actual malice, and thus leaving the fair inference that they approve and justify, if they did not directly order the acts of violence to the passenger,—ask the court to say that the damages returned by the jury were greater than necessa-

ry for the public protection, while at the same time their own acts show before the court that they were insufficient.

V. The learned judge rightly refused to instruct the jury to measure their damages by a hypothetical suit against Jackson, not only for the reason given by him which was sufficient, but because it would have been intrinsically bad law.

We have seen that the theory of exemplary damages involves the question of a defendant's wealth. *McBride* v. *McLaughlin*, 5 Watts, 375.

The defendant's wealth may be given in evidence. Greenl. on Ev., vol. 2, p. 221.

Especially where it was proved that the defendant was amply able to pay for it. Hilliard on Remedies for Torts, chap. 7, p. 453, § 1.

Therefore damages which would be absurdly, nay, oppressively large, as against a worthless, brutal fellow, whom no person or corporation in the world but one, would retain in its employment, would be ridiculously and contemptibly small when inflicted either as punishment or example, on his employers and retainers with a capital of eighty millions in gold, an annual income of more than half a million pounds sterling, and a line nearly one thousand miles long.

The authorities will be found by a preponderance to establish the following propositions:

1. The master is liable in a civil suit of trespass, or trespass on the case for the tortious acts of his servant done in the scope of his employment.

2. The fact of the tortious act having been done in disobedience of express orders, and without subsequent approval or ratification, makes no difference.

3. Nor whether the purpose of the servant was malicious except so far as the amount of damages.

4. Railroad corporations stand on no better footing than individuals in any of these particulars.

5. Under a given state of facts, the court may rightly instruct the jury, as matter of law, that the servant was in the course of his employment.

6. In the present case the judge correctly instructed the jury on the facts supposed.

7. In case of malicious personal tort, the jury are authorized to give punitory or exemplary damages.

8. The instruction on this point was correct, and very carefully guarded.

9. A corporation is liable to punitory damages at least as fully as an individual master.

10. In fact, a very large and increasing proportion of the later cases of punitory damages have been inflicted on railroad corporations, and that, too, without proof of previous knowledge or subsequent approval of the tortious act by any other officer of the defendant corporation than the offending servant..

Finally. All the instructions of the presiding justice were correct, or at least sufficiently favorable to defendants.

P. Barnes, for the defendants, cited *Derby* v. *Penn. R. R. Co.* 14 How. 468, and cases there cited; *Howe* v. *Newmarch*, 12 Allen, 56; Reeves' Dom. Relations, 356, 358; *Foster* v. *Essex Bank*, 17 Mass. 508; 2 Kent's Com. 259, 260; Story on Agency, § 318; *Brown* v. *Purviance*, 2 Harris & Gill. 317; *Lyons* v. *Martin*, 8 Ad. & Ellis, 514; *Thames Steam Boat Co.* v. *R. R. Co.*, 24 Conn. 40; 1 Redfield on Railways, 510–515; *Pote* v. *Dill*, 48 Maine, 539, Rice's dissenting opinion; *Hagan* v. *Prov. & Wor. R. R. Co.*, 3 Rhode Island, 188; *Turner* v. *N. B. & M. R. R. Co.*, 34 Cal. 594; *Pleasant* v. *N. B. & M. R. R. Co.*, 34 Cal. 586; *Finny* v. *Mil. & Wis. R. R. Co.* 10 Wis., 338; *Clark* v. *Newson*, 1 Exch. 131; *Montfort* v. *Wordsworth*, 7 Ind. 83; *Ripley* v. *Miller*, 11 Ind. 247.

Walton, J. Two questions are presented for our consideration: first, is the common carrier of passengers responsible for the willful misconduct of his servant? or, in other words, if a passenger

who has done nothing to forfeit his right to civil treatment, is assaulted and grossly insulted by one of the carrier's servants, can he look to the carrier for redress? and, secondly, if he can, what is the measure of relief which the law secures to him? These are questions that deeply concern, not only the numerous railroad and steamboat companies engaged in the transportation of passengers, but also the whole travelling public; and we have endeavored to give them that consideration which their great importance has seemed to us to demand.

I. Of the carrier's liability. It appears in evidence, that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and shaking it violently, told him not to yip, if he did he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman

who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct.

Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that "the master is not responsible as a trespasser, unless by direct or implied authority to the servant, he consents to the unlawful act."

The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the

negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible.

And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal, and profane. The best security the traveler can have that these servants will be selected with care, is to hold those by whom the selection is made responsible for their conduct.

This liability of the master is very clearly expressed in a recent case in Massachusetts. The court say, that wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing that contract, although the act is fraudulent and done without his consent. *Howe* v. *Newmarch*, 12 Allen, 55. (Paragraph nearest the bottom of the page.)

And Messrs. Angell and Ames, in their work on corporations (section 388, p. 404, eighth edition), say: "A distinction exists as to the liability of a corporation for the willful tort of its servant toward one to whom the corporation owes no duty except such as each citizen owes to every other; and that toward one who has entered into some peculiar contract with the corporation by which this duty is increased; thus it has been held that a railroad corporation is liable for the willful tort of its servants whereby a passenger on the train is injured."

In *Brand* v. *Railroad*, 8 Barb. 368, the court say, a passenger on board a stage-coach or railroad-car, and a person on foot in the street, do not stand in the same relation to the carrier. Toward

the one the liability of the carrier springs from a contract, express or implied, and upheld by an adequate consideration. Toward the other he is under no obligation but that of justice and humanity. Hence a passenger, who is injured by a servant of the carrier, may have a right of action against him when one not a passenger, for a similar injury, would not.

In *Moore* v. *Railroad*, 4 Gray, 465, the plaintiff was forcibly put out of a car for not giving up his ticket or paying his fare, when in fact he had already surrendered his ticket to some one employed on the train. The defendants insisted that they were not responsible for the misconduct of the conductor; and further, that an action for an assault would not lie against a corporation. But the court held otherwise, and the plaintiff recovered.

In *Seymour* v. *Greenwood*, 7 Hurl. & Nor. 354, the plaintiff was assaulted and taken out of the defendant's omnibus by one of his servants. The defendant insisted that he was not liable, because it did not appear that he authorized or sanctioned the act of the servant. But it was held in the exchequer chamber, affirming the judgment of the exchequer court, that the jury did right in returning a verdict for the plaintiff.

In *Railroad* v. *Finney*, 10 Wis. 388, the plaintiff was unlawfully put out of a car by the conductor. After stating that it was insisted, by the counsel for the railroad, that in no case could a cause of action arise against the principal for the willful misconduct of the agent, the court went on to say, that after a careful examination of the position, they were satisfied it was not correct; that where the misconduct of the agent causes a breach of the principal's contract, he will be liable whether such misconduct be willful or merely negligent.

In *Railroad* v. *Vandiver*, 42 Penn. St. R. 365, a passenger received injuries, of which he died, by being thrown from the platform of a railroad car because he refused to pay his fare or show his ticket, he averring he had bought one but could not find it. The evidence showed he was partially intoxicated. It was urged in defense that if the passenger's death was the result of force and

violence, and not the result of negligence, then (such force and violence being the act of the agents alone without any command or order of the company) the company was not responsible therefor. But the court held otherwise. "A railway company," said the court, "selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent, and humane men. In the present case the company and its agents were all liable for the injury done to the deceased."

In *Weed* v. *Railroad*, 17, N. Y. 362, the jury found specially that the act of the servant by which the plaintiff was injured, was willful. The court held the willfulness of the act did not defeat the plaintiff's right to look to the railroad company for redress.

In *Railroad* v. *Derby*, 14 Howard, 468, where the servant of a railroad company took an engine and run it over the road for his own gratification, not only without consent, but contrary to express orders, the supreme court of the United States held that the railroad company was responsible.

In *Railway* v. *Hinds*, 53 Penn. 512, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held responsible, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate, by an earnest effort, that it was impossible to do so.

In *Flint* v. *Transportation Co.*, 34 Conn. 554, where the plaintiff was injured by the discharge of a gun dropped by some soldiers engaged in a scuffle, the court held that passenger carriers are bound to exercise the utmost vigilance and care to guard those they transport from violence from whatever source arising; and the plaintiff recovered a verdict for $10,000.

In *Landreaux* v. *Bell*, 5 Louisiana, O. S. 275, the court say, that carriers are responsible for the misconduct of their servants toward passengers to the same extent as for their misconduct in regard to merchandise committed to their care; that no satisfactory distinction can be drawn between the two cases.

In *Chamberlain* v. *Chandler*, 3 Mason 242, Judge Story declared

in language strong and emphatic, that a passenger's contract entitles him to respectful treatment; and he expressed the hope that every violation of this right would be visited, in the shape of damages, with its appropriate punishment.

In *Nieto* v. *Clark*, 1 Clifford 145, where the steward of the ship assaulted and grossly insulted a female passenger, Judge Clifford declares, in language equally emphatic, that the contract of all passengers entitles them to respectful treatment and protection against rudeness and every wanton interference with their persons from all those in charge of the ship; that the conduct of the steward disqualified him for his situation, and justified the master in immediately discharging him, although the vessel was then in a foreign port. And we have his authority for saying that he has recently examined the question with care, in a case pending in the Rhode Island district, where the clerk of a steamboat unjustifiably assaulted and maltreated a passenger, and that he entertains no doubt of the carrier's liability to compensate the passenger for the injury thus received, whether the carrier previously authorized or subsequently ratified the assault or not. A report of the case will soon be published. (See 3 Clifford.)

And a recent and well-considered case in Maryland (published since this case has been pending before the law court, and very much like it in all respects), fully sustains this view of the law. *Railroad* v. *Blocher*, 27 Md. 277.

The grounds of the carrier's liability may be briefly stated thus:

The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted

and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages.

II. We now come to the second branch of the case. What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

In 1763, Lord Chief Justice Pratt (afterwards Earl of Camden), with whom the other judges concurred, declared that the jury had done right in giving exemplary damages. *Huckle* v. *Money*, 2 Wilson, 205.

In another case the same learned judge declared with emphasis, that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty. Campbell's Lives of the Chancellors, Am. edition, vol. 5, p. 214.

In 1814, the doctrine of punitive damages was stringently applied in a case where the defendant, in a state of intoxication, forced himself into the plaintiff's company, and insolently persisted in hunting upon his grounds. The plaintiff recovered a verdict for five hundred pounds, the full amount of his *ad damnum*, and the court refused to set it aside. Mr. Justice Heath remarked in this case that he remembered a case where the jury gave five hundred

pounds for merely knocking a man's hat off, and the court refused a new trial. It goes, said he, to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages. *Merest* v. *Harvey*, 5 Taunt. 442. See also, to the same effect, *Sears* v. *Lyon*, 2 Starkie, 317, decided in 1818.

In 1844, Lord Chief Baron Pollock said, that in actions for malicious injuries, juries had always been allowed to give what are called vindictive damages. *Doe* v. *Filliter*, 13 M. & W. 50.

In 1858, in an action of trespass for taking personal property on a fraudulent bill of sale, the defendant's counsel contended that it was not a case for the application of the doctrine of exemplary damages; but the court held otherwise. No doubt, said Pollock, C. B., it was a case in which vindictive damages might be given. *Thomas* v. *Harris*, 3 H. & N. 961.

In 1860, in an action for willful negligence, the defendant contended that the plaintiff's declaration was too defective to entitle him to exemplary damages; but the court held otherwise; and the judge who tried the case remarked that he was glad the court had come to the conclusion that it was competent for the jury to give exemplary damages, for he thought the defendant had acted with a high hand. *Emblen* v. *Myers*, 6 H. & N. 54.

"Damages exemplary," is now a familiar title in the best English law reports. See 6 H. & N. 969.

It was the firmness with which Lord Camden (then Chief Justice Pratt) maintained and enforced the right of the jury to punish with exemplary damages the agents of Lord Halifax (then Secretary of State) for the illegal arrest of the publishers of the North Briton, that made him so immensely popular in England. Nearly or quite twenty of those cases appear to have been tried before him, in all of which enormous damages were given, and in not one of them was the verdict set aside. In one of the cases a verdict for a thousand pounds was returned for a mere nominal imprisonment at the house of the officer making the arrest, and the court refused to set it aside. *Beardmore* v. *Carrington*, 2 Wilson, 244.

"After this," says Lord Campbell, in his Lives of the Chancel-

lors," he became the idol of the nation. Grim representations of him laid down the law from sign-posts, many busts and prints of him were sold not only in the streets of the metropolis, but in the provincial towns; a fine portrait of him, by Sir Joshua Reynolds, with the flattering inscription, "in honor of the zealous asserter of English liberty by law," was placed in the Guildhall of the city of London; addresses of thanks to him poured in from all quarters; and one of the sights of London, which foreigners went to see, was the great Lord Chief Justice Pratt."

In this country, perhaps Lord Camden is better known as one of the able English statesmen who so eloquently defended the American colonies against the unjust claim of the mother country to tax them. Lord Campbell says some portions of his speeches upon that subject are still in the mouths of school-boys. But in England his immense popularity originated in his firm and vigorous enforcement of the doctrine of exemplary damages. And we cannot discover that the legality of his rulings in this particular was ever seriously called in question. On the contrary, we find it admitted by his political opponents that he was a profound jurist and an able and upright judge. His stringent enforcement of the right of the jury to punish flagrant wrongs with exemplary damages, arrested not only great abuses then existing, but it has had a salutary influence ever since. It won for him the title of the "asserter of English liberty by law."

In this country the right of the jury to give exemplary damages has been much discussed. It seems to have been first opposed by Mr. Theron Metcalf (afterwards reporter and judge of the supreme court of Massachusetts), in an article published in 3 American Jurist, 387, in 1830. The substance of this article was afterwards inserted in a note to Mr. Greenleaf's work on Evidence. Mr. Sedgwick, in his work on Damages, took the opposite view, and sustained his position by the citation of numerous authorities. Professor Greenleaf replied in an article in the Boston Law Reporter, vol. 9, p. 529. Mr. Sedgwick rejoined in the same periodical, vol. 10, p. 49. Essays on different sides of the question were

also published in 3 American Law Magazine, N. S. 537, and 4 American Law Magazine, N. S. 61. But notwithstanding this formidable opposition, the doctrine triumphed, and must be regarded as now too firmly established to be shaken by anything short of legislative enactments. In fact the decisions of the courts are nearly unanimous in its favor.

In a case in the supreme court of the United States, Mr. Justice Grier, in delivering the opinion of the court, says, it is a well-established principle of the common law, that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offense rather than the measure of compensation to the plaintiff. "We are aware," the judge continues, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Day* v. *Woodworth*, 13 Howard, 363.

In a case in North Carolina, the court refer to the note in Professor Greenleaf's work on Evidence, and say that it is very clearly wrong with respect to the authorities; and in their judgment wrong on principle; that it is fortunate that while juries endeavor to give ample compensation for the injury actually received, they are also allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. And the same court hold that the wealth of the defendant is a proper circumstance to be weighed by the jury, because a thousand dollars may be a less punishment to one man than a hundred dollars to another. In one case the same court sustained a verdict which in terms assessed the actual damages at $100, and the exemplary damages at $1,000. The court held it was a good verdict for $1,100. *Pendleton* v. *Davis*, 1 Jones (N. C.), 98. *McAulay* v. *Birkhead*, 13 Iredell, 28. *Gilreath* v. *Allen*, 10 Iredell, 67.

In fact, Professor Greenleaf is himself an authority for the doctrine of exemplary damages. Speaking of the action for assault and battery. he says the jury are not confined to the mere corporal

injury, but may consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon award such exemplary damages as the circumstances may in their judgment require. 2 Greenl. on Ev., § 89.

But if the great weight of Professor Greenleaf's authority were to be regarded as opposed to the doctrine, we have, on the other hand, the great weight of Chancellor Kent's opinion in favor of it. He says, surely this is the true and salutary doctrine. And after reviewing the English cases, he continues by saying it cannot be necessary to multiply instances of its application; that it is too well settled in practice, and too valuable in principle to be called in question. *Tillotson* v. *Cheetham*, 3 Johnson, 56 and 64.

This brief review of the doctrine of exemplary damages is not so much for the purpose of establishing its existence, as to correct the erroneous impression which some members of the legal profession still seem to entertain, that it is a modern invention, not sanctioned by the rules of the common law. We think every candid-minded person must admit that it is no new doctrine; that its existence as a fundamental rule of the common law has been recognized in England for more than a century; that it has been there stringently enforced under circumstances which would not have allowed it to pass unchallenged, if any pretext could have been found for doubting its validity; and that in this country, notwithstanding an early and vigorous opposition, it has steadily progressed, and that the decisions of the courts are now nearly unanimous in its favor. It was sanctioned in this State, after a careful and full review of the authorities, in *Pike* v. *Dilling*, 48 Me. 539, and cannot now be regarded as an open question.

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own willful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly au-

thorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse

the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence, called a corporation. And yet under cover of its name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks,—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and band-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the willful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country.

In a case in Mississippi, the plaintiff was carried four hundred yards beyond the station where he had told the conductor he wished to stop; and he requested the conductor to run the train back, but the conductor refused, and told the plaintiff to get off the train or he would carry him to the next station. The plaintiff got off and walked back, carrying his valise in his hand. The plaintiff testified that the conductor's manner toward him was insolent, and the defendants having refused to discharge him, the jury returned a verdict for four thousand five hundred dollars, and the court refused to set it aside. They said the right of the jury to protect the public by punitive damages, and thus prevent these great public blessings from being converted into the most dangerous nuisances, was conclusively settled; and they hoped the verdict would have a salutary influence upon their future management. *Railroad, in Error*, v. *Hurst*, 36 Miss. 660.

In New Hampshire, in an action against this identical road, where, through gross carelessness, there was a collision of the passenger train with a freight train, and the plaintiff was thereby injured, the judge at *nisi prius* instructed the jury that it was a proper case for exemplary damages; and the full court sustained the ruling, saying it was a subject in which all the traveling public were deeply interested; that railroads had practically monopolized the transportation of passengers on all the principal lines of travel, and there ought to be no lax administration of the law in such cases; and that it would be difficult to suggest a case more loudly calling for an exemplary verdict. [If mere carelessness, however gross, calls loudly for an exemplary verdict, what shall be said of an injury that is willful and grossly insulting?] *Hopkins* v. *At. & St. Lawrence Railroad*, 36 New Hamp. 9.

Judge Redfield, in his very able and useful work on railways, expresses the opinion that there is quite as much necessity for holding these companies liable to exemplary damages as their agents. He says it is difficult to perceive why a passenger, who suffers indignity and insult from the conductor of a train, should be compelled to show an actual ratification of the act, in order to subject

the company to exemplary damages. (2 Redfield on Railways, 231, note.) But if such a ratification is necessary, he thinks the corporation, which is a mere legal entity, inappreciable to sense, should be regarded as always present in the person of its servant, and as directing and ratifying the servant's acts within the scope of his employment, and thus be made responsible for his willful misconduct. 1 Redfield on Railways, 515 *et seq.*

And in a recent case in Maryland (published since this case has been pending before the law court), a case in all respects very similar to the one we are now considering, the presiding judge was requested to instruct the jury that the plaintiff was not entitled to recover vindictive or punitive damages from the defendants, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed; but the presiding justice refused so to instruct the jury, and the full court held that the request was properly rejected; that it was settled that where the injury for which compensation in damages is sought, is accompanied by force or malice, the injured party is entitled to recover exemplary damages. *Railroad* v. *Blocher*, 27 Md. 277.

But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted; but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used? It is a case of wanton insult and injury to the plaintiff's character, and feelings of self-respect, and the damages can be measured by no property standard. It is a case where the judgment will be very much influenced by the estimation in which character, self-respect, and freedom from insult are held. To those who set a very low value on character, and think that pride and self-respect exist only to become objects of ridicule and sport, the damages will undoubtedly be considered excessive. It would not be strange if some such persons, measuring the sensibilities of others by their own low standard, should view this verdict with envy, and regret that some-

body will not assault and insult them, if such is to be the standard of compensation. While others, who feel that character and self-respect are above all price, more valuable than life itself even, will regard the verdict as none too large. We repeat, therefore, that it is a case where men's judgments will be likely to differ. And suppose the court is of opinion that the damages in this case are greater, much greater even, than they would have awarded, does it therefore follow that the judgment of the court is to be substituted for that of the jury? By no means. It is the wisdom of the law to suppose that the judgment of the jury is more likely to be right than the judgment of the court, for it is to the former and not to the latter that the duty of estimating damages is confided. Unless the damages are so large as to satisfy the court that the verdict was not the result of an honest exercise of judgment, they have no right to set it aside.

A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveller upon that road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road.

And when we consider the violent, long-continued, and grossly insulting character of the assault; that it was made upon a person in feeble health, and was accompanied by language so coarse, profane, and brutal; that so far as appears it was wholly unprovoked; we confess we are amazed at the conduct of the defendants in not instantly discharging Jackson. Thus to shield and protect him in his insolence, deeply implicated them in his guilt. It was such in-

difference to the treatment the plaintiff had received, such indifference to the treatment that other travelers might receive, such indifference to the evil influence which such an example would have upon the servants of this and other lines of public travel, that we are not prepared to say the jury acted unwisely in making their verdict highly punitive. We cannot help feeling that if we should interfere and set it aside, our action would be most unfortunate and detrimental to the public interests. On the contrary, if we allow it to stand, we cannot doubt that its influence will be salutary. It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but to trust to the law and to the courts of justice, for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury.

On the whole, we cannot doubt that it is best for all concerned that this verdict be allowed to stand.

We see nothing in the rulings or charge of the presiding judge, of which the defendants can justly complain. And there is nothing to satisfy us that the jury were prejudiced or unduly biased; or that they made any mistake either as to the facts or the law. Our conclusion, therefore, is, that the exceptions and motion must be overruled. *Motion and exceptions overruled.*

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

TAPLEY, J., did not concur upon the question of damages, and gave his opinion as follows:

In so much of the opinion of Mr. Justice *Walton* as determines the question of the liability of the defendants to answer in damages

for the acts of the brakeman Jackson I concur; but I do not concur in sustaining the rulings of the court at the trial of the cause fixing the rule of damage for the jury; and I regard it so clearly wrong in principle, inequitable and unjust in practice, and so entirely wanting in precedent, that my duty requires something more than a silent dissent.

So much of the opinion as discusses the right of a jury to give in civil actions punitive damages, I do not propose now to review or express any opinion of or concerning, but it is to the application of the rule made in this case by the justice presiding at the trial of the cause. The rulings upon this matter are happily so clearly expressed and positive in terms, that no reasonable doubt concerning the proposition involved in them can be entertained. If by possibility any doubt could have arisen concerning them, the opinion he has drawn in the case sets them at rest.

The case shows that "on the subject of damages the presiding justice instructed the jury as follows: If the plaintiff has proved his case so that he is entitled to recover some damages, the question arises how much. That is a question which you must determine, being guided by the rules of law as I shall state them to you. In the first place, the plaintiff is entitled to such damages as he has actually suffered, and in estimating the amount, you will not be limited to what he has lost in dollars and cents. In fact, there is no evidence that he has suffered pecuniarily to any extent. You are to consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering, occasioned by the assault, and the feeling of degradation that necessarily resulted from it. There are few men probably that would not rather suffer a severe pecuniary loss than a personal and insulting assault. Hence if one man should spit in another's face in public, the jury would not be limited to ten cents damages on the ground that that sum would pay him for washing his face. A man's feelings, self-respect, and pride of character are as much under the protection of the law in such case as his property. And in estimating the damages for a personal assault attended with opprobrious and insulting language, the jury have a

right to consider the character and standing of the person assaulted, and the injury to his feelings, as well as the injury to his person, and then to give him such damages as, in view of all the circumstances, will be a just compensation for the injury actually suffered. This amount must be left, in every case, to the sound judgment and discretion of the jury."

Pausing at this point of the instructions, we shall notice that they embrace all the elements of compensatory damages recognized by courts of the most liberal views in these matters; and embrace elements which many courts denominate exemplary; and they are stated in so clear and concise a manner, and accompanied by so forcible an illustration, that had they stopped at this point the plaintiff might well have expected his verdict to cover the utmost his injuries would warrant. With the rule thus far I am content, although carrying it to the very verge and utmost limit of precedent. I call attention to it at this point to show that the jury had, at this time, instructions which covered all the tangible and intangible elements of assessment in such cases. Instructions which if adhered to and followed by the jury restore him to the condition in which the assaulting party found him, so far as money can do it. Under these instructions he is to be made whole in the eyes of the law, just as if the injury had not been done; in every particular compensated so far as money can do it; what is done beyond is not to compensate, it is not to meet mere speculative or intangible injuries, is not to give him anything due him, for he has his full desert. These elements reach everything he, as an individual, can claim by reason of any infringement of his rights.

These instructions having been given, so full, clear, and liberal, the presiding judge proceeds to give the next element of damage, which has not for its basis any injury, invasion of right or privilege, discomfort, inconvenience, or indeed anything relating to the plaintiff, or anything in which he has any interest above that possessed by every other member of the community. It is not act or deed, word or menace,—these have all been adjusted; but it is mere motive, thought, interest, and secret desire. Being evil, morally

wrong, somebody must be punished for their existence, and the judge says:

"There is also another important rule of law bearing upon the question of damages. If the injury was wanton, malicious, committed in reckless and willful disregard of the rights of the injured party, the law allows the jury to give what is called punitory or exemplary damages. It blends the interests of the injured party with those of the public, and permits the jury not only to give damages sufficient to compensate the plaintiff, but also to punish the defendants. I feel it my duty, however, to say, that you ought to be very cautious in the application of this rule. The law does not require you to give exemplary damages in any case, and where the damages which the plaintiff is entitled to recover in order to compensate him for the injury he has actually suffered is sufficient to punish the defendants, and serve as a warning and example to others, the jury ought not to give more. But if they think it is not enough, then the law allows them to add such further sum as will make it enough for that purpose. But they should be careful in fixing the amount not to allow more than is just and reasonable, and not to allow their judgment to be swerved by their passions. Defendants' counsel requested the presiding judge to instruct the jury, that the plaintiff is not entitled to recover against the defendant company, any greater damages than he might against Jackson himself, for the same cause of action upon similar evidence. Upon which request the presiding judge stated to the jury: I decline to give you such instruction. I have endeavored to give you the correct rules by which the damages, if any, are to be assessed in this case; and I think you cannot rightfully be required to enter into a consideration of the damages which a party not now before the court, and has not therefore had an opportunity to be heard, ought to pay, and then measure the damages in this case which has been heard, by those which you think ought to be just in another which has not been heard; we will endeavor to decide this case right now, and when Jackson's case comes before us, if it ever does, we will endeavor to decide that right.

"Defendants' counsel further requested the presiding judge to instruct the jury, that if the jury find that the acts and words of Jackson were not directly nor impliedly authorized, nor ratified by the defendants, then the plaintiff is not in any event entitled to recover vindictive damages against the defendants, nor damages in the nature of smart-money, which request was not complied with, the presiding judge having already instructed the jury upon what state of facts the plaintiff would be entitled to such damages."

I have copied all the instructions "on the subject of damages;" it will be seen that these latter instructions are substantially that the jury having given full compensatory damages, may give others in their discretion to punish these defendants for the wanton, willful, and malicious act of their brakeman in assaulting a passenger, although they neither directly or impliedly authorized or ratified the act.

This proposition must be sustained, if at all, upon one of two grounds; either that it is competent to punish one man for the criminal intent of another, or that the malice of the brakeman in this case was that of the defendant corporation.

A brief notice of some of the authorities touching the liability of the master for the acts of his servant will, I think, show the ground of liability, the reason for the rule, and exhibit a marked distinction between the ordinary case of master and servant and the case at bar.

In Dane's Abridgment of American Law, vol. 2, chap. 59, art. 2, it is said: "The master is not liable for the willful, voluntary, or furious act of his servant." "If my servant distrain a horse lawfully by my order, and then use him, this conversion is his act, and trover lies against him; for my order extends only to distraining the horse, and not to using him; this is his own act."

"Nor is the master bound for the voluntary acts of his servants; for if he be bound, servants may ruin their masters by willful acts; nor are willful acts, wrongs authorized by their masters."

"If I order my servant to do what is lawful, and he does more, he only is liable; it is his own act, otherwise he might ruin me,

and in such case there can be no express or implied command from me for what he does beyond his orders; and whenever the question is how far the master is liable for his servant's acts, the material inquiry must be, how far he expressly or impliedly authorized it."

"The master is liable for the negligent act of his servant, but not for his willful wrong; is liable in trover; for which rule several reasons may be given: (1) A willful wrong is the servant's own act. (2) To allow him by his willful tortious act to bind his master and subject him to damages, would be to allow servants a power to ruin their masters. (3) In such cases there is no command from the master expressed or implied to do a willful wrong."

In Bacon's Abr., vol. 4, title Master and Servant, it is said: "The master must also answer for torts, and injuries done by his servant in the execution of his authority. But though a master is answerable for damages occasioned by the negligence or unskillfulness of his servant acting in the execution of his orders, yet he is not answerable in trespass for the willful act of his servant done in his absence, and without his direction or assent."

Chancellor Kent says: "The master is only answerable for the fraud of his servant while he is acting in his business, and not for fraudulent or tortious acts, or misconduct in those things which do not concern his duty to his master, and which when he commits, he steps out of the course of his service. But it was considered in *McManus* v. *Cricket*, 1 East, 106, to be a question of great concern and of much doubt and uncertainty, whether the master was answerable in damages for an injury willfully committed by his servant while in the performance of his master's business, without the direction or assent of the master. The court of K. B. went into an examination of all the authorities, and after much discussion and great consideration, with a view to put the question at rest, it was decided that the master was not liable in trespass for the willful act of his servant in driving his master's carriage against another, without his master's direction or assent. The court considered that when the servant quitted sight of the object for which he was employed, and without having in view his master's orders, pursued

the object which his own malice suggested, he no longer acted in pursuance of the authority given him, and it was deemed so far a willful abandonment of his master's business. This case has received the sanction of the supreme court of Massachusetts and New York, on the ground that there was no authority from the master express or implied, and the servant in that act was not in the employ-ment of his master."

Wright v. *Wilcox*, 19 Wendall, 343, Cowen, J., who gave the opinion of the court, says: "If the act was willful, the master is no more liable than if his servant had committed any other assault and battery. All the cases agree that a man is not liable for the willful mischief of his servant, though he be at the time in other respects engaged in the service of the former." After citing several cases he adds: "Why is a master chargeable for the act of his servant? Because what a man does by another he does by himself. The act is not within the scope of his agency." He says: "The authorities deny that when the servant willfully drives over the man, he is in his master's business. They held it a departure, and going into the servant's own independent business."

In *Richmond Turnpike Co.* v. *Vanderbilt* (1 Hill, 480), case of a collision of steamboats, the supreme court held that if the collision was willful on the part of the defendant's servant, the defendant was not liable, referring to *Wright* v. *Wilcox*. The case afterward went to the court of appeals (2 Com. 479) where the doctrine applied in the supreme court was sanctioned; and it was further held that the corporation was not liable, although the willful act producing the injury was authorized and sanctioned by the president and general agent thereof; because a general or special agent, when he commits or orders a willful trespass to be committed, acts without the scope of his authority.

In *Hibbard* v. *N. Y. & Erie R. R. Co.* (15 N. Y. 455), which was "an action against the corporation for ejecting a passenger from the cars, who, having once exhibited his ticket, refused so to do when again requested by the conductor." Brown, J., in giving his opinion says, speaking of a requested instruction concerning

damages, "the object of the request was, that the court should discriminate between those acts of the company's agent done in the execution of its directions, and those done in the excess of its instructions and without authority or approbation. This I think should have been done. The plaintiff may have been injured by the use of unnecessary force to effect what the company had a right to do. The conductor and those who aided him are not the company. They are its agents and servants, and, whatever tortious acts they commit by its direction, it is responsible for and no other. This is upon the principle that what one does by another he does by himself. For injuries resulting from the carelessness of the servant in the performance of his master's business the latter is liable. But for the willful acts of the servant the master is not responsible, because such willful acts are a departure from the master's business;" and cites the case of *Wright* v. *Wilcox*, and cases there cited.

In the same case Comstock, J., says: "If the conductor had no right to eject the plaintiff from the train after he had complied with the request and produced the ticket, then I do not see upon what principle the defendants can be made liable for the wrong. The regulation and instructions to the conductor, as we have said, were lawful, and they did not in their terms or construction profess to justify the trespass and eviction. The result is, the wrong was done without any authority, and, therefore, that those who actually did it are alone unanswerable." "If he mistook the authority conferred upon him both when he committed the trespass and when he was examined as a witness, it cannot alter the law or change the rights of the parties. His own mistake as to the extent of his powers cannot make the railroad company liable for acts not in fact authorized." These cases are all cited in a subsequent case. *Weed* v. *The Panama R. R. Co.*, 17 N. Y. 362.

The rule is thus stated in Story's Agency, § 456. "But although the principal is liable for the torts and negligence of his agents, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency.

For the principal is not liable for the torts or negligences of his agent in matters beyond the scope of the agency unless he has subsequently adopted them for his use or benefit. Hence it is that the principal is never liable for the unauthorized, the willful, or the malicious act or trespass of his agent."

Mr. Hilliard, in his work on Torts, says: "In general, a master is liable for the fault or negligence of his servant; but not for his willful wrong or trespass. The injury must arise in the course of the execution of some service lawful in itself, but negligently or unskillfully performed, and not be a wanton violation of law by the servant, although occupied about the business of his employer." Hilliard on Torts, c. 40.

In *Parsons* v. *Winchell*, 5 Cushing, 592, Metcalf, J., says: "But the act of a servant is not the act of a master even in legal intendment or effect unless the master personally directs or subsequently adopts it. In other cases, he is liable for the acts of his servant when liable at all, not as if the act were done by himself, but because the law makes him answerable therefor. He is liable, says Lord Kenyon, 'to make compensation for the damage consequential for his employing of an unskillful or negligent servant.'" (1 East, 108.)

Of this latter class of cases, Story says: "In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all the matters of the agency." (Story on Agency, § 452.)

In *Southwick* v. *Estes*, 7 Cushing, 385, Dewey, J., instructed the jury "that if the act of the servant were not done negligently but willfully with the intention of disregarding the directions of the master, he would not be responsible therefor." This instruction was held correct, and the case of *McManus* v. *Crickett* was cited by the court.

In *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Langley*, 21 Howard, 202, Mr. Justice Campbell in delivering the opinion of the court says, "the result of the cases is that for acts done by the agents of a corporation either *in contractu* or *in delicto* in the course

of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

In *Weed* v. *Panama R. R. Co.*, 17 N. Y. 362, this rule was invoked to relieve the defendants from the consequences of the willful act of the conductor in the detention of a train whereby a passenger was made sick and suffered permanent injury in her health.

Strong, J., in delivering the opinion of the court says: "The defendants insist that they are not liable for the willful act of the conductor followed by such a result; and they invoke, in support of their position, the rule, well sustained by principle and authority, that a master is not liable for a willful trespass of his servant." He then proceeds to say, "it is important, therefore, to inquire whether that rule extends to a case like the present, and for that purpose to consider the basis on which it is founded. The reason of the rule clearly appears by the cases in which it has been declared and applied." He then examines many of the cases where the rule has been stated and applied, and cites also Story on Agency, § 456, and then says: "All the cases on the subject, so far as I have observed, agree in regard to the principle of the rule, and also in limiting the rule to that principle. For acts of an agent within his authority, the principal is liable, but not for willful acts without his authority." (*Phil. & Read. R. R. Co.* v. *Derby*, 14 How. 468.) He then proceeds, in reference to the case then under consideration, to say: "In the light of this examination of the class of cases which has been considered, it cannot fail to be seen that there is an important difference between those cases and the one before the court. The former are cases of willful, unauthorized, wrongful acts by agents, unapproved by their principals, occasioning damage, but which do not involve nor work any omission or violation of duty by their principals to the persons injured; wrongs by the agents only with which the principals are not legally connected. In the present case, by means of the wrongful, willful detention by the conductor, the obligation assumed by the defendants, to carry the wife with proper speed to her destination, was broken. The real wrong to the wife in this case, and from which the damage pro-

ceeded, was the not carrying her in a reasonable time to Aspinwall as the defendants had undertaken to do, and this was a wrong of the defendants unless the law excused them for their delay on account of the misconduct of their agent." In the conclusion of his discussion he says, the rule of law, relied on by the defendants to sustain their position, is inapplicable to the case, and that it makes no difference whether the act was willful or negligent as to the liability of the defendants for a nonfulfillment of their contract. From an examination of these authorities, I think it will be found that the principal is liable for the act of his agent in three classes of cases:

I. Where the act is done by the previous command of the principal, or is subsequently ratified or adopted by him.

This command may appear from proof of specific directions, or implied from the circumstances of the case.

II. Where the agent negligently, unskillfully or otherwise improperly performs the duties pertaining to his employment.

III. Where the act of the agent has caused the breach of a contract, or prevented the performance of an obligation due from, and existing between, the principal and a third person.

The liability, in the first class of cases, rests solely upon the maxim, "*Qui facit per alium facit per se;*" and in no other cases is he liable as an actor, but in those cases where he has commanded the act or subsequently ratified it, which is regarded in law as a previous command.

The authorities, ancient and modern, are believed to be uniform upon this proposition, and wherever a liability attaches for an unauthorized act, it is founded upon some other reason.

In the second class the agent is held out as competent and fit to be trusted (by the principal), and he, in effect, warrants his fidelity and good conduct in all the matters of the agency; by reason of this, as Lord Kenyon says, he becomes liable "to make compensation for the damage consequential for his employing of an unskillful or negligent servant." As to whether this warranty covers the willful tortious acts of the agent while engaged in and about the

master's business, the authorities do not all agree. Some hold that as soon as the act becomes a willful trespass, the master is no longer liable; others hold that for acts done in the course of his employment the master is responsible whatever may be the *animus* of the actor. A review of the authorities, touching this question, will be found in the case of *Evansville & Crawfordsville R. R. Co.* v. *Baum*, 26 Ind.

The liability, in the third class of cases, rests not upon the lawfulness or unlawfulness of the act done by the agent, but as grounded upon the failure of the principal to perform a contract or fulfill an obligation with the party injured. In this class of cases it matters not whether the act be a "willful trespass" or not; whether it was done in the course of the employment of the servant is immaterial; if the act produces the breach of the contract, or causes a failure to fulfill the existing obligation, the liability to answer attaches. The gravamen of the charge is not that the agent has done this or that act, but that the principal has not fulfilled his agreement.

That the case at bar comes within this class of cases I think there can be no doubt, and the liability of the defendants is well placed upon those grounds, by Mr. Justice Walton, and could be sustained upon no other.

In the light of these authorities and decisions, ancient and modern, emanating from courts of the highest jurisdiction, character, and ability, what is the true rule of damages in the case at bar? Or, putting the question in a more pertinent form, were the defendants liable to punitory damages, such as "is sufficient to punish the defendants and serve as a warning and example to others."

If the act of Jackson was a willful, wanton, and malicious trespass upon his part, and was neither directly or impliedly authorized or ratified by the defendants, the act was neither in fact or legal intendment the act of the defendants. This is quite clear from reason and authority. Although it may be one which devolved upon them a liability, it is in no sense their act; so that, if ordinarily the malice of the acting agent was so inseparably connected with the

act that it would attach to the principal, *nolens volens*, in those cases where, by legal intendment, it was his, the principal's act, in this case it would not, it being neither in act or legal intendment the act of the defendants.

The requested instruction clearly presented the proposition that unless the act was authorized directly or impliedly, or subsequently ratified by the defendants, they could not be chargeable with the motive and intent of the actor. This was refused and the rule left, that, regardless of authorization or ratification, they might be punished for the willful, wanton, and malicious acts of Jackson.

The ruling, it is apparent, extends to cases not within the first class, and the result of placing it in either of the other classes is to punish one for the malice of another. To relieve the case from this difficulty an effort is made to make corporations an exception to the rule, although all the authorities, whether found in elementary treatises or judicial decisions, place them upon the same footing. The idea put forward seems to be, that the servant is the corporation. In order, however, that the position may certainly stand as it is made, and the argument proceed upon no erroneous deductions of mine, I quote: "A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants, and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands, and those minds and hands are its minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation is 'sheer nonsense,' and only tends to confuse the mind and confound the judgment."

In relation to this proposition one inquiry may be made, viz.: Have these servants no "minds," no "hands," and no "schemes" except those of the corporation? Are all their schemes, all their acts, and all the emanations of their minds those of the corpora-

tion? If they have any other, shall the corporation be punished for them?

Does not the argument attach a responsibility to the corporation for all the acts of a person in its employ? If it does not, where is the dividing line? It is all, or part. What part? This is the question which law-writers and judges have been answering for many years, and whether, in the estimation of any, it be or not "sheer nonsense," they have distinguished between those acts of the agent for which the corporation is, and those for which it is not liable.

What its "voice" commands, what its "hands" do, and the "schemes" which it executes, it should be and is held responsible for, whether done by direct or implied authority or subsequently ratified by them; and when they do this in wanton and willful disregard of the rights of others, they may, under the law as now administered, be punished by punitive damages.

But when the "voice" which speaks, and the "hand" which executes, is not that of the principal, however wanton, willful, and malicious it may be, the "stones," even, "cry out" against inflicting upon him a punishment therefor, and the more wanton and malicious the act, the more horrible is the doctrine.

Corporations are but aggregated individuals acting through the agency of man. They may consist of a single individual, or more, and they are no more ideal beings when thus acting than the individual thus acting. For certain acts the individual, though not manually engaged in it, is held responsible. For the same acts the body of individuals, denominated a corporation, are held responsible. The principal and agent, in both cases, are separate and independant beings. Agent presuppose a principal,—somebody to act for. Somebody whose orders they are to execute, and somebody for whom they are to perform service; somebody who is answerable to them, and who may be answerable for the acts done under their direction. Mr. Justice Brown, in *Hibbard* v. *N. Y. & Erie R. R. Co.*, before cited, says, "the conductor and those who aided him are not the company, they are its agents and servants." If the employee and servant is the corporation, in fact or legal intendment,

it does not act through agents. Its acts are all the direct acts of principals without the intervention of any other power, and it carries us back to a responsibility for all the acts of a person employed by a corporation, whether those acts have any relation to his particular employment or not, a proposition too absurd and monstrous in its results to be entertained at all. Mr. Justice Campbell, in giving the opinion of the supreme court of the United States, in the case before cited (21 How. 202), says, the result of the cases is that for acts done in the course of its business and of their employment "the corporation is responsible, as an individual is responsible, under similar circumstances."

I, therefore, come to the conclusion that if liable at all to be punished for the malice of Jackson, it must be upon some other ground than their legal identity with him, and that in no sense can his malice be said to be their malice; and there seems to be strong indications in the charge of the presiding judge, that he, at that time, placed it upon no such grounds. The defendants, in view of this assumption by the plaintiff, "requested the presiding judge to instruct the jury that the plaintiff is not entitled to recover against the defendant company any greater damages than he might recover against Jackson himself, for the same cause of action upon similar evidence." This instruction the court declined to give, and remarked to the jury, "I think you cannot rightfully be required to enter into a consideration of the damages which a party, not now before the court, and has not, therefore, had an opportunity to be heard, ought to pay, and then measure the damages in this case which has been heard by those which you think might be just in another case which has not been heard. We will endeavor to decide this case right now, and when Jackson's case comes before us, if it ever does, we will endeavor to decide that right."

I think the argument is very strong from this remark, that it was not the malice and ill-will of Jackson that was designed to be punished, for he says his case has not been heard. The court say, substantially, we know not what excuses or justification he may offer when heard, if ever, "and when his case comes before us, if ever

it does, we will endeavor to decide that right." One would suppose that it was some "wanton, malicious act, committed in reckless and willful disregard of the rights of the injured party," by these defendants that was to receive such punishment as should "serve a warning and example to others," and not such an act done by Jackson. The argument would seem to proceed and say Jackson, for his act, may deserve one punishment, and those defendants, for their acts, may deserve another; and I cannot well forbear the inquiry here, if there is not here some evidence of an "attempt to distinguish between the guilt of the servant, and the guilt of the corporation; or the malice of the servant, and the malice of the corporation; or the punishment of the servant, and the punishment of the corporation?" Was it here that "sheer nonsense" was enacted, and "the mind confused," and the "judgment confounded."

If it was the malicious act of the defendants that was to be punished, the enormity of Jackson's wrong had indeed nothing to do with it. If it was the malicious wrong of Jackson that was to be punished, why should a party, innocent of all wrong in the matter, be punished more than the wrong-doer himself. If he was the corporation, why would not all the acts of extenuation and justification surrounding him be also the acts of the corporation, and be proper elements to be considered in graduating or fixing the penalty? How could his case come before us, if he was the corporation? Would it be to be punished for the act of the corporation?

If we hold both guilty and both liable, it must be founded upon the idea of two actors, and that the employee is not only the corporation but somebody else, and the nonentity of agent becomes itself a nonentity, and instead of a mere imaginary thing which swallows up and extinguishes all the relations of principal and agent, and renders any attempt to distinguish between them "sheer nonsense," we do have two distinct, independent, accountable subjects, susceptible of being brought before the courts to answer and be punished, and we are not left to the ideal action of punishing an ideal existence. Again; if the actor is brought before the court and punished, would he be punished for the act of the corporation or

his own act? for the malice of the corporation, or his own malice? If imprisoned, should we say the corporation was imprisoned?

If not, and he is (as undoubtedly he may be) called to answer for an assault, and punished for an assault, when we come to fix the punishment, do we not distinguish between his guilt and the guilt of the corporation, his malice and the malice of the corporation? And when the rule is required that we punish him in the same manner and to the same extent as the corporation, should we not reply very much as did the presiding judge at the trial? I think there can be no two opinions about the matter, and that there is manifestly a distinction between the two, and that there are two to distinguish between, and that when the act is authorized by any previous command or subsequent adoption, it is not, and cannot in the nature of things be made the act of another than the actor. Laws may be made making others responsible therefor, but it is the act of him who does it, and not of him who neither does or authorizes it; and no amount of judicial legislation or refinement can make it so; as before remarked, it is not possible in the nature of things.

Again; if this servant is the corporation, what becomes of the law regulating the liability of the principal for an injury received by an employee while in the business of the corporation. It is held, that if the injury was produced by the carelessness or negligence of the master or corporation, they must respond in damages; but if produced by the act of a fellow-servant, they are not liable. Is not here a distinction recognized between the guilt of the servant and the guilt of the corporation? Is not here a manifest distinction noted and acted upon between the servant and corporation? If the servant is the corporation, it is the act of the corporation when done by the fellow-servant. But these cases say, no. You assume the risks arising from the acts of your fellow-servants, but not the acts of your principal, the corporation; when the corporation is negligent you may recover, but when it is the servant, you cannot. Again, I ask, how can this be, if the servant is the corporation? This new idea, it appears to me, has in it more of ingenuity than logic

or substance; it is altogether ideal, and if it finds place in the law, it will be among its fictions.

The learned judge then adds, "and it might as well not be applied to them at all, as to limit its application to cases where the servant is directly and specially directed by the corporation to maltreat and insult a passenger, or to cases where such an act is directly and specifically ratified; for no such cases will ever occur." The instruction requested and refused, used the term directly or "impliedly," and with this sentence so amended, I have simply to say, that if no such case ever does occur, there is no occasion, right, or propriety in inflicting the punishment. If the act is neither directly or impliedly authorized or ratified, there is in it no wantoness, no malice, and no ill-will toward the person injured, and no public wrong by them done to be redressed or atoned for. Repentance with them is absolutely impossible. The argument is simply this; if we do not punish you when you do not directly or impliedly authorize or adopt a wrong, we shall never have an opportunity, for you never will thus authorize or adopt one. The argument is clearly stated by the learned judge, and I leave it as he left it, remarking, that if the end to be attained is the punishment of railroad corporations whether guilty or innocent, the rule requiring them first to be guilty of wrong had better be abolished.

That the learned judge meant to state his argument thus, is, I think, apparent from the remark which immediately follows: "that if those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured."

In *Evansville & Crawfordsville R. R. Co.* v. *Baum*, 26 Indiana, 70, the court say: "Nor will sound policy maintain the application of a rule to railways or corporations on this subject, which shall not be alike applied to others, as has been intimated in some quarters. The suggestion is not fit to be made, much less sanctioned, in any tribunal pretending to administer justice impartially."

In another case it is said, "The law lays down the same rule for

all, and we cannot make a different rule in the case of a servant of a railway company and an ordinary tradesman;" "and, therefore, treating Phillips as the servant, the company are not liable for his tortious act any more than other individuals would be." *Roe* v. *Birkenhead &c. R. R. Co.*, 7 Eng. Law and Eq., 547.

With the criticism (if it be entitled to that appellation) of the opinion upon railroads and their management I have, in the position I now occupy, no occasion to deal. My duty I consider performed, and best performed, when I have endeavored to ascertain the law as it is, and apply it to causes as they are presented, rather than in making rules for any real or supposed grievances. The law-making power is ample to afford the necessary means of redress where none now exists; and did these great and growing evils really exist, we might reasonably expect to find the law-makers, the people, those who must suffer by their existence, exercising their corrective powers.

If the evil is not sufficient to induce the sufferers to provide a remedy, it will hardly justify the judiciary in leaving the clear path of the duty of expounding the law, and assuming the powers and responsibilities of law-makers. Perhaps there has been no one thing that has introduced into the law so much confusion and embarrassment as the engrafting policy of courts; adding here a little and there a little, till the original is covered with these judicial excrescences; and not unfrequently the jewel is lost in its surroundings of dross.

The plaintiff, in the printed brief of his argument presented in this case, says, "If, therefore, an individual master, perhaps personally innocent of positive evil intent is liable to punishment by exemplary damages for the malice of his servant, for a much stronger reason ought a soulless corporation to be responsible for the wicked and wanton acts of its sole representative."

In my judgment, if the premise were right in this proposition, there is no reason why the conclusion is not right. But I know of no case where the master, innocent of all wrong upon his own part, has been held to be liable to punishment for the malice of his ser-

vant. It is only where he has been a participator in some manner in the wantonness and malice displayed in the act, and it is his own wanton and malicious act that is then punished. The plaintiff says further: "Besides, if corporations cannot be reached in exemplary damages for the malice of their servants, they escape entirely, and thus stand infinitely better than citizens who are liable in punitory damages, not only for their own personal acts, which latter it is obvious a corporation can never be guilty of in the strict sense." If citizens were liable in punitory damages for the malice of their servants, in nowise participated in by themselves, the conclusion that corporations would stand better than citizens, if they escaped a punishment for the malice of their servants, is irresistible; but again I say, I know of no law, authority, or reason for holding an innocent citizen to punishment for the malice of his servant or agent. It is quite as much as one can reconcile with just accountability to hold him to compensate for injuries maliciously inflicted in the course of his employment, without adding punishment.

The theory of punitive damages is the infliction of a punishment for an offense committed. It presupposes the existence of a moral wrong, an infraction of the moral code; a wrong in which the community has some interest in the redress, and in securing immunity from in the future. It presupposes also an offender, and designs to punish that offender. To punish one not an offender is against the whole theory, policy, and practice of the law and its administrators. "It is better that ten guilty men should escape than one innocent man should suffer." Before the smallest fine can be inflicted, evidence, leaving no reasonable doubt of the guilt of the party to be thus punished, must be adduced. Evidence that he possessed the evil intent, wicked and depraved spirit; that it was he that was regardless of social duty. The idea of punishing one who is not *particeps criminis* in the wrong done is so entirely devoid of the first principles and fundamental elements of law, that it can never find place among the rules of action in an intelligent and virtuous community. There is no parallel, for it is in the administration of the law, and courts of the highest repute have, whenever

the question has arisen, declared it unsound in principle and inequitable in practice.

In *Hagan* v. *Prov. & Worcester Railroad*, 3 R. I. 188, Broughton, J., in delivering the opinion of the court says:

"In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness, or wickedness on the part of the party at fault as amounted to criminality, which for the good of society and security to the individual ought to be punished. If, in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as a punishment, and teach the lesson of caution to prevent repetition of such criminality, yet we do not see how such damages can be allowed, when a principal is prosecuted for the tortious act of a servant, unless there is proof in the case to implicate the principal, and make him *particeps criminis* of his agent's act. No man shall be punished for that of which he is not guilty. Cases may arise in which the principal is deeply implicated in the servant's guilt or fault,—cases in which the conduct of the principal is such as to amount to a ratification. In all such cases, the principal is *particeps criminis*, if not the principal offender; and whatever damages might properly be visited upon him who commits the act, might be very properly inflicted upon him who thus criminally participates in it. But where the proof does not implicate the principal, and however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrong of a person acting as his servant."

In *Railroad* v. *Finney*, 10 Wisconsin, 388, which was a case for putting a passenger off the cars before reaching the end of the route to which his ticket entitled him, the court below instructed the jury that "in this case, if you find the complaint sustained by evidence, you may give such damages as shall compensate the plain-

tiff for his loss by the act of the defendant, and also such exemplary damages as you may find proper under the circumstances." The defendants requested an instruction, "that they should give the plaintiff such damages only as would compensate him for his loss by reason of putting off the cars; that they could not give vindictive or punitory damages, called smart-money." This instruction was refused. The court, in giving their opinion, say: "The judge improperly refused to instruct the jury as requested by defendants' counsel, that the plaintiff was only entitled to recover such sum as would compensate him for his actual loss by being put off the cars, and that he was not entitled to vindictive damages or smart-money. If it be admitted that the action of the conductor in expelling the plaintiff from the cars was willful and malicious, or so grossly negligent, oppressive, or insulting as to bring the case within the rule authorizing exemplary damages, if the suit had been brought against him; yet there was not one word of testimony offered showing, or tending to show, that such conduct on his part was either previously directed, or subsequently ratified or adopted by the company; although they may be liable in this action to indemnify the plaintiff for the actual loss or damage which he sustained by reason of the misconduct of the conductor, because it occasioned a breach of their duty or obligation to carry him from Madison to Edgerton. Still it does not follow that they may be visited with damages by way of punishment, without proof that they directed the act, or subsequently confirmed it. Defendants are not to be visited with damages by way of punishment, without proof that they directed the act to be done, or subsequently confirmed it. Such damages are given by way of punishing the malice or oppression, and are graduated by the intent of the party committing the wrong. But how can such damages be assessed against a principal with such intent? Surely they cannot be. But in an action against the principal for the act of the agent, how can the question of their assessment be properly submitted to the jury when there is no evidence connecting the principal with such intent on the part of the agent; clearly it cannot." The damages in this

case were $175, and the judgment of the court below was reversed.

Turner v. *The North Beach & Mission R. R. Co.*, 34 Cal. 594, was an action for unlawfully ejecting the plaintiff from a car by the conductor. The court below ruled, "that the injury, if committed, and if a willful one on the part of the defendants in their servant the conductor, and accompanied by malice or such acts as in their nature tended to show a purpose of resentment or ill-will, or a disposition to degrade the plaintiff, entitled her to what is called exemplary damages." After some comment, and citing Story's Agency, sec. 456; 19 Wend. 343; and 14 Howard, 486, before referred to, the court say, "Tested by these principles, it is obvious that in this case the defendant was not liable for any malicious and wanton conduct of the conductor. If liable at all, its liability must be confined to the actual damages which the plaintiff suffered. To render the defendant liable to punitive damages, it was incumbent on the plaintiff to show that the act complained of was done with the authority either express or implied of the defendant, or was subsequently adopted by the company." "If her expulsion resulted from the malice of the conductor, or was accompanied by violence or personal indignity, the conductor alone is responsible for such damages as she may be entitled to for this cause beyond the actual damages resulting from her exclusion from the car, unless as before stated the company expressly or tacitly participated in the malice and violent conduct of the conductor. In other words, if the act of the conductor was wholly unauthorized, the company is liable for the actual damage, and the conductor alone for the punitive damages, if any."

There is another case in the same volume, *Pleasants* v. *Same Defendants*, and decided upon the same grounds.

In *Clark* v. *Newson*, 1 Exch. 131; and 1 Welsby, Hurlstone & Gordon (a case of joint trespass by two), Pollock, Ch. Baron, said, "I think it would be very wrong to make the malignant motive of one party a ground of aggravation of damages against the other party who were altogether free from any improper motive.

In such case the plaintiff ought to select the party against whom he means to get aggravated damages."

In relation to the views thus expressed, it is said by Mr. Justice Walton, in his opinion, that, "In none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty. And what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish." Waiving, for the present, the question of fact as to whether they were or not simply cases of mistaken duty, we find in each of them the question of punitive damages legitimately and clearly raised and discussed, and the reasoning, such as it is, is before the profession. The cases are not cited as mere authority by reason of their being decided cases by courts of competent jurisdiction, but because the reasoning is believed to support the decision. If the reasoning is bad, fallacious, inconclusive, some would adopt the plan of exhibiting these facts by a course of reasoning of their own, rather than by promulgating a general proposition that it is unsafe to rely upon their reasoning. If the reasoning is sound and applicable to case at bar, it does not matter that it was, or was not necessarily called out in the case into which it has been introduced, and it requires some other answer than mere criticism upon course of proceeding by the judges in those cases.

That the gentlemen, composing the several courts alluded to, supposed the cases called for the decisions and reasonings they made, cannot well be doubted, and an examination of the cases as reported in the printed volumes of the reports referred to, will, I think, leave the reader in no doubt concerning that question.

There are some other cases to be found in the books not referred to on the defendant's brief to which I will advert as indicating the views of some of the courts in other States.

Akerman v. *Erie Railway Co.*, 32 N. J. 254, was an action to

recover damages for injuries sustained while traveling in their cars by reason of the carelessness and disobedience of the employees of the road. The court say: "It appeared on trial that the defendants had adopted all needful rules and regulations for the running of their trains, and had employed competent persons as tender of the switch at which the accident occurred. No care or caution, required for the safety of the passengers, had been omitted by the company. Through the carelessness and disobedience of their agents the accident happened." "In fact, the only fault or negligence complained of was that of the employees of the company. Where a railroad company adopts all rules and regulations needful for the safety of passengers, and employ competent agents, whose duty it is to see that these rules and regulations are observed, I do not think that the company, in case of injury to the passengers happening by reason of the failure of the agent to perform his duty, can be held liable for punitive damages. If, however, the company, as such, is in fault, a different rule applies. The company, for its own carelessness, may be justly held liable for smart-money. This rule does not prevail where the carelessness is only that of a subordinate agent. There is no justice in punishing the company after it has done all in its power to prevent an injury. The agent, if guilty of negligence, may, in certain cases, be proceeded against by indictment. I cannot yield to the argument so earnestly urged by the counsel of the plaintiff, that by construction of law the company is guilty of gross negligence whenever its agent is, and is, therefore, to be treated the same as if through its own negligence the injury happened. I think the verdict was against the charge of the court in that it is, to some extent at least, for punitive damages. Full compensation to the plaintiff for all real loss, present and prospective, was the measure of damages."

Porter v. *Same Defendants*, argued at the same time, was determined upon the rules announced in this case.

These cases well indicate the views of the court in New Jersey. *McKeon* v. *Citizens Railway Co.*, 42 Misso. 79, was an action for an injury done to a passenger. The court, in giving their opinion, say:

"If the conduct of this driver was willful and malicious with intent to injure the plaintiff, he might be liable to indictment for assault with intent to kill, or some other criminal offense; but his employer was not responsible for his crimes, nor liable for his acts of willful and malicious trespass. The company was answerable only for his negligence, or his incapacity, or unskillfulness in the performance of the duties assigned to him. In such cases we have no hesitation in saying, that punitory damages, or any damages beyond a full compensation for the injury sustained, cannot be allowed."

Louisville & Portland R. R. Co. v. *Smith*, 2 Duval, 556 (Kentucky Reports), was a case where the evidence tended to show that the car of the plaintiffs was upset by the carelessness of their driver, and defendant injured thereby. The instruction was, "that if the car was thrown from the track by the fast and careless driving of the defendants' (now plaintiffs') agent, they should find for plaintiff (now defendant), and that the jury are not necessarily restricted to actual damages, but may, in their discretion, award such exemplary damages as they deem just and proper in view of all the facts in the case." The court say, the facts did not authorize a punishment of the defendants, and the court below should have restricted them to compensatory damages, and for this reason the judgment was reversed.

In the case of *Hill* v. *New Orleans Opelousas R. R. Co.*, 11 Louisiana, 292, the court used the following language: "In actions of this kind, it is not within the province of the jury, although negligence is clearly proven, to give vindictive damages, as is sometimes allowed in case of willful and malicious injuries. The company, in such cases, is not to be punished for the negligence of its agents as a crime."

Keen v. *Lezardie*, vol. 8, cases of the supreme court of Louisiana, page 26, was an action brought to recover damages of defendants, ship-owners, for injuries to plaintiff's wife, at the hands of a master of a vessel on which she was a passenger. The evidence showed gross neglect and wanton outrage on the part of the master against the lady. In delivering the opinion of the court, the judge

said, "It is true, juries sometimes give what is called smart-money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrong-doer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is liable for the acts of his factor or agent."

In *Jefferson R. R. Co.* v. *Rogers*, 28 Indiana, 1, it is said: "Whatever rule of damages would apply in a suit against a natural person, ought to apply in a suit against a corporation. Any discrimination in that regard would shock the public sense of impartial justice, and would be an unjust innovation. The instructions, governing subordinate employees and agents, may be devised in such utter disregard of the rights of others, that obedience to them will result in palpable wrong to individuals; whether it was so here was a question for the jury," thus putting the question whether the acts are done in obedience to instructions that the execution of would result in palpable wrong.

Detroit Daily Post Company v. *McArthur*, 16 Mich. 447, was an action by McArthur for publishing an alleged libel. The court say: "The employment of competent editors, the supervision, by proper persons, of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blame-worthiness of a publisher to a minimum for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling, beyond what is inevitable from the nature of the libel. And no amount of express malice in his employees should aggravate damages against him, when he has thus purged himself from blame." "While, therefore, in the present case the reporters were guilty of carelessness in receiving hearsay talk of legal charges, which could only be lawfully published in accordance with the documentary facts, and while there could be no justification for publishing outside scandal against an individual from any source whatever, yet the defendants were only responsible

beyond the damages recoverable under any circumstances, for such a libel to the extent of their own conduct in the case, or want of care used in guarding their columns against the insertion of such articles."

In the case of *R. R. Co.* v. *Baum*, before cited, the court say: "But when the act is unnecessary to the performance of the master's service, and not really intended for that purpose, but is done by the servant to gratify his own malice, though, under pretense of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment, and the master is not, therefore, liable." "Under these circumstances, last enumerated, it is not easy to perceive, in the nature of things, any just reason for holding the master responsible. It will not do to say he shall answer in damages, because by employing the servant he gives him opportunity to maltreat those with whom he comes in contact in discharging his duties, that reason would hold the shop-keeper for any outrage committed by his clerk upon a customer; the merchant for the like conduct of his journeyman; and, indeed, it would be equally applicable to almost every department of business in the conduct of which it is necessary or convenient to employ assistants to deal with the public. Even the inn-keeper, whose cook feloniously mingles poison with the food of a guest, must then respond in damages."

In *Kleen* v. *Central Pacific R. R. Co.*, 37 Cal. 400, the court say: "As to the general rule upon that subject there can be no doubt. If the act of the conductor, in pulling the plaintiff off the cars was a wanton and malicious act, committed out of the course of his agency, the defendant cannot be held responsible for the manner in which he did it, unless, however, the defendant expressly authorized the act."

In the case of the "Amiable Nancy," 3 Wheaton, which was a suit for a marine trespass, Mr. Justice Story, in delivering the opinion of the court, among other things says: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage without any just provocation or excuse; under

such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoers, it might be proper to go yet further and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet from the nature of the service they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages.

In *Wardrobe* v. *California Stage Co.*, 7 Cal. 118, the jury found for actual and exemplary damages in the sum of $2,500. The chief justice, in delivering the opinion of the court, quoted with approval the opinion of Judge Story in the "Amiable Nancy," and said, "when it appears that the coach at the time of the accident was driven by a servant or agent of the owner, the rule in such case is, that the principal is liable only for simple negligence, and that exemplary damages cannot be enforced against him."

In the case of *Moody* v. *McDonald*, 4 Cal. 297, the facts were similar to the above, and in the action brought against the principal for tortious acts of his servant, where the jury gave $2,500 damages, and $2,500 smart-money, the court disallowed the verdict for the smart-money, holding the principal liable only for compensatory damages.

In *McLellan* v. *Cumberland Bank*, 24 Maine, 566, the court say: "The first question obviously presented by the case is, can a corporation aggregate be chargeable with malice? Such corporations have

been held answerable in trover; and might, perhaps, in other actions sounding in tort for all acts done by their officers under circumstances implying authority to do them. But it may well be doubted if such corporations can be implicated by the acts of their servants in transactions in which malice would be necessary to be found in order to the sustaining an action against them therefor."

Two cases are cited by Mr. Justice Walton as sustaining the rulings of the presiding judge; one in New Hampshire, and one in Mississippi.

In the case in New Hampshire (*Hopkins* v. *The Atlantic & St. Lawrence R. R. Co.*, 36 N. H. 1) the ruling complained of was "that if the jury should find the defendants guilty of gross negligence at the time of the collision, and the plaintiff's injury was occasioned by such negligence, they might in their discretion give exemplary damages."

"To this instruction two objections are made:

1. That it is not a case for exemplary damages, because the negligence, which is the foundation of the suit, was the negligence of the defendant's servants;

2. Because the facts of the case disclose no fraud, malice, violence, cruelty, or the like, nor any turpitude or moral wrong."

Upon the last point, the court hold that "gross carelessness in such case implies a heedless disregard for human life, and for the safety of passengers who intrust themselves to the care of the road, which brings the case very strongly within the rule that the wrong complained of, to warrant exemplary damages, must have something of a criminal character."

In relation to the first objection the court say: "The defendants are a corporation, and can act in no way but by their officers, agents, and servants; and when their officers, agents, or servants act within the scope of their authority and employment, it is the act of the corporation, and their negligence is the negligence of the corporation;" and they cite Angell & Ames on Corp. 386, and *Chestnut Hill Turnpike* v. *Rutter*, 4 S. & R. 6.

It will be noticed that the learned chief justice, who drew this

opinion, makes only such acts of the agent, as are authorized by the corporation, their acts. It is such as are within the scope of their authority as well as employment. He does not say that unauthorized acts by the agent become the acts of the principal. His proposition conforms to the rules which we have before deduced from the authorities. A recurrence to the authorities, cited by him, will show this. Section 386, Angell & Ames on Corp., which is cited, reads as follows: "Yet it is somewhat remarkable that the question whether an action of trespass would be against a corporation should not, until within a very late period, have been the subject of express judicial decision. In the case of *Maud* v. *Monmouthshire Canal Company* it was expressly decided by the English court of common pleas, in 1842, that trespass will lie against a corporation. The action was brought for breaking and entering locks on a canal, and seizing and carrying away barges and coal. The trespasses, it was proved, had been committed by an agent of the company, which was incorporated by an act of parliament, and the barges and coal, it appeared, had been seized for tolls claimed to be due them. The only question being whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of their authority. The court held, that when it is established that trover will lie against a corporation, there could be no reason why trespass should not also lie against them; that it was impossible to see any distinction between the two actions."

This section which is cited relates alone to the question whether or not trespass can be maintained when the act done was within the scope of their authority; that is the authority conferred by the corporation, and it is held, when the act is done by the authority of the corporation, it is the act of the corporation, and trespass will lie.

The next section, save one, which follows (388) says: "It is of importance, however, to be observed, that an action of trespass cannot be sustained against a private corporation for an act done by one of its agents unless done *communicato consilio*, or, in other words, unless the act has been directed, suffered, or ratified by the corporation. A corporation is liable for an injury done by one of its ser-

vants in the same manner and to the same extent only as a natural individual would be liable under like circumstances. The well-known rule of law is, that if the cause of an injury to a person be immediate, though it happens accidentally, the author of it is answerable in trespass as well as in case; but a master, whether a natural individual or an artificial one, is not liable for a willful act of trespass of his servant."

With these authorities before him we cannot well suppose he meant to include any unauthorized act of the agent. He was too good a lawyer to say that an act done against the master's orders and directions was the act of the master. Did these, however, leave us in doubt, what follows upon the same page of his opinion would seem to put the matter at rest, for he proceeds to say: "Corporations may be sued in trespass for the authorized acts of their servants; and if the trespass is committed by their authority, with circumstances of violence and outrage such as would authorize exemplary damages against an individual defendant, it is not easy to discover any ground for a different rule of damages against the corporation which the law charges with the consequences of the act as the responsible party. If a corporation like this is guilty of an act or default such as, in case of an individual, would subject him to exemplary damages, we think the same rule must be applied to the corporation."

This we understand to be in harmony with all the authorities, and comes within the first class of cases to which I have referred. The act is theirs, because done by their authority. Being theirs, they are held as would be an individual defendant. If unauthorized, it is not their act, although they may, upon other principles, be liable to compensate for the injury done.

The ground upon which exemplary damages is allowed is, that the trespass is committed by their authority "with such circumstances of violence and outrage as would authorize exemplary damages against an individual defendant. I regard the law, as stated by the chief justice, as directly sustaining the views that I present, viz.: that to be chargeable with the *animus* of the transaction, it

must be theirs by previous authority, direct or implied, or subsequently adopted or ratified by them. The instruction in the court below required the defendants to be guilty of gross negligence to subject them to exemplary damages; and the sum total of the decision was that this was right, and that if the act was done by the authority of the defendants, it was the act of the principal. What evidence there was, if any, that the defendants participated in the act which produced the injury, does not appear; nor does it appear that the jury found the defendants were guilty of gross carelessness. All the remarks of the chief justice are made upon the hypothetical case of an injury happening through the gross carelessness of the defendant corporation.

The case in Mississippi came before the court on a motion to set aside the verdict. The discussion in the opinion is upon the propriety and authority of the court to set aside verdicts on account of the amount of damages in those cases where there is no fixed rule of computation, and the authorities cited are almost all of them upon this point. There was no ruling excepted to, and no question of law presented. Upon the matter of punitive damages, referred to by Judge Walton in his opinion, they say: "The case is much stronger for the defendant in error, than were the facts in the case of *Heirn* v. *Mc Caughan and Wife*, 32 Miss. 18. The decision in that case was conclusive in this, as to the form of action as well as the right of the jury, in such cases, to protect the public, by punitive damages, against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

It will be perceived that this case, so far as any consideration of punitive damages was concerned, was regarded as settled by the case in the 32d Mississippi.

Looking at that case I find it was an action brought for an act done by a partner. Heirn with others were owners of a vessel. Grant, one of the owners, was the captain. The court say, by Hand, J., "There was testimony tending to show that the captain in charge of the boat, which was published to stop at Pascagoula at

the time specified, willfully and capriciously disregarded the obligation incurred by the publication, and that the failure occasioned great bodily exposure, and mental suffering and disappointment to the plaintiff (now defendants); these circumstances were properly submitted to the jury, to be considered by them, with the circumstances of excuse or extenuation relied upon by the defendants; and it was their province to determine whether there was such fraud or willful neglect of duty causing oppression to the plaintiffs, and under such circumstances of aggravation as to warrant exemplary damages. This was the substance of the rulings of the court upon this point, and we perceive no error in them."

This is the case which decided all that was said in the 36th Miss. about punitive damages, and was an action brought against several partners for the act of one of them. The value of this case, in support of the principle that a railroad corporation may be punished for the malice of an employee, cannot, I think, be considered great, especially when, in the case in the 36th, we find this remark: "It is not enough that, in the opinion of the court, the damages are too high. It may not, rightfully, substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury." Since the opinion in this case was drawn, and since writing this opinion, my attention has been directed by Mr. Justice Walton to the case of the *Baltimore & Ohio Railroad Company* v. *Blocher*, 27 Md. 277, as a case sustaining the ruling of the court in the case at bar.

Upon an examination of that case, it will be found that a difficulty arose between the conductor of train upon the appellant's road and appellee about his ticket; the one contending it had been surrendered to the conductor, and the other averring it had not, and to prevent being put off the train, the appellee paid his fare; it subsequently appeared that he was right, and properly surrendered his ticket when called upon so to do. He alleged that the conduct of the conductor was violent and insulting.

At the trial of the case, the appellants requested the court to instruct the jury as follows:

"7. If the jury believe the conductor caught the appellee violently, etc., by the collar and dragged him from his seat, while a passenger in the train, the appellee is not entitled to recover for the same in this action against the appellants, unless they believe the appellants authorized the act, and adopted and justified it since its committal."

"8. That if the jury believe the conductor wrongfully extorted from the appellee the fare from Martinsburg to Baltimore, after the appellee had surrendered his ticket, etc., the appellee was not entitled to recover vindictive or punitive damages from the appellants, unless they expressly or impliedly participated in the tortious act authorizing it before, or approving it after, it was committed."

Concerning these two requests, the court say: "The conductors and employees of the corporation represent them in the discharge of these functions, and being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission. *Vide* Redfield on Railways, 381, note 6, and authorities there cited. The court was, therefore, right in rejecting so much of the defendant's prayers, as limited their liability to such tortious acts of their agents as they had either personally authorized or subsequently approved."

The seventh and eighth prayers, requiring the plaintiff to prove either previous authority or subsequent approval of the acts of the conductor to render the defendant liable, were rejected for reasons before assigned" [those above copied]. "The prayer of the appellee claims compensation for injury to his feelings and degradation of character. The appellant's eighth prayer affirms he is not entitled to recover vindictive or punitory damages against the company, unless they expressly or impliedly participated in the tort, by authorizing it before, or approving it after. We have already declared our opinion on the latter branch of this proposition. This court, in the case of *Gaither* v. *Blowers*, 11 Md. Rep. 552, said, that where the injury was accompanied with force or malice, the injured party might recover exemplary damages. The action

being *vi et armis*, or in that character, the jury were authorized to give whatever damages the evidence showed the immediate consequence of the wrong warranted, and which necessarily resulted from the act complained of. 2 Greenl. Ev. sec. 89. *McNamara* v. *King*, 2 Gilman, 436. 2 Greenl. Ev. 254. *McTavish* v. *Carroll*, 13 Md. 439."

This is all that is said upon this question. I have quoted the requested instructions, and the remarks of the court upon them. The conclusion of the court, and the law of that case, is found in these words: "The action being *vi et armis*, or in that character, the jury were authorized to give whatever damages the evidence showed the immediate consequences of the wrong warranted, and which necessarily resulted from the act complained of."

A careful examination of that case will disclose the fact that the question of damage raised and decided, was whether the plaintiff had a right in such case to recover "for injury to his feelings, and degradation of character." This was the prayer of the appellee, and he asked no more, and no other instruction was given. These were treated as exemplary damages by the appellants, and they sought, by their request, to limit the damages to the actual physical and pecuniary injuries. An examination of the authorities cited by the court in their opinion will lead to the conclusion that they regarded that as the question, and considered such damages exemplary damages. They cite Mr. Greenleaf for the rule they lay down, and I hazard the opinion that Mr. Greenleaf never expected to be quoted as an authority for punitive damages in civil actions. (See his note to sec. 253, vol. 2 on Ev.) The case of *Gaither* v. *Blowers* referred to, goes no further than Mr. Greenleaf and his language, *totidem verbis*, is used as the authority for the doctrine advanced.

Mr. Greenleaf, in the note referred to, speaking of the term "exemplary damages," as used by the courts in a case he is reviewing, says: "From this and other expressions it may well be inferred, that by actual damages the court meant those which were susceptible of computation, and that by exemplary damages or

smart-money they intended those damages which were given to the plaintiff for the circumstances of aggravation attending the injury he had received, and going to enhance its amount, but which were left to the discretion of the jury, not being susceptible of any other rule."

The rulings, in the case at bar, covered all these intangible matters before reaching the point of punishing the defendant corporation. They had been told "to consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering occasioned by the assault, and the feeling of degradation that necessarily resulted from it." This was going as far as the court in Maryland went or was asked to go, and does not reach the ground of complaint in the case at bar. I find no evidence in it of a design to go beyond this; the rule was declared in plain terms to be such damages as "the evidence showed the immediate consequence of the wrong warranted, and which necessarily resulted from the act complained of." This certainly does not include damages by way of punishing the defendants. Such damages would not be the immediate consequence of the wrong, and necessarily resulting from it.

Some comment is made concerning the retention of Jackson in the defendant's employ. All that I find, in the report of the case concerning the matter, is a statement, made by the plaintiff in his testimony, that he had seen him several times since, in performance of duties upon the train.

So far as any question arises upon the rule of damages laid down in the instruction, it is quite apparent this is perfectly immaterial, and could be regarded, in any event, only as remote evidence of ratification. If he was retained in their employ, we do not know under what circumstances; possibly they were such as would have furnished to the mind of any reasonable man a perfect justification; sitting here, we must take the report as we find it. The opinion states that the jury undoubtedly regarded it as "a practical ratification and approval of his conduct." Could they have done so if they had been correctly instructed in the theory now advanced?

What was there to ratify? Yea, more, who was there to ratify? If the servant is the corporation, and the act of commission was the act of the corporation, was there anything to ratify? Was it not an original act of the corporation? Did they ratify their own act? If the act of commission was originally theirs, the act of retention was a subsequent act, having no relation to the first. Did that infringe any right of his? If it did, it was a new and substantive cause of complaint not embraced in this declaration. If, however, the theory which is now advanced is not only novel but unsound, and that previous command or subsequent approval was necessary to warrant the infliction of punishment, the matter was of vital importance, and the defendants should have had the advantage of the instruction. It is not quite right, I think, to now assume that the jury regarded it as a ratification. Possibly the gentlemen composing that jury were not quite prepared to find that the gentlemen composing the administrative and executive departments of that corporation were so lost to all that is decent and honorable among men, and so blind to their own interests that they would justify an act condemned by everybody. Giving full force to the encomiums bestowed in the opinion upon juries, might we not conclude that they would be more likely to infer, from the circumstances, that such amends had been made as honorable gentlemen would require, rather than convict them of an act that any prison convict would cry out against?

Will it do to shield the verdict with that which the jury were substantially told was immaterial?

I have not considered this case upon the motion, or upon any facts supposed to be proved by the evidence reported, nor have I considered the question whether, under the plaintiff's declaration, he can recover upon the grounds set forth in the opinion. I have only considered the rule advanced by the instructions. Under this rule a railroad corporation may exercise all possible care in the selection of servants, and strictly enjoin them from day to day against any irregularity of conduct; yet if one of them, unmindful of his duty, regardless of his master's interest, and bent on exercising some pri-

vate malice against a person who happened to be a traveler, assaults him, the corporation must not only make full compensation for all the injury, under the most liberal rules, but may be punished for an act they have used every endeavor within the reach of human power to prevent. One committed by another, against their wishes, interest, and positive commands; and it is to be such a punishment as will "serve as a warning and example to others."

If we were punishing the actor himself, we should consider the probable effect of a given punishment upon him; but when, for his offense, we punish another, how can we form any idea of the influence of a punishment he cannot feel. The master may discharge him from his employment, and he thus feel the punishment another suffers indirectly, and to that extent. It will be perceived, however, that this is the extent for all classes, kinds, and degrees of offense. It is the only channel through which he can be made to feel it. But suppose it were otherwise, is the punishment which is inflicted upon the innocent party any the less keen, unjust, and onerous?

Is that in any degree affected by the manner in which the offender receives the intelligence of its infliction upon another? Again; how shall the corporation avoid the constant recurrence of penalties for the offenses of others? Can they, when they select another servant, exercise any more care or be more watchful over him? Can they change the passsions of men? What is their fault if they have exercised all the care, wisdom, and prudence with which men are invested? Must they be punished for not being omnipotent?

If the idea and design of punishment is to restrain the offender and make the punishment serve as a warning to others, how can it better be done than by making it personal; inflicting it upon the offender? How can its influence upon others be made more restraining than by the reflection that they must personally suffer the same punishment if they offend? Is the reflection that others will suffer it, more potent with that class of individuals? Has the observation of men led to this conclusion? And if it has, have all the principles of reason, right, and justice yielded to it and made it right?

If the punishment, thus inflicted, is to serve as a warning to others, who must take warning? Evidently the innocent as well as guilty. The innocent are to be the greatest sufferers by reason of the offense, and punished alone directly. It is to serve as a warning to all innocent persons, that they may be punished for the offenses of others, after having fully compensated the injury done.

One other consideration I barely suggest. The liability in this case is based upon a contract; purely so. No liability could, under the proof, arise by the rules of law applicable to master and servant. Had the plaintiff been a stranger to the defendants, and had no claims upon them, except such as each citizen owes to the other, no liability of any kind would have attached to these defendants for the willful trespass of their servant. Not only would they be saved punishment, but compensation even. Now it being a case where no liability would attach, but for the contract, and the liability which does attach being for breach of contract, the rule in this case is not only punishing one for the act of another, but it is doing this in an action *ex contractu*, for this declaration must be construed to be such to meet the law of the opinion.

All consideration of the matter tends to show the fundamental error in holding an innocent party liable to punishment. In all these acts, done by the command of the principal (whether the authority appears by direct command or by fair implication from the proceedings of the party charged), there is propriety in punishing if the act be wrong and an infraction of the moral code; but in those cases where the act is unauthorized, and the principal is in no-wise connected with the *animus* of the actor, and becomes liable to compensate upon grounds other than that the act was done by his command, it appears to me that all punishment inflicted, or rather all suffering imposed under the name of punishment, is flagrant injustice; it is not punishment, for it has not its necessary antecedent, wrong: both reason and authority are opposed to it, and no case can be found, where the question has been presented and discussed, in which such doctrines are not denounced as unsound and unjust. In addition to the cases which I have cited, there is the pregnant

fact that no case can be found in Massachusetts or New York where it has ever had any sanction, even in the inferior courts; and no case can be found, that I am aware of, where any party has sought to establish any such rule by an appeal to the superior courts or courts of last resort in those States. Yet these States are a net-work of railroads, and questions of liability are constantly arising and being settled by the courts of those States. It appears to me the fact has some significance.

The rule established in this case is so important, and fraught with such results under the ordinary modes of administering law, that I have felt impelled to enter my dissent at length, and regret that the pressure of other duties have prevented me from giving a more extended examination of the authorities, and the compression of them and my own views into a narrower compass.

LOUISA L. TRAIP *vs.* LYDIA TRAIP.

A person who has conveyed land by deed of warranty may acquire a subsequent title thereto by disseisin.

DICKERSON, J. DOWER ON REPORT. The case finds that Robert W. Traip was married to the plaintiff May 13, 1846; that he was seized of the premises in fee-simple in his lifetime; that he occupied them during coverture, and was in possession of them at the time of his death, Nov. 10, 1864.

These facts are sufficient to entitle the plaintiff to dower in the premises, unless the defendant shows a paramount title. *Knight* v. *Mains*, 12 Me. 41.

The plaintiff's evidence further shows, that Robert W. Traip was in possession of the premises more than twenty years next preceding his death. A portion of the time he and his wife boarded in Boston during the winter, and, returning, passed the summer on

the premises. He paid the taxes, claimed and used the premises as his own, built another house there, pointed out the boundary between them and land of defendant, and declared his purpose never to sell the homestead. There is no evidence that the defendant, or any other person, in any way interfered with, or called in question his right of possession and control of the premises during the twenty years next preceding his death.

This evidence negatives the theory that he occupied in subordination to the title of another. Such open, notorious, exclusive, and adverse possession would have given him a perfect title to the premises, though he had never had any deed of them. *School District in Winthrop* v. *Benson*, 31 Me. 381.

A party may reacquire title to property that he has once parted with, by the same process through which he might have originally acquired it; and if Robert W. Traip conveyed the premises in question by deed to the defendant, and for twenty years thereafterwards held open, notorious, exclusive, and adverse possession of them, he reacquired title to them as effectually as though she had reconveyed them to him. The evidence in the case, as we have seen, establishes such possession. The only evidence to the contrary is that which comes from the defendant, who testifies that she heard him tell his wife that he was only a tenant, and did not own the place. If he ever made use of the language it was during one of those paroxysms of ill feeling which seems to have sprung up between him and his wife, and resulted in their separation. It would be unsafe to allow such a remark to rebut the force of a series of unequivocal acts and expressions, covering a period of more than twenty years.

It is unnecessary to decide whether the deed from Robert W. Traip to the defendant was ever delivered, as we are satisfied that, if it was delivered, the subsequent open, notorious, exclusive, and adverse possession of the premises by the grantor, for more than twenty years, revested the title in him. Having failed to assert her title to the premises, and acquiesced in the adverse possession of her alleged grantor for a period of more than twenty years after

the date of her deed, it is too late for the defendant to defeat the plaintiff's claim for dower, in the mode proposed.

Judgment for the plaintiff in dower.

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

Howard & Cleaves, for the plaintiff.

Hackett, for the defendant.

GEORGE W. GRIFFIN & another, in equity, *vs.* WILLIAM W. NITCHER & others.

Only a judgment debtor can seek relief in equity, on the ground that real estate, paid for by his debtor, has been fraudulently conveyed to the debtor's wife.

BILL IN EQUITY.

The case is sufficiently stated in the opinion.

E. B. Smith, for the complainant.

I. The bill proceeds upon the ground of fraud. It only prays for injunction as incidental to general relief.

II. Nitcher never had the title, therefore levy would be nugatory. *Russell* v. *Lewis*, 2 Pick. 508. *Corey* v. *Green*, 51 Maine, 114. *Low* v. *Marco*, 53 Maine, 45. *DeBrisay* v. *Hogan*, 53 Maine, 554. If prior to any levy, Mrs. Nitcher conveyed to an innocent purchaser, for value, the creditors would be remediless. *Hartshorn* v. *Eames*, 31 Maine, 93. *Blood* v. *Wood*, 1 Met. 528. *Howe* v. *Bishop*, 3 Met. 26.

All that is required is, that complainant show he has no legal remedy; if all legal remedy has been exhausted, evidence is received to show the necessity of a resort to equity. Allegations of bill show complainant has no legal remedy, equivalent to a return of

nulla bona. Neither judgment nor levy is required where land has been fraudulently conveyed to wife, and husband never had any title.

Complainant is only required to show a lien upon the estate in controversy. In England, New York, and elsewhere, lien is created only by docketing a judgment against the debtor,—hence the origin of the rule requiring judgment to be obtained. A similar lien is obtained here by attachment, which is sufficient to maintain the bill. *Dodge* v. *Griswold*, 8 N. H. 428. The lien is the essential element; the judgment is simply to show the lien. *Beck* v. *Burdett*, 9 Cowen, 732; *Reed* v. *Cross*, 14 Maine, 261.

III. The bill asks that Mrs. Nitcher be restrained from conveying to any one else, pending the suit at law. This relief could not be postponed till judgment and execution against Nitcher; and if the court take jurisdiction thus far, it will determine the merits of the bill. *Stevens* v. *Williams*, 12 N. H. 246.

Chisholm, for the respondents.

Appleton, C. J. The complainants, claiming to be creditors of William W. Nitcher, on 30th Oct., 1867, sued out a writ against him for the amount due, returnable at the January term, 1868, of this court for the county of York. On Nov. 1, 1867, they commenced this bill against William W. Nitcher, his wife, and other persons named therein.

The bill alleges that on Dec. 9, 1865, said Nitcher purchased of one Tibbetts certain real estate described therein, for the sum of $4500; that $2000 was paid by the money of Nitcher; that the land so purchased was conveyed to the wife of Nitcher; that the balance of the price was paid by the notes of Humphrey P. Kendrick, the brother of Mrs. Nitcher, secured by a mortgage given by her of the premises in controversy; that these transactions were fraudulent, and known to be so to all the parties thereto; and that the plaintiffs are creditors of said Nitcher, having a lien on said estate by virtue of their attachment.

The bill concludes with a prayer for an injunction "to prevent

any conveyance of said property, . . . and that the payment of the sum due the complainants may be decreed and secured out of said estate, and for an account of the sum due on the mortgage."

The complainants, when this bill was commenced, had only attempted to make an attachment on certain real estate never owned by their debtor. They had not even entered their action, and whether they ever would, was uncertain and contingent. The question, therefore, arises, whether they are in a condition to seek the equitable intervention of this court.

Courts of equity are not courts for the collection of debts. The remedies at common law must be exhausted before a party can ask their aid or assistance.

A judgment creditor, seeking to enforce his security against the debtor's equitable interest, must aver in his bill that he has previously sued out an *elegit*, and if he does not, the bill will be fatally defective. Story's Eq. Pl., § 257 a. In *Webster* v. *Clark*, 25 Maine, 313, and in *Webster* v. *Withey*, 25 Maine, 327, it was held that a creditor seeking relief by a bill in equity, on the ground that his debtor has made a fraudulent conveyance of his real estate to the defendant, must allege and show that he has acquired title to the estate by a levy upon it, and by a conveyance, or that an execution has been placed in the hands of an officer, who has made a return upon it that he could obtain no satisfaction, else he will not be entitled to relief, and his bill will be dismissed. When, as in the case at bar, the debtor never had the legal title, a levy is not required; but there must be a return of *nulla bona* to lay the foundation of a suit in equity. *Hartshorn* v. *Eames*, 31 Maine, 93. *Corey* v. *Greene*, 51 Maine, 115. *Dockray* v. *Mason*, 48 Maine, 178. In all the cases decided by this court, the complainant had obtained judgment and execution, and levied upon the estate in controversy, if the judgment debtor held the title, and if he did not, there had been a return of *nulla bona* upon the execution issued upon his judgment.

The counsel for the complainants relies upon *Dodge* v. *Griswold*, 8 N. H. 425, where it was held that a creditor, who has com-

menced a suit against a debtor, and caused real estate by him fraudulently conveyed to be attached thereon, might maintain a bill in equity to set aside such fraudulent conveyance as soon as his debtor has been defaulted in the suit against him. But in the case before us, the debtor Nitcher had not been defaulted, nor could it be known that he ever would be. This case, if it were to be regarded to be law of this State, would not avail the complainants. In giving the opinion of the court, Richardson, C. J., uses the following language. "In England and New York, where a judgment is a lien upon land, a creditor has a right to file a bill in equity to set aside fraudulent conveyances of land, as soon as he has obtained a judgment, which is a lien upon the property." . . . But "in every case, where the plaintiff in a bill in equity shows only a probability of a future title, upon an event that may never happen, he has no right to institute a suit assuming it." It assuredly might never happen that these plaintiffs would obtain judgment against their debtor by default or otherwise.

Bill dismissed. Costs for defendants.

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

BENNING HOOPER *vs.* JOSEPH HOBSON.

Log-owners are liable to the riparian proprietor for the actual damages caused by traveling upon the banks of a floatable stream for the purpose of propelling their logs.

ON REPORT.

TRESPASS *quare clausum* for breaking and entering the plaintiff's close in Biddeford, trampling down the grass, breaking down a bridge, driving logs in and upon the stream of water running through the plaintiff's close, and breaking down and injuring the banks of said stream.

It appeared from the evidence that the defendant, in the spring of 1868, turned into and drove down "Swan Pond Brook," so called, about a million feet of logs; that the stream averaged from two to six feet in depth, and from six to fifteen feet in width; that the defendant had thirty men at work driving his logs, who propelled them by walking on the banks; that frequently logs were rolled in from the banks with handspikes, thereby punching the soil with holes.

There was much testimony as to the capacity of the stream for floating logs, and the necessity of going upon the banks for the purpose of propelling them along where there was not much current.

There was also testimony tending to show that the damage to the plaintiff was twenty-five dollars.

The case was taken from the jury and reported to the full court, who were to decide whether the defendant had a right to drive the stream in the manner described, using the banks when necessary for that purpose.

Wedgwood & Stone for the plaintiff.

Chisholm, for the defendant, contended that Swan Pond Brook is a floatable stream, and a public highway. *Brown* v. *Chadbourne*, 31 Maine, 21. *Treat* v. *Lord*, 42 Maine, 561.

The reasonable and necessary use of the banks is incident to the public right of way. *Brown* v. *Chadbourne*, *Treat* v. *Lord*, *supra*, and *Gerrish* v. *Brown*, 50 Maine, 256. *Veazie* v. *Dwinel*, 50 Maine, 487. The action is not based on R. S. of 1857, c. 42, § § 7 and 8, relating to "lodged logs."

The defendant is protected by the common law based upon necessity and public policy, and by general and immemorial custom and usage.

BARROWS, J. It is not necessary to the proper determination of this case, to settle the question whether Swan Pond Brook, where it flows through the plaintiff's farm, is a public highway. Perhaps

it might not be difficult to do so, by carefully applying to the testimony here presented the legal principles laid down in *Wadsworth* v. *Smith*, 2 Fairfield, 278; *Brown* v. *Chadbourne*, 31 Maine, 9; and *Treat* v. *Lord*, 42 Maine, 552; but there is no occasion for it here and now. If it be conceded that this brook is a highway by water, in which the defendant may have a right in common with the rest of the public, still the defense is not maintained, for, according to his own showing and the testimony of his employees, the defendant went *extra viam*, and injured the plaintiff's grass-land, through which the brook runs, by trampling it and disturbing the soil more or less during some five or six weeks in the spring of the year, and along the whole course of the stream.

The right of the public in a stream, capable of being used for floating logs or as a passage-way for boats or barges of sufficient capacity to be useful in commerce or agriculture, is not thus to be extended over adjoining lands. The water makes and defines the highway. The facilities for transportation, afforded by it, are privileges which, like those of air and light, are too great to be suffered to become the subjects of private property. But the exercise of the common privilege must not be made an occasion for encroachment upon that which is legitimately the exclusive property of another. The right which the public enjoy in a navigable or floatable stream is, in general, limited by its banks. The proper definition of the word bank, in this connection, is, "a steep acclivity on the side of a lake, river, or the sea." These banks are the boundaries within which the exercise of the common right must be confined. Except during the continuance of an overflow, or in the exercise of those privileges which are given and defined by statute, log-owners and river-drivers have no rights in a floatable stream, beyond these boundaries. Important as their business undoubtedly has been and is, it must be conducted with a due regard to the rights of others. Their liability to pay damages to the riparian proprietor, for traveling upon the banks to propel their logs, is expressly recognized in *Brown* v. *Chadbourne*, relied upon by the defendant here. See the opinion in that case in the 31st Maine Reports, at the bottom of the 24th page *et seq.*

The dictum in the same case that "the banks of the stream may be used for driving logs" is based upon the statute privileges already alluded to, and is to be construed with reference to the statute creating them. With regard to the use of the banks of navigable rivers, or such streams as are, from their inherent capacity, properly recognized as public highways, there is an essential difference between the doctrines of the common law and those of the civil law.

Under the latter, the public have the same right to use the banks as they have to use the river itself.

Vide Cooper's Justinian, Lib. 2, Tit. 1, *De usu et proprietate riparum.*

Not so under the common law. *Ball* v. *Herbert*, 3 Term Rep. 253.

It is not, however, to be inferred that every casual landing upon the bank by those employed in driving a floatable stream, would be the ground of an action by the proprietor of the land. The privilege of going upon adjoining lands, to remove timber lodged thereon, after tender of compensation for damages, which is conferred by c. 42, § 8, R. S. of 1857, would seem to imply that where no actual damage is inflicted in so doing, no action would lie; and that, we think, is the true extent and meaning of the dictum in *Brown* v. *Chadbourne*, above referred to, which the defendant here seeks to expand into a justification for driving this stream in a manner more convenient and economical for himself, perhaps, than any other which could have been adopted; but manifestly prejudicial to the interests of the owner of the soil. The log-owner, who seeks privileges of this description, can obtain them only by contract with the riparian proprietor.

It is hardly supposable that anything that could properly be termed the bank of a stream like Swan Pond Brook, would afford a foothold for travelers; and in order to include the ground traversed by the defendant's employees, the signification of the word bank must be extended as indefinitely as the defendant claims to extend the public easement. The defendant's employees seem to have traveled on the plaintiff's land, adjoining the brook, because, as one or two of his witnesses declare, "it was more convenient to go on the banks,"—"a saving of time and money."

No question arises, in this case, as to any right of using the banks of a stream which may be acquired by long and constant usage. No such usage is shown to have existed there.

The defendant, after paying one year for similar use of the plaintiff's land, and telling the plaintiff to get the damages for which this suit is brought appraised, now claims that that use is a right, incident to the enjoyment of a public highway in the course of the stream. The claim cannot be allowed.

Judgment for plaintiff for $25 damages.

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

JOHN GILPATRICK *vs.* INHABITANTS OF SACO.

By virtue of the Public Laws of 1865, c. 319, assessors are not concluded by lists made and returned in conformity with R. S. of 1857, c. 6, § 53, as amended by c. 318 of the Public Laws of 1862.

When a citizen of a town has been overrated by the assessors, either on an overvaluation, or property not owned by him, his only remedy is by an application for abatement in accordance with R. S. of 1857, c. 6, §§ 54 and 55.

ON REPORT.

ASSUMPSIT to recover taxes claimed to have been illegally assessed in 1866. The taxes were paid under protest.

The only questions raised and the material facts relating thereto, are sufficiently stated in the opinion.

Chisholm, for the plaintiff, contended,

That the cases referring to application for abatement were unlike the case at bar.

The act of 1865, c. 319, not designed to repeal R. S. c. 6, § 53, and act of 1862, c. 318, so far as they made the list "a rule" and to be "taken as true." It simply meant that if the assessors discovered that the tax-payer had other specific property not on the

list, and that his list was so far false, they might add such property specifically, and tax him for it.

"Other personal property, $15,000," is not "invoice" or "valuation" of property to be assessed. R. S. of 1857, c. 6, § 59.

It is not a case of overvaluation, but dooming, based upon nothing.

It is "error and mistake" of the assessors, and hence makes void the assessment; and plaintiff is entitled to remedy under R. S. of 1857, c. 6, § 98.

E. B. Smith, for the defendants.

APPLETON, C. J. By R. S. of 1857, c. 6, § 51, the assessors are to notify the inhabitants "to bring in to them true and perfect lists of their polls, and all their estates, real and personal, not by law exempt from attachment," &c.

By § 53, "the assessors, or either of them, may require the person presenting such list to make oath to its truth . . . and such list, being exhibited on oath, shall be the rule for that person's proportion of tax."

By chapter 138, § 1, approved March 19, 1862, the 53d section of c. 6 is so far modified "that such lists being exhibited on oath shall be taken as true," unless the person exhibiting it "shall refuse to answer all proper inquiries in relation to the nature and situation of his property, and, if required, subscribe and make oath to the same," &c.

By c. 319, approved Feb. 24, 1865, it is enacted that the rule prescribed by R. S. c. 6, § 53, and c. 138 of the Public Laws of 1862, "shall not be construed as a conclusive rule and limitation upon the assessors in making the assessment." It follows, therefore, that the rule prescribed by c. 6, § 53, is thereafter not to be conclusive, and that the oath is not to be taken as conclusively true, and a limitation upon all further inquiries, though the person exhibiting his list and swearing thereto, may bring himself within the provision of c. 138 of the Public Laws of 1862. It would seem, therefore, that the assessors would be at liberty to assess property not included

in the lists sworn to, but of which the person exhibiting the list might be the owner.

The plaintiff is an inhabitant of Saco. The assessors, therefore, had jurisdiction to assess his real and personal estate.

The plaintiff gave in his list of real and personal property, with his estimate of its value, all duly sworn to. No objection is taken to the taxes on the real estate, nor on specific articles of personal property.

After specifying his real and personal estate, the plaintiff further adds: "ten shares Washington Mills, par value one hundred dollars."

"Fancy stocks, with no par value or any other, except the selling price, worth April 1 fourteen hundred and twenty-five dollars."

"Stocks, money, and debts, not included above, four thousand and seventy-five dollars."

The valuation and invoice of the assessors embraces the plaintiff's real estate and specific articles of personal property, and then adds, "other personal property, $15,000." It is to the assessment upon this personal property thus described, that exceptions are taken.

The plaintiff's list, as presented, was vague and indefinite. Fancy stocks, stocks, money, and debts are but an uncertain description of property. What are fancy stocks? What were the stocks? What the amount of money and of debts? Here is no information whatever, as to what property is thus disclosed to the assessors for assessment. The vagueness of the invoice and valuation only corresponds to that of the list as exhibited by the plaintiff, and gives him no ground of complaint. Is such a list as the plaintiff exhibited a true and perfect one?

The tax upon "other personal property, $15,000," includes the tax upon "fancy stocks, stocks, money, and debts." The valuation made by the plaintiff was not binding upon the assessors. The assessment, as made, may have been only upon the articles last mentioned in the plaintiff's list, or upon those and other articles, not included in his list, and not owned by him. In either event,

whether there was an overvaluation or an assessment upon property not owned by him, the plaintiff's remedy was by application to the assessors, and if they refused redress, by appeal to the county commissioners as provided by §§ 54, 55.

In *Stickney* v. *Bangor*, 30 Maine, 404, it was held, that if the assessors of a town, through an error in judgment, make upon one of the inhabitants an overvaluation of his property, and thereby assess him too much in the town list of taxes, or tax him for property not belonging to him, his remedy is not by an action at law, but by an appeal to the county commissioners. In *Hemingway* v. *Machias*, 33 Maine, 445, the plaintiff was taxed for property not belonging to him. The court held, that his only remedy was by appeal to the county commissioners, upon a refusal of the assessors to make the proper abatement.

The same principles have been adopted in Massachusetts under statutes similar to those of this State. In *Osborn* v. *Danvers*, 6 Pick, 98, the plaintiff, as in this case, exhibited a list of his estate, to which the assessors added the sum of eighteen thousand dollars. He paid his tax and brought an action of assumpsit to recover back the sum thus paid, but the action was not sustained. Whether the excess is caused by including in the valuation property of which the person taxed is not the owner, or that for which he is not liable to be taxed, or by an overvaluation of property taxable, the court decided that only remedy was by an application for an abatement pursuant to the statute. In *Howe* v. *Boston*, 7 Cush. 274, the same principle was affirmed. In *Lincoln* v. *Worcester*, 8 Cush. 57, the assessment was on "personal, bank, railroad, and other stocks, $117,000." In delivering the opinion of the court, Shaw, C. J., says: "We are not aware that any decided case has given sanction to the principle, that assumpsit against the town or city will lie to recover back money on the ground of any irregularity, error, or mistake, in fact or in law, in the mode of making the assessment. On the contrary, we think it is now definitely settled by a series of decisions, that in such case, the party's only remedy is by application to the assessors for abatement. If the party obtain no satisfac-

tory relief there, he may complain to the county commissioners for a revision." So where one being assessed for property lying in another town pays the tax under protest, he cannot recover it back from the town. His only remedy is by an application for abatement. *Salmond* v. *Hanover*, 13 Allen, 119.

Plaintiff non-suit.

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

JOSHUA R. WORKS *vs.* FARMERS M. F. INS. CO.

The defendants, by their policy numbered 72,272, promised the plaintiff to pay him the amount insured upon his house, within three months next, after a loss and "notice thereof given," by the plaintiff, "in writing to the secretary within thirty days from the time such may have happened." In less than a week after the loss, the defendants' local agent gave the secretary a written notice of the following tenor: "James R. Works, of . . . requests me to notify you that his house, insured in policy No. 72,272, was totally destroyed by fire on the 29th ult;" to which the secretary replied by letter, acknowledging the receipt of the notice, and declaring that it will receive the attention of the directors, at their first meeting, and that "in all probability some one will be there to prepare the necessary papers before that time." In an action on the policy, *Held*, that no objection ever having been made to the notice, all exception thereto was thereby waived.

ON REPORT.

ASSUMPSIT on a policy of insurance against fire.

The case is fully stated in the opinion.

W. J. Copeland, for the plaintiff.

Drew, for the defendants.

BARROWS, J. Joshua R. Works, upon an application written by the defendants' agent, procured from the defendant company a policy, numbered 72,272, upon his dwelling-house, which was totally consumed by fire during the life of the policy. All the facts nec-

essary to entitle the plaintiff to recover the amount insured are admitted, if the notice and statement of loss are deemed sufficient.

By article 21 of the by-laws, it appears that "in cases of loss, the assured is required to make a statement, under oath, of his title and interest to the property, and of such other matters as may affect the insurance thereon." The company promised in the policy to pay within three months next after a loss and "notice thereof given as required by the act" of incorporation, unless the directors shall, within said three months, determine to rebuild or replace the property destroyed.

The provision, with regard to notice in the act referred to, is as follows: "In case of any loss or damage . . . the said member shall give notice thereof, in writing, to the directors, or some one of them, or to the secretary of said company, within thirty days from the time such loss or damage may have happened; and the directors, upon a view of the same, or in such other way as they may deem proper, shall ascertain and determine the amount of said loss or damage."

In less than a week after the loss, a written notice was given to the secretary of the company in the form of a letter from the company's local agent, running thus: "James R. Works, of Berwick, requests me to notify you that his dwelling-house, insured in policy No. 72,272, was totally destroyed by fire on the night of the 29th ultimo;" to which the secretary replied: "The notice through you of the loss of house by fire, insured to J. R. Works, policy 72,272, was received yesterday. It will receive the attention of the directors on the first Tuesday in December; that will be their first meeting. In all probability some one will be there to prepare the necessary papers before that time."

Nothing further appears to have been done. The directors apparently took no steps to ascertain or pay the amount of loss,—sent no one to call for or prepare any papers, and never suggested to the plaintiff, in any manner, that they considered his notice or statement defective, until they filed their specification of defense to this suit, which was commenced the following summer. They now

claim to be relieved from the payment of the loss by reason of the mistake in the plaintiff's Christian name and the want of a statement of his title, &c., under oath.

They admit his title and his loss. There is nothing in the evidence to suggest the idea that a further statement could have subserved any useful purpose. The assertions of counsel in argument, as to the existence of an imaginary brother and a fraudulent loss, can have no weight. The answer of the secretary shows that they were not misled by the mistake in the written notice. Good faith and honest dealing required that they should call the attention of the insured to the error and defect, if they intended to rely on them. Not having done so, they must be considered as having waived all exception to the claim for these causes. *Heath* v. *Franklin Ins. Co.*, 1 Cush. 257. *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 401.

Judgment for plaintiff for amount insured and interest from Feb. 7, 1868.

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

SARAH HATCH, administratrix, *vs.* ENOS HATCH.

In a rule of court, the clause—"The rights of parties under offer to be defaulted, to be preserved," is simply directory; and it leaves to the referees full authority, both as to law and fact, to determine what those rights are, including costs.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note, and on an account annexed.

The action was entered at the September term, 1866, when the defendant appeared, and in writing offered to be defaulted "for the amount due upon the note." At the January term, 1867, the action was referred by a rule of court. On July 6, 1867, the referees heard the parties, and at the January term, 1868, returned

to the court their report, wherein they determined that the "plaintiff shall recover of the defendant, as damages, the sum of $104.83," due upon the note alone; "and costs of the court to be taxed by the court up to" the time of filing the offer to be defaulted. "And that the defendant recover of the plaintiff subsequent costs of court to be taxed by the court, and costs of reference," &c.

To the acceptance of the report as a whole, the plaintiff objected in writing, because the referees restricted the plaintiff in his recovery of costs, and gave costs to the defendant.

The presiding judge accepted the report in part, to wit, so much thereof as pertained to the amount of damages, and rejected so much as relates to costs.

Thereupon the parties taxed their several bills of cost; the plaintiff claiming costs for the whole time to acceptance of the report, and the defendant claiming costs as determined by the referees. The clerk allowed the plaintiff's taxation of court costs, but disallowed the taxation of costs before referees; and disallowed the defendant's taxation, and, upon appeal, the presiding judge sustained the decision of the clerk; to which ruling the defendant alleged exceptions.

S. W. Luques, for the plaintiff.

I. S. Kimball, for the defendant.

DANFORTH, J. A rule of court, without limitation or restriction, gives the referees full authority, both as to law and fact, over the subject-matter referred. This includes costs as well as damages. *Bacon* v. *Crandon*, 15 Pick. 79.

The rule in this case contains no restriction in any way affecting the decision of the referees. There is no suggestion of corruption, bias, or prejudice, on the part of the referees; no evidence tending to show that the award is not their honest judgment. It is, therefore, conclusive upon the parties. *Long* v. *Rhodes*, 36 Maine, 109.

It will be noticed, that in that part of the rule referring to the rights of the parties under the offer to be defaulted, the word "re-

served" is not used; but the word "preserved," which would seem to convey the idea, not that any part of the case is to be kept back from the referees, but rather that they are to act upon this part of the case, as well as the other parts; that by their decision they are to take care of and protect the rights of the parties in this regard. The rights are "to be preserved," evidently by the tribunal which is to try the case, and not by the one from which the case is taken.

It would seem to follow that this clause is not a limitation of the authority of the referees, but simply directory. In accordance with this view is the case of *Mickles* v. *Thayer*, 14 Allen, 114, and cases cited in that opinion. Those cases are stronger than the one at bar, inasmuch as in those rules the referees were directed to decide "according to the rules of law and equity;" and in *Bigelow* v. *Newell*, 10 Pick. 348, to "always have regard to the legal rights of the parties;" while in this rule nothing is said of the legal or equitable rights, but simply the rights, leaving it to the referees to settle what those rights are.

It may be that the referees have not "preserved" the rights of the parties under the offer to be defaulted according to strict legal principles. But this, as already seen, is not required; and if it were, the error does not appear upon the face of the report as required by the cases cited. Other testimony is necessary to show it.

That testimony may be a part of the record, nevertheless it is outside of the report and not a part of it. Nor is there any question of law reserved for the court by the report.

Exceptions sustained.
Report of referees accepted.

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

YORK CO. MUT. FIRE INS. CO. *vs.* RICHARD A. BOWDEN.

Where the charter of a mutual insurance company provides that the deposit note shall be payable in part, or in whole, when the directors deem the same requisite for the "payment of losses or other expenses," and the remainder, after deducting such payment, to be relinquished to the signer; that every member "shall pay his proportion of all losses and expenses accruing in and to the class in which his property is embraced;" and that the policy shall create a lien upon the property insured, for the security of the deposit note, "and the cost which may accrue in collecting the same;" an assessment of ninety-five per cent additional to the actual losses in a certain class, upon the premium notes in such class to "meet estimated bad debts, interest, expenses, and costs of collection," is illegal.

ON REPORT.

ASSUMPSIT on a premium note.

The case is sufficiently stated in the opinion.

Howard & Cleaves, for the plaintiffs.

The assessment was duly ordered and made. Act of Inc., § 209. *Penob. & Ken. R. R. Co.* v. *Dunn*, 39 Maine, 598. *Jones* v. *Sisson*, 6 Gray, 288. *New Eng. F. Ins. Co.* v. *Belknap*, 9 Cush. 140. *Peoples Equit. M. Fire Ins. Co.* v. *Babbitt*, 7 Allen, 235.

This kind of assessment is necessary in mutual companies.

It is presumed that the directors acted in good faith. They have determined that the estimated amounts were reasonable, just, necessary. Their judgment and determination are conclusive until impeached. What amount was estimated for "bad debts," for "interest," for "expenses," or for "cost of collection," does not appear in the objection. Who can say either item was excessive?

TAPLEY, J. This is an action upon a note given for an insurance premium. The note is payable in such portions and at such times as the directors of said company may, agreeably to their act of incorporation and by-laws, require.

Upon the 10th day of April, 1861, the directors ordered an as-

sessment upon the note of $69.07, and this suit is to enforce the payment of that sum.

The defendant contends that this assessment is void by reason of the unauthorized acts of the directors apparent from their own records.

By the terms of the plaintiffs' charter every member of said company shall be, and hereby is, bound and obliged to pay his proportion of all losses and expenses happening or accruing in and to the class in which his property is embraced (sec. 7); and every person who shall become a member of the company, by effecting an insurance therein, shall, before he receives his policy, deposit his note for such sum of money as may be determined by the directors, a part, not exceeding ten per cent, of which note shall be immediately paid for the purpose of discharging the incidental expenses of the institution, and the remainder of said deposit note shall be payable in part, or the whole, at any time when the directors shall deem the same requisite for the payment of losses or other expenses (sec. 6). All buildings and the land upon which they stand, and the property insured therein, shall be held by the company for any deposit note, which they may hold, of the member for whom they have insured; and the policy of insurance to any member of said company upon his buildings or other property shall, of itself, create a lien upon the same for the sum of such deposit note, and the cost which may accrue collecting the same, and such lien shall continue during the existence of said policy, and the liability of the assessed thereon, notwithstanding any transfer or alienation (sec. 7).

These provisions substantially provide for the payment of losses and the expenses of the institution in just and equal proportions by the members, according to the amount insured and character of the risk. To secure this result a note is required, and the property itself held as a security for the payment, in addition to a cash premium to meet the incidental expenses of the institution.

Under these provisions of the charter the assessment in question was made. From the records it appears that this class had suffered

losses amounting to $11,730.50, for which an assessment upon the notes of that class was ordered. Having thus provided for the payment of these losses, which are stated in dollars and cents, not only in the aggregate but in the detail of each individual loss, its date and amount and to whom payable, the directors then proceed to "vote to assess ninety-five per cent additional upon said sums, on said premium notes in said third class of said company to meet estimated bad debts, interest, expenses, and costs of collection;" and the assessment in question was made to cover not only the actual existing losses specified, but also the ninety-five per cent for estimated bad debts, interest, expenses, and costs of collection. We think such an assessment cannot be sustained. There is no authority given by the charter and by-laws to the directors to make such an one. The provisions of law before referred to contemplate the assessment of the notes to meet actual existing liabilities in just proportions, according to the amounts and character of the several risks. To ascertain these proportions, the amounts of the several liabilities must be ascertained and determined. One class cannot be called upon to pay for the losses and expenses of another class. What each class is chargeable with must be ascertained, whether it be of a loss of one character or of another, and what each note, in the same class, is chargeable with, must also be ascertained. No authority is conferred upon the directors to estimate losses which have and may occur, and estimate losses which have and may accrue, and join them together with an estimated amount of interest not accrued, but as yet only possibly necessary. As before remarked, the assessment is only to meet existing liabilities,—ascertained liabilities.

If made to meet possible contingencies, for which if they did occur they would be properly chargeable, a fund might be raised which might never be called for, inasmuch as the estimated and anticipated losses may never happen.

There can be no difficulty in ascertaining the liabilities after they have accrued; there may be a difficulty in so doing before. The argument of convenience is entitled to no consideration. The di-

rectors act under specific powers and must act in obedience to them.

To sustain such an assessment might do great injustice to the other members of the company. It will be seen that this extraordinary overlay is by a sweeping per cent, without detail of estimate. How much for bad debts, or how much for interest, or how much for expenses of collection is not determined; but the whole is put in gross, at ninety-five per cent, and this, too, while the charter charges each piece of property with the cost which may accrue in collecting the assessment belonging to it, and gives a lien thereon to secure it (sec. 7). By such a course one piece of property is made to pay the charges properly accruing against another.

If no bad debts are actually made, what becomes of the fund raised? If the amount estimated for interest proves to be too large, what is to be done with the surplus?

Why may not the directors estimate the losses which may occur by fire during a given period, and make an assessment for it, as well as estimate other liabilities which may or may not accrue?

It is quite apparent that such a course is inconsistent with the general purpose and design of the charter as well as being in conflict with some of its specific provisions.

One serious objection to such a practice is its great uncertainty in reaching the cardinal and fundamental end and aim of the institution, viz., a just and equal sharing of the losses, according to the amount insured and character of the risk. It is not even reasonably certain that such end will be thus attained. The whole basis of the overlay lies in conjecture, and unnecessarily so, for the exact amounts may be known when they accrue. Good judgment and fidelity in the execution of the trust committed to them would forbid such a course even if it could be considered within the strict letter of the charter and by-laws.

Another objection, fatal to such an assessment, is the fact that it is in direct violation of some of the material provisions of the charter. We have seen that provision is made that each note shall pay the expense of collecting the assessments upon it, and, to secure this

end, a lien is created upon the property not only to secure the note, but the costs of collecting the assessments thereon. This general overlay for estimated expenses of the collection of the assessment in the aggregate upon this class, imposes upon the policy holders an unequal share of the expenses thus accruing, according to the amounts of their several notes; and thus the delinquent is released from any greater expense than those who pay upon first call, and those who are prompt in the discharge of their liabilities are made to contribute to the expense of collecting from those who seek to avoid paying their just share of the losses.

This objection is equally fatal if we assume that good judgment and good faith was exercised in fixing the amount necessary to be expended in that way. We are, therefore, of the opinion, that the assessment is invalid, and there must be

Judgment for the defendant.

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

STEPHEN THOMPSON *vs.* JEDEDIAH PERKINS & another, appellants.

No appeal lies from the judgment of a trial justice, rendered against the defendant by his express consent.

ON EXCEPTIONS.

CASE originally commenced and returned before a trial justice and brought into this court by appeal. So much of the justice's record, as is essential, is of the following tenor:

"And now the plaintiff appears, and the defendants appear; and the defendants plead not guilty; and the plaintiff, by consent of said defendants, takes judgment. It is, therefore, considered by me, the said justice, that the said Stephen Thompson recover of said Jedediah Perkins and Samuel M. Clark, the sum of twenty dollars

damages, and costs of suit taxed at eight dollars and sixty-eight cents; from which judgment the said Perkins and Clark claim an appeal, . . . and enter into a recognizance . . . to prosecute their appeal," &c.

The action was entered in this court at the January term, 1865, and at the May term, 1866, when the same came up for trial, the plaintiff moved the appeal be dismissed, on the ground that judgment was rendered in his favor by consent of the defendants. But the motion was overruled, and the plaintiff alleged exceptions.

E. B. Smith, for the plaintiff, cited R. S., c. 83, § 7; *Harrup* v. *Bagley*, 6 Ellis & B. 224; *Harris* v. *Hutchins*, 28 Maine, 102; *Turner* v. *Putnam*, 31 Maine, 557; R. S., c. 83, § 5; *Patten* v. *Starrett*, 20 Maine, 145; *Woodman* v. *Valentine*, 22 Maine, 401; Broom's Leg. Max. *129; 3 Chit. Gen. Prac. 534; *Van Sittart* v. *Taylor*, 4 Ellis & B. 910; *Andrews* v. *Elliott*, 6 Ellis & B. 338; *Colburn* v. *Murray*, 2 Maine, 336; *Hatch* v. *Allen*, 27 Maine, 58; *Carlisle* v. *Weston*, 21 Pick. 537; *State* v. *Bonney*, 34 Maine, 223.

Entry here gives no validity. *Hills* v. *Hills*, 19 Maine, 423; *Hatch* v. *Allen*, *supra*; *Waterville* v. *Howard*, 30 Maine, 105.

Objection not waived. *Smith* v. *Robinson*, 13 Met. 165; *French* v. *Snell*, 37 Maine, 100; *Dolliff* v. *Hartwell*, 38 Maine, 54; *Bailey* v. *Smith*, 12 Maine, 196; *Hilton* v. *Longley*, 30 Maine, 200; *Harris* v. *Hutchins*, 28 Maine, 102; *Bennett* v. *Green*, 46 Maine, 499.

Plaintiff entitled to costs. R. S. c. 82, § 94; *Harris* v. *Hutchins*, 28 Maine, 105; *Turner* v. *Putnam*, 31 Maine, 557; *Bennett* v. *Green*, *supra*.

Drew, for the defendants.

No brief came to the reporter.

WALTON, J. This action was originally commenced before a trial justice, and brought into the supreme court by appeal. The plaintiff moved to have the appeal dismissed on the ground that judgment was rendered in his favor by consent of the defendants. The motion was overruled. The plaintiff then proceeded to trial,

and his evidence being insufficient, in the opinion of the presiding judge, to entitle him to a verdict, he was nonsuited; to all which he excepts.

We think the motion to dismiss the appeal should have been granted. The record of the magistrate states that judgment was rendered in favor of the plaintiff by consent of the defendants. Such being the case they could not rightfully appeal. Parties aggrieved, by the judgment of a justice may appeal. (R. S., c. 83, § 7.) But when a party consents to have judgment rendered against him, he cannot rightfully claim to be aggrieved. It is a fundamental maxim that consent cures error. *Consensus tollit errorem.* (Co. Litt. 126.) The law provides that any party aggrieved by the ruling of a presiding judge of this court may except. But he cannot except to a ruling made with his consent, however erroneous. Nor has it ever been supposed that a judgment rendered in this court by express consent of the party against whom it is rendered, could be reversed on error. The reason is, that a party who consents to a judgment or a ruling against him is not, in contemplation of law, aggrieved thereby. Otherwise every piece of illegal evidence, ruled in by consent, would be ground of exception, and every judgment rendered by consent be liable to be reversed on writ of error. Undoubtedly a defendant may sit by and decline to make any defense, after he has put in a plea on which issue is joined, and the plaintiff will take judgment at his peril. In other words, a defendant may remain silent and not lose his right of appeal. But if he goes further and expressly consents that judgment may be rendered against him, he does lose his right to appeal. In the latter case, he cannot rightfully claim to be an aggrieved party, and none but aggrieved parties have a right to appeal. Thus parties, against whom judgment is rendered on default, cannot appeal. By not appearing to object, they impliedly consent that judgment may be rendered against them, and cannot, therefore, rightfully claim to be aggrieved. If such is the effect of implied consent, *a fortiori*, such ought to be the effect of express consent. The appeal which was attempted in this case was illegal and void, and the

judgment of the justice is still in force. *Harris* v. *Hutchins*, 28 Maine, 102. *Turner* v. *Putnam*, 31 Maine, 557. *Kimball* v. *Moody*, 18 Maine, 350. *Patten* v. *Starrett*, 20 Maine, 145. *Woodman* v. *Valentine*, 22 Maine, 401.

Exceptions sustained. Action dismissed.

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

APPLETON, C. J., did not concur, but submitted his views as follows:

APPLETON, C. J. The plaintiff contends that the action is not rightfully here. The defendants were duly summoned. They appeared and pleaded the general issue. The record of the magistrate shows that "the plaintiff, by consent of the defendant, takes judgment." Thereupon the magistrate renders judgment for twenty dollars; "from which judgment," the defendants claim an appeal, and enter into a recognizance to prosecute their appeal with effect.

The plaintiff insists, that, as the defendants consented to his taking judgment, they cannot appeal, however erroneous that judgment may be. But the whole record must be taken together. The defendants did not waive their right to appeal. They consented that the plaintiff might take judgment. When the court of common pleas existed, verdicts were frequently rendered by consent for the plaintiff or defendant, for the very purpose of carrying the case to the supreme court. No one supposed that thereby the right to appeal was lost. So in cases before justices of the peace, it has been a common practice to give judgment to the plaintiff or defendant, after filing the general issue, and then to appeal; thus saving the costs of the trial below, when it was intended that the cause should be carried to another tribunal. "A plaintiff may always," observes Bigelow, J., in *Ball* v. *Buck*, 11 Cush. 80, "after issue joined, purposely withhold his proof, allow judgment to go against him on the merits, and then claim his appeal."

This is what was done here, and parties so understood it. The

case was to be litigated. The defendants filed their plea and allowed the plaintiff to take judgment for the purpose of bringing the case into this court. The magistrate takes the defendants' recognizance, and issues no execution. The defendants claim an appeal, and he takes their recognizance.

The defendants, while consenting that the plaintiff might take judgment, did not consent that he might take judgment for what was not due or for more than was due. The defendants have a right to appeal from any judgment by which they have been aggrieved. This right is guaranteed by statute. Though they consented that the plaintiff might take judgment; they did not consent that damage might be assessed upon erroneous principles, or judgment be rendered upon causes of action not set forth in the plaintiff's writ. By R. S., c. 83, § 7, any person aggrieved by the judgment of the justice may appeal. The defendants may have been willing judgment should be rendered for one sum, and not for another. Suppose the suit was for five dollars, and the judgment was for twenty, would not the defendant be aggrieved by such judgment. Unless infallibility be predicated of justices of the peace, they may err in assessing damages; and if they err, the defendant will thereby be aggrieved, and if aggrieved, he may appeal. A judgment is rendered for a sum too large, or for a cause of action not embraced in the plaintiff's writ. Such "a judgment may be the proper subject of complaint by the aggrieved party, and may be corrected upon an appeal, if seasonably taken." *Holman* v. *Sigourney*, 11 Met. 439.

If there was consent, it was not that the justice should render judgment for what was not due, or for what was not included in the plaintiff's writ. The defendant is aggrieved to the extent of the error on the part of the magistrate.

The general rule that consent cures error is undoubtedly true. But the principle is hardly to be applied to a case like the present, when it is manifest that it was not intended that the judgment should be final in the court rendering it.

The cases cited do not sustain the plaintiff. The distinction be-

tween exceptions and appeals are distinct and obvious. Exceptions precede and delay judgment. Appeals follow judgment. They presuppose its rendition, and when duly taken, it is vacated. In *Mudgett* v. *Kent*, 18 Maine, 349, it was held that after final judgment, exceptions cannot be taken to any proceedings prior to its rendition. The reason is, because by the statute, giving exceptions, "all further proceedings shall be stayed," and the right to "render final judgment" is conferred upon the court before which the exceptions are to be heard and determined. The exceptions, though consented to, were contrary to the express provisions of the statute. In *Patten* v. *Stowell*, 20 Maine, 145, it was held, that exceptions were not allowable after a default, because a default is an agreement that judgment may be entered up against the defendant. In *Harris* v. *Hutchins*, 28 Maine, it was held, that an appeal could not be taken from the judgment of a magistrate after a default, when no issue had been joined. "The judgment of the justice in § 9," says Wells, J., "must be construed to mean a determination of the cause when the defendant appears and answers."

WILLIAM BEAN *vs.* MARY A. BOOTHBY.

To constitute an indirect conveyance of real estate to a married woman by her husband, within the meaning of R. S., c. 61, § 1, the deed from him must be made as one step in the conveyance to her, for her benefit, and for the purpose of getting the estate into her hands.

If the grantee of real estate mortgage it back to secure the purchase-money, and the mortgagee assign *bona fide* the mortgage to the wife of the mortgager, such assignment will not operate as a discharge of the mortgage.

And if, when the mortgage given back for the purchase-money of real estate is assigned *bona fide* to the wife of the mortgager, the husband quitclaim to her, and she thereupon convey to a third person, by a deed of warranty, therein referring to the mortgage, "as having been cancelled by assignment," the mortgage will not thereby become merged, but it will be upheld.

ON REPORT.

WRIT OF ENTRY.

On Nov. 24, 1855, one Moses Morrill owned the premises in con-

troversy, when he conveyed them to Leander Boothby, the defendant's husband, and at the same time took back a mortgage of the same premises to secure the payment of $900 as therein provided. On Feb. 6, 1858, Morrill, having previously recorded a judgment upon the mortgage, took possession under a writ of possession; and by deed of quitclaim, dated Dec. 11, 1860, but delivered Dec. 22, 1860, he assigned his interest to the defendant, who, on the last day named, conveyed by deed of warranty to the plaintiff, the defendant's husband having on the same day quitclaimed his interest to her.

Charles W. Pierce and others, creditors of Leander Boothby, attached all the right, title, and interest he had in any real estate in this county, on Dec. 26, 1856. Execution issued on the judgment recorded in that case Oct. 24, 1861, and a levy made on the premises, as the estate in fee-simple of Leander Boothby, Nov. 4, 1861. The levy and all the deeds mentioned were duly recorded. It appeared in evidence that the plaintiff furnished the money to pay the consideration of the deed from Morrill to the defendant.

The court were to enter the legal judgment.

Moore & Drew, for the plaintiff.

E. B. Smith, for the defendant.

The issue is, which has the better title in himself. The defendant being in possession, will prevail, unless the plaintiff show that as to him her possession is wrongful. *Wyman* v. *Brown*, 50 Maine, 144.

I. The plaintiff counts on his own seisin; and, to defeat his title, the defendant may show that the plaintiff was never seized. Jackson on Real Actions, 4, 157. Stearns on Real Actions, 365, 380.

Plaintiff must show actual seisin. *King* v. *Barnes*, 13 Pick. 24. *Hall* v. *Stevens*, 9 Met. 421. *Cutler* v. *Lincoln*, 3 Cush. 128. *Parlin* v. *Haines*, 5 Maine, 178. *Wms. Col.* v. *Mallett*, 16 Maine, 84. *Bussey* v. *Grant*, 20 Maine, 281.

Bean shows no other seisin (and no other title) than that derived from deed of tenant to him, of Dec. 22, 1860; its validity

(and his claim to the premises) depend upon the character and derivation of her title.

II. If the defendant derived her title "directly or indirectly" from her husband, she cannot convey, "without the joinder of her husband in such conveyance" (R. S. c. 61, § 1), and the plaintiff fails in this action.

All her title was conveyed to her "directly or indirectly" from her husband. Moses Morrill was the undisputed owner; Nov. 24, 1855, he conveyed to Leander Boothby, and took back from him a mortgage of even date, to secure notes specified therein. Before the completion of the process of foreclosure the mortgagee assigned the mortgage to the mortgager's wife, which extinguished the mortgage. *Clark* v. *Wentworth*, 6 Maine, 259.

Morrill assigned to Mrs B.; he transferred to her a claim or title to the estate derived from her husband. Morrill didn't give, grant, nor convey the land to Mrs. B., nor make any covenant relative thereto; he only turned over to her her husband's notes and deed; her claim as assignee then came "indirectly" from her husband. Morrill's deed and the title he conveyed to tenant, were paid for by the notes of Leander Boothby.

All her other claim to demanded premises came "directly from her husband by his deed of Dec. 22, 1860, to her, which is expressly mentioned and referred to in (and thereby made part of) the tenant's deed to Bean, under which he claims; therefore he certainly had "actual notice" of Leander Boothby's conveyance to Mary A. Boothby, which is equivalent to record, and makes it immaterial when this deed was recorded, or if ever recorded, so far as plaintiff is concerned.

III. By well-settled principles of common law, a *feme covert* who owns the fee of land, can convey it only by deed executed by herself and husband, and when both are parties to the effective and operative part of the instrument of conveyance. *Lithgow* v. *Kavanagh*, 9 Mass. 161, 172. *Bruce* v. *Wood*, 1 Met. 542, 543. *Concord* v. *Bellis*, 10 Cush. 276. *Jewett* v. *Davis*, 10 Allen, 71, and cases there cited.

Our Rev. Sts. have changed the common law only so far as relates to land owned by a *feme covert* in her own right; it remains unaltered as to property conveyed to her "directly or indirectly" by her husband. R. S. c. 61, § 1.

A married woman's deed, at common law, is absolutely and *ipso facto* void,—not merely voidable. 10 Cush. 276, 277. Co. Lit. 426, and note 4. 2 Kent's Com. 167, note. Cruise's Dig. Tit. "Deed," c. 2, § 24. *Fowler* v. *Shearer*, 7 Mass. 14. *Lane* v. *McKeen*, 15 Maine, 304. *Watrous* v. *Chalker*, 7 Conn. 225. 2 Story's Eq. Jur., §§ 1388, 1391.

And is so still in cases not sanctioned by statute. *Jewett* v. *Davis*, 10 Allen, 71, 72.

1. The debt is the principal thing; the mortgage is only ancillary thereto, and security therefor. If the debt be paid, the mortgage is discharged. *Patch* v. *King*, 29 Maine, 451, 452. *Smith* v. *Stanley*, 37 Maine, 11, and books *passim*.

Debt is extinguished by the marriage (at common law); by parity of reasoning it is also extinguished by assignment to the wife. 6 Maine, 259, cited *supra*. *Greenleaf* v. *Hill*, 31 Maine, 563. *Carlton* v. *Lovejoy*, 54 Maine, 445. *Jordan* v. *Jordan*, 52 Maine, 320.

The statutes relating to rights of married women, being in derogation of the common law, have been (and are to be) strictly construed. Sedgw. on Stat. and Const. Law, 313. *Graham* v. *Van Wyck*, 14 Barb. 531, 582.

See all recent Maine decisions on this subject, especially *Howe* v. *Wildes*, 34 Maine, 573; *Crowther* v. *Crowther*, 55 Maine, 562.

They are all prospective. *Bryant* v. *Merrill*, 55 Maine, 515. *McLellan* v. *Nelson*, 27 Maine, 129. *Greenleaf* v. *Hill*, 31 Maine, 562.

Then, while Public Laws of 1843, c. 24, cannot act retrospectively upon this conveyance, it shows that prior to that date a married woman could not convey any interest she held in real estate to secure a debt due her from her husband, without his joining in the conveyance.

No statute can be found (prior to one last above cited) author-

izing the wife to convey by her sole deed any interest in land derived either "directly or indirectly" from her husband, whether that interest be defeasible or absolute.

2. Both by common law, and, as it now stands, the assignment of the mortgage by Morrill to Mary A. Boothby, discharged it; because,

(a) This was the intention of the parties, which ought to govern. Story on Cont., § 634 *et seq.* *Gibson* v. *Crehore*, 3 Pick. 482.

This intention is to be gathered from the contract, and not from parol evidence. *Wade* v. *Howard*, 6 Pick. 392.

It is only when so intended by parties, that conveyance operates as assignment. *Crooker* v. *Jewell*, 31 Maine, 306. *Gibson* v. *Crehore*, *supra.*

It was the evident intention to merge the whole title in Mary A. Boothby; she so states expressly in her deed to demandant, and both parties to that deed are estopped to deny it.

(b) To constitute it a mere assignment, it must be to a "stranger." *Dockray* v. *Noble*, 8 Maine, 278. 6 Pick. 392. And our legislation has not yet made husband and wife legally strangers to each other.

(c) And there must be a delivery of the note, or other personal security, to which the mortgage is collateral. 8 Maine, 278. *Dixfield* v. *Newton*, 41 Maine, 223. *Webb* v. *Flanders*, 32 Maine, 175. *Wade* v. *Howard*, 11 Pick. 297.

They have not (and do not pretend to have) the notes which were paid.

(d) The fact that Bean furnished Mrs. Boothby the money to procure Morrill's deed to her is immaterial; it does not affect his legal rights.

(e) The same objection lies to the admission of evidence of the Pierce judgment and levy.

It avails nothing; defendant holds by possession, as well as under Leander Boothby's deed; to prevail, the demandant must show a better title in himself, not in Pierce *et als.*

And (the mortgage, having certainly been "cancelled and dis-

charged "), the demandant never having been in actual possession, and counting upon his own seisin, defeats his own action by showing the "better title" and the seisin in Pierce *et als.*, and not in himself. *Buzzey* v. *Grant*, 20 Maine, 281. *Cutler* v. *Lincoln*, 3 Cush. 125. *Thayer* v. *McLellan*, 23 Maine, 417.

The levy is admissible to show that Bean never had "seisin" of the premises, but for no other purpose.

(f) It is also immaterial whether Boothby was solvent or insolvent. Bean is not (and never was) a creditor of Boothby. It don't concern him whether that deed from Boothby to his wife was fraudulent or *bona fide;* and it does not lie in his mouth to impeach it, since it is expressly incorporated into, and made part of the deed under which he claims.

The very case cited by demandant (*Crosby* v. *Taylor*, 15 Gray, 64) only says that such a deed would be an assignment of the mortgage (when made to a stranger, and not to mortgager's wife), by virtue of certain other recitals and the peculiar circumstances of that case. Though that deed were fraudulent as to creditors, it is admitted to be "good as between the parties." *Crosby* v. *Taylor*, 15 Gray, 66.

Bean cannot use Pierce's levy to obtain possession of premises levied upon and hold them against Pierce. The respondent (Taylor) in case above cited (15 Gray, 64) was in the position of Mrs. Boothby, with the important exception that he was not a *feme covert.* He claimed that there was no merger; plaintiff claims that there was in this case. The petitioner (Crosby) stood in position of Pierce *et als.* to Boothby; not as Bean stands. There is no pretense that if Taylor had undertaken to convey the premises discharged of the mortgage, that the court would still have held it to be in existence.

It is the interest (or rather the intent) of the party into whose hands the mortgage and equity first comes, that decides whether it does, or does not, merge; not what a person who may subsequently purchase of that party might eventually wish. 3 Pick. 482.

And that intent cannot be shown by parol. *Wade* v. *Howard*, 6 Pick. 392.

In case *Wade* v. *Howard*, an assignment of a first mortgage to the person who held the equity of redemption was held to be a discharge of the mortgage, though a second mortgage intervened. 6 Pick. 492, 500. Same case, 11 Pick., 289. *Gardner* v. *Astor*, 3 Johns. c. 53. *Coates* v. *Cheever*, 1 Cow. 460. *James* v. *Morey*, 2 Cow. 301. *Forbes* v. *Moffat*, 18 Ves. 390. *Eaton* v. *Simonds*, 14 Pick. 104. *Warren* v. *Jennison*, 16 Gray, 561.

DANFORTH, J. The demandant claims the premises in dispute by virtue of a deed of warranty from the tenant to himself, dated December 22, 1860. The validity of this deed is the only question in issue. On the part of the tenant, it is contended that it is void, because at the time of its execution the grantor was, and still is, a married woman, and received her title directly or indirectly from her husband, who did not join in the conveyance. It may be admitted that this proposition is true in law if it were so in fact. But the case shows no facts upon which it can rest. The conveyance to the tenant is in no legal sense either direct or indirect from her husband; if she holds under the mortgage it certainly is not direct, nor can it be indirect, for the title comes from Morrill by assignment of his mortgage. It is true, she traces her title through her husband; but this is not in the legal sense holding by virtue of a conveyance from him.

The language of the R. S., c. 61, § 1, limits the wife's capacity to convey to such real estate only, as has been "directly or indirectly conveyed to her, or paid for by her husband."

The indirect conveyance here referred to, must have the same force and effect as the direct. It must convey the land from the husband to the wife. Direct where it is conveyed at once to her, indirect when conveyed to her through the medium of one or more intervening persons. The deed from him must be made for her benefit, as one step in the conveyance to her, and for the purpose of getting the estate into her hands. This being accomplished

through one or more mesne conveyances, it would be an indirect conveyance to her. When the mortgage to Morrill was made, it was not, so far as appears, made with any expectation that it would be assigned to the wife, or for any such purpose. It was not adopted as a means or any instrumentality to accomplish a conveyance to her. A wife is not prohibited from conveying land without the joinder of her husband simply, because he may have once owned it, but because it was conveyed by him to her.

But further, as regards this mortgage, the husband had nothing to convey. Morrill's deed to him, and the mortgage back, were but one transaction. His seisin was but instantaneous, and carried with it no rights whatever, as against Morrill or any one holding under the mortgage. The mortgage being foreclosed, Morrill would not hold under the husband, but by virtue of his own original title and his assignee, whether immediate or remote, whether the tenant or her grantee, would hold by the same title. Hence it may with propriety be said that the wife holds neither indirectly from her husband, nor even under him, but under Morrill. No one could interfere with her title by virtue of any claims against her husband, no one could disturb her except by showing a title paramount to that of Morrill.

But it is said that the assignment of the mortgage to the wife operated as a discharge of it. This may be true under the common law, but not under our statutes as then and now in force. She was authorized to buy and sell property. This mortgage, with the debt thereby secured, was property which she had the same right to purchase and hold as any other. If a note given by the husband to the wife is valid, she must certainly have the right to purchase and hold a note given by him to a third person. *Randall* v. *Lunt*, 51 Maine, 246.

But it is said that when the tenant took the deed from her husband, her interest under the mortgage merged in that, and she, therefore, held directly from him. Mergers are not favored in law or in equity, and the separate estates will be sustained when the parties so intend, and this intention will be inferred, when justice permits,

and the interests of the parties require it. *Simonton* v. *Gray*, 34 Maine, 50. *N. E. Jewelry Co.* v. *Merriam*, 2 Allen, 390. 2 Washburne on Real Property, 3d ed. 180.

The same result follows, notwithstanding the words in the deed of the tenant to the demandant, referring to the mortgage as "having been cancelled by assignment." *Crosby* v. *Taylor*, 15 Gray, 64.

The interest of the tenant and her grantee, alike require the upholding of the mortgage, otherwise the creditors of the husband would have taken the whole estate. The tenant then received a title from Morrill under the assignment of his mortgage to her. This title she held independent of her husband, not merged in his deed to her, and conveyed to the demandant.

There is another view of this case which leads to the same result. The tenant stands in the same condition in relation to the premises in dispute, as did her husband when he gave the mortgage to Morrill. She never had other than an instantaneous seisin. The case finds that the demandant furnished the money with which the tenant purchased the mortgage. The assignment to the tenant and the deed from her, were delivered at the same time and place. The deed of the husband was executed the same day. These facts necessarily lead to the conclusion that all these deeds were part of one and the same transaction; that the tenant received and parted with the seisin at the same time, and by the same act; and that the two conveyances were made to her for an ulterior purpose, which purpose was that the land might be conveyed to the demandant in consideration of the money advanced by him. She was the mere conduit through whom the title of Morrill and her husband passed. She never had an attachable interest in the premises, nor any such seisin as would give her husband any rights under R. S., c. 103, § 17. Nor could he have any rights under his deed.

That the seisin may be instantaneous merely, "it makes no difference whether the transaction consists of one conveyance or of several, or whether they are executed between two parties only, or more. If they all constitute one transaction, done at the same time,

it matters not how complicated it is. If he is but an instrument or conduit to pass the title to another, it is unimportant how many simultaneous conveyances are made into and out of him."

Haseltine v. *Lesure*, 9 Allen, 24. *King* v. *Stetson*, 11 Allen, 407. *Chickering* v. *Lovejoy*, 13 Mass. 51. *Webster* v. *Campbell*, 1 Allen, 313.

In any view we can take of the case the demandant takes title of Morrill, and if that mortgage is not foreclosed, that of the husband also, subject only to the paramount rights of his attaching creditors. *Judgment for demandant.*

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

EZEKIEL AUSTIN *vs.* INHABITANTS OF YORK.
BRADFORD W. BLAISDELL *vs.* Same.

An article "to see if the town will vote to pay the same bounty to those who may enlist after" a specified time, "as is now paid by the town to those who enlisted before that time," does not authorize the vote to pay a larger bounty. (BARROWS, J., *dissentiente.*)

ON REPORT.

ASSUMPSIT for soldier's bounty. The case is sufficiently stated in the opinion.

G. C. Yeaton, for the plaintiffs.

1. The article in the warrant was sufficient for the vote of August 23d. R. S., c. 3, § 5 requires "the business to be acted upon" only to be stated in distinct articles. In *Blackburn* v. *Walpole*, 9 Pick. 97, the "subject" to be acted on was all that was necessary to be stated in the article. This case was approved in *Avery* v. *Stewart*, 1 Cush. 502. "To give previous notice of the subjects

to be acted on is the object of a warrant." *Torrey* v. *Milbury*, 21 Pick. 68. "If it gives intelligible notice of the subject to be acted upon, it is sufficient." *Grover* v. *Pembroke*, 11 Allen, 89. *Haven* v. *Lowell*, 5 Met. 40. *Hudsell* v. *Hancock*, 3 Gray, 526. *Alger* v. *Curry*, 40 Verm. 437. *Davenport* v. *Hallowell*, 10 Maine, 317. *State* v. *Beeman*, 35 Maine, 242.

The article stated the "business" and gave full intelligence of the "subject to be acted upon," to wit, "bounty to volunteers."

Counsel also contended that the vote was ratified by Public Laws of 1865, c. 298, § 1.

E. B. Smith, for the defendants.

DICKERSON, J. Action for soldier's bounty. Under an article in the warrant, calling the town meeting, "to see if the town would vote to pay the same bounty to those who may enlist, as volunteers in the army of the United States, after the 15th of August, 1862, as is now paid by the town to those who enlisted before that time, and make the necessary provision for funds for that purpose," the town voted "that the sum of $200 be paid to each person who shall enlist as a volunteer in the army of the United States . . . and that the treasurer of the town be authorized and directed, under the direction of the selectmen, to hire all necessary sums of money to pay the same."

At an adjournment of the same meeting it was voted, "that the bounty of $200 be increased to $300." The bounty paid by the town, to those who had previously enlisted, was $200. The town paid the plaintiff the $200, voted on the return day of the warrant, but refuses to pay the additional $100, voted at the adjourned meeting; and the question is whether the vote to pay this sum was authorized under the warrant.

Sec. 5, c. 3, R. S., provides that the warrant shall state, in distinct articles, the business to be acted upon, and prohibits action upon any other subject. The object of the statute is to secure to the inhabitants of the town, previous intelligible notice of the subjects to be acted upon; and when this is substantially done, the re-

quirement of the statute is complied with. *Grover* v. *Pembroke*, 11 Allen, 89.

Accordingly, it has been held sufficient to authorize a town to raise money for a particular purpose, when the subject, to be acted upon, was distinctly stated in the warrant, and was one which would be likely to require a grant of money. *Blackburn* v. *Walpole*, 9 Pick. 97. *Fuller v. Inhabitants of Groton*, 11 Gray, 340.

So an article in the warrant "to see what measures the town will take to provide a work-house, or house of correction for the reception, support, and employment of the idle and indigent, and such other persons, as by law be liable to be sent to such houses, and for the superintendence of the same," is sufficient to enable the town to empower the selectmen to contract with some person for the support of the poor for one year. *Davenport* v. *Inhabitants of Hallowell*, 10 Maine, 317.

In these and like cases, found in the reports, the article in the warrant was general in its description of the subject to be acted upon, giving the heads of the topics to be considered by the town, without calling for its action, yea or nay, upon a single distinct proposition. In such cases it is undoubtedly competent for the town to take into consideration and pass upon matters incidental to, or connected with, the main subject stated in the warrant.

In the case at bar, the article in the warrant called for the action of the town upon the question whether it would "pay the same bounty," to those who should enlist after a given time, as was then paid under a former vote of the town. The sum so paid was $200. The case is, therefore, the same as if the article in the warrant had been to see if the town would pay $200 to those who should enlist subsequently to a time stated. Had the town authority, under such a call, to vote to pay $300? We think not. The subject to be acted upon was not the general one, to see what bounty the town would pay, if any, but to see if the town would pay a particular sum, the same bounty as before. Citizens of the town, seeing such a notice, might reasonably presume that the town would not vote any larger sum than the one intended in the warrant, and

might safely refrain from attending the meeting, under this impression. Such a notice was a guaranty against voting a larger sum. An article in the warrant, to see if the town will raise $200 for a particular purpose, in general, gives no authority to raise a larger, though it might a smaller sum. If, under such a call, a town may legally raise $300, it would be difficult to fix a limit to the amount that might thus be raised, as that might depend upon the passion, caprice, or personal interests of the voters present at the meeting.

The town exceeded its authority in voting to pay the additional $100, at the adjourned meeting, and the judgment in both actions must be *Plaintiffs nonsuit.*

Judgment for defendants.

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

BARROWS, J., dissented and submitted the following opinion.

BARROWS, J. I cannot help feeling as if the ratifying acts, passed by the legislature, making valid the doings of towns in the matter of voting bounties to volunteers, were designed to include all votes passed by the towns, at meetings regularly warned and holden, where the attention of the town had been called to the subject of bounties to volunteers by an article in the warrant, calling for action of some sort upon that matter.

And I do not think we ought to be more nice and critical in inquiring whether the vote was proper under the article in the warrant, than cases heretofore decided require us to be.

Where it is manifest that it was the fairly expressed intention of the town to give the bounty, and especially where the enlistment was procured under the understanding that the bounty had been, or would be, voted, I am in favor of sustaining the vote and the claim of bounty, if the people of the town had notice by the article, that some action was to be taken upon the question of bounties.

If we establish too nice rules for the action of towns, under the articles in their warrants, we shall certainly find ourselves compelled

to invalidate many of their doings which ought to be sustained. Why should we confine the town to a simple yea or nay vote upon the question, "whether they would give the same bounty," &c.? I think they ought to be allowed, under such an article, to say what bounty they would give,—whether the same or a different one,—greater or smaller.

Why not, as well as to hold it competent for a town to pass a vote indemnifying a committee for taking a meeting-house under an article to see whether they would build a town-house and raise money for the same? *Hudsell* v. *Hancock*, 3 Gray, 526. As in the case of the meeting called to hear the report of a committee appointed to buy a certain piece of land, it was held competent for the town to vote to buy another piece additional to that, what objection can there be to the town here passing any vote as to bounties, that being the general subject to which their attention is called by the article? It is useless to expect that town officers will state their topics with the accuracy that might be necessary in a power of attorney, and I think it ought to be sufficient if voters have a warning as to the nature of the questions likely to arise. See *Davenport* v. *Hallowell*, 10 Maine, 317.

WILLIAM SANDERSON & another *vs.* J. B. BROWN & others.

The plaintiffs contracted in writing to cut and haul from the "Dartmouth College Grant," and drive and deliver into the defendants' boom, "in the spring of 1867, from three to five million feet of spruce logs," of a specified description, "and all the pine timber they can obtain from said grant." In the same instrument, the defendants agree to pay the plaintiffs seven dollars per M. for the spruce, and eleven dollars per M. for the pine, "when scaled and delivered in said boom;" "to advance from time to time such sums, not exceeding one-half the amount to be paid for the logs, as the plaintiffs may need in the prosecution of the work;" and "in case any logs cut on said grant are not delivered in their boom as aforesaid," the defendants "are to retain in their hands, at the rate of one dollar per M. on account of said logs." In an action to recover the price stipulated, *Held*, (1) That the plaintiffs were entitled to recov-

er the full prices for all lumber cut and delivered by them into the defendants' boom in the driving season of 1867; and (2) The same prices, less one dollar per M. for all timber cut, hauled, and properly landed by them, but which remain undriven, without any want of reasonable diligence on their part.

No action can be maintained for services rendered without the knowledge, or request, express or implied, of the defendant, notwithstanding he verbally promised to pay therefor, after their rendition.

On Exceptions and motions.

Assumpsit, on a special contract for cutting and hauling timber from "Dartmouth College Grant," in New Hampshire, and driving a portion of it into the defendant's boom in Milan, New Hampshire. The essential part of the contract, together with the instructions, may be seen in the opinion.

The writ contained a special count on the contract, and also a count on an account annexed, embracing, along with the items of cutting, hauling, marking, and driving from Dartmouth College Grant, 4,090,136 feet spruce timber into Milan boom, at seven dollars per M.; 274,988 feet pine timber, at eleven dollars; cutting, hauling, marking, and landing 30,000 feet pine timber on Diamond rivers and Abbott brook, at ten dollars; cutting, hauling, marking, and landing 1,100,000 feet of spruce, at same place, at six dollars per M.; sundry charges for driving old logs from different localities on the Androscoggin river and its tributaries, among which was an item of "$160 for driving Winslow & Foster timber into Milan boom." The debit side of the account amounted to $44,769.24. The credit, embracing numerous items of cash and supplies, etc., amounted to $33,782.63, leaving a balance of $10,976.61. The credit side of the account did not contain an item of $1000, ordered and sent by express in January, 1867, or of $490.24 paid by the defendants for toll on the timber actually driven.

It appeared on the part of the plaintiffs that in December, 1866-7, they put 100 oxen and 150 men to hauling, cutting, marking, and landing pine and spruce timber on the Abbott brook, Dead Diamond, and Swift Diamond rivers, tributaries of the Androscoggin; that they worked until March 20, 1867, when their teams and men

were taken out; that they agreed to drive out certain old logs belonging to the defendants, and situated at different places along with their new ones, at the rates charged; that before the streams opened they, with thirty drivers, went to the landings prepared to drive; that there were no rains to raise the water to a driving pitch, and the snow wasted away without materially raising the streams; that they cut, hauled, and drove the amounts charged, and cut, hauled, and properly landed the several amounts charged in their account; and drove the old logs at a fair price, except the item of $160 concerning which there was no contract; and that about two-thirds of all that was cut by plaintiffs, were driven by them to the defendants' boom. Only a portion of the items was contested by the defendants. There was evidence introduced by the defendants, tending to show that the plaintiffs agreed to drive the old timber at cost; that too much timber was landed on Abbott's brook, more than could be driven in such a stream; and that the plaintiffs, having refused to drive after season of 1867, the defendants hired others to drive what the plaintiffs left. The defendants also introduced evidence as to the cost of driving these streams.

The jury returned a verdict for the plaintiffs for $9,329.91, which the defendants moved be set aside as being against law, and the weight of evidence, and the defendants also alleged exceptions to the instructions.

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

Howard & Cleaves, and *D. R. Hastings*, for the plaintiffs.

Appleton, C. J. On 17th September, 1866, the plaintiffs, and defendants, under the name of the Berlin Mill Company, entered into a contract, by the terms of which the plaintiffs agreed "to cut and haul from the Dartmouth College Grant in New Hampshire, and to drive into the boom of the said Berlin Mill Company, in the spring of 1867, from three to five million feet of spruce logs" of a specified description, and "to cut, haul, and deliver all the pine timber they can obtain from said college grant; said pine logs to

be good sound timber, to be marked the same as spruce logs, and to be delivered at the said time and place as the spruce."

The defendants "contract and agree to pay to the said W. & M. Sanderson, seven dollars per thousand feet, board measure, for said spruce logs when scaled and delivered in said boom, and to pay for said pine logs the sum of eleven dollars per thousand feet, board measure, when scaled and delivered as aforesaid, which sums are to be in full for said logs, payment to be made as follows: The Berlin Mill Company agree to advance to said W. & M. Sanderson, from time to time, such sums as they may need in the prosecution of their work, not to exceed one-half the amount to be paid for said logs, for which advances interest is to be allowed at the banking rates; and the said Berlin Mills Company, in case any logs cut on the said college grant, are not delivered in their boom at Milan, as aforesaid, are to retain in their hands at the rate of one dollar per thousand feet, on account of said logs."

"The spring of 1867" was the time fixed for the delivery of the logs to be cut and run by the plaintiffs to the defendants' boom. Any one acquainted with lumbering operations knows that all the logs are rarely if ever driven in the spring after they are cut. The success of the driving depends, in a great degree, upon the quantity of the water in the spring freshet. There may be too much or too little.

The contract assumes the existence of the contingency that a portion of the logs may remain behind, and makes provision therefor. It provides, "in case any logs cut on said college grant are not delivered in their (defendants') boom at Milan, as aforesaid, the defendants are to retain in their hands, at the rate of one dollar per thousand feet, on account of said logs." They are to retain one dollar. This implies the payment of the remainder. The authority to retain this sum impliedly negatives the right to retain more. The claim of the defendants is, that all the logs must be delivered before the plaintiffs can recover. But if this be so, then the defendants would be authorized to retain not the one dollar, but the whole amount remaining due, which is directly adverse to the terms of the con-

tract, for by that, one dollar is retained in the event of the happening of the anticipated contingency and no more.

Further, the retention is to be in case the logs are not delivered "as aforesaid," that is to say, "in the spring of 1867." Reference, it will be perceived, is made to the time specified for the delivery of the logs, and the completion of the contract on the part of the plaintiffs. While an entire and complete performance, by the delivery of all the logs cut under the contract is not anticipated, provision is made for those cut, but not delivered, by authorizing the retention of a specified sum, and impliedly requiring the payment of the balance.

The presiding judge instructed the jury "that if the plaintiffs deliberately abandoned the contract, and refused to comply with its terms, they would not be entitled to recover anything under it." To this the defendants assuredly cannot object.

He further instructed them, that "in order to enable them to recover under that part of the contract which provides for the lumber cut, hauled, landed, but not delivered in the Milan boom, they must use necessary diligence in the spring of 1867, and during the driving season of that year, to get the lumber to the boom. Necessary diligence is that degree of diligence which men, ordinarily engaged in and acquainted with that kind of business, would use in their own affairs. Such diligence as you would find in the average of men, engaged and acquainted with that kind of business. If they neglected to use this degree of diligence, then it would be an abandonment of their contract, and they could not recover under it." This instruction assumes the right to recover, though all the logs are not delivered in the boom, in the spring of 1867. But as before seen, the contract contemplates that all might not be so delivered and provided for that contingency by authorizing the retention of a portion of the contract price. But the plaintiffs were bound to use all reasonable diligence to prevent, as far as possible, any logs remaining undriven. If, however, logs so remained without negligence on the part of the plaintiffs, they were entitled to recover the contract price, save what by its terms the defendants

were allowed to retain. This sum was obviously retained as compensation for any expense the defendants might subsequently incur in driving the logs.

For the charge of $160 in the plaintiff's bill, it is claimed that there was no contract. In relation to this the instruction given was as follows: "When, without any agreement, services are rendered to another, with his knowledge and consent, and without objection, then the party is to receive a reasonable compensation. In order to be an implied contract, it must be at least with the knowledge and consent of the party receiving the services. If, subsequently, however, to the performance of the services, it was brought to their knowledge, and they promised to pay for it, the law would hold them responsible."

In *Weston* v. *Davis*, 24 Maine, 375, Shepley, J., says: "When one performs services for the benefit, and with the knowledge and tacit consent of another, the law implies a promise to pay a reasonable compensation for them. Such promise, however, is implied only." But no action can be maintained on a past consideration, unless alleged at the request of the promisor. *Allen* v. *Woodward*, 22 N. H. 544. *Wilson* v. *Edmunds*, 24 N. H. 517. *Bartholomew* v. *Jackson*, 20 Johns. 28. The last clause in the instruction implies, that an action may be maintained, when the services were rendered without the knowledge or request express or implied of the defendants, if, after their rendition, there was a promise to pay. But a past and executed consideration, without knowledge or request, is no sufficient basis for a promise to pay. It may afford evidence from which the jury may infer a request. It is the province of the jury to determine from the evidence, whether a promise can be inferred or not. *Oatfield* v. *Waring*, 14 Johns. 188.

The evidence shows satisfactorily that the $1000 sent in answer to the order of Jan. 18, 1867, was not allowed by the jury, nor the sum of $490.24, which the defendants paid for tolls, and of which the plaintiffs had the benefit.

New trial granted unless plaintiffs will remit $1650.24, said sums being $1000 cash sent them, and 490.24 paid for tolls, and interest

from the date of their payment, and the bill for driving of $160, with interest from the date of their writ.

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

AMMI R. MITCHELL, in equity, *vs.* OLIVE R. BURNHAM & another.

In arguing exceptions to a master's report, finding that, to entitle the assignee of a mortgager in a bill in equity against the assignee of the mortgagee to redeem the mortgage conditioned for the maintenance of the mortgagee, he shall pay a certain sum incurred for support since the recovery of a conditional judgment on the mortgage, by the mortgagee against the mortgager; the complainant cannot urge that the respondent is estopped by the judgment, unless such objection is specially raised by the exceptions.

Nor, where by the terms of the condition the mortgagee was to be maintained upon the mortgaged premises, can the complainant object to a reasonable allowance by the master, incurred for the support of the mortgagee off from the premises, when the complainant had neglected to furnish means for his support on them.

Nor, for support accruing after an assignment by the mortgagee to one of the beneficiaries named in the condition, when such assignment was not made until a breach of the condition, nor until after an assignment by the mortgager to the complainant, who, with the mortgagee's assent, had undertaken, but failed to fulfill the condition of the mortgage.

Such an assignment by the mortgagee, is not a release and discharge of his claims for support under the condition of the mortgage.

Such assignee of the mortgagee may claim for the future support of the mortgagee and other beneficiaries named in the condition, on the failure of the assignee of the mortgager to furnish it.

Nor can the complainant object to an allowance for support of the mortgagee, actually incurred by the respondent after she had assigned for a time the legal title in trust for the beneficiaries named in the condition.

Nor can the complainant object that the respondent is not charged with the rents and profits after the buildings on the premises were burned, and the complainant had collected the insurance thereon, and placed a tenant of his own on the premises.

Under what circumstances interest may be allowed on the sum found due by the master.

Mitchell *v.* Burnham.

On Exceptions to the acceptance of a report of a master in chancery.

On May 16, 1844, one Benjamin Harnden, being seized in fee of a farm in this county, conveyed the same, by deed of warranty, to his son, B. H. Harnden, who, on the same day, conveyed the same premises in mortgage back to his father, conditioned that, "if the said B. H. Harnden . . . shall at all times . . . well, truly, and sufficiently support, and maintain his father, Benjamin Harnden, and his mother, Betsey Harnden, during their natural life, in the house they now live in, and in case of the loss of the present house, in another on the same farm, . . . and provide house and home for his three sisters, Sabra, Olive (respondent), and Hannah, whenever they are at his house, until they shall get married, . . . then the mortgage to be void, otherwise to remain in full force and virtue."

On Aug. 10, 1846, B. H. Harnden, being then in possession, conveyed the premises to one Jameson.

On March 30, 1850, B. H. Harnden, having failed to fulfill the condition in the mortgage, was sued in a writ of entry brought upon the mortgage by the mortgagee, a conditional judgment recovered thereon at the October term, 1851, with damages assessed at $250 and costs, which not being paid, Benjamin Harnden went into possession under a writ of possession, Feb. 14, 1852.

During the pendency of the writ of entry, to wit, on the eighth of February, 1851, Jameson conveyed the premises to the complainant, who claimed the right to redeem them.

On May 2, 1853, Benjamin Harnden conveyed the premises to the respondent, and Betsey Harnden executed the deed in token of her relinquishment of dower.

The respondent supported Benjamin Harnden and his wife, Betsey, on the premises, until September, 1853, when she removed them to Saco, where she supported them until they died, to wit, the former Sept. 6, 1854, and the latter May 3, 1860.

Sabra Harnden was taken sick on the premises, Nov. 2, 1852, and died there from the same sickness, Feb. 19, 1853.

On March 30, 1854, the respondent conveyed the premises to one Jane Osgood, who occupied them, by herself or tenant, until May 3, 1861, when the buildings on the premises were destroyed by fire. Jane Osgood reconveyed the premises to the respondent, Nov. 7, 1866.

It appeared that B. Harnden expressed himself satisfied with his support; but that he never received any support from the complainant.

On Jan. 13, 1855, the complainant called for an account which was declined, and thereafterwards, to wit, on Feb. 15, 1855, he filed his bill to redeem. See *Mitchell* v. *Burnham*, 44 Maine, 286.

The complainant sold the timber from the farm about the year 1860, obtained the insurance on the buildings, and sold and conveyed the farm about the year 1865.

Neither the respondent, nor any person claiming under her, occupied the premises after the destruction of the buildings, but they were subsequently occupied by a tenant under the complainant.

The master's report, returned September term, 1868, charged the complainant:

To the expense of the support (exclusive of medical attendance) of Sabra Harnden, from Nov. 2, 1852, to Feb. 19, 1853.

To the expense of the support of Benjamin and Betsey Harnden, from Oct. 25, 1851 (day of rendition of judgment on the mortgage), to Sept. 6, 1854 (time of Benjamin Harnden's death), medical attendance and funeral expenses.

From the amount of these items, the report deducted the amount of rents and profits from Feb. 14, 1852, when the mortgagee took possession under writ of possession, until his death, and to the remainder added interest from Sept. 6, 1854, to May 3, 1861 (destruction of buildings).

The report also found that from the decease of Benjamin Harnden (Sept. 6, 1854) to the decease of Betsey Harnden (May 3, 1860), the rents and profits were just sufficient for her support and no more. The remaining year's rents and profits (from May 3, 1860, time of Betsey's death, to May 3, 1861, destruction of build-

ings), were not sufficient to pay accruing interest; whereupon the report computed and added interest on the above remainder to the time of the sitting of the court when the report was submitted; the whole sum amounting to $614.96.

To the acceptance of the report the complainant alleged the following exceptions:

1. Because it allows for the support of Benjamin and Betsey Harnden from Sept., 1853 (when they were removed to Saco), to the dates of their death (Sept. 6, 1854, and May 3, 1860, respectively).

2. Because it allows for the support of Benjamin and Betsey Harnden after May 2, 1853, when Benjamin conveyed the premises to the respondent.

3. Because it allows for the support of Benjamin and Betsey Harnden from March 30, 1854, to the dates of their death respectively, although it also finds that the respondent then conveyed the premises to Jane Osgood, who held the respondent's title continually thereafter until Nov. 17, 1866.

4. Because it does not charge the respondent with the rents and profits of the mortgaged premises from May 3, 1861 (time of destruction of buildings), to the time of filing of the report; and

5. Because it allows interest on the amount found due on the mortgage.

S. C. Strout & H. W. Gage, in support of the exceptions.

1. The mortgagee and wife were to have their support upon the mortgaged premises and not elsewhere. When they voluntarily abandoned the premises, the expense of their support, at another place of residence, was not a charge under the mortgage.

2. The mortgagee's assignment to the respondent was a release and discharge of all claim for future support by the mortgagee, under the conditions of the mortgage, as he conveyed all his title to the land, which was the only means he possessed of enforcing performance of the conditions. His assignee could take nothing as an indebtedness under it, except amount then due for prior non-sup-

port; and he could not claim anything for future support of the mortgagees. At most, respondent could claim only the amount of the conditional judgment rendered before that time. *Bryant* v. *Erskine*, 55 Maine, 153.

3. The respondent should be charged with rents and profits until 1867, when premises were conveyed, since she held a subsisting assignment of a mortgage. But, in fact, nothing was due. The assessment of damages, for breach of the condition, being for personal services, was entire, and included both past and prospective damages, and no other assessment can be made. *Philbrook* v. *Burgess*, 52 Maine, 271. *Sibley* v. *Rider*, 54 Maine, 465.

Pulsifer & Frost, for the respondent.

BARROWS, J. This case comes before us for a hearing upon certain exceptions taken to the report of a master in chancery, appointed in pursuance of an opinion rendered in the case, and reported 44 Maine, 286, holding the complainant entitled to redeem the mortgaged premises, upon payment of such sums as should be found to be legally and equitably due upon the mortgage.

The mortgage was originally given to the father of the defendant by her brother, who received a conveyance of the father's farm, and gave the mortgage to secure the performance of certain covenants and stipulations by him then entered into for the support of his father and mother, upon the farm, during life, and the furnishing of certain privileges to his sisters while they remained unmarried, and other matters which it is not necessary here to specify in detail.

The mortgager, in a few years, parted with his interest in the premises, and the complainant acquired it while a writ of entry was pending in the name of the father, the original mortgagee, to recover possession of the farm for an alleged breach of condition.

In that action a conditional judgment for $250 and costs was made up at the October term, 1851; and the same not being paid, the mortgagee went into possession under a writ of possession, Feb.

24, 1852, and conveyed the farm to the respondent, by deed of warranty, May 2, 1853.

The complainant, holding the title of the mortgager, in January, 1855, within three years after the mortgagee went into possession, tendered to the respondent the amount of the conditional judgment and interest, demanded an account of rents and profits which the respondent refused to give, and offered to pay any additional sum that might be found due upon an adjustment of the rents and profits, and brought his bill to redeem, which he was held by the court entitled to do in these terms: "The conditional judgment having been entered in the action, *Harnden* v. *Harnden*, upon the mortgage, the plaintiff to be entitled to redeem, must pay such further sums, if any, as have since accrued."

The master finds a certain sum accruing since the entry of the conditional judgment which he says the complainant ought to pay in order to redeem.

The most formidable objection to the master's report, and the one now principally relied on in argument by complainant's counsel, is that the respondent is estopped by the conditional judgment rendered upon the mortgage, from claiming anything that might subsequently accrue,—that that judgment must be conclusively presumed to embrace all the damages, both past and prospective, occasioned by the violation of the condition and the failure of the mortgager to furnish support.

But we think it unnecessary to consider whether there is anything in the condition of this mortgage, or in the manner in which the conditional judgment upon it was made up, to distinguish the case in principle from *Philbrook* v. *Burgess*, 52 Maine, 271; and *Sibley* v. *Rider*, 54 Maine, 463.

It is a sufficient answer to the objection, that it is now, for the first time, suggested in an argument to the full court upon exceptions to a master's report in which it does not appear that any such position was taken before the master, or any exception alleged to his ruling upon that point.

We hold that, in a hearing of this description, a party must be

confined to such exceptions as he filed to the master's report, and cannot be permitted to go out of those exceptions to raise other objections never before taken, and which he must be held to have waived. *Pingree* v. *Coffin*, 12 Gray, 315. *Smalley* v. *Corliss*, 37 Vermont, 435.

We have no reluctance in applying the rule to the present case, because in doing so we are only conforming to the view which, until very recently, the complainant and his able counsel seem to have taken of his equitable rights and duties, and to the view which the court entertained in this very case, when the master was appointed,—such an appointment being totally unnecessary if this objection ought to have prevailed.

It is manifest that in the making up of the conditional judgment on the mortgage, no prospective damages for the breach of the condition were included. The report states that testimony was offered tending to prove that the complainant proposed to the mortgagee to provide for the support of the beneficiaries named in the mortgage, and it would seem that the mortgagee assented to this; but the master finds, further, that the complainant did not make adequate provision for their support, and that they received no part of their support from him. Under these circumstances, equity does not permit him to resort to a legal estoppel which has once been so completely waived in order to preclude the mortgagee or his assignee from the benefit of such provision as the mortgage was designed to secure; for equity looks to the intention of the parties rather than to the form of their proceedings, and strives to give effect to such intention when fairly disclosed.

We proceed now to consider the exceptions that were actually taken to the master's doings.

The first exception is to the allowance made by the master for the support of the mortgagee and his wife, after September, 1853, when they removed from the farm, against the position taken by the complainant that by the conditions of the mortgage they were to be supported there and not elsewhere. The exception would be well taken if it did not also appear by the master's report that the complainant, though he assumed the duties and obligations of the mortgager ap-

parently with the assent of the mortgagee, neglected to furnish the necessary means of support. This being the case, the mortgagee and his wife were under no obligation to maintain themselves upon the farm, but might seek the support required by their age and infirmities where it could best be afforded, which was with their daughter, the respondent; the plaintiff cannot complain if loss and expense have resulted from his neglect to fulfill the obligations which he had undertaken, since it does not appear that the expense incurred for their support, by their daughter, was extravagant or unreasonable.

The second exception relates to the expense for support accruing after the conveyance by the mortgagee to the respondent. This objection we think equally ill-founded. The complainant insists that the conveyance to the respondent was a release and discharge of all the mortgagee's claim for support under the conditions of the mortgage, inasmuch as it passed all his title to the land, which was the only means he had of enforcing the performance of the condition; and that the assignee of such a mortgage could take nothing by such assignment except what was due at the time of the assignment, and could claim nothing for the future support of the mortgagee and other beneficiaries named in the mortgage, in case of the failure of the mortgager or his assignee to furnish it. Not so in either particular.

No good reason can be shown why such a conveyance should be construed as a release to the mortgager, or his assignee, who has (with the consent of the mortgagee) undertaken, but has not performed the duties of the mortgager, from the obligation to afford support according to the conditions of the mortgage. Manifestly, nothing of that sort was intended. True, the mortgagee, for want of the legal title, might be embarrassed in enforcing the claim; but if that is done in the name of the assignee for the benefit of the mortgagee and the other beneficiaries in the mortgage, it is not perceived why the mortgager, or his assignee, has any just cause of complaint. His rights and duties are affected by such assignment only in one respect. If he has notice of it, he must pay any sum that is due as damages for past non-performance to the assignee.

His obligations in all other respects remain the same, and it is solely by reason of his continued neglect to perform those obligations, that the assignee of the mortgagee can claim anything further in the premises.

It was held in *Bryant* v. *Erskine*, 55 Maine, 153, that the interest of the mortgagee was not assignable before breach of the condition, but it does not appear to have been held, in that case, that such assignment released the assignees of the mortgager from the obligation to afford future support in accordance with the conditions of the mortgage. In the present case, there had been both an actual breach and an entry for condition broken before the assignment by the mortgagee.

Doubtless the assignee of the mortgagee would acquire, and could exercise, only such rights as his grantor had in the premises; in this case, the right to hold possession of the mortgaged premises to compel the fulfilment of the condition, was included. Nothing more was required of the complainant than the performance of that condition, but he neglected it. Why should he claim to hold the estate free from the incumbrance which his grantors had placed upon it?

Where, as here, the original mortgagee held the mortgage in trust for himself and others, and the existence of such trust was apparent upon the face of it, his grantee would take subject to the same trust; but when the interest of all the beneficiaries has expired by death, or other limitation (which appears to have happened long ago in this case), there seems to be no good reason why the reasonable expense, incurred by the assignee of the mortgagee, over and above the rents and profits of the estate, in affording the support which it was the duty of the mortgager and his assignees to have furnished, should not be a charge against the estate, or why the assignee of the mortgager, if he seeks to redeem, should not pay it.

It would be adding grievously and unnecessarily to the embarrassments of an aged and infirm mortgagee to withhold from him the power to convey an effective security for such support to one upon whom he can and does rely, when the party who has undertaken to furnish the support fails him.

The third exception taken is to the allowance of any sum accruing for the support of the mortgagees, after the conveyance by this respondent to Jane Osgood, in 1853.

Though Jane Osgood held for a time the legal title, in trust for the beneficiaries named in the condition of the mortgage, the support was actually furnished by this respondent, and at the request of the parties entitled to it under the condition of the mortgage. Since the reconveyance by Jane Osgood to the respondent, inasmuch as the respondent is the sole party interested, and the only one who holds any conveyance from the mortgagee; and, inasmuch as it is not pretended that any payments were made by the complainant to Jane Osgood, or that any support was furnished by her, the fact that she once held a conveyance from the respondent cannot be considered as affecting the rights of the parties. It was rightly held when this case was originally presented, that the complainant's tender was well made to this respondent, though the conveyance to Jane Osgood was then outstanding, for want of notice of that conveyance. Now that all rights or claims under it have been extinguished, so far as the duties, liabilities, and rights of these parties are concerned, it is as though it had never existed. The master allowed the rents and profits of the estate in offset to the support so long as the property was in the possession of the mortgagee, the respondent, or her grantee, Jane Osgood, or any person holding under them, or under any other than the complainant himself. The proper rents and profits to be allowed would be the same, no matter who was in the actual possession of the premises; and no complaint is made of the manner in which they were estimated; for, during a large portion of the time, the report shows that they were found adequate for the support of the parties interested in the condition of the mortgage.

This brings us to the fourth exception, in which complaint is made that the respondent is not charged with the rents and profits since May, 1861.

The claim that she should be so charged comes with ill grace from the complainant, who, as the report shows, at that time, when there was no longer any one to be supported, seems to have bestirred

himself, to have sold the timber from the farm, collected the insurance on the buildings which were burned, and finally to have disposed of the entire premises. The exception cannot be sustained.

Neither can the fifth exception, which relates to the allowance of interest on the sum found due. The complainant's counsel makes no point of this, and, under all the circumstances, we think the interest was properly reckoned and allowed. Not finding any of the exceptions to the master's report sustainable, and being satisfied that in the language of the opinion in *Bryant* v. *Erskine*, *ubi supra*, it "will mete out equal justice between the contending parties."

The exceptions are overruled.

Master's report accepted and confirmed.

Final decree for redemption to be entered accordingly.

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

57 324
94 293

HIRAM HINES *vs.* LUCIUS ROBINSON & another.

Winslow Hall conveyed to Ephraim Gammon and Ira Bartlett each, "one undivided half of certain land ... being the 'mill privilege,' so called, ... the same on which Hall's saw-mill now stands, being a part of lot nine, range five," and described by metes and bounds. Gammon & Bartlett erected a grist-mill on the same dam, whereupon Gammon conveyed to the plaintiff "one undivided half of a saw-mill and grist-mill, and one undivided half of the privilege on which the mills stand, being part of lot nine, range five, and containing what was conveyed to me by Winslow Hall's deed." Thereafterwards, the plaintiff conveyed to Horace Bartlett "one undivided half of a saw-mill, and one undivided half of the saw-mill privilege on which the saw-mill stands, being part of lot nine, range five, ... containing what was deeded to me by Ephraim Gammon. . . . For a more full description see Winslow Hall's deed to said Gammon, to which reference is hereby made;" which last deed embraced the land on which the grist-mill stands; *Held*, that one undivided half of the grist-mill passed by the plaintiff's deed to Horace Bartlett.

A grantor who has conveyed a good title by his deed of warranty, may, nevertheless, set up against his grantee and those holding that title, a title subsequently acquired by himself by disseisin of his original grantee or those holding under him.

What facts will sustain such a title by disseisin.

Hines *v.* Robinson.

One tenant in common is liable to an action by his co-tenant for an injury to the common property.

Where the common property consists of a grist-mill, the erection of an excelsior mill in such proximity thereto as to darken the grist-mill and prevent access to its underworks, and the use of the yard in front of it as a place for the piling of lumber to the exclusion of customers, constitute such an injury.

So one tenant in common may maintain an action against his co-tenant and a stranger for using water for another mill which rightfully belongs to the common mill.

Where the plaintiff and one of the defendant's predecessors in title, being tenants in common of a grist-mill and saw-mill on the same dam, were careful to leave at least four and one-half feet of water in the reservoir-pond, for the exclusive use of the grist-mill from 1841 to 1847, when the plaintiff's co-tenant conveyed his undivided half of the saw-mill and its privileges to a grantor of the defendant, reserving all the water in the reservoir-pond when not more than four and one-half feet deep, and received back a bond conditioned that the grantee would not use, or cause to be used, any water in the pond for running the saw-mill when the water was less than four and one-half feet deep; and no attempt to otherwise use the water until 1865; *Held*, that the proprietor of the grist-mill was entitled to the exclusive use of the water when it was not more than four and one-half feet deep.

A construction of a grant of a water-power which will restrict the grantee to the specific use to which the water was applied when the grant was made, will never be adopted unless the language of the grant unmistakably indicate such to have been the intention of the parties.

On report.

Case for infringing certain water rights of the plaintiff, and erecting an excelsior mill in such proximity to the plaintiff's grist-mill as to darken it, prevent repairs, reconstruction, or enlargement of it, &c.

On the 23d of July, 1835, Winslow Hall, owning a mill-privilege, consisting of a saw-mill situate on a dam across the outlet of Buggernut pond, near its mouth, the dam at the mouth, and the surrounding land, by his deed of warranty, of that date, conveyed to Ira Bartlett "one undivided half part of a certain piece of land situated in said Hartford, being the mill-privilege, so called, situated near Hall's dwelling-house, and the same on which said Hall's saw-mill, now conveyed, now stands, being a part of lot No. 9, in the 5th range of lots in Hartford, and bounded as follows," &c.; "beginning," &c. Here follows metes and bounds which embrace several acres of land, with the dam, saw-mill, and mill-pond in the middle. "Also, one-half the right to flow the other lands belonging to said

Hall, lying above said privilege, to any extent necessary for the use of the mill on the privilege now standing, or any other that may be built thereon," &c.

On the 13th of Aug., 1835, Hall conveyed the other half to E. B. Gammon.

Some time during the joint ownership of Bartlett & Gammon, between Aug. 15, 1835, and March 30, 1841, they erected the grist-mill now standing on the same dam with the saw-mill.

On March 30, 1841, Gammon, by his deed of warranty, conveyed to the plaintiff "one undivided half of a saw-mill and grist-mill situated in Hartford, and one undivided half of the mill-privilege on which the said mills stand, being part of lot No. 9, in the 5th range of lots in said Hartford, containing what was deeded to me by Winslow Hall, of said Hartford, by deed dated Aug. 30, 1835."

On May 17, 1843, the plaintiff, by his deed of warranty, conveyed to Horace Bartlett "one undivided half of a saw-mill situated in said Hartford, and one undivided half of the saw-mill privilege on which the said saw-mill stands, being part of lot No. 9, in the 5th range of lots in said Hartford, containing what was deeded to me by Ephraim B. Gammon, by his deed dated March 13, 1841; for a more full description see Winslow Hall's deed to the said Gammon, dated Aug. 30, 1835, to which deed reference is hereby made."

On March 11, 1845, Horace Bartlett, by his deed of warranty, conveyed to Harvey Bartlett "one undivided half of a saw-mill in Hartford, and one undivided half of the saw-mill privilege on which the said saw-mill stands, being part of lot No. 9, in the 5th range, &c., containing what was deeded to me by Hiram Hines, by his deed dated May 7, 1845; for a more full description, see E. B. Gammon's deed to Hiram Hines, of March 30, 1841."

On May 13, 1847, Ira Bartlett, by deed of warranty, conveyed to the plaintiff and Rufus Woodsum "one undivided half of a grist-mill, . . . and one undivided half of the grist-mill privilege on which the said grist-mill stands, being part of lot No. 9, in the 5th range, with the exclusive right of the water when it is no more than four

feet and one-half foot high in the flume at the upper dam, the privilege of flowing, and so forth. For a more particular description, reference being had to a deed from Winslow Hall to Ira Bartlett, dated July 23, 1835."

On May 13, 1847, Ira Bartlett, by deed of warranty, conveyed to Harvey certain premises, adopting the precise language *mutatis mutandis* in describing them as is used in Winslow Hall's deed of July 23, so far as the same is copied in this report; and then it adds, "excepting and reserving the grist-mill and one-half the use of the mill-yard, and also reserving all the water in the pond when it is below four feet and one-half foot in the flume at the upper dam, except from 1st of March to the 1st of May in each year. The intent this deed is to convey one undivided half part of the saw-mill and its privileges."

On the same day, Harvey Bartlett executed and delivered to Hiram Hines and Rufus Woodsum a bond in the penal sum of $500, conditioned that he would not "use, or cause to be used, any water in the mill-pond for running his saw-mill, from the first of May to the first of March following, in each and every year, unless the water in the upper dam is more than four feet and one-half foot deep."

On April 4, 1859, Rufus Woodsum quitclaimed his interest in "one undivided half of a grist-mill situated in Hartford, and one undivided half of the grist-mill privilege on which the said grist-mill stands," to A. G. Tinkham, who, on Jan. 2, 1861, quitclaimed same to defendant, Corliss.

On Sept. 14, 1863, Harvey Bartlett quitclaimed to both defendants certain premises, adopting the language of the Winslow Hall deed, and "for a more particular description reference is made to a deed from Ira Bartlett to Harvey Bartlett, dated May 13, 1847, and from Horace Bartlett to Harvey Bartlett."

E. G. Harlow & G. D. Bisbee, for the plaintiff.

On the construction of the deed, cited 2 Wash. on Real Prop. 619, §§ 36, 37; *Ricker* v. *Barry*, 34 Maine, 116.

W. W. Virgin, for the defendants.

BARROWS, J. ACTION ON THE CASE. The plaintiff alleges in his writ, that he is the owner of an undivided half of a grist-mill and privilege, and all the appurtenances thereto belonging, including the right to raise a head of water necessary for the same, by means of the upper dam on the outlet of Buggernut pond, and the right to "all the water in said pond, except so much as shall be actually needed and used by a certain saw-mill there situated; and the exclusive right to all the water in said pond when the water is no more than four feet and six inches high in the flume of the said upper dam;" that Nathaniel W. Corliss, one of the defendants, is the owner of the other undivided half of said grist-mill, its privileges and appurtenances, and also, with the other defendant, Robinson, owns the saw-mill above referred to; that Robinson and Corliss have erected a building on the privilege, so placed and constructed as to darken the grist-mill and obstruct its use, and prevent repairs, reconstruction, or enlargement of it, and have placed in this new building certain excelsior machines and a shingle machine, which they run in addition to their saw-mill, using the water so as to infringe the exclusive right of the grist-mill above asserted, and to prevent any profitable use of the grist-mill. The erection of a building in close proximity to the grist-mill, and the use of the water when there was less than four feet and a half in the flume, for the purpose of running the additional machinery, are admitted by the defendants.

They deny the plaintiff's title, and claim the right to do what they have done without subjecting themselves to an action.

If the plaintiff can maintain a suit against any person for doing these acts, the fact that one of these defendants is his co-tenant in the property injured, will not bar the action.

Blanchard v. *Baker*, 8 Maine, 253. See also, *Maddox* v. *Goddard*, 15 Maine, 218, where Shepley, J., remarks as follows: "One general principle may be clearly discovered in all these authorities, that when a tenant in common does an unlawful act whereby his co-tenant is injured, the law affords the appropriate remedy arising out of the nature of the property or estate, and the character of the wrongful act."

The appropriate remedy for such an injury as the plaintiff here alleges is an action of trespass on the case.

Indeed, the defendants' counsel do not appear seriously to rely upon the fact of the co-tenancy in defense; but claim that, upon a correct construction of the deeds which make part of the case, and upon such other evidence as is legally admissible, the plaintiff shows no title.

On the 23d of July, 1835, Winslow Hall owned the whole privilege, and conveyed to Ira Bartlett an undivided half of it, describing it as "being the mill-privilege, so called, situated near said Hall's dwelling-house, and the same on which said Hall's saw-mill now stands, being a part of lot number nine, in the fifth range of lots in Hartford, and bounded as follows, viz.: beginning," &c.; also, "one-half the right to flow the other lands belonging to said Hall, lying above said privilege, to any extent necessary for the use of the mill on the privilege now standing, or any other that may be built thereon," with sundry other rights not material to the proper understanding of the questions here raised. Hall conveyed the other undivided half of the same property, with like rights, to Ephraim B. Gammon on August 13, 1835. It appears that Ira Bartlett and Gammon built a grist-mill on the privilege, and Gammon conveyed to the plaintiff, March 30, 1841, by deed duly recorded the next day, "one undivided half of a saw-mill and grist-mill situated in said Hartford, and one undivided half of the mill-privilege on which the said mills stand, being part of lot No. 9, in the 5th range of lots in said Hartford, containing what was deeded to me by Winslow Hall of said Hartford, by deed dated August 30, 1835, except a piece sold to Samuel Alley, jr., and occupied by him, with a tan-yard and shop and bark-house."

On the 17th of May, 1843, the plaintiff conveyed to Horace Bartlett "one undivided half of a saw-mill situated in said Hartford, and one undivided half of the saw-mill privilege on which the said saw-mill stands, being part of lot numbered nine, in the fifth range of lots in said Hartford, containing what was deeded to me by Ephraim B. Gammon, of said Hartford, by his deed dated March 30th,

1841. For a more full description, see Winslow Hall's deed to the said Gammon, dated August 30, A. D. 1835, to which deed reference is hereby made."

We find no rule of construction under which this deed can be held to convey anything less than the whole estate which Hines acquired, through E. B. Gammon, from Winslow Hall, to whose deed to Gammon reference is made. There is nothing in that reference which creates any ambiguity,—nothing inconsistent with whatever there is of specific description in this deed. It comports fully throughout with a design to convey all the property described in the deed to which reference is made; and where the language of a conveyance is intelligible and consistent, we cannot let in parol evidence to show the intention of the parties and to limit its extent by construction in a way which would violate any of its calls. Their intention must be ascertained from the writing itself, which, in such cases, is the best and only legal evidence of it.

A deed which, through the ignorance or heedlessness of the scrivener, misrepresents the bargain between the parties, may doubtless be reformed in equity; but until that is done, it must be allowed to have, in a suit at law, all its legitimate effect according to its terms.

But it does not follow that the plaintiff has not now a good title to the part of the grist-mill and its privilege, of which he has been so long in possession.

It remains to be determined from the testimony whether the plaintiff has not, since the making of his deed to Horace Bartlett on the 17th of May, 1843, acquired a good title, by disseisin and adverse possession, to the premises which he claims, as against his grantee and the defendants who derive their title from him.

That there is no legal rule or principle which will preclude the plaintiff from asserting a title thus acquired against his grantee, and those claiming under him, was settled in a thoroughly satisfactory opinion in the case of *Stearns* v. *Hendersass*, 9 Cush. 497. It is unnecessary here to rehearse the reasons for the doctrine. They are clearly and forcibly set forth in the case referred to. Suffice it to say, that we hold that a grantor who has conveyed a good title by war-

ranty deed may nevertheless set up against his grantee, or against those who hold his grantee's title, a title subsequently acquired by himself by disseisin of his original grantee and those claiming under him; that he does not thereby impeach or overthrow his own conveyance; that no principle of estoppel or rebutter prevents him from asserting a title thus subsequently acquired; and that such title, when maintained by the proper evidence, will stand him in as good stead as an undisputed reconveyance from his grantee. Has the plaintiff here such a title?

It is admitted by the defendants that Horace Bartlett, after his purchase from the plaintiff on the 17th of May, 1843, actually took possession of one-half of the saw-mill and the saw-mill privilege only. The plaintiff testifies (and there is nothing in the case to discredit or control his testimony) that he has kept possession of his half of the grist-mill, hitherto taking the profits accruing therefrom; that he, and those jointly interested with him, have always had the open and exclusive possession of the grist-mill and grist-mill privilege, claiming to own it, alternating in the use of it with each other monthly up to November, 1865, when the wheel broke; no one ever denying his right or asserting any counter claim, until some time in the summer of 1865, when these defendants erected the building and put in the machinery here complained of, and began to use the water without regard to the alleged rights of the grist-mill proprietors, and to deny the plaintiff's interest in the premises.

In 1855, the plaintiff alleging himself to be the owner of an undivided half of the grist-mill and grist-mill privilege, petitioned the county commissioners for an assessment of the damages caused thereto by the location of the Buckfield Branch Railroad. Harvey Bartlett, then owning half the saw-mill, by conveyance from Horace, the plaintiff's grantee, petitioned in like manner for the damages done to the saw-mill; and it appears that the hearing before the commissioners on these two petitions was had on the same day, and that an award of some $800 was made to the plaintiff as the owner of the grist-mill. In fine, he seems to have been in full and undisputed possession of the half of the grist-mill and the grist-mill privilege,

claiming it as owner, and being recognized as such, not only by his co-tenants in that property, but by the successive proprietors of the saw-mill up to the time of the commencement of the defendants' encroachments in 1865, that is, for something over twenty-two years subsequent to his conveyance to Horace Bartlett. That possession must have been perfectly well known to all the proprietors of the saw-mill who are the defendants' grantors; and it must be considered as proved, that the plaintiff has had such a possession of one-half of the grist-mill since his conveyance to Horace Bartlett, as gives him a perfect title thereto, although it was included in that conveyance. The defendant Corliss, as grantee of Rufus Woodsum, owns the other half; but that fact, as we have seen, will not protect him in a suit by his co-tenant for an injury to the common property.

The building of the excelsior mill in such a manner as to darken the grist-mill and prevent access to it for the purpose of repairing the wheels and underworks, and the use of the land in front of it as a piling place for lumber, to the exclusion of customers from the grist-mill, constitute such an injury.

With regard to the use of the water, the undisputed testimony is, that prior to 1865 the owners of the saw-mill were careful to leave water enough for the use of the grist-mill at all seasons; that the water in the upper flume did not ordinarily fall to a depth of less than four and a half feet before August or September; and that that depth of water in the upper flume would keep the grist-mill alone supplied for a month. When Ira Bartlett conveyed his half of the saw-mill and its privileges now owned by the defendants, he excepted and reserved in the conveyance all the water in the pond when it is below four and a half feet in the flume at the upper dam, except from the first of March to the first of May in each year; and simultaneously with the conveyance, Harvey Bartlett, to whom it was made, gave his bond to the plaintiff and Rufus Woodsum (who were then in possession of the grist-mill) with penalty, reciting his obligation "not to use or cause to be used any water in the mill-pond for running his saw-mill from the first day of May to the first day of March

following, in each and every year, unless the water in the upper flume is more than four and a half feet deep." Taking this in connection with the testimony previously adverted to in regard to the use of the water prior to 1865, it must be considered as establishing the right of the proprietors of the grist-mill to the exclusive use of the water if it falls below four and a half feet in depth in the upper flume, between the first of May and the first of the succeeding March.

This right, also, the defendants have infringed, and are responsible for the damage thereby occasioned.

Among the questions stated in the report we find the following:

"Have defendants a right to use water for any other purpose than for a saw-mill?"

This must depend, in the present case, upon the terms of the deeds under which they hold. A construction, which would restrict the grantees to the specific use to which the water was first applied, is not to be favored for reasons which are well assigned in *Tourtellot* v. *Phelps*, 4 Gray, 370, and *Ashley* v. *Pease*, 18 Pick. 268; and it will never be adopted unless the language of the grants unmistakably indicates that it was the intention of the parties so to restrict the use of the water. Upon an examination of the conveyance here, we see nothing to base such a restriction upon, nothing to take the case out of the general rule which is stated by Shaw, C. J., in the case last referred to, as follows:

"In general, where a mill-seat is granted, that is, land on a stream on which mills are actually situated, or where it appears by the grant that the object is to erect mills thereon, the soil is the principal subject of the grant; the right to use it for any and all mill purposes at the pleasure of the owners, and to change those uses at pleasure, follows as incident to the ownership; and words of description of the water-power, such as the right to use the stream for the saw-mills and grist-mills, &c., situated, &c., are not to be considered as restrictive of the more general right incident to the ownership."

We hold, then, that the defendants may rightfully use the water

for other purposes than for a saw-mill, provided only that they do not by the new use interfere with the rights which the proprietors of the grist-mill have gained by long-continued, uninterrupted user, and the compacts of the previous proprietors.

But they can in no event, and for no purpose, draw the water so as to reduce the depth in the upper flume below four and a half feet, between the first day of May and the first of March following, as the case finds they have done, without subjecting themselves to a liability to pay all damages to the proprietors of the grist-mill. We think Harvey Bartlett's bond must be taken to be declaratory of the mutual rights of the proprietors of the saw-mill and grist-mill respectively, as previously established among themselves and confirmed by long-continued use.

Some other questions are proposed in the report, but the evidence relating to them is too scanty and vague to enable us to give answers sufficiently definite to subserve any useful purpose.

If the referee, to whom the case is to go for the assessment of damages, has any doubt with regard to them, it will be competent for him to present them to the court by his report, accompanied by such a statement of the facts which he finds established, as may be necessary for their determination. *Defendants defaulted.*

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

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

ELBRIDGE GERRY *vs.* SAMUEL W. DUNHAM.

If a "person summoned as a trustee, upon his examination wilfully and knowingly answers falsely," the perjury thereby committed constitutes, not only a cause of action within R. S., c. 86, § 77, but also a fraudulent concealment of the cause of such action within c. 81, § 107.

ON REPORT.

CASE to recover, under R. S., c. 86, § 77, the amount of a judgment recovered at the November term, 1859, of this court, for this county, by this plaintiff in an action against one Dean, in which action, Dunham, the defendant in this action, was summoned as trustee of Dean, and, as the plaintiff alleges, upon his examination as such trustee, "wilfully and knowingly answered falsely."

The writ was dated April 16, 1867. Plea, general issue and the statute of limitations.

The plaintiff made out a *prima facie* case, and the defendant relied on the statute of limitations, R. S., c. 86, § 105; to which the plaintiff replied a fraudulent concealment of the cause of action within the meaning of R. S., c. 86, § 107.

The disclosure of the trustee was taken in writing and placed upon the files in the clerk's office, where it has remained ever since it was made in 1859.

It appeared that prior to the defendant's disclosure as trustee, Dean had delivered into his possession goods and chattels, notes and accounts, to quite an amount, and absconded to Illinois, where he has remained ever since, and that Dunham falsely answered that he was not indebted to Dean, and had no money, goods, or effects in his hands, when summoned as trustee, belonging to Dean.

It also appeared substantially that Gerry had made diligent inquiries for Dean, and could not ascertain his place of residence.

A. Black, for the plaintiff.

W. W. Virgin, for the defendant.

If the plaintiff's cause of action was not penal, as held in *Mansfield* v. *Ward*, 16 Maine, 433, and therefore subject to the one year limitation of the statute, it would be subject to the six year clause.

To the statute of limitation the plaintiff replies, that the defendant "fraudulently concealed the cause of such action from the person entitled thereto," who is the plaintiff, within the meaning of R. S., c. 81, § 107.

If the action had been founded on c. 113, § 47, for "aiding"

Dean "in the fraudulent transfer and concealment of his property," and the false disclosure put in to prove the fraudulent concealment of such cause of action, there would have been a cause of action consisting of "aiding a debtor in a fraudulent transfer or concealment of his property," &c., as defined in c. 113, § 47, and a fraudulent concealment of such cause of action, under c. 81, § 107, by answering falsely.

But the cause of action, now under consideration, is defined by c. 86, § 77, to consist in perjury by falsely disclosing as a trustee; and the only question is, does the one act of perjury constitute *per se* not only the cause of action, but also, and at the same time, a fraudulent concealment of the cause of action, which is itself.

Were it not for § 107, the statute of limitation being otherwise unqualified in its terms, would be an absolute bar to all actions at law to which it is applicable, although otherwise in equity. Some courts have mixed law and equity together, and held that even in law an absolute statute bar may be temporarily repealed by the fraud of the party pleading it. Angell on Lim. 179, where all the cases are collected. See, particularly, *Troupe* v. ——, 20 Johns. 33, where Spencer, C. J., demonstrates the absurdity of such a proposition, commenting on *Turnpike Co.* v. *Field*, 3 Mass. 201, cited by the plaintiff.

The limitation bar is qualified by § 107 which consists of two clauses, whereas the corresponding section in the Massachusetts statute consists of but one. Our § 107 is but an affirmance of the principle laid down by a class of cases, and which Professor Greenleaf, in his last sentence on "limitations" expresses as follows: "And it must be alleged and proved, not only that the plaintiff did not know of the existence of the cause of action, but that the defendant had practised fraud in order to prevent the plaintiff from obtaining knowledge at an earlier period." Hence § 107, which, like the cases which suggested it, contemplates two distinct things, viz., a cause of action and a fraudulent act by the defendant, by which the cause of action was concealed. If the terms of the statute had been, "Any person entitled to an action may commence the same within six years after he discovers that he has a just cause of action," then

this plaintiff might recover; for no fraudulent concealment would intervene.

Again; substitute the cause of action in § 107 and it will read, "If any person who has falsely disclosed, fraudulently conceals the fact of such false disclosure," &c. The fraudulent concealment is wanting.

Massachusetts Turnpike Co. v. *Field*, *supra*, is cited by Greenleaf to sustain his last sentence on "Limitations," 2 Greenl. on Ev., and does not sustain the plaintiff's case. Field promised to build and complete a turnpike in a special manner, but executed it in a defective manner, and then not only literally covered up the defect, "thereby concealing the cause of action" (as Metcalf, J., in the last paragraph of *Rice* v. *Burt*, 4 Cush., 210, says, in commenting upon the case), but represented that he had completed the work according to contract. Chapman, J., in pronouncing the opinion of the court in *Nudd* v. *Hamblen*, 8 Allen, 131, remarks, while speaking of *Turnpike* v. *Field*, as follows: "The defendant had contracted to construct a turnpike for the plaintiffs. He did some of the work deceitfully, and covered the defective work with earth. He then represented that he had completed the work, and received his pay." The defendant contends this case sustains Mr. Greenleaf and not the plaintiff.

There is a class of cases deciding that it is necessary to prove a concealment, and that there is no concealment when the party defrauded possesses the means of acquiring a knowledge of the facts. Such are *Cole* v. *McGlathry*, 9 Greenl. 131; *Farnham* v. *Brooks*, 9 Pick. 244; *McKown* v. *Whitman*, 31 Maine, 448; *Rouse* v. *Southard*, 39 Maine, 404; *Nudd* v. *Hamblin*, 8 Allen, 131.

Way v. *Cutting*, 20 N. H. 187, cited by the plaintiff, declares that the fraud by which a concealment is accomplished need not be other than that which constitutes the cause of action; and adds, that fraud will in all cases prevent the bar of the statute, although the plaintiff possessed the means of detecting it.

New Hampshire has no statute like § 107. In deciding *Way* v. *Cutting*, their court were not giving a construction to the plain terms

of a statute, but went beyond all rules even in equity, and declared that where the owner of a farm falsely and fraudulently represented to the plaintiff that certain men named had appraised his farm at $4,150, *per quod* the plaintiff was induced to buy it, the defendant owner could not have the benefit of an unqualified absolute statute bar. In other words, that the power of an individual in its war with fraud, like the power of the government in its war with treason, is above all statute law.

All penal actions are made short-lived by § 105, and they can only be resurrected when they come within the spirit and letter of § 107. If there be no legal remedy in this case, the law should not be outraged to make one which shall meet any man's sense of justice.

But there is a remedy under c. 113, § 47, and nowhere else at this time unless the court conclude that a perjury committed under c. 86, § 77, is the representative of a dualism which more than rivals that of the Manichean.

Dickerson, J. Case charging the defendant with making a false disclosure, as trustee, whereby the plaintiff lost his debt against the principal debtor. R. S., c. 86, § 77.

The cause of action accrued more than six years before the commencement of this suit. The defendant relies upon the statute of limitations. R. S., c. 81, § 105. To this the plaintiff replies, that the statute does not attach, because of the defendant's fraudulent concealment of the cause of action from him. R. S., c. 81, § 107. The case calls for a construction of this section, which is as follows: "If any person, liable to an action, mentioned in this chapter, fraudulently conceals the cause of such action from the person entitled thereto, . . . the action may be commenced at any time within six years after the person entitled thereto discovers that he has just cause of action."

The cause of action consists in the false answers given by defendant in his disclosures as trustee; and the question is, whether the defendant "fraudulently concealed the cause of such action"

from the plaintiff. If he did, it is conceded that the action is not barred by the statute of limitations; if he did not, it is.

The fraudulent concealment, if any, consisted in the perjury of the defendant, which also constituted the cause of action. In his disclosure as trustee the defendant denied that he was indebted to the principal debtor, though he then well knew that he owed him a very considerable sum. As the debtor had absconded from the State, and the defendant refused to pay him until the latter recovered judgment against him, it is apparent that the defendant committed the perjury for the fraudulent purpose of holding the debtor's property as his own. There were, therefore, the perjury and the fraudulent purpose. Was there superadded thereto a concealment of the cause of action, that is, of the perjury? There was no corporeal object to be concealed, but simply a mental one, a knowledge of the fact of the perjury. By his fraudulent representations concerning the relation of debtor and creditor then subsisting between him and the plaintiff's debtor, the defendant furnished the plaintiff with a cause of action against him, and by withholding from him all knowledge of the falsity of such representations he at the same time concealed from him the cause of action. The word "conceal," according to the best lexicographers, signifies to withhold, or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. Viewed in the former sense of this word, the defendant's conduct clearly amounted to a concealment of the cause of action; he falsified the facts in the case, and concealed the knowledge that he had done so. If there was a concealment of the cause of action, there can be no question, as we have seen, that it was fraudulent.

It is not necessary that the fraudulent concealment should occur subsequently to the time the cause of action accrued. There is no such provision in the terms of the statute, nor does it admit of such construction; both may take place at the same time. It is not the purpose of the statute to protect a man in the enjoyment of the fruits of a fraudulent transaction, unless he should conceal the fraud subsequently to its commission, though he may have done so at its

inception. A guilty party cannot thus take advantage of his own wrong.

The view we have taken of the case is sustained by the authorities cited by the plaintiff's counsel. *Cole* v. *McGlathey*, 9 Greenl. 193; *The First Massachusetts Turnpike Cor.* v. *Field*, 3 Mass. 201; *Way* v. *Cutting*, 26 N. H. 187. *Judgment for Plaintiff.*

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

INHABITANTS OF BYRON, appellants, from decision of the County Commissioners of Oxford County.

Section 22, c. 18, of R. S. as amended by Public Laws of 1862, c. 123, takes the place of the original section; and the reference in § 23 to the "preceding section," since the date of such amendment applies to § 22 as amended.

Hence, an appeal lies from the decision of the county commissioners rendered on a petition setting out an unreasonable refusal of a town to accept a town-way duly laid out from land under improvement therein to a town-way, by its selectmen on the petition of an owner of such land.

ON EXCEPTIONS.

APPEAL from the decision of county commissioners.

On Sept. 4, 1864, one Samuel Houghton, owning certain improved land in Byron, petitioned the selectmen to lay out a town-way from his land to a certain town-way already existing in Byron. After due proceedings thereon, the selectmen duly laid out the way and made the proper report of their acts; and on the 15th of October following, the town, at a legal meeting duly called, and under a sufficient article, refused to accept the way laid out as above stated. Thereupon, the county commissioners, after due proceedings had, upon the petition of Houghton, determined and adjudged that public convenience and necessity required the location of said town-way, that the town unreasonably refused to accept said way, that the same should be laid out and accepted, and directed that

their proceedings be recorded by their own, and the clerk of the town.

Thereupon, the inhabitants of Byron, at the September term of this court, 1867, entered an appeal from the decision of the county commissioners, a committee was duly appointed, which, after due notice and proceedings made and returned their report wholly reversing the decision of the county commissioners.

To the acceptance of the report of the committee, John Houghton, the original petitioner, appeared and objected, alleging that the statute did not authorize an appeal from the decision of the county commissioners, in such case, but that their adjudication and decision in the premises were conclusive.

The presiding judge overruled the objection, and accepted the report of the committee; and thereupon Houghton alleged exceptions.

Bolster & Wright, in support of the exceptions.

E. G. Harlow, contra.

APPLETON, C. J. By R. S., 1857, c. 18, § 22, "When the municipal officers unreasonably neglect, or refuse to lay out, or alter a town-way, or a private way on petition of an inhabitant, or of an owner of land therein for a way leading from such land under improvement, to a town or highway, the petitioner therefor may, within one year thereafter, present a petition stating the facts to the commissioners of the county at a regular session, who are to give notice thereof to all persons interested, and proceed to act thereon as is provided respecting highways. Their decision, returned and recorded, is to be conclusive; allowing those aggrieved by their estimate of damages, a right to have them assessed by a committee or jury, as is provided respecting highways. The damages, and the costs if the damages are increased, are to be paid by those liable if no such application had been made; and the commissioners may issue a warrant of distress to collect the same."

By § 23, "When a town unreasonably refuses to discontinue a

town or private way, or to accept one laid out and altered by the selectmen, the parties aggrieved may, within the time and in the manner stated in the preceding section, present a petition to the commissioners, who shall, in like manner, proceed and act thereon, and cause their proceedings to be recorded by their own and by the town clerk; and the rights of all parties may be preserved and determined as provided in that section."

By the act approved March 18, 1862, c. 123, "section twenty-two of chapter eighteen of the revised statutes is hereby amended by striking out of said section all after the word "highways" on the ninth line thereof, and inserting in lieu thereof the following words:

"When their decision is returned and recorded, parties interested have the same right to appeal to the supreme judicial court in said county, and also the same right to have their damages estimated by a committee or jury as is provided in this chapter respecting highways."

The 22d section was accordingly so amended. By this section the right to appeal is given to all cases within its purview. Is the same right extended to cases embraced within § 23?

The act of 1862, c. 123, is the modification of an existing statute. It provides that § 22, after its amendment, shall still be and remain § 22 of c. 18 of the revised statutes. Chapter 18 must, therefore, after the passage of the act of 1862, be regarded and construed as containing the 22d section as now amended.

If it were not so, the rights of parties under § 23 would be lost. The rights of all parties could not "be preserved and determined as provided in that section," as it stood before the amendment, for the mode and manner of preserving and determining them as thereby provided have been repealed.

The twenty-third section of c. 18, remains. It has not been repealed. Effect should be given to it. The preceding section, upon which the rights of parties depended, has been modified, but it is still § 22, with its modifications. Section twenty-three still refers to the preceding section. If to the preceding section, as it

stood before the amendment, then no rights are protected. If the reference be to the preceding section as amended, that is, if the reference is to continue and apply to the preceding section, with its amendment, from the time of such amendment, then the rights of all parties will be preserved. The original statute and the amendment are to be viewed as one act. No portion of it is to be regarded as inoperative. The amended section takes the place of the original section by the terms of the act. The intention of the legislature was, that the act should remain with the same number of sections as before. From the date of the amendment, the statute is to be construed as if, originally, the statute was as amended. Consequently, then, there is the same right of appeal under § 23, as is given under § 22. *Harrell* v. *Harrell*, 8 Florida, 46. *McKibben* v. *Lester*, 8 Ohio, N. S. 627. *Blake* v. *Brackett*, 47 Maine, 28.

Both sections relate to the same subject-matter, and are part of the same statute. The rule is, that in endeavoring to ascertain the meaning of a statute, all laws relating to the same subject-matter are to be construed together. Much more is this principle applicable to sections of one and the same statute.

Exceptions overruled.

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

LYMAN RAWSON *vs.* OBED TAYLOR *et ux.*

By R. S. of 1857, c. 104, § 3, the plaintiff in a real action is required to "set forth the estate he claims in the premises, whether in fee-simple, fee-tail, for life, or for years; and if for life, then whether for his own life or that of another.

To recover he must prove that he is entitled to such estate as he has alleged, and that he had a right of entry therein when he commenced his action.

ON REPORT.

REAL ACTION for the recovery of the possession of certain land

described in the writ, and for rent thereof. The writ set out an estate in fee in the plaintiff.

The plaintiff put in a judgment recorded in his own favor in March, 1864, against Sarah Brister, and a levy of the execution issued thereon upon the premises, the appraisers' certificate describing the estate set off as the "life-estate of Sarah Brister," "to hold to said creditor, his heirs and assigns, for and during the natural life of the said Sarah Brister."

Rawson, pro se.

Bolster & Wright, for the defendants.

APPLETON, C. J. The demandant by his levy on his execution against Sarah Brister obtained only an estate during her life.

By R. S., 1857, c. 104, § 3, the demandant is required to "set forth the estate he claims in the premises, whether in fee-simple, fee-tail, for life or for years; and if for life, then whether for her own life or that of another," &c. By § 8, if 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.

In the declaration the demandant claims an estate in fee. His proof utterly fails to support it. The action cannot be sustained without an amendment. As none is asked for, the plaintiff must become nonsuit. *Plaintiff nonsuit.*

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

Inhabitants of Jay *vs.* Inhabitants of Gray.

The latter clause of § 5,* c. 37, of the Public Laws of 1858, was not repealed by c. 116 of the Public Laws of 1859, or c. 182 of 1860, or c. 57 of 1861.

On report.

Debt founded upon the latter clause of § 5, c. 37 of the Public Laws of 1858, to recover money paid by the plaintiffs to the superintendent of the State reform school, for the clothing and subsistence for thirty weeks of one Farwell, a boy between the age of eleven and sixteen years, convicted of an assault and battery, before the justice of this court, in and for this county, at the April term, 1867, and by the court sentenced to the reform school during his minority, and committed to the reform school in pursuance of the sentence on the 6th of May, 1867, he then being a resident of the town of Jay, but having a legal settlement in the town of Gray.

All the facts, essential to a recovery, were proved. And the only question raised was, whether the latter clause of § 5, c. 37 of the Public Laws of 1858, was still in force.

R. Washburn, for the plaintiffs.

W. H. Vinton, for the defendants, contended that:

Section 5, c. 37 of the Public Laws was repealed by c. 57, of 1861. The institution is a school and not a poor-house, and the inmates scholars and not paupers. Hence, the town where the boy was a scholar, and not where he had his pauper settlement, was intended by the legislature to be responsible for his clothing and subsistence.

* Latter clause of § 5, c. 37 of the Public Laws of 1858. And an action shall accrue to such city or town, to recover the money so paid, against the parent, master, or guardian of such boy, or against the city or town in which he may have a legal settlement.

DANFORTH, J. This action is founded upon the latter part of § 5, c. 37 of the statutes of 1858. If that clause is still in force, the plaintiffs can recover, otherwise their action must fail. The amendments made to this act in 1859, c. 116, and 1860, c. 182, do not affect the clause in question. If repealed, it is by the act of 1861, c. 57. This latter act does not purport to be amendatory of the former, or a revision of it, but does reënact two sections of it, with slight alterations, one of which provides for the payment of the support of the convict by the town "where such boy resides," not exceeding one dollar per week. It does not reënact the clause in question, giving the town a remedy "against the parent, master, or guardian of such boy, or against the city or town in which he may have a legal settlement." The act of 1861 repeals only such acts and parts of acts as are inconsistent with it. It is not easy to see in what respect these two provisions are inconsistent. They stood together in the act of 1858, and no reason is perceived why they may not stand together in different acts. According to the agreement of the parties there must be judgment for the plaintiff for $30 and interest from date of writ.

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

FREEMAN COBURN *vs.* JEREMIAH J. HALEY & another.

An assertion in his bond for the sale of land that the obligor is "possessed and seized in fee" of the premises, when in fact he has only a bond for a deed thereof from the real owner, is, between the original parties thereto, a good defense to a promissory note given in consideration of the bond.

And, in such case, the maker of the note may rely upon the misrepresentation in defense without returning the bond.

On report.

Assumpsit on a promissory note by the payee against the maker.

The plaintiff having an equitable title to a certain parcel of land in February, 1867, caused it to be conveyed to one Jennings, as security for one hundred and eighty-eight dollars, whereupon, on the same day, Jennings gave the plaintiff a bond conditioned to convey to him, by quitclaim deed, the land, on the payment within one year of the amount above mentioned, and interest.

Subsequently, and before the expiration of the year, to wit, on the 16th of May, 1867, the plaintiff executed and delivered to the defendants a bond asserting that the plaintiff "is possessed and seized in fee" of the land therein described and conditioned; that the plaintiff will convey the same to the defendants on the payment by them of $700, according to the tenor of several promissory notes given by the defendants in consideration of the bond, the first of which is the one in suit.

The bond from Jennings to the plaintiff was, while in force, conditionally assigned to one Turner, and the condition having been fulfilled, the bond reverted to the plaintiff, and expired in February, 1868. Thereupon Jennings claimed a forfeiture, but waived it, and on the 30th of June, 1868, renewed the bond for one year.

It appeared that the plaintiff had no other title to the land, that none of the notes given by the defendants to the plaintiff had been paid, and that at the trial the defendants tendered the bond to the plaintiff, which was refused.

The full court to award judgment in accordance with the law and facts.

W. P. Frye & J. B. Cotton for the plaintiff.

The note was given in consideration of the bond. A promise is a good consideration for a promise. 1 Pars. on Con. 373. Met. on Con. 182. The promise is not for the land, but for a promise. The estate is not the moving cause, as in *Rice* v. *Goddard*, 14 Pick. 296. But the promise, as in *Trask* v. *Vinson*, 20 Pick. 105. *Reed* v. *Cummings*, 2 Greenl. 82. *Smith* v. *Lincoln*, 15 Mass. 72. *Lloyd* v. *Jewell*, 1 Greenl. 352. 1 Pars. on Con. 383–4.

Jennings simply held the land for security of a comparatively nominal sum, and the plaintiff had the right to dispose of it at any time by paying off Jennings.

The having the title at the time of making the bond is a non-essential. *Trask* v. *Vinson*, *supra*. 2 Pars. on Con. 266. The inducement was not that the obligor was seized of the land, but his promise to convey. *Pratt* v. *Philbrook*, 33 Maine, 22. *Daniel* v. *Mitchell*, 1 Story, 172. The words "possessed and seized in fee" do not change the contract, whether they are in or out of the bond. If the false representation is not the inducement, it will not avoid the contract. *Bronson* v. *Wiman*, 8 N. Y. 182.

It cannot support charge of fraud. It was put into the bond by the scrivener as mere matter of form, both parties knowing at the time what the real facts were.

The principle of *caveat emptor* applies. The common law does not require the vender to disclose defects which are open to the observation of both parties. *Bean* v. *Herrick*, 12 Maine, 262. *Prentiss* v. *Russ*, 16 Maine, 30. Jeremy on Eq. 385. *Sibbons* v. *Eddy*, 4 Mason, 414. *Pratt* v. *Philbrook*, *supra*.

"The buyer of land is at his peril to see to the title." *Parley* v. *Freeman*, 3 T. R. 56.

The policy of the law is not to promote negligence, but reasonable diligence.

The defendants did not rescind within a reasonable time. *Stevens* v. *McIntire*, 14 Maine, 17. *Pratt* v. *Philbrook*, *supra*.

The representation was not made with design to misrepresent a material fact.

The defendant must rely on his bond for the performance of the agreement. *Reed* v. *Cummings*, 2 Greenl. 82. *Smith* v. *Sinclair*, 15 Mass. 171. *George* v. *Stockton*, 1 Ala. 136. *Wood* v. *Morgan*, 1 Morris, 179. *Head* v. *Bowers*, 23 Pick. 461.

Pulsifer & Frost, for the defendants.

APPLETON, C. J. This suit is upon a note of the defendants, the consideration of which is a bond given by the plaintiff, con-

ditioned to convey a tract of land therein described to them upon their payment of certain notes specified in the bond.

The bond alleges that "said Freeman Coburn is possessed and seized in fee of a certain tract or parcel of land situated in Greene, aforesaid, bounded as follows," &c., then giving the boundaries. In fact, however, the plaintiff was not "possessed and seized in fee" of the premises contracted to be conveyed, having only a bond from the legal owners, which he permitted to be forfeited before the maturity of the note in suit, but of which he afterwards obtained a renewal. It does not appear that he has now acquired the title.

The defendants seek to avoid their liability, on the ground that the plaintiff was guilty of a fraudulent misrepresentation of his title, by stating that he was "possessed in fee" of the premises, when he had no title thereto. A promissory note, founded on the payee's bond to convey to the promisor land belonging to a third person, is not void for want of consideration. *Trask* v. *Vinson*, 20 Pick. 108. It is a promise for a promise,—one being the consideration of the other. "Whether the contractor would be bound to disclose his want of title, or whether the omission to do so would be such a *suppressio veri* as would render the contract voidable, are questions," observes Morton, J., "which we are not now required to decide."

A material misrepresentation in reference to the essentials of a contract will justify a party deceived thereby in rescinding the same.

In *Trask* v. *Vinson*, *supra*, the contract was "executory, and contained no stipulation that the contractor was then seized of the estate." In the case before us there is the express assertion, that the obligor "is possessed and seized in fee" of the land described in the bond.

Now for what were the defendants contracting? Not for a lawsuit, the result of which might be a sum in damages. The contract was for the land which one was to convey, and for which the defendants were to pay. Whether the obligor had or had not a legal title was material. If he had the title, a court of equity would compel him to convey the premises upon a performance, by the defendants,

of what was to be done and performed by them. If the obligor had no title, as he might never obtain any, all the obligees could recover would be the damages sustained, and thus the object of the party contracting for the land would be defeated. The defendants had a right to rely on the assertions of the plaintiff, as to his title, and the latter cannot complain if, finding those assertions false, they seek to avoid their liability. *Stow* v. *Towle*, 22 Pick. 166.

The obligor, if he would tender a deed, it must be one conveying the title. To tender one conveying no title would not be deemed a performance. The title is manifestly of the essence of the contract, and a false assertion in relation thereto cannot be deemed other than material. When a vender of an estate had made a fraudulent misrepresentation of the title, the vendee is entitled, in equity, to a rescission of his contract. *Harris* v. *Carter*, 3 Stew. 233.

It was not necessary for the defendants to return their bond. They may rely on the misrepresentations of the plaintiff as a defense without returning the bond. *Wyman* v. *Heald*, 17 Maine, 329.

Plaintiff nonsuit.

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

HARRIET A. REYNOLDS, appellant, from decision of the Judge of Probate for Androscoggin County.

Where an intestate dies without issue, father or mother, but leaving a sister, a child of a deceased sister, and children of a deceased child of a deceased sister, such children will, by virtue of c. 75, of R. S. of 1857, be entitled to a distributive share of the estate by right of representation.

ON EXCEPTIONS.

APPEAL from a decision of the judge of probate for this county, wherein he decreed that Hattie C. Pulsifer, Benjamin T. Chase,

and Mary E. Chase were entitled to a distributive share of the estate of one Belinda Andrews, deceased, intestate.

It appeared that one Hannah Little died leaving one child, Harriet A. Reynolds (appellant), and three grandchildren, Hattie C. Pulsifer, Benjamin T. Chase, and Mary E. Chase, children of George W. Chase, a deceased son of said Hannah Little; that subsequently one Belinda Andrews, *a feme sole* and sister of Hannah Little, died intestate, leaving no father, mother, or issue, but one sister. The judge of probate decided, that, upon the foregoing facts, Hattie C. Pulsifer, Benjamin T. Chase, and Mary E. Chase, inherited a share of the estate of Belinda Andrews. The presiding judge at *nisi prius* affirmed the decree of the judge of probate, and thereupon the appellant alleged exceptions.

C. Record, in support of the exceptions, cited *Quimby* v. *Higgins*, 14 Maine, 309.

Pulsifer & Frost, contra.

Appleton, C. J. The appellant is the only living child of Hannah Little, a sister of Belinda Andrews, who died intestate, leaving neither father, mother, nor issue; but leaving one sister one child of a deceased sister (the appellant), and three grandchildren of said deceased sister. The question to be determined is whether the grandchildren inherit the estate which would have descended to their father, a brother of the appellant, had he survived.

By St. of 1821, c. 38, § 17, "if the intestate leave no issue, father, brother, or sister, then the same (his estate) shall descend to his mother, if any, but if there be no mother, then to his next of kin in equal degree; the collateral kindred claiming through the nearest ancestor, to be preferred to the collateral kindred claiming through a common ancestor, more remote," &c.

In *Quimby* v. *Higgins*, 14 Maine, 311, Emery, J., says: "The rightful claimant of the estate must be one who claims not only through the nearest ancestor, but also as the next of kin. If broth-

ers and sisters be all dead, leaving children, they take as next of kin; but if some of those children of a brother should be dead, while others are living, such children cannot take, for they are not next of kin as long as any of the brother's children be living."

By the third rule of descent as established by R. S. 1857, c. 75, § 1, "If no such issue or father, it descends in equal shares to her mother, brothers, and sisters; and when a brother or sister has deceased, to his or her children or grandchildren by right of representation."

It will be perceived that the words "next of kin in equal degree," found in the statute of 1821, are omitted, and that special provision is made for grandchildren. These changes are significant and were intended to prevent the result to which the court arrived in *Quimby* v. *Higgins*, before cited. The brother of the appellant would have taken equally with her if living. His children, the grandchildren of his mother, take his share by right of representation. This seems the obvious as well as just intention of the legislature.

The words "next of kin in equal degree" are found in rule fifth, where effect is to be given to them. But each rule is to be construed separately and with reference to the conditions therein assumed as existent.

Decree of the Judge of Probate affirmed with costs.

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

EBENEZER JORDAN *vs.* ANDREW J. STAPLES & another.

The plaintiff leased a certain farm for the term of one year, the lessee to pay therefor "one-half of all the proceeds raised or grown thereon, and to cut and put into the barn all the hay." The lessor was to furnish all the grass-seed, "to have the right to cut off the stock on said farm, during the winter, to amount of hay that the place may furnish for their keeping, to furnish all the

hay if any is wanting to keep out the stock, and if any hay is left, the lessor to have the same." *Held*, that the hay was not included in the "proceeds," and that the lessee had no property in the hay.

Where, by the terms of the lease, the lessor retained a right of occupation of the barn, for the storage of hay and other chattels, he may maintain trespass *quare clausum* against a stranger for entering and carrying away the hay.

ON REPORT.

TRESPASS *quare clausum*, wherein the plaintiff alleges that the defendants broke and entered his close, and took and carried away eleven tons of hay, owned and possessed by him.

The fee of the premises was admitted to be in the plaintiff.

The quantity of hay taken was admitted to be 17,396 pounds. The defendants claimed the hay as the vendees of one Isaac Harmon, who carried on the farm on which the hay was cut, under a written lease from the plaintiff, the material parts of which are of the following tenor:

"That the said Ebenezer Jordan doth lease unto the said Isaac Harmon all that farm lately occupied by Ezekiel C. Downs, to hold for the term of one year, yielding and paying therefor one-half of all the proceeds raised or grown upon said farm, to be delivered unto the said Jordan's dwelling at the time of harvesting.

"The parties agree to furnish, respectively, each one-half of the salt to salt the butter and stock; said Harmon agrees to cut and put into the barns all the hay in seasonable time and good order; the parties agree to furnish, each respectively, one-half of all seed on said farm, grass-seed excepted, which is to be furnished by said Jordan.

"Said Jordan is to have the right to cut off the stock on said farm, during the winter, to amount of hay that the place may furnish for their keeping, and also agrees to furnish all the hay, if any is wanting to keep out the stock, and if any hay is left, said Jordan is to have the same.

"And said Harmon agrees that the said Jordan may, at all reasonable times, enter said premises for the purpose of viewing and making improvements, and nothing in this lease shall be construed

as to bar said Jordan of his occupation of the premises attached to the same as heretofore occupied by him under a former lease to Ezekiel C. Downs."

After the evidence was all in, the case was withdrawn from the jury and reported to the full court, who were to render such judgment as the legal rights of the parties required.

All the remaining essential facts appear in the opinion.

W. P. Frye & J. B. Cotton, for the plaintiffs.

C. Record, for the defendants, cited *Bailey* v. *Fillebrown*, 9 Maine, 12, 137; *Turner* v. *Bachelder*, 17 Maine, 257, and cases *infra*; *Sherburne* v. *Jones*, 20 Maine, 70, and cases there cited; *Garland* v. *Hilborn*, 23 Maine, 442; *Miller* v. *Fulton*, 4 Ohio, 434; *Wait, appellant*, 7 Pick. 100; *Lienow* v. *Ritchie*, 8 Pick. 235 and note 2; *Eames* v. *Prentice*, 8 Cush. 337; *Ropps* v. *Barker*, 4 Pick. 238; *Bishop* v. *Barker*, 19 Pick. 517; *Sawyer* v. *Goodwin*, 34 Maine Rep. 419; *Sampson* v. *Coy*, 15 Mass. Rep. 493.

DICKERSON, J. TRESPASS for breaking and entering plaintiff's close, and carrying away his hay.

The title to the premises was in the plaintiff who had leased them to one Isaac Harmon before the alleged trespass was committed. Harmon sold the hay to the defendants.

By the terms of the lease of the premises, the lessee was "to yield and pay therefor one-half of all the proceeds raised or grown upon said farm, to be delivered unto the lessor's dwelling-house at the time of harvesting." Subsequent provisions of the lease, however, render it clear that the parties did not intend to include the hay in "the proceeds" named in the lease. These required the lessee "to cut and put into the barns all the hay," authorized the lessor to reduce the stock on the farm, during the winter, to the amount of the hay that the place might furnish for their keeping, bound him to furnish all the hay, if any should be needed to keep out the stock in the spring, and entitled him to the hay left on the place at the expiration of the lease. The lessor agreed to furnish

stock for the place, under the stipulation, that the hay cut thereon should be fed out to such stock. In respect to the hay, the lessee was simply the servant of the lessor, and had no title to it whatever. The case is clearly distinguishable from the common one of "letting a farm on shares," as it is termed, where the property in the crops is in the lessee until they are divided.

The lessor reserved the right of occupying the premises attached to the property leased, as he had before done under a lease to one Downs. It appears from the testimony, that, pending that lease, the lessor was in possession of the barn where the hay in controversy was put, and that he held such possession under the lease to Harmon. The plaintiff was thus the owner, and in possession of the hay.

The declaration in the writ sets forth in one count that the defendants "broke and entered the plaintiff's close, and took and carried away his hay," &c. The counsel for the defendants argues that this is not a sufficient count in trespass *de bonis asportatis* to entitle the plaintiff to maintain this action. The cases cited by the learned counsel render it clear that such a declaration cannot be supported by simply proving a trespass in taking and carrying away the goods, though it would be good upon the further proof of a breach of the close. In the case at bar such proof is furnished. The plaintiff testifies that the defendants took the hay from the barn, and hauled it away; that they cut it down with a hay-cutter; that he forbade them; . . . that "they told him he had forbidden them enough; they had bought the hay, and were able to pay for it, if they had not bought it of the right man."

There is some conflict of testimony as to the quantity and value of the hay; but we think the plaintiff is entitled to recover one hundred and twenty-five dollars, and that judgment should be rendered in his favor for that amount.

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

THOMAS WINSLOW & another, in error, *vs.* JOSEPH S. LAMBARD.

A judgment obtained on default, at the return term of a writ declaring on a joint judgment against two defendants, on one of whom, as it appears by the return, no service had been made, is erroneous, and may be reversed on error.

ON REPORT.

WRIT OF ERROR, alleging that in a judgment obtained before this court, in and for this county, on the first Tuesday of March, A. D. 1864, wherein the said Joseph S. Lambard was plaintiff, and the said Thomas Winslow and James R. Grant (plaintiffs in error) defendants, there occurred certain errors specified.

It appeared that on Feb. 16, 1857, this defendant sued out a writ against these plaintiffs as makers of a promissory note, dated Oct. 6, 1854, for twenty dollars and interest; that the service of the writ, dated Feb. 17, 1857, and signed by a deputy-sheriff, recited the attachment of a chip "as the property of defendant, and at same time left a summons at his last and usual place of abode;" that the writ declared both of said defendants to be of "Pittston, in said county;" that the writ was duly entered and an appearance by attorney; that judgment was rendered at the November term, 1857; that the defendant in error brought an action of debt on that judgment, returnable at the March term, 1864; that the deputy-sheriff who served the writ made a return thereon dated Feb. 11, 1864, reciting that he had "attached a chip as the property of the within-named defendant . . . and the same day left at his last and usual place of abode a summons for his appearance at court;" that no one appeared for the defendants or either of them in the latter action, and a default was entered at the return term. The remaining facts appear in the opinion.

Bradbury & Bradbury, for the plaintiffs.

Whitmore, 2d, for the defendant, cited *Holmes* v. *Fox*, 19 Maine, 107; *Lovell* v. *Kelly*, 48 Maine, 265; *Morrison* v. *Underwood*, 5

Cush. 52; *Orcutt* v. *Ranney*, 10 Cush. 183; *Stinson* v. *Snow*, 10 Maine, 263; *Blanchard* v. *Day*, 31 Maine, 496; *Lord* v. *Pierce*, 33 Maine, 550.

WALTON, J. A judgment obtained on default of the defendant when there has been no legal service of the writ is erroneous. *Railroad* v. *Weeks*, 52 Maine, 456. And a judgment against two defendants, when the writ was served only on one of them, is equally erroneous. *Buffum* v. *Ramsdell*, 55 Maine, 252. When there are two or more defendants, and the cause of action is joint, a want of service on one of them is a good cause for abatement of the writ as to all. *Sawtelle* v. *Jewell*, 34 Maine, 544.

In this case the judgment sought to be reversed was obtained on default of the defendants, and there is no pretense that the writ was served on more than one of them; and the validity of the service on him is denied. He was absent in the army, and the service was by a summons left at the house of his father at Bath. He was a married man, or had been, had a family of his own, and had resided for many years in California, and he denies that he had a home at his father's, and says he had no notice whatever of the pendency of the suit. The validity of such a service may well be doubted. But it is unnecessary to determine whether the service on him (Winslow) was legal or not, for there is no pretense of any service on the other defendant, Grant. As to him the officer testifies as follows: "I did not serve said writ on James R. Grant; he was not here at the time, and had no residence here that I know of; I could not find him in my precinct." There was no appearance for either defendant, and the action was defaulted at the return term of the writ. A judgment obtained under such circumstances is clearly illegal. *Judgment reversed.*

APPLETON, C. J.; KENT, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

CHARLES FIELD *vs.* ELMIRA D. TIBBETTS.

A negotiable promissory note, payable by installments, is dishonored when the first installment is overdue and unpaid.

By virtue of Public Laws of 1858, c. 33, § 27, the fact that a negotiable promissory note was overdue when negotiated, will not, in an action thereon by "any holder for a valuable consideration, and without notice of the illegality of the contract," subject it to the defense that it was given in part for intoxicating liquors unlawfully sold.

And, under the statute, the fact that a note is overdue is not notice express or implied, that it was given for intoxicating liquors.

ON EXCEPTIONS.

WRIT OF ENTRY on a mortgage, dated Oct. 24, 1866, and given by the defendant to one Coffee, to secure a negotiable promissory note, of the same date, for one hundred dollars, payable to Coffee or order, "in monthly payments of five dollars each, at the expiration of each and every month from the date" thereof, "and interest."

The plaintiff read the mortgage and an assignment thereof to himself, dated Dec. 24, 1866, duly acknowledged and recorded; and also the note which was duly indorsed by the payee at the date of the assignment of the mortgage.

The defendant offered to prove that the note was given in part for intoxicating liqnors, sold without authority of the State or United States, and that the other part of the consideration was the sale of property not owned by the payee. This evidence was objected to by the plaintiff, and excluded by the presiding judge. Thereupon the defendant submitted to a default, which was to be taken off, and the case stand for trial, if the ruling was erroneous.

Titcomb, for the plaintiff.

J. Baker, for the defendant.

WALTON, J. We think the note must be regarded as dishonored at the time it was indorsed to the plaintiff (4 Allen, 562), and was therefore subject to the defense of a want or failure of consideration. But we do not think the fact, that it was then overdue, subjected it to the defense that it was given in part for intoxicating liquors. The effect of our statute is that such a defense shall not extend to negotiable paper in the hands of any holder for a valuable consideration, and without notice of the illegality of the contract. This protection is not limited to such holders as take the paper before it is due; it is extended in terms to "any holder for a valuable consideration, and without notice of the illegality." (Act of 1858, c. 33, § 27.) In the trial of such an issue, the fact that the paper was or was not overdue when the plaintiff took it, seems to be immaterial. The question is not whether the paper was or was not overdue, but whether the plaintiff is a holder for value and without notice of the illegality of the contract. If he prevails upon these points, he brings himself within the terms of the statute, and is entitled to its protection. Such a defense must be governed by our statute, and not by the rules of the mercantile law. By the common law, the fact that the note was given for intoxicating liquors would be no defense. Such a defense, as well as its limitations, is created and regulated by our statute, and not by the mercantile law. Under our statute, the fact that a note is overdue, is not notice, express or implied, that it was given for intoxicating liquors. *Case to stand for trial.*

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

LOUIS J. HOEFFNER *vs.* WILLIAM M. STRATTON.

Where an action of replevin in which the pleadings put the plaintiff's title in issue, is submitted to the law court on report of the evidence, the clerk of this court in the county where the action is pending, may, upon receipt of the certificate "plaintiff nonsuit," rightfully enter up judgment for a return of the property replevied.

ON REPORT.

ACTION against the defendant, clerk of this court, for issuing a writ of restitution and execution without authority.

The case is sufficiently stated in the opinion.

S. Lancaster, for the plaintiff.

L. Clay, for the defendant.

WALTON, J. The gist of the plaintiff's complaint is, that the defendant, as clerk of the supreme judicial court for the county of Kennebec, wrongfully entered up judgment against him for the return of a piano-forte which he had replevied from one Elbridge Berry. The case was submitted to the law court for a determination upon a report of the evidence, signed by the presiding judge. The certificate of the decision of the law court was simply "plaintiff nonsuit." The plaintiff contends that this certificate did not authorize the clerk to enter up judgment against him for a return of the piano-forte, because a plaintiff in replevin may be nonsuited, and yet the defendant not to be entitled to a return. In other words, that the judgment was a *non sequitur* of the certificate.

It is undoubtedly true, that a plaintiff in replevin may fail in his suit, and yet the defendant not be entitled to a return. When judgment is rendered against the plaintiff, and there is no other plea than *non cepit*, the defendant cannot have judgment for a return, for such a plea admits the plaintiff's title, and denies the taking only. So, if the defendant had a lien on the goods which gave him the right of

possession when the action was commenced, but before judgment, the lien is discharged; in such a case, the defendant will prevail in the suit, but he will not be entitled to judgment for a return.

But in all cases when the defendant pleads property in himself or a stranger, and traverses the plaintiff's title, if he prevails he will be entitled to a return. Judge Story says, "no avowry or cognizance for return need be made in these pleas, for they disaffirm the plaintiff's property, and a return follows of course." Story's Pleadings, 2d ed. 456, note. And again, on page 445: "If the defendant pleads property in himself, or in a stranger, in bar or abatement, if it is found for him, he shall have a return without an avowry." And the same proposition is also affirmed on page 441. The reason of the rule is this: When it appears from the defendant's plea, which is proved or admitted to be true, that the chattels were not the plaintiff's, it follows that the plaintiff has illegally taken them from the defendant, and has no right to retain them against him; therefore they shall be returned. When the defendant prevails upon such an issue, his right to a judgment for a return is as clearly established, as his right to a judgment for costs. Morris on Replevin, 87, 88. Wilkinson on Replevin, 91.

In the plaintiff's suit against Berry the pleadings did put in issue the plaintiff's title to the property replevied. It was alleged "that said piano was the property of one Franklin McGowan, and was not the property of the plaintiff;" and the report in the case shows that this was the only issue tried. When, therefore, the certificate from the law court was received "plaintiff nonsuit," it was equivalent to a special finding that the plaintiff had failed to establish his title to the property in controversy; and judgment for a return was as much a matter of course as the judgment for costs; and we see no reason why the clerk should not have entered the one as well as the other, and without any special order so to do. Nothing appearing to the contrary, one was as much a conclusion of law as the other.

But the defendant's justification does not rest alone on the certificate which he received from the law court. Having some doubts whether the entry "plaintiff nonsuit," necessarily entitled the de-

fendant to judgment for a return of the piano, he consulted Judge Rice, then a member of this court, as to what he ought to do; and when we consider his well-known character for correctness, and that he could have no motive or interest to act otherwise, we cannot doubt that he followed the directions which he received, notwithstanding he may now have, after a lapse of many years, no positive recollection that he did so. Being a sworn officer of large experience and well-known integrity, he is certainly entitled to the benefit of the presumption, that he acted as it was his duty to act till the contrary is shown.

Assuming, then, that the defendant entered up such a judgment as he was directed by a member of this court to enter up, the question arises, whether he can be held responsible, as for a tort, provided the judgment proves to be erroneous. We think not. If the certificate of a decision of the law court happens to be so imperfect, or so ambiguous, that the clerk is in doubt as to the judgment which he ought to record, it is competent for any member of this court to direct him; and he will not be a wrong-doer for following such directions, even if they prove in the end to be erroneous. It is not for a clerk to assume that a judge of this court is incompetent, or not to be trusted, to direct him in such a case. The judge will determine for himself whether it is a proper case for him to direct the clerk or not. But if he does direct him, it is the clerk's duty to obey, and the law will protect him in so doing.

But we are satisfied that in this case no error was committed by any one. The defendant's pleadings expressly averred, that the property replevied was not the property of the plaintiff. The burden of proof was, therefore, upon the plaintiff to prove his title. Failing so to do, he must necessarily fail in his suit. Failing in his suit upon such a plea and such an issue, the defendant's right to a judgment for damages, and for costs, and for a return, was a conclusion of law, and was rightfully made up by the clerk upon receipt of the certificate from the law court. *Judgment for defendant.*

JOSEPH BAKER *vs.* ANSON G. STINCHFIELD.

An action on a negotiable promissory note, indorsed by the payee in blank, may be brought in the name of any person who consents thereto, although the note is the property of an insolvent bank in the hands of receivers.

If in the trial of an action the defendant offered evidence in support of an account by him filed in set-off, and the question of allowance or disallowance was submitted to and passed upon by the jury, he is precluded from again offering proof in support of the same account in another suit, although the jury may have decided in the former suit not to allow it.

WALTON J. This is an action of assumpsit on two promissory notes, and is before the law court on report. "If the action cannot be maintained in the name of the plaintiff," he is to be nonsuited; "but if it can be maintained in the name of the plaintiff, and the defendant cannot prove his account in set-off on so much of the evidence as is legally admissible, the defendant is to be defaulted; but if he can go into evidence of his account in set-off, the action is to stand for trial."

The report is very brief, and the meaning not very clear. But we think there can be no doubt that the plaintiff is entitled to judgment. The notes declared on, having been indorsed by the payees, became payable to bearer, and were transferable by delivery. The plaintiff has them in his possession, and is *prima facie* the owner of them. The evidence tends to show that he holds them for collection merely, and that the suit is being prosecuted for the benefit of the creditors of the American bank, "at the request and by the authority of the receivers" thereof. But this evidence, if true, constitutes no defense. It is now well settled, that an action on notes like these may be commenced in the name of any one who will consent to have his name thus used. We think, therefore, there is no force in the objection that the action cannot be maintained in the plaintiff's name. We think it can.

And we think the defendant cannot be allowed to prove his account in set-off. It is the identical account filed in set-off in an

action by the American Bank against him. This is evident when the two accounts are compared. One is a substantial copy of the other. The defendant offered to show that the items claimed in this account were not passed upon in the former suit; but we do not understand him to deny, that there was a trial in the former suit. Nor do we understand him to deny that he introduced evidence at that trial in support of his account, and that the case was submitted to a jury and a verdict returned. If we understand the report, what the defendant desired to do, was to show that in fact, the jury did not allow all of his account. This the law would not allow him to do. If he offered evidence in support of it, and the question of allowance or disallowance was submitted to the jury, and they acted upon it, he is precluded from again offering proof in support of the same account in another suit, although the jury may have decided not to allow it. *Defendant defaulted.*

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

J. Baker, pro se.

A. G. Stinchfield, pro se.

HORACE WEBSTER *vs.* GEORGE H. BAILEY and others.

If a debtor, having failed to disclose in accordance with the conditions of a bond given under R. S., c. 113, § 16, would reduce the amount of damages to be recovered thereon to a nominal sum, he must satisfy the court upon the hearing in chancery, that, during the thirty days next after judgment in the original suit, he was utterly worthless in property, so that the plaintiff suffered no damages by the debtor's failure to disclose.

Proof that he was insolvent, during that time, is insufficient.

ON REPORT.

DEBT on a bond given under R. S., c. 113, § 16, by the defendants, to relieve George H. Bailey from arrest on *mesne process* brought against him by the plaintiff. The judgment in the original suit was recovered Dec. 23, 1868.

Bailey did not attempt to disclose, but undertook to reduce the damages to a nominal sum.

The evidence is sufficiently recited in the opinion.

G. C. Vose, for the plaintiff.

J. Baker, for the defendants.

BARROWS, J. In bar of this action of debt on a bond given to relieve George H. Bailey, one of the defendants, from arrest on *mesne process*, the respondents plead the general issue, and file a brief statement, alleging that "at the time of the rendition of judgment in the original suit against the principal in this bond, and for thirty days thereafter, the said George H. Bailey was entirely insolvent, and utterly worthless in property, so that plaintiff suffered no damage by his failure to disclose."

It has often been adjudged by this court, that only the actual damage is recoverable in a suit for the breach of a bond of this description.

In *Downes* v. *Reily*, 53 Maine, 62, the most recent case reported, reference is made to some of those in the long series, in which the question has arisen in a variety of forms, and the distinction between bonds on *mesne process* and bonds on execution has been illustrated. They need not now be cited anew.

The question here is whether sufficient proof is furnished in the debtor's deposition, which is the only testimony (aside from the bond and the record in the original suit) introduced by either party, to reduce the damages to a nominal sum.

That it is incumbent upon the defendants to furnish evidence which shall justify the court, upon the hearing in chancery as to the damages, in reducing the amount to be recovered below that of the judgment in the original suit, was settled in *Sargent* v. *Pomroy*, 33 Maine, 388. In the absence of all evidence with regard to his ability to pay, and all evidence which might have a tendency to account for the forfeiture of the bond, the natural presumption would be, if the principal made no attempt to disclose and save such a for-

feiture, that the creditor suffered damage to the amount of the judgment which he had recovered, and judgment should be rendered for that amount unless the court is satisfied, by the evidence produced, that the actual damage, caused by the debtor's failure to disclose, was in fact less.

When the debtor is within reach and capable of testifying, the defendants seem to have the means of showing the amount of the damages with reasonable precision, or of demonstrating the fact (if it be a fact) that there were none. All doubtful, indefinite, or equivocal statements coming from him, must needs be construed against them. Especially, if the debtor is the only witness produced, should his testimony be carefully weighed and examined by the court, so as to ascertain whether, and how much the amount, to which the creditor would otherwise be entitled, ought to be reduced to conform to the actual damage accruing from the breach of the bond. If his testimony consists of merely vague general statements that are not in themselves conclusive as to his means and ability to pay at the time when the disclosure should have been made; or, if his account of matters is so inconsistent or improbable in itself, as to compel us to reject it as unworthy of credit, the issue presented by the defendants, in their brief statement, is not maintained on their part, and the plaintiff will be entitled to judgment for the amount of his debt and costs in the former suit with interest.

Such would be the case if the debtor offered only a naked statement that he was insolvent. The assertion is not necessarily inconsistent with the idea that a disclosure, at the time specified in the bond, would have exhibited property sufficient to pay this creditor. A man is said to be insolvent, and might honestly enough declare himself so, when he had not property enough to pay all his debts; but proof of that statement of things differs widely from proof that he was "utterly worthless in property, so that the plaintiff suffered no damage by his failure to disclose." This last is the proposition which the defendants must establish, if they would claim to have the plaintiff's judgment reduced to merely nominal damages.

"From the 23d day of December, A. D. 1868, to January 24,

A. D. 1869, I was insolvent." That is the only material evidence that this debtor vouchsafes to utter on his examination in chief. If this were all, and we believed it to be true, it might entitle the defendants to a nominal deduction from the amount of the original judgment, but assuredly nothing more.

That a debtor, called upon under these circumstances to make proof of his complete inability to pay his debt, or any portion of it, should stop with this solitary inconclusive statement, is a somewhat significant fact.

His deposition is taken in this county May 19, 1869. Upon a cross-examination, he states that he was never married; that he returned from California the last of 1866, or first of 1867, and from January, 1867, to February, 1868, was employed in farming or carpenter work, for his father and brother, who paid him for his services; that he left Maine again in April, 1868, and went directly to California; remained there about a month, and went thence to Idaho, and remained till the 12th or 13th of January, 1869, being employed part of the time in driving a team, and part of the time at work in the shop, shoeing oxen; that he settled with his employers on the 4th of December, 1868; that his business did not support him from March, 1868, to February, 1869, by about $800; that when he left for California in April, 1868, he had about $425, or $450; that he owed nobody but the plaintiff in December, 1868, and January, 1869; that he collected nothing while in California the last time, all his demands being outlawed, or worthless; that he had a silver watch in December, 1868, worth $50; that at the time of giving this deposition, he had about $250, and was to start that day again for Idaho.

These statements are not only inconsistent with the hypothesis, that the debtor had no means between Dec. 24, 1868, and January 24, 1869, which ought to have been appropriated to the payment of his debt, but they are so improbable and inconsistent with each other as to destroy our belief in the honesty of the witness.

That the business of a single man, free from all family burdens, and, for aught that appears, in good health and constant employ-

ment on wages, should be insufficient to support him, showing so large a deficit as $800 in eleven months, is sufficiently improbable; but taking in connection with this the statement that he had but $450 at the most at the beginning, and that he owed nobody but the plaintiff (whose debt accrued in 1864) at the end of the period named, we have a financial problem presented which is arithmetically impossible. Little explanation of the intrinsic improbabilities of the evidence, or of its manifest inconsistencies, is made or attempted in the reëxamination by defendant's counsel. The debtor admits the reception from his employers of $383 a few days before Jan. 12, 1869, which was just about the time that his disclosure should have been made.

If a debtor thus failing to comply with the conditions of his bond would relieve himself and his sureties from the payment of damages, his testimony must exhibit something more clear, consistent, and decisive, or at least more strongly indicative of honest intentions than anything that we find in this deposition.

Defendants defaulted.

Judgment for plaintiff for the amount of the original judgment and interest.

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

WILLIAM B. BONNEY *vs.* SAMUEL MORRILL.

In pursuance of the express terms in a written agreement between the counsel therein, judgment in a real action by him, and also in a suit upon an injunction bond against him, was rendered for the plaintiff, and execution for costs stayed until the next term. In the trial of a subsequent action for *mesne profits* from the time of the commencement to that of judgment in the real action, *Held*, that parol evidence is admissible on the part of the defense to show that, in order to obtain a judgment in those suits without a trial, the plaintiff's counsel authorized the defendant's counsel to say to the defendant, as an inducement to enter into the agreement, that it would be a full and final settlement of all

matters up to that time; and that at the same time the counsel further agreed that the plaintiff should lease the land to the defendant in interest for a certain time thereafterwards, at a specified rent.

If specific objections are not made to the admission of evidence, exceptions to the ruling admitting it will not be sustained.

The employment of a counsellor and attorney at law to prosecute a suit for land, of which the party alleges he has been disseized, carries with it an authority to such attorney to compromise the claim against the disseizor for *mesne profits* during the pendency of the suit, if the attorney deems it best for the interest of his client to avoid all the chances of litigation, and secure the speedy and successful termination of the principal suit in the most economical manner thereby.

ON EXCEPTIONS.

TRESPASS for the *mesne profits* of a certain piece of land described in a written agreement hereafter mentioned, from Sept. 4, 1860, to Dec. 1, 1864.

On Sept. 4, 1860, this plaintiff sued out a writ of entry against the defendant to recover possession of certain land described in the writ, which was duly entered in this court, and continued from term to term until November term, 1864.

The plaintiff had also obtained an injunction upon the defendant, and one Foss and wife, during the pendency of the real action, and had given them a bond to pay all damages sustained by reason of the injunction. The injunction had been subsequently removed, and a suit on the bond brought by the obligees against the plaintiff and his sureties, which had been duly entered and continued until the November term, 1864, when both actions were to be tried. Thereupon the parties, through their counsel, had some negotiations concerning a compromise of the actions, which finally resulted in the counsel drawing and signing and placing on file an agreement of the following tenor, omitting the detailed description of the land, to wit:

"S. J. Court, Ken. County, Nov. Term, 1864. William B. Bonney *v.* Samuel Morrill. Samuel Morrill *et als. v.* William B. Bonney *et als.*

"In the above actions it is agreed by the parties, that the defendant in the action, Bonney *v.* Morrill, shall be defaulted, and judg-

ment entered for the plaintiff for so much of the land declared for in the plaintiff's writ as lies easterly of a line" specifically described. "And said Bonney is to have judgment for his legal costs.

"And it is further agreed, that in the action, Morrill *et als. v.* Bonney *et als.*, the plaintiffs shall become nonsuit, the defendants recover their legal costs, and the executions for costs in both actions shall be stayed until the next term of this court."

Judgment was rendered in those actions Dec. 1, 1864, pursuant to the agreement.

This agreement was put into the case at bar; whereupon

A. Libbey, called by the defendant, testified, substantially, that he was counsel for Bonney in the real action, and for Bonney *et als.* in the suit on the bond; and made and signed the agreement as their attorney. Judge May, counsel for the other parties, suggested the settlement, and made a proposition which witness talked over with his client, who was not satisfied with the proposition; that the next morning witness stated defendant's objections to May, who authorized witness to say to the defendant, as an inducement to accept the terms, that it should be a final adjustment of all matters up to that time; that witness communicated the inducement to his client as by May's authority, which he finally accepted. Thereupon a written memorandum was drawn up and signed by the counsel; that the subject of intervening rents was not spoken of in terms by either side; that witness would not have agreed to the settlement had he not supposed it was to end all controversies between these parties; that it was witness' intention that the written agreement should set forth all the terms of the settlement; and that it was further agreed, that the plaintiff should lease the land to the defendant in interest, for a certain time thereafterwards, at a specified rent, which he did accordingly.

To the admission of the foregoing evidence the plaintiff seasonably interposed a general objection, that it was parol, and, therefore, incompetent.

Seth May, called by the plaintiff, testified substantially to the

same facts as Libbey, adding that witness had no reference to the *mesne profits* when negotiating the settlement.

The presiding judge instructed the jury, *inter alia*, that this being incident to the former suit, counsel had authority to settle this subject-matter.

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

J. W. May, for the plaintiff.

This court has invariably excluded parol testimony to explain, vary, enlarge, or in any way modify a written agreement, except where fraud is alleged. *Waterhouse* v. *Gibson*, 4 Maine, 230. *Small* v. *Quincy*, 4 Maine, 297. *Low* v. *Treadwell*, 12 Maine, 441. *Medomak Bank* v. *Curtis*, 24 Maine, 36. *Gilman* v. *Veazie*, 24 Maine, 202. *Palmer* v. *Fogg*, 35 Maine, 368. So in Massachusetts. *Brigham* v. *Rogers*, 17 Mass. 571. *Boyle* v. *Agawam Canal Co.*, 22 Pick. 381. *Wakefield* v. *Steadman*, 12 Pick. 362. *Curtis* v. *Wakefield*, 15 Pick. 437.

1. The rule excludes all the previous and contemporaneous *colloquia*. *Marshall* v. *Baker*, 19 Maine, 405. *McClellan* v. *Cumberland Bank*, 24 Maine, 566.

2. Libbey's testimony, "if he had not supposed it was an end of all controversies," &c., was inadmissible, and had great weight with the jury.

3. The attorneys had no express authority to settle any claim for *mesne profits*. No general authority can be inferred. Claim for *mesne profits* accruing subsequent to date of the real action cannot be coupled to it. His only remedy is by a subsequent action. The rents and profits incident to the real action are those only which are recoverable by it. In Massachusetts, the incident rents and profits recoverable in a writ of entry include all accruing to the time of the judgment. In Maine, they are limited to the date of the writ. No subsequent suits for rents and profits are incident to the writ of entry. *Raymond* v. *Andrews*, 6 Cush. 265. *Curtis* v. *Francis*, 9 Cush. 427.

J. Baker, for the defendant.

BARROWS, J. At the November term, 1864, in this county, the plaintiff had judgment against the defendant for a strip of land, upon a writ of entry dated September 4, 1860, to which defendant had pleaded the general issue.

That judgment was rendered in pursuance of a written agreement, filed in the case, and offered in evidence here, providing for a disposition of the real action, and of a suit upon an injunction bond brought by the defendant against the plaintiff. By the terms of this agreement judgment was to be rendered in favor of this plaintiff in both suits, but the executions for costs were to be stayed until the next term of court. This action is brought to recover the *mesne profits* of the same land during the pendency of the aforesaid writ of entry. The defendant offered parol evidence to prove that the claim for *mesne profits* was embraced in the settlement of the above-mentioned suits. The presiding judge admitted it subject to the plaintiff's objection, and upon the strength of it the jury found a verdict for the defendant.

Was this evidence admissible?

The testimony of both the counsel in the former suits, by whom the written agreement above referred to was made and signed, tends to show, that at the November term, 1864, in order to bring about a rendition of judgment in his client's favor in those suits without the trouble and expense of a trial then imminent, the plaintiff's counsel authorized the counsel for the defendant to say to him, as an inducement to enter into the agreement for the disposition of the suits, that it would be a full and final settlement of all matters up to that time; and that it was further agreed between them, that the plaintiff should lease the land to the defendant, in interest for a certain time thereafterwards at a specified rent, which he accordingly did.

If it could be maintained that the object and effect of this evidence must be to contradict, vary, or in any manner to control the legal import of the written agreement between the parties, its admission could not be sanctioned. But on a careful examination it will be seen, that there is nothing inconsistent with the written

stipulations of the parties, and that the parol evidence is offered to establish a distinct collateral agreement between the same parties, which was not required to be in writing, and which, in fact, constituted in part the consideration of the written agreement. The authorities are abundant, that proof of such an agreement, not inconsistent with the terms of the writing, may be made by parol evidence. *Jeffrey* v. *Walton*, 1 Starkie, R. 213. *Preble* v. *Baldwin*, 6 Cush. 557. *Nickerson* v. *Saunders*, 36 Maine, 413. *Hersey* v. *Verrill*, 39 Maine, 271. *Goodspeed* v. *Fuller*, 46 Maine, 144. Starkie on Evidence, Part IV. vol. 3, p. 1049.

The specific agreement as to the mode and time of entering up judgment in the previous suits between these parties did not necessarily embrace all the stipulations made by them as to their settlement. That agreement has been allowed to have its legitimate effect. Under it the plaintiff had judgment for the land which he claimed, and the case finds that the demanded premises were surrendered to him upon the recovery of that judgment.

There is no rule of evidence which precludes the defendant from asserting and proving, by oral testimony, any distinct and valid parol contract of the plaintiff, made at the same time and not reduced to writing, which is not in conflict with the provisions of the written agreement, and which undoubtedly operated as an inducement to the defendant to enter into it.

The case seems to be fairly within the rule laid down in the authorities above cited, and should be governed by them.

It is further claimed, as ground for a new trial, that the defendant's counsel testified that he certainly should not have agreed to the settlement if he had not supposed it was an end to all controversies between these parties. No specifie objection appears to have been made to this at the time of the trial. The only objection then presented was the general one to the reception of parol evidence to prove the relinquishment of the claim here in suit. If other objections were to be urged to particular portions of the testimony, the attention of the presiding judge should have been called to them. It is too late now. *Longfellow* v. *Longfellow*, 54 Maine, 240. *White* v. *Chadbourne*, 41 Maine, 149.

The plaintiff further complains, that the jury were instructed that counsel had authority to settle the subject-matter of this suit as incident to the former suit in which they were employed.

The duties, obligations, and authority of counsellors and attorneys at law, who are employed to maintain and protect their clients' interests in our courts, have often been held to extend not only to the suit in which they are immediately and directly employed, but to other processes growing out of the same and naturally connected therewith. *Marco* v. *Low*, 55 Maine, 549, and cases there cited.

We do not hesitate to say, that the employment of a counsellor and attorney at law to prosecute a suit for land of which the party alleges that he has been disseized, carries with it an authority to such attorney, to compromise the claim against the disseizor for *mesne profits* during the pendency of the suit if he deems it best for the interest of his client to avoid all the chances of litigation and secure the speedy and successful termination of the principal suit in the most economical manner thereby.

The plaintiff has performed (apparently not to his own disadvantage) one of the verbal stipulations embraced in that adjustment. The jury have found that he made another, by which, if made by him or his lawfully constituted attorney, he must be content to abide. The sufficiency of the whole evidence to justify the finding is not in question before us. *Exceptions overruled.*

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

William H. Morgan *vs.* City of Hallowell.

A city is not liable under R. S., c. 18, § 61, for an injury received by a traveler by falling into an excavation unguarded by lights or railings, situated just without the limits of a public street, in a vacant lot whither he voluntarily went, in the evening, to witness the licensed exhibition of a circus.

Nor under R. S., c. 17, § 8; the temporary location of a traveling circus in its vicinity, cannot convert a reservoir in process of construction in a vacant lot into a nuisance either public or private.

Nor under R. S., c. 18, § 75; the object of this section being, (1) To guard the streets and public ways from injury by excavations improvidently made by the abuttors; and (2) To determine under what circumstances a city or town which is compelled to pay damages under § 61, may have a remedy over against the person making the excavation.

Nor at common law as for gross negligence in omitting to place guards indicating the position of the excavation which was being made by servants of the town.

On Exceptions.

Case for injury occasioned by falling into an excavation near a public street. The case is sufficiently stated in the opinion.

A. G. Stinchfield, for the plaintiff.

Harley, for the defendant.

Barrows, J. The plaintiff offered to show that on a certain dark evening in September, 1866, he was going along a public street in Hallowell to attend a circus duly licensed to exhibit in the city, and on exhibition in an unfenced vacant lot on the easterly side of the street; that he turned from the street to go to the place of exhibition and fell into an excavation made for a reservoir, very near, though not within the limits of the street, and received a severe injury; that he was ignorant of the existence of the excavation, and in the exercise of due care; that there were no guards, lights or railings about the excavation, and that this state of things had continued for some days prior to the accident, and that defendants were not the owners of the land on which the reservoir was located.

The presiding judge ordered a nonsuit, and the plaintiff excepts; and the question is whether proof of these facts would have entitled the plaintiff to a verdict.

1. We think it plain, from the foregoing statement, that the case cannot be maintained under c. 18, § 61, R. S., which gives a remedy against a city or town for any injury received through any defect or want of repair or sufficient railing in any highway, townway, causeway, or bridge within its limits when the city or town has reasonable notice of the defect. It was not while passing along the street and for want of a sufficient railing to prevent him from accidentally getting off the street into a chasm in dangerous proximity that the plaintiff received his injury, but because he intentionally turned from the street to go into the grounds occupied by the circus. Railings may be necessary to prevent the wayfarer from accidentally getting off the line of safe travel in darkness or daytime, but the statute which requires cities and towns to provide them when necessary for the safety and convenience of travelers, cannot be made to enure to the benefit of one who, in pursuit of his own pleasure or business, designedly leaves the street to go upon adjoining land. Under the circumstances stated, neither the want of a railing between the street and the reservoir, nor the excavation itself, can be held to be a defect in the street, causing the injury to the plaintiff, although it was very near the line of the street. It is well settled that even though there be a defect or obstruction within the limits of the highway as located, if it is not in the traveled part of the road, nor so connected with it as to affect the safety or convenience of those using the traveled path, the town is not responsible for an injury sustained by one using the road for the purpose of passing to or from a private way, or his own land. *Shepardson* v. *Colerain*, 13 Met. 55. *Smith* v. *Wendell*, 7 Cush. 498. *Kellogg* v. *Northampton*, 4 Gray, 65.

A fortiori, there can be no pretense of claim, under this statute, where the traveller has intentionally passed beyond the limits of the street before he receives the injury. The fact that the city authorities had licensed the exhibition of the circus there, could not lay

the city under any obligation to furnish a safe and convenient access to the place of exhibition over private property, nor subject it to any liability for defects in the way of approach that might be selected by the circus or its patrons.

2. Plaintiff's counsel claims that the excavation was a nuisance, and that the city is liable under § 8, c. 17, R. S., which authorizes any person injured in his comfort, property, or the enjoyment of his estate, by a common and public or private nuisance, to maintain against the guilty party an action on the case to recover his damages, unless it is otherwise specially provided by law.

That section can have no application to such a case as this. There was no offer to prove that the reservoir was so located as to obstruct or encumber any public way, or any previously existing private way. The establishment of a traveling circus for a day or two in its vicinity could not convert a reservoir already in process of construction in a vacant lot into a nuisance, either public or private.

In the ancient case of *Blyth* v. *Topham*, Cro. Jac. 158, 159, cited in Comyn's Digest, Action upon the case for a nuisance, C., it was held that "the action does not lie, if a man makes a ditch in his waste which lies near the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste." Modern legal learning has never improved upon nor controverted the terse statement of rights, faults, and liabilities here made. It recognizes fully the right of him who, having the dominion of the soil, without malice does a lawful act on his own premises, and leaves the consequences of an accident thereby happening where they belong, upon him who has wandered out of the way, though he may have been guilty of no negligence in the ordinary acceptation of the term. It is purely *damnum absque injuria.*

3. Again, it is urged that there is an implied liability under the provisions of § 75, c. 18, R. S. The object of that section appears to be two-fold: 1. To guard the streets and public ways from injury by excavations, improperly made by the abuttors, by requiring them

to call the attention of municipal officers to their work, and to conduct it in a manner deliberately prescribed by such officers; and, 2. To determine under what circumstances a city or town, which is compelled to pay damages under § 61, of the same chapter, on account of a defect in their streets or ways thus caused, may have a remedy over against the person making the excavation. But we have already seen that there was nothing in the plaintiff's statement tending to show that his misfortune was caused by a defect in the street. Hence, the section in question can have no bearing upon the case.

4. It seems to be conceded that the city was the party engaged in the construction of the reservoir, and the presumption is, that it was by permission of the owner of the land; and hereupon it is contended for the plaintiff that the corporation is liable at common law, as for gross negligence in omitting to place guards, railings, or lights about it to indicate its position.

While it is undoubtedly true, that, aside from all statute remedies provided against them, cities, towns, and other *quasi* corporations, will be liable for the actual malfeasance of their officers, agents, and employees, when their acts are authorized or ratified by the corporation councils having control of the subject-matter; as, for example, for all wrongs done to another party in the assertion of alleged rights of property in the corporation, and also for neglects in the performance of corporate duty, where there has been a special duty imposed, or a special authority conferred by and with the consent of the corporation; there is a strong line of decisions in which it is held, that for the neglects of their officers and agents in the performance of those duties imposed upon them by law for public purposes exclusively independent of their corporate assent, they are liable only when a right of action is given by statute; that as to them, in such cases, the maxim, *respondeat superior*, does not apply; that negligence in the performance of such duties cannot be held to be the negligence of the corporation.

See *Mitchell* v. *Rockland*, 52 Maine, 118; *Bigelow* v. *Randolph*, 14 Gray, 541; *Eastman* v. *Meredith*, 36 N. H. 284, and the cases

therein cited, for a full discussion of the distinction which obtains between ordinary corporations aggregate and these *quasi* corporations in this respect.

If the persons employed by the municipal officers of Hallowell to construct this reservoir in a vacant lot, were guilty of actionable negligence (which by no means distinctly appeared in the plaintiff's statement of his case), the city itself was not.

The plaintiff has mistaken the party against whom his remedy, if he has any, should be pursued.

If the circus company invited the public to a place of exhibition, the access to which was unsafe, without using reasonable precautions against accident, or if the persons actually engaged in making the excavation for the reservoir negligently omitted the safe-guards, which under all the circumstances they ought to have afforded, the city is not responsible therefor. *Exceptions overruled.*

Nonsuit confirmed.

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

JAMES B. DINGLEY and another *v.* JOHN BUFFUM.

In trespass for breaking and entering the plaintiff's close and carrying away therefrom certain personal property, the unlawful breaking and entering constitute the gist of the action, and must be proved in order to maintain it. 57 379 94 58

When a party exceeds an authority given him in fact, as distinguished from an authority conferred upon him by law, he is only liable for the excess.

ON REPORT.

TRESPASS *quare clausum fregit.*

KENT, J. This is an action *quare clausum*, for breaking and entering the close of the plaintiffs, and tearing down and carrying away certain doors and fixtures in the store thus entered. All the

counts in the writ are similar in this respect, all being "*quare clausum.*" The gist of each is the breaking and entering; all the other allegations are simply laid as aggravations of the trespass. It is, therefore, incumbent on the plaintiffs to prove such unlawful entry.

The defendant contends that he had not surrendered the possession at the time of the alleged trespass, and, therefore, this action cannot be maintained against him. The plaintiffs contend that the possession had been surrendered, but they admit and show, by their own evidence, that after the key had been delivered to them, they voluntarily delivered it again to the defendant, for him to enter and "get out something, and he did not return it until he had torn the inside out."

The entry, then, was by permission, on the plaintiffs' own showing.

But it is contended, that if it was so, yet that the conduct and acts of the defendant in taking down and removing the fixtures was such an abuse of the license as made him a trespasser *ab initio.*

In the old case of "the Six Carpenters," so familiar to the lawyer, it was ruled, that if a man abuse an authority given him by the law, he becomes a trespasser *ab initio. Contra*, of an authority given by the party. 8 Coke, 46 a. 1 Smith's Leading Cases, 188, and notes. This has been the doctrine of the common law ever since that case was decided, although the justice and wisdom of the distinction has been sometimes questioned. There are many cases in which it has been reaffirmed. In the late case of *Jewell* v. *Mahood*, 44 N. H. 474, Mr. Justice Sargent states the rule in a very clear and condensed form. He says, "The defendant entered under an express authority; an authority in fact, and not one conferred or implied by law. It is well settled, that where a man abuses an authority in law, by committing acts which are in themselves trespasses, not authorized by the authority, the party is a trespasser *ab initio;* but that when there is an authority in fact, and a party exceeds that authority, he is only liable for the excess. In this case, the gist of the action is the breaking and entering, the other circumstances are only stated as affecting the damages. But the defendant is not liable for breaking and entering, because he

had the right to enter, and in this form of action, if the breaking and entering is not made out, the action fails. If the plaintiff would recover damages for any of the acts done after entry, he must bring case or trespass in some other form, and not trespass *quare clausum fregit.*"

This decision is fortified by the citation of many authorities. But it is needless to repeat them here, or to cite other cases which have been examined.

The action on the facts before us cannot be sustained.

Judgment for defendant.

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

N. M. Whitmore, 2*d*, for the plaintiffs.

L. Clay, for the defendant.

JAMES B. DINGLEY and another *vs.* JOHN BUFFUM and another.

A tenant at will has no estate which is assignable.

At the expiration of a tenancy, fixtures erected by the tenant go to the landlord, unless the tenant, before surrendering possession, has removed them.

ON REPORT.

REPLEVIN for certain lumber which has constituted partitions and box-stalls in a saloon.

The case is sufficiently stated in the opinion.

N. M. Whitmore, 2*d*, for the plaintiffs.

L. Clay, for the defendants.

KENT, J. An action of replevin for certain lumber, which had constituted fixtures in a shop formerly occupied by the defendants.

Several questions have been raised and discussed in the case. It

is not necessary for us to consider many of them. Assuming that the articles were fixtures, put up by a lessee, and such as he would have had a right to remove during his tenancy or occupation, the question is, whether these defendants had such right.

James Stone owned the store, and, in 1859, leased it, by a written lease, for one year, to Somes. Somes occupied it for the year, under that lease, and continued to occupy afterwards without any new written lease, until 1863. During this time, he put up the fixtures in question. He then sold out his stock, &c., to one Chadbourne, by a bill of sale, the contents of which are not before us. But when he gave him possession of the goods, he "left every thing there — took nothing away." There were two or three intermediate sales and transfers, but they all failed, and Somes resumed possession in each case, and remained until he sold to Chadbourne in 1863. Chadbourne went in as tenant of Stone, the owner, took a bond for a deed from him, and paid rent to him as long as he occupied. In 1865, Chadbourne sold to Buffum, one of the defendants, the stock in the store, "with all the furniture, fixtures," &c. The defendants went in, and paid rent to the owner until October, 1866. The plaintiffs bought the land and store of Stone on August 1, 1866, and notified the defendants to leave the premises, which they did in October.

There is a controversy on a question of fact, viz., whether the fixtures were removed before the surrender of possession by the defendants. But a prior question arises, whether the defendants had any right to remove these fixtures, at any time.

It does not appear, that, in any of the purchases, there was any attempt to sell or assign any interest in any lease. After the first year, all the tenancies were at will, and each succeeding tenant seems to have attorned to the owner, and to have paid, or agreed to pay, rent to him. These defendants agreed to pay and did pay rent to the plaintiffs, after their purchase.

"A tenancy at will is determinable at any time, and the tenant has no certain and indefeasible estate which he can assign or grant to any other person." *Cunningham* v. *Holton*, 55 Maine, 36. No

rights are acquired by such sale against the owner of the real estate, much less when there is only a sale of goods.

If Somes might have removed the fixtures before his tenancy terminated, it does not follow that any subsequent tenant might do so. This subject has been fully considered, and it is now well settled, that it is a right of the tenant, who erected them, but the right must be exercised during the term or before he surrender possession. The general rule is, that the fixtures go, at the expiration of the term, to the landlord, unless the tenant has, during the term, exercised the right to remove.

It is unnecessary to do more than to refer to the case of *Davis* v. *Buffum*, 51 Maine, 160, where this doctrine is clearly stated and affirmed as the law of this State, and shown to be in accordance with the authorities.

It, therefore, becomes unnecessary to determine whether the removal was before or after the defendant's tenancy had terminated, or whether they were such fixtures as an outgoing tenant might remove. *Judgment for the plaintiffs, damages* $1.

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

PAUL WING, executor, *vs.* ASAHEL H. MERCHANT.

A valid gift, *inter vivos*, of a promissory note, payable to the order of the payee, may be made without indorsement or other writing.

And where the note is already in the possession of the donee, proof of an actual manual tradition at the time of making the gift, is not essential.

But the actual transfer of the possession of an unindorsed negotiable promissory note to the donee, supplemented three years thereafterwards by plenary evidence of an intentional release to the donee by the donor of any right to deprive the donee of the possession of it, constitute a complete gift, *inter vivos*.

ON REPORT.

ASSUMPSIT by the plaintiff as executor of the last will and testament of Timothy Woodward, deceased, to recover two hundred dollars, alleged to have been left with the defendant for investment, by the deceased.

The action was defended upon the ground, that the money sued for was the property of Mrs. Asahel H. Merchant, wife of the defendant, and daughter of the deceased, by virtue of a gift to her by her father in 1861, which was about three years before his decease.

The evidence tended to show, that in 1862, Timothy Woodward left with his daughter, Mrs. Merchant, some notes payable to himself, and amounting to about $200, for safe-keeping; that she collected interest, and let her father have some small sums from time to time as he called for them, until about three years before he died, in February, 1865, when, as she testified, "my father gave the money to me. He said he did not think this would be any help to my insane sister Mary, if he should save it for her support, and I had done more for him than all the rest of his children, and staid with him longer, and he gave it to me. There was no one present when the notes were given to me. He was at my house at the time, in the sitting-room. The notes were at the time in a box in a chest, and the chest in my sleeping-room. Do not know as father did anything at the time any more than to tell me that he gave them to me for my labor, and what I had done for him."

There was also testimony tending to show, that after the notes were given to Mrs. Merchant, her sister, becoming insane, was supported at the insane hospital, and the money from the notes was paid by Mrs. Merchant for the support of her insane sister.

A. Libby, for the plaintiff.

The *onus* is on the defendant.

To constitute a gift, it must be unconditional, absolute, accompanied by such a delivery as the property is susceptible of. *Dole* v. *Lincoln*, 31 Maine, 422. *Allen* v. *Polereczky*, 31 Maine, 338. *Shower* v. *Pilck*, 4 Excheq. 477. *Noble* v. *Smith*, 2 Johns. 55. *Allen* v.

Cowan, 28 Barb. 99. Delivery not sufficient. *Shower* v. *Pilck*, *supra.*

S. Lancaster, for the defendant.

BARROWS, J. The circumstances which oblige us in some cases to look with suspicion upon a defense which asserts that property claimed by an executor or administrator in his representative capacity, has passed by a gift from the deceased to one of his heirs, are not found in the case at bar. The defendant, with the consent of his wife to whom it is claimed the property was given, has appropriated it already for the benefit and support of an insane sister of the wife, a daughter of the deceased, and he is indemnified against ultimate liability in this suit. The testimony comes free from selfish bias; and the naked question is, whether enough was said and done by Timothy Woodward, the plaintiff's testator, to constitute a valid gift. The money and notes, amounting to about $200, had been placed by the testator, several years before his death, in the hands of the defendant for safe-keeping; and for some time subsequently he was accustomed to call on the defendant and his wife for such little sums as he wanted on account of them, and the defendant kept an account of what was thus repaid. The wife personally had the charge of the notes and kept them in a box, which was placed in a chest in her sleeping-room, and she seems to have made most of the small payments to her father which he called for. While the matter stood thus, three or four years before the testator's death, as Mrs. Merchant, the defendant's wife testifies, he said, in conversation with her about the money represented by these notes, that she had done more for him than all the rest of his children; had staid with him longer; and that he gave it to her. The notes were then in the box in her sleeping-room; they were not indorsed; they were payable to her father. She says, "I do not know as father did any thing at the time any more than to tell me that he gave them to me for my labor and what I had done for him. . . . After he gave me the notes he never called on me for any money."

It would seem that there was no selfish solicitation for the gift, but, on the contrary, that Mrs. Merchant, in this conversation, and the defendant in another talk with the testator about the same time, suggested to him that it ought to be appropriated for the support of the insane sister, and that when he gave the notes to Mrs. Merchant, he said, apparently in reply to these suggestions, that he "did not think this would be any help to her if he should save it for her support."

Now it is insisted, on the part of the plaintiff, that here was no indorsement of the notes, and no delivery of them to Mrs. Merchant at the time of the conversation, and consequently no valid gift.

But it has been settled, that a valid gift of a negotiable promissory note may be made, either *inter vivos* or *causa mortis*, without indorsement or other writing. *Grow* v. *Grow*, 24 Pick. 261. *Borneman* v. *Sidlinger*, 15 Maine, 429.

To perfect the gift in either case, delivery to the donee or to some person for him is necessary; such delivery as the subject of the gift is capable of. But, in case of a gift, *inter vivos*, where the property has passed into the possession of the donee, and has been held by him in a manner indicating a change of the title to the property, and a recognition of the donee's title by the donor, proof of actual manual tradition at the time of making the gift may well be dispensed with.

No particular ceremony is necessary to constitute a delivery when there is actual possession by the donee, accompanied by satisfactory evidence that the donor has relinquished all control of, and claim to the subject of the gift, in her favor. I borrow a book of my friend, and, while it is in my possession, he says, "I make you a present of it," and I hold it thereafterwards as mine; it cannot be essential to the validity of the gift that I should first put it into his hands in order that it may be returned to mine. *Lex non cogit ad vana seu inutilia.*

The actual transfer of possession to the donee whenever and however accomplished, if supplemented by plenary evidence of an intentional release to the donee, on the part of the donor, *per verba de*

præsenti, of any and all right or claim ever to resume the possession, or to deprive the donee of it, will make a complete gift *inter vivos*. It matters not whether the change of possession takes place before or after, or at the time of the utterance of the words importing a gift, if there is a manifest design on the part of the donor that the donee should thereafterwards hold such possession absolutely, as of his own property. Thenceforward, the possession and the right are concurrent in the same person, and the gift is perfect and irrevocable.

These elements we find in the case at bar. The notes were already in the possession of Mrs. Merchant, when the testator, in conversation with her respecting them, used language importing a present, absolute, unconditional gift, and a making over of all his interest in them to her. From that time during the remaining three or four years of his life, he never called upon her or her husband for small sums on account of them, as he had before been accustomed to do. The defendant exchanged the notes for others, and paid, not to the testator, but to Mrs. Merchant, such sums on account of them as she called for.

There is an essential difference between this case and that of *Shower* v. *Pilck*, 4 Excheq. Rep., relied on for the plaintiff.

There, though the silver plate was in the possession of the alleged donee, the language of the testator implied nothing beyond a promise to give in the future. *Judgment for the defendant.*

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

APPLETON, C. J. I concur in the opinion. Delivery is essential to pass the title to a chattel by gift; but if, at the time, the donee is in possession, as the donor's agent, he need not surrender it for a redelivery; if the donor relinquishes all dominion and control, and recognizes the donee's possession as being in his own right, and the donee so accepts and releases possession with the donor's consent, it is sufficient. *Tenbrook* v. *Brown*, 17 Ind. 410.

HENRY K. BAKER and others, receivers, *vs.* HENRY COOPER, jr.

Where an execution in favor of an insolvent bank has been legally extended on real estate and seisin thereof delivered to the receivers, they may maintain, in their own names, a process of forcible entry and detainer against the execution debtor, provided he continues in possession without their consent.

And the process may be commenced and maintained before the expiration of the time for the redemption of the levy.

By R. S., c. 47, § 64, it is made the duty of the receivers to take immediate possession of all the real as well as personal estate of an insolvent bank.

To maintain the process of forcible entry and detainer, it is not essential that the defendant should be the tenant of the plaintiff. It is sufficient under R. S., c. 94, § 1, if the defendant be a disseisor of the plaintiff and has not acquired any claim by possession and improvement.

Objections to the admission of evidence must be specific in order to sustain exceptions.

The admission of evidence wholly immaterial is not the subject of exceptions.

ON EXCEPTIONS.

FORCIBLE ENTRY AND DETAINER tried before the municipal court of Hallowell, and brought to this court by appeal by the defendant.

The plaintiffs introduced, against the objection of the defendant, the injunction of this court on the American Bank, made perpetual Sept. 12, 1865; the appointment of the plaintiffs as receivers of said bank, made the same day; and their bond, filed and approved Sept. 19, 1865; and proved that they took possession of the assets of said bank Sept. 26, 1865; also, the record of a judgment in the name of the American Bank against this defendant, recovered in this court at the November term, 1867, on which an execution issued, and a levy was made on the premises in dispute Dec. 27, 1867, and recorded Feb. 21, 1868. An attachment of real estate was made on the original writ Aug. 5, 1865. Also, a copy of an assignment in bankruptcy of defendant's property, made by S. S. Marble, register, to W. P. Whitehouse, his assignee, dated Feb. 21, 1868, and recorded in the Kennebec registry March 18, 1868. It was admitted that written notice to quit the premises, signed by the

plaintiffs, was left with the defendant thirty days before the time therein named for him to quit, and before the commencement of this process.

And the case was thereupon submitted to the determination of the presiding judge under the statute, each party reserving the right of exception. The presiding judge was of the opinion that the evidence offered was admissible, and that the action was maintained, and ordered judgment for the plaintiffs; and the defendant alleged exceptions.

J. Baker, for the plaintiffs.

A. G. Stinchfield, for the defendant.

WALTON, J. This case was submitted to the determination of the presiding judge, each party reserving the right to except. The presiding judge ordered judgment for the plaintiffs, and the defendant excepts.

1. The defendant contends that the action is improperly brought in the name of the receivers; that it should have been commenced in the name of the bank. We hold otherwise. The object of the suit is to obtain possession of the real estate in question for the receivers, and not for the bank. A suit in the name of the bank would not accomplish that purpose; for the execution, or writ of possession, if one was obtained, would require the officer executing it, to put the bank, and not the receivers, into possession. As it is the receivers that are seeking to obtain possession, we think the suit is properly brought in their names. It is the direct road to the end in view. A suit in the name of the bank would be circuitous, and result doubtful.

2. The defendant contends that the action was prematurely brought; that it should not have been commenced till the expiration of the year within which he had a right to redeem. We think otherwise. We understand the law to be well settled, that when real estate is legally levied on, the creditor may forthwith maintain a real action, or an action of trespass even, against the debtor, if he

continues in possession, without his consent. *Gove* v. *Brazier*, 3 Mass. 523.

3. The defendant contends that the plaintiffs have no right to go into possession of the real estate of the bank; that their only power is to sell it. We think the law is otherwise. We think it was not only the right, but the duty of the receivers, to take immediate possession of all the real as well as the personal estate of the bank; and to commence suits if necessary to obtain such possession. R. S., c. 47, § 64.

4. The defendant contends further that this process will not lie, because the defendant was never tenant to the plaintiffs. It is not necessary that he should have been their tenant. The law now allows such process to be commenced against a disseisor. R. S., c. 94, § 1.

5. The exceptions state that all the evidence introduced by the plaintiffs was objected to by the defendant, but no specific objection appears to have been made to any of it. We think the objection was properly overruled. So far as we are able to discover, the evidence was not only legally admissible, but essential to the maintenance of the suit, except, perhaps, that portion of it which relates to the defendant's bankruptcy. That was wholly immaterial, and could not have changed the result. *Exceptions overruled.*

Judgment for plaintiffs.

APPLETON, C. J.; KENT, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

DAVID WARE *vs.* JAMES HEWEY.

A loan of money "to be paid when called for," is due on the day the money is lent, and the statute of limitations begins to run from that date.

ON EXCEPTIONS.

ASSUMPSIT on account annexed. The writ was dated July 26, 1868.

The plaintiff introduced evidence tending to show that on July 20, 1862, he loaned the defendant the sum of money mentioned in the account annexed to the writ, with an agreement on the part of the defendant that it was "to be paid when called for;" and that he called on the defendant for payment of the same in a month or more, after the time of the loan. The presiding judge instructed the jury, among other things not excepted to, that the statute of limitation would commence to run from the date of the loan, and that if six years had elapsed from the date of the loan before the writ was made, the plaintiff could not recover in this action, and that the verdict of the jury must be for defendant.

The plaintiff requested the presiding judge, who declined to instruct the jury, that if the money was loaned by plaintiff to be paid when called for, then the statute of limitations would not commence to run until it was called for by the plaintiff.

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

N. M. Whitmore 2d, for the plaintiff.

Clay, for the defendant.

APPLETON, C. J. A promissory note payable on demand is due instantly, and the statute of limitation begins to run from its date. An action may be maintained on a bank-bill payable on demand, but having no place therein appointed for payment, without a special demand. *Bryant* v. *Damariscotta Bank*, 18 Maine 240. It makes no difference, though the note be "on demand, with interest

after six months," or to pay "when demanded," or "whenever called upon to do so." *Rice* v. *West*, 2 Fairf. 323. *Young* v. *Weston*, 39 Maine, 492. *Kingsbury* v. *Butler*, 4 Verm. 458. *Waters* v. *The Earl of Thanet*, 2 Queen's Bench (42 E. C. L.), 757.

The debt in this case was due when the loan was made. The defendant is in no worse condition than if he had signed a note, payable on demand. By the general current of American authorities, the statute of limitations would, in such case, have commenced running, when the debt was created. Whether the loan was payable on demand, or "when called for," can make no difference. It was payable on demand. The statute of limitations is a bar. *The exceptions must be overruled.*

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

CITY OF AUGUSTA *vs.* JAMES W. NORTH and another.

Neither § 11, nor § 22, of article 1, of the constitution of this State, limits or restricts the power of the legislature to repeal any statute by which taxes have been imposed, or to prohibit the collection of taxes after they have been duly assessed and committed to the collector.

ON REPORT.

ASSUMPSIT to recover $4,170.50 for taxes assessed to the defendants, as commissioners of the sinking fund of the Ken. & Portl. Railroad Company, under Public Laws of 1868, c. 160.

The defendants relied upon Public Laws of 1869, c. 63.

W. P. Whitehouse, city solicitor for the plaintiff.

Public Laws of 1869, c. 63, § 2, is in violation of the constitution of this State, art. 1, § 11.

The tax having been duly assessed and committed, a liability on the part of the defendants to pay it, was thereby created; and when the liability became fixed, the tax had become a debt from the defendants to the plaintiff.

A tax is a debt *sui generis*, arising from an implied contract, and partaking also of the nature of a judgment, and as such it carries with it an obligation which the legislature cannot impair. 3 Bl. Com., 160. Bouv. Law Dict., Debt.

A tax is recognized and provable as a debt, under the statute, for the settlement of insolvent estates. It may be collected by action, but generally under a collector's warrant, which is in the nature of an execution.

It is a debt of highest character, and its prompt collection so essential to the existence of the government that it cannot be subject-matter of set-off. *Camden* v. *Allen*, 2 Dutcher, 398. The parties stand in the relation of debtor and creditor. *Multnomah Co.* v. *Oregon*, 1 Oregon, 358. All taxes payable in money are debts. *Rhodes* v. *O'Farrell*, 2 Nevada, 60. But see, as precisely in point, *Munroe Co. Savings Bank* v. *City of Rochester*, 37 N. Y.

Lane Co. v. *Oregon*, 7 Wall. 71; *Pierce* v. *Boston*, 3 Met. 520; *Shaw* v. *Peckett*, 26 Verm. 482, turned upon the construction of peculiar statutes.

A. Libbey & J. W. Bradbury, for the defendants.

Appleton, C. J. By an act approved Feb. 17, 1868, c. 160, personal estate, held as a trust fund, was made liable to taxation.

By virtue of that statute, the tax in question was duly assessed to the defendants as commissioners of the sinking fund of the Ken. & Portl. Railroad Co., and the lists were seasonably committed to the collector for collection.

The act approved March 12, 1869, c. 63, repeals c. 160 of the preceding year, under and by virtue of which the tax in dispute was assessed. By § 3 the act took effect when approved.

By § 2, "No proceedings under the act hereby repealed shall be hereafter enforced."

The plaintiffs seek to enforce the collection, notwithstanding the express prohibition contained in § 2, on the ground that a tax duly assessed is a debt within the meaning of the provision of the con-

stitution of this State, art. 1, § 11, which prohibits the legislature from passing any law "impairing the obligation of contracts."

But a tax duly assessed is not a debt. It is an impost levied by the authority of the State upon its citizens. There is no promise on their part to pay. The proceedings throughout are *in invitum*. A debt is a sum due by express or implied agreement. It was held in *Pierce* v. *Boston*, 3 Met. 520, that taxes being neither judgments nor contracts, were not the subject of set-off. "Nor are taxes," observes Shaw, C. J., "contracts between party and party either express or implied, but they are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required." In *Shaw* v. *Peckett*, 26 Verm. 482, it was held that the assessment of taxes did not create a debt that could be enforced by suit, or upon which a promise to pay interest could be implied. In *Lane County* v. *Oregon*, 7 Wall. 71, it was decided that the clauses in the several acts of congress of 1862 and 1863, making United States notes a legal tender for debts, had no reference to taxes imposed by State authority, the court holding that congress had in contemplation "debts originating in contract or demands carried into judgment, and only debts of this character."

The only clause in the constitution of this State relating to taxes is found in art. 1, § 22, and is in these words: "No tax or duty shall be imposed without the consent of the people or of their representatives in the legislature." But this section relates only to the imposition of taxes. It in no respect limits or restricts the power of the legislature to repeal any act by which taxes have been imposed, or to prohibit their collection. The legislature have the same right to remove a burden as to impose it. It was a matter for their determination, and it is not for this court to say that a tax shall be enforced, which they, by statute, decree shall not be enforced.

Plaintiffs nonsuit.

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

JAMES A. CROOKER, petitioner for partition, *vs.* CHARLES CROOKER.

Whoever takes a title to real estate in litigation, *pendente lite*, will be bound by the judgment or decree in the suit.

ON REPORT.

PETITION FOR PARTITION of a certain parcel of land described in the petition, situate in the city of Bath. Petition dated April 10, 1866.

The petitioner introduced a copy of a judgment recovered April 19, 1858, in favor of one James Houdlette against one William D. Crooker; a copy of the execution issued thereon, dated April 27, 1858; a copy of a levy of the execution upon an undivided half of the land described in the petition, made May 17, 1858; a receipt of seisin and possession; and a copy from the registry showing the levy was duly recorded May 22, 1858. He also introduced a deed of warranty of the premises covered by the levy, dated August 8, 1865, from the judgment creditor, Houdlette, to the petitioner.

The respondent introduced a deed of warranty of the whole of the premises in controversy, dated Nov. 15, 1832, from Hannah Crooker to Charles Crooker, the respondent, and William D. Crooker; and a copy of the record of a bill in equity, and judgment thereon, *Charles Crooker* v. *William D. Crooker*, and certain creditors named, of the copartnership of C. & W. D. Crooker, (among whom was James Houdlette) filed Sept. 15, 1857 (*vide* 46 Maine, 250), in which was substantially alleged a former copartnership between Charles Crooker, the respondent, and William D. Crooker; that it was owing debts to a large amount in 1854, when it was dissolved, which were outstanding at the date of the bill; that its assets consisted mainly of parts of ships and parcels of land described (among which was the parcel in controversy), purchased on the account and credit of the copartnership, but conveyed to Charles Crooker and W. D. Crooker as tenants in common; that the

respondents in the bill, and, among others, James Houdlette (this petitioner's grantor) had brought actions against William D. Crooker, on debts incurred by the latter on his own individual account and credit, and in the prosecution of business, in which the said Charles Crooker had no interest; that the respondents in said bill attached, on the writs in said actions, all of William D. Crooker's interest in the said lands; that they threaten to levy their executions on William D. Crooker's interest; and that if they do so, one-half of the company assets will be absorbed, and the remainder be utterly insufficient to meet the copartnership debts. The prayer of the bill was, among other things, that the respondents therein be restrained from satisfying their judgments by levy on said lands, and that the attachments be dissolved. The record shows a service upon Houdlette, an answer filed by him, but withdrawn; that in July, 1860, the prayer of the bill was granted, and that one Caleb S. Jenks was duly appointed and authorized to act as receiver.

Caleb S. Jenks came in by leave of court, and defended in this petition, and introduced a deed to him as receiver from Charles Crooker and William D. Crooker, dated Nov. 14, 1866.

Charles Crooker testified that the consideration of the deed from Hannah Crooker to himself and William was paid from the store and property of C. & W. D. Crooker.

J. S. Baker, for the petitioner.

Tallman & Larrabee, for the respondent and Jenks.

WALTON, J. Whoever takes a title to property in litigation, *pendente lite*, will be bound by the judgment or decree in the suit. If the law were otherwise the whole object of a long and expensive course of litigation could, at any moment, be defeated by a transfer of the subject-matter of the suit. And as the records of our court are open to the inspection of all, and every one who chooses to do so can easily ascertain whether there is any suit pending which is likely to affect the title of property which he contemplates purchasing, there is no hardship in the rule. 1 Story's Equity, §§ 405, 406, and authorities there cited.

The title of James Houdlette (under whom the plaintiff claims) was acquired by a levy on the real estate in question, while a suit in equity was pending, the principal object of which was to restrain him and others from levying on this and other real estate, as the property of W. D. Crooker, it being alleged that it was the property of the firm of C. & W. D. Crooker, and was needed to pay the partnership debts; and in which suit a decree was finally obtained restraining Houdlette from making any such levy, and a sale of the property ordered for the benefit of the creditors of the firm. The suit referred to is reported in 46 Maine, 250.

So far as the rights of the parties to that suit are concerned, and the rights of the creditors for whose benefit in part it was prosecuted, the levy in question was a nullity, and the title to the real estate levied on did not pass to James Houdlette, and he could convey none to the plaintiff. The plaintiff's title, therefore, fails, and he cannot have the partition prayed for.

Prayer of the petition denied.

APPLETON, C. J.; KENT, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

ALEXANDER SNOWMAN *vs.* JACKSON HARFORD.

One who purchases real estate while a bill in equity is pending in relation to the title thereto, is bound by the decree which may be made against the party from whom he takes his title, although the purchaser is not a party to the bill.

The fact that the respondent, during the pendency of a bill to compel specific performance of his contract for the conveyance of land had, in pursuance of a subsequent contract, conveyed the premises to a third person, creates, in equity, no inability, and affords no excuse for refusing to obey the decree requiring a conveyance to the complainant.

Nor does it make any difference that the respondent had contracted to make the conveyance to such third person before the commencement of the complainant's bill to compel performance of the prior contract with him.

Where, by the terms of the decree, the complainant is entitled to a clear conveyance from the respondent, a deed of the premises executed by the latter, recit-

ing that "having conveyed said land" to a third person named, "I now make this conveyance by order of said court, in order to purge myself of contempt in not conveying said land according to said order of said court," is not sufficient to purge the respondent of contempt.

A tardy and reluctant compliance with the decree after the issuing and service of a writ of attachment for refusing to obey the decree, does not purge the contempt.

An attachment against a party respondent in a bill in equity for not obeying a decree of the court, is not an appeal purely to the discretion of the judge before whom it is heard.

In such a process, where the facts upon which the rulings were predicated are not in dispute, and are stated as the ground of the rulings, it is proper for the presiding judge to allow exceptions in order to present the case to the full court for revision; and if the rulings are found incorrect, they may be set aside.

On exceptions.

Attachment for contempt, issued by an order of court of Nov. 24, 1868, returnable to the December term following, for not obeying a decree of the court entered up at the August term, 1868.

The defendant filed an answer asserting that he was not "in contempt of court in refusing to convey, to said Snowman, the land described in plaintiff's bill, because, he says, at the time of issuing said decree, it was not in his power to convey said lands; that after the expiration of the time limited in his said bond to plaintiff, to wit, March 18, 1867, he became bound and obliged to convey the same to one Benjamin Saddler, on his complying with certain conditions, which he did; and afterwards, viz., Dec. 6, 1867, he conveyed the said premises to said Saddler, and before the making of said decree. That he never was notified or forbidden by the court, or by its authority, or by said plaintiff, from conveying said land to any person other than said complainant; and he is willing now to convey, except he is forbidden by law to convey property of which he is not the owner."

The remaining essential facts appear in the opinion, and in 55 Maine, 197, where the original case is reported.

F. Adams, for the plaintiff.

Tallman & Larrabee, for the defendant.

Snowman *v.* Harford.

BARROWS, J. Snowman had a decree from this court, sitting in equity, against Harford, requiring the defendant "forthwith and upon reasonable request of the said Alexander Snowman, by a good and sufficient deed, to that end by him to be executed in due form and manner, with the lawful revenue stamp affixed, to convey to the said Alexander Snowman the premises described in the plaintiff's bill of complaint, in fee-simple, clear of all incumbrances," and for the payment of costs. (See case reported in 55 Maine, 197.)

While the bill in equity, praying for a specific performance of Harford's contract to convey to the plaintiff, and for an injunction against other conveyance and incumbrance, was pending, the defendant conveyed the premises, December 6, 1867, to one Saddler. The decree requiring him to convey to plaintiff was entered up at the August term, 1868, and shortly after Snowman requested a conveyance in compliance with it, which the defendant refused to make. Hereupon Snowman filed his rule setting forth the facts and praying for a writ of attachment against the defendant, as in contempt. Upon this rule, due notice being given and no response made, a writ of attachment issued returnable at the December term, 1868. Then the defendant appears and files his answer, alleging that he is not in contempt in refusing to convey to Snowman, because, he says, it was not in his power so to do at the time of the issuing of the decree. And thereupon he sets forth his agreement with and conveyance to Saddler before the making of the decree, and says he never was enjoined against making such conveyance, "and is willing now to convey, except that he is forbidden by law to convey property of which he is not the owner."

With this answer he filed a deed to Snowman, containing the following recital: "Having conveyed said land to Benjamin Saddler, Dec. 6, 1867, I now make this conveyance by order of said court in order to purge myself from contempt in not conveying said land according to said order of said court."

The exceptions state that "the presiding judge held, that inasmuch as it was shown that defendant had contracted and conveyed the land as alleged in his answer, the deed tendered and filed is suf-

ficient to purge himself of contempt in the premises, and he overruled the motion of the plaintiff, that defendant be required to give a deed without a recital of the alleged conveyance to Saddler." The plaintiff filed exceptions to these rulings. The position now taken by the defendant is, that this process is an appeal purely to the discretion of the judge before whom it is heard, and that exceptions do not lie to correct any errors into which he may have fallen.

We do not think this position can be maintained. The facts upon which the rulings were predicated are not in dispute. They are stated as the ground of the rulings. The exceptions were rightfully and properly allowed by the judge presiding at the term, in order to present the case to the full court for revision; and if the rulings are found incorrect, they may be set aside.

The defendant, in his answer, claimed that he was unable to comply with the decree of the court. But he showed no such inability. The fact, that he had conveyed the premises to Saddler during the pendency of the plaintiff's bill in equity, created no such inability. Perhaps he thought it did, but his ignorance of the law was no excuse for his disobedience to the decree of the court.

It has often been held, and for good reasons, that one who purchases, *pendente lite*, is bound by the decree which may be made against the party from whom he takes his title. *Sorrell* v. *Carpenter*, 2 Peere Williams, 482. *Garth* v. *Ward*, 2 Atk. 175. *Mead* v. *Lord Orrery*, 3 Atk. 242. *Gaskell* v. *Durdin*, 2 Ball & Beattie, 169; and that he need not be made a party to the suit in order to be so bound. *Bishop of Winchester* v. *Paine*, 11 Vesey, 197. *Metcalf* v. *Pulvertoft*, 2 Vesey & Beames, 205.

An examination of these cases will show, that although the rule may sometimes operate to the prejudice of an innocent purchaser, without actual notice, it is firmly adhered to; and it is based upon strong grounds of public policy and general equity; for, but for its adoption, the whole object of an expensive piece of litigation might be defeated by alienations made while it was pending, and there would be no end of controversies. The conveyance to Saddler, then, *pendente lite*, was entirely void of effect upon the rights and

duties of these parties, and was, in fact, no excuse for the defendant's refusal to obey the decree of the court.

Neither does it make any difference that the defendant had contracted to make the conveyance to Saddler before the commencement of the plaintiff's process. Long before that he had made a contract to convey to the plaintiff, which contract the court, upon a full hearing, have held him bound in equity to fulfill. He could not subsequently make any effectual agreement in violation of the plaintiff's rights; and Saddler's remedy, if the bargain was made on Saddler's part in good faith, must be by suit against the defendant for the breach of a contract which he could not make good.

Doubtless these views, and the idea that the plaintiff's rights would not ultimately seriously suffer from the defendant's contumacy, induced the learned and kindly judge, who heard this case at *nisi prius*, to dismiss it thus lightly, with the rulings of which the plaintiff here complains.

But this proceeding was partly for the purpose of ascertaining whether the defendant had been guilty of contempt in refusing to conform to the decree of the court. He admits the refusal; he undertakes to justify it; he declares, in his answer, "that he is forbidden by law to convey property of which he is not the owner." He thus sets up an excuse which is found to have no validity.

It was erroneous to hold that his tardy and reluctant compliance, even had it been in all respects, except in point of time, unexceptionable, purged the contempt of which he was guilty in refusing to obey the decree. If it was purely a sin of ignorance, it need not be heavily visited; but he should, at all events, have been required to pay the cost which the plaintiff had been put to in order to compel an obedience which ought to have been unhesitatingly rendered. We apprehend that if contempts should be held to be thus easily purged, without expense to the guilty party, few decrees in equity would be obeyed except under the pressure of a writ of attachment.

Moreover, the plaintiff was entitled to a clear conveyance according to the terms of the decree, unaccompanied by any impertinent recital of a previous conveyance by his grantor, which (abortive as

it was), in the minds of many, might operate as a cloud upon his title, and thereby put him to trouble and expense to clear it up. The defendant came into court tendering with one hand what he claims is a compliance with the decree of the court, and placing on record with the other, an averment of his inability to comply, by reason of a previous conveyance, a recital of which he incorporates into the deed so tardily presented. The natural and inevitable tendency of such a course would be to induce Saddler to attempt a denial of the plaintiff's rights, and to put the plaintiff to further expense in establishing them.

The plaintiff was under no obligation to accept a deed containing this irrelevant and obnoxious matter, and his motion, that the defendant should be required to give a deed without a recital of the alleged conveyance to Saddler, should have been sustained.

Such a deed the defendant must now give, and pay the costs which have been incurred by reason of his failure, without excuse, to obey the decree of the court. *Exceptions sustained.*

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

TAPLEY, J., dissented.

STATE OF MAINE *vs.* PORTLAND & KENNEBEC RAILROAD COMPANY.

Where the charter of a railroad corporation authorizes the erection of a bridge across navigable rivers, "provided said bridge shall be so constructed as not to prevent the navigating said waters," an indictment against the corporation for erecting a bridge across a navigable river named, which does not directly allege that the bridge prevents the navigating the waters of the river, is not good.

An indictment drawn under R. S., c. 17, § 1, alleging that the corporation did "unlawfully and injuriously obstruct and impede, without legal authority, the passage of said navigable river . . . by erecting a bridge across said river, which bridge is so constructed as to prevent the navigating said river . . . by means whereof the passage of said river and common highway hath been obstructed and impeded, and still is obstructed and impeded," &c., is not sufficient.

State *v.* Portland & Kennebec Railroad Company.

On Exceptions.

Indictment based on R. S., c. 17, § 1.

The jury returned a verdict of guilty, whereupon the defendants filed a motion in arrest of judgment, upon the ground, among others, because the indictment does not charge that the defendant corporation prevented the "navigating said Androscoggin river."

The presiding judge overruled the motion, and the defendants alleged exceptions.

Frye, attorney-general for the State.

A. Libby, and *Tallman & Larrabee*, for the defendant.

Appleton, C. J. This is an indictment against the defendant corporation, under R. S. 1857, c. 17, § 1, for "obstructing or impeding, without legal authority, the passage of" the Androscoggin river, by the erection of their bridge over the same.

By the act, c. 146, establishing the Bath and Portland Rail Road Company, approved Feb. 28, 1844, it is provided by § 15, that if said road shall, in the course thereof, cross any tide-waters, navigable rivers or streams, the said corporation is hereby authorized and empowered to erect for the sole and exclusive travel on their said railroad, a bridge across each of said rivers or streams, or across any such tide-waters; provided said bridge or bridges shall be so constructed as not to prevent the navigating said waters: and said corporators shall be liable for all damages sustained by individuals in consequence of unreasonable detention.

By an act in addition to an act incorporating the Kennebec & Portland Road Company approved July 16, 1846, c. 341, "The said company shall have the same power to construct bridges and causeways across tide-waters on the route of said road and branches, and with the same conditions and restrictions as are granted to the Bath & Portland Railway Company by the 15th section of the act incorporating said company."

The evidence as reported shows that the bridge of the defendant corporation was erected "across tide-waters." If so, the railroad company was authorized to erect a bridge across tide-waters, pro-

vided it does not "prevent the navigating said waters." It may obstruct, it may impede navigation to some extent. It cannot be erected without obstructing or impeding navigation. Provision is made "for all damages sustained by individuals in consequence of unreasonable detention." It is implied that there will be detention, but it shall not be unreasonable. If unreasonable, the party injured is to receive compensation. "The rule is," observes Mr. Justice Catron in *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 494, "that if the abridgment of the right of passage occasioned by the erection was for a public purpose and produced a public benefit, and if the erection was in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, then it is not an unreasonable obstruction, and indictable."

The indictment sets forth that the defendant did "unlawfully and injuriously obstruct and impede, without legal authority, the passage of said navigable river, and ancient and common highway, by erecting a bridge across said river, which bridge is so constructed as to prevent the navigating said river," &c., "by means whereof the passage of said river and common highway hath been obstructed and impeded, and still is obstructed and impeded," &c. It nowhere directly alleges that the bridge prevents the navigating the waters of the Androscoggin river. The indictment is for obstructing and impeding, and not for preventing the navigation of the river. The prevention may, perhaps, be inferred from the indictment, but it is not directly alleged, nor is such prevention the offense for which the defendants are indicted. The defendants justify under the charter of the Kennebec & Portland Rail Road Company. They have a right to erect a bridge, "so constructed as not to prevent the navigating said waters," though it may obstruct and impede such navigation.

The indictment being under c. 17, § 1, the defendants are not liable under this section, as they show a legal authority to erect a bridge, which may, to a limited extent, obstruct or impede, but which must not prevent the navigation of tide-waters.

Exceptions sustained.

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

FIRST NATIONAL BANK OF SALEM *vs.* CHARLES P. REDMAN and another.

A seasonable levy of the execution on real estate attached on the writ, operates as a statute conveyance made at the date of the attachment.

Such a title is superior to a mechanic's lien for labor and materials, the earliest item of which is subsequent to the date of the attachment.

If a judgment for a lien-claim on a house include labor and materials for painting a fence and varnishing carpets, the lien is thereby defeated.

TAPLEY, J. This is a writ of entry. Both parties claim title under levies founded upon judgments against the same debtor. The plaintiff's is earlier in time. The defendant claims, however, that his was the perfection of a statute lien upon the premises, for materials furnished and labor performed thereon, and, therefore, takes precedence.

An examination of the papers in the case will discover two fatal objections to this claim of the defendant.

1. The date of the earliest item in the defendant's account is May, 1865. The date of the plaintiff's attachment is April 28, 1865. This attachment created a lien upon the estate, which ripened into title by the levy. The levy being duly made within the time required by law, the "title obtained by the levy takes effect by relation, at the time when the attachment was made; and it operates as a statute conveyance made at that time." *Brown* v. *Williams*, 31 Maine, 404.

The plaintiff, therefore, has a title originating before the defendant's claim, or any portion of it, came into existence.

2. The defendant in his action declares for "a lien on said house and lot, for labor done on, and materials furnished for repairing said house." His judgment embraces not only such labor and materials, but also for painting a fence and varnishing carpets.

These are not lien-claims, and judgment having been taken for

them as well as the others, the lien to secure the others was lost. *Johnson* v. *Pike*, 35 Maine, 291. *Lombard* v. *Pike*, 33 Maine, 141.

Defendants defaulted and action to stand for assessment of damages.

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

A. P. Gould & Henry Farrington, for the plaintiffs.

S. S. Marble, for the defendants.

CHARLES C. LINSCOTT *vs.* SAMUEL H. FULLER.

Trespass *quare clausum fregit* is to be regarded as a personal action, and it may be commenced by trustee process.

ON REPORT.

ASSUMPSIT. Writ dated May 22, 1867. The defendant was summoned as trustee of this plaintiff, on May 18, 1867, in an action of trespass *quare clausum*, brought in the name of *Nathaniel Bryant, Jr., et als.* v. *Charles C. Linscott & Samuel H. Fuller*, trustee.

This defendant contended that this action should be continued to await the result in the action of trespass, under the provisions of R. S. of 1857, c. 86, § 56; but the presiding judge otherwise ordered, and ruled that an action of trespass *quare clausum* could not be commenced by trustee process. Thereupon the case was reported to the full court with the agreement that if the ruling was not correct, the action to stand for trial.

A. P. Gould, for the plaintiff.

The ruling was correct. The trustee process must be brought in the trustee's county. R. S., c. 86, § 5. Trespass *quare clausum* is, and has always been, local. The novelty of the case is against it. 2 Denio, 609. Trespass *quare clausum* is not a personal action

within the meaning of R. S., c. 86, § 1. The title to real estate is involved. The gist is the breach of the plaintiff's close. It has always been regarded as a real action in this State. *Burnham* v. *Ross*, 47 Maine, 456, 460. Massachusetts courts classed actions involving title to real estate as real actions. *Blood* v. *Kemp*, 4 Pick. 169, 172. *Davis* v. *Mason*, 4 Pick. 156, 158. *Plympton* v. *Baker*, 10 Pick. 475. Massachusetts statutes, at time of separation, regarded trespass *quare clausum* as a real action. Our statute took same view. The excepted cases in c. 86, § 1, indicate the intention to exclude all actions local in their nature, by common law, or by statute. The statute assumes that trespass on lands was not in its nature personal, and did not enumerate actions involving title to real estate, such as waste; trespass for treble damages against a tenant in common for committing waste; actions for *mesne profits;* waste pending real action; malicious mischief to the realty; and nuisance. Waste is not regarded as personal. 1 Chit. Pl. 125. Trespass is generally classed with real or mixed actions. Tomlin's Law Dict., "Action." The term "personal actions" is not used in the statute in its technical sense, but in the general and popular sense, of injuries to the person or personal property; otherwise the statute classification would be absurd. Assault and battery is excluded, because of the uncertainty as to the amount which it would be reasonable to stop in the hands of the trustee during litigation. Same reason applies in trespass on lands. Interests of public and suitors require a construction that shall not compel an owner of real estate to go into remote county to defend his title. If trespass on lands was intended to be embraced in c. 86, § 1, it would have been excepted in § 5 as to the *venue*. When the injury to lands is less than twenty dollars, it is clear the legislature did not intend to interfere with the common-law rule. R. S., c. 83, § 1. *Burnham* v. *Ross*, *ubi supra*. If the injury exceeds that amount, the construction contended for by the defendant will authorize the action to be brought in a county remote from the *locus in quo* by rustee process.

J. H. Converse, for the defendant.

APPLETON, C. J. By R. S., 1857, c. 86, § 1, "all personal actions except those of detinue, replevin, actions on the case for a malicious prosecution, for slandering by writing and speaking, and for assault and battery, may be commenced by trustee process," &c. Is trespass *quare clausum fregit* a personal action?

"Actions are divided into real, personal, and mixed. Real actions are those brought for specific recovery of land, tenements, and hereditaments. Personal, are those brought for specific recovery of goods and chattels, or for damages or other redress; for breach of contract or other injuries, of whatever description; the specific recovery of lands, tenements, and hereditaments, only excepted. Mixed, are such as appertain in some degree to both; are properly reducible to neither of them, being brought both for specific recovery of lands, tenements, and hereditaments, and for damages for injury sustained in respect of such property." 1 Pet. Abr., 170. "Actions may be personal," remarks Parke, B., in *Attorney-general* v. *Churchill*, 8 Mees. & Welsb. 191, "as contradistinguished from real and mixed. The first being actions against persons only, for damages; the second for the recovery of real estate; the third for both." "Actions are either real or personal, according as the thing to be recovered is either real or personal." 1 Bac. Abr., Action A. Personal actions are such whereby a man claims a debt or personal duty or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. 3 Bl. Com. 117. "For an action," observes Willes, C. J., in *Eaton* v. *Southby*, Willes, 134, "is either real or personal, according as the thing to be recovered by the action is real or personal; and as nothing that is real can be recovered by an action of replevin, be the recovery what it will, it cannot be considered as a real action. If the nature of the defense would make a difference, actions of trespass wherein the title of the land is brought in question, and actions of debt for rent, wherein the title to land might come in question, nay, even actions of debt on a bond, against an heir, where *riens per descent* is pleaded, must be considered as real actions, which yet would be most absurd."

Trespass *quare clausum* is not a real action; because damages only, and not the realty are recovered.

"Some actions are mixed in the realty and in the personalty; as an action of waste sued against tenant for life; this action is in the realtie, because the place wasted shall bee recovered; and also in the personaltie, because treble damages shall bee recovered for the wrongful waste done by the tenant; and therefore in this action a release of actions reals is a good plea in barre, and so is a release of actions personals." Co. Lit. § 492. To the same effect in the law as laid down by Blackstone in his Commentaries, 3 Vol. 118.

Trespass *quare clausum* is not a mixed action; because damages only are recovered, and not damages and the realty.

In *Davis* v. *Jones*, 4 B. & P., 268, it was held that an action of covenant for not levying a fine was a personal action within the meaning of 13 Geo., 3, c. 51, § 1. "It seems to me," remarks Mansfield, C. J., "that we are called upon to decide whether the words 'other personal action' used in the statute are introduced idly, or whether they have some meaning annexed to them. Is it possible to entertain a doubt that they were meant to include every personal action in which a debt or damage could be recovered?"

By R. S., c. 95, § 14, in case of waste or trespass committed on land "all or any of the tenants in common, coparceners, or joint tenants may join or sever in personal actions for injuries done thereto," &c.

It follows, that trespass *quare clausum fregit* is to be regarded as a personal action, and may be commenced by trustee process. Indeed, no very good reason is perceived why one upon whose lands a trespass has been committed, may not as well secure the damages to be recovered by an attachment by trustee process, as if the trespass was committed on his specific goods and chattels.

Unless the trustee, or if many, one of them, resides in the county in which the trespass is committed, as trespass *quare clausum fregit* is local, it may be a question whether the action can be maintained. R. S., c. 86, § 5. *The action to stand for trial.*

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

JESSE C. CONNOR and another *vs.* THOMAS MADDEN and another.

On a writ against two defendants, the body of one may be arrested, and the property of the other attached.

ON REPORT.

DEBT on a bond to procure the release of this defendant, Madden, from arrest on a writ in favor of these plaintiffs, and against Madden, and one Mark O'Neil.

The original action was assumpsit on a joint and several note signed by the defendants.

The mandate in the original writ was "to attach the goods and estate of Thomas Madden and Mark O'Neil, . . . and for want thereof to take the bodies of the said Thomas Madden and Mark O'Neil, the said defendants . . . and them safely keep," &c. The writ was served by attaching a house, as the property of O'Neil, and giving him a summons for his appearance, and subsequently by arresting the body of Madden, whereupon the bond in suit was given by Madden and sureties. On the back of the writ was the certificate provided in R. S., c. 113, § 2, that both defendants were about to depart and reside beyond the limits of the State, &c.

The defendants in this action contended that it was not competent for the plaintiffs, in the original suit, to cause the arrest of Madden on the original writ, they having previously attached the property of O'Neil, the other defendant, on the same writ.

If the service of the original writ was legal, judgment to be entered for the plaintiffs for the amount of their original judgment.

D. D. Stewart, for the plaintiffs.

S. D. Lindsey, for the defendants.

APPLETON, C. J. A defendant whose property has been attached on a writ against him, cannot be legally arrested on the same process. *Trafton* v. *Gardiner*, 39 Maine, 501.

In the original action in which the bond in suit was taken, there were two defendants. The property of one was attached. The other was arrested, the plaintiffs having made and subscribed the oath required by R. S., c. 113, § 2. The service on every defendant is a several service. The alternative mandate in the writ applies to each defendant where there are many. It matters not whether there be several suits against the several parties to a contract, or one suit against all. The service must be on each. It is nothing to one defendant that the property of a co-defendant has been attached. He is not thereby exempt from arrest.

The bond is valid. *Judgment for plaintiffs for the amount of the original judgment, and interest.*

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

AMANDA SPAULDING *vs.* ROBERT FISHER.

Money and choses in action are property for the fraudulent transfer of which the debtor and the person knowingly aiding him in such transfer, would be liable under R. S., c. 113, § 47.

A house purchased with the funds of a debtor, to whomsoever conveyed, is, as to his creditors, his property.

And its fraudulent transfer is equally established whether the conveyance is directly from the debtor, or from another by the debtor's direction and procurement.

ON REPORT.

CASE under R. S., c. 113, § 47. Writ dated July 7, 1868.

It was objected by the defendant that upon the facts alleged, if proved, the plaintiff could not maintain the action.

It appeared that David P. Chase, the debtor named in the writ, on the 26th of August, 1867, filed in the district court of the United States, for the district of Maine, his petition to be decreed a bankrupt, and in September following he was decreed a bankrupt,

and an assignee appointed; and that a petition for his final discharge is now pending, but is opposed by this plaintiff. Thereupon it was contended by the defendant, that the plaintiff was not such a creditor as was entitled to maintain this action. Whereupon the case was withdrawn from the jury and reported to the full court for the determination of these two points.

So much of the declaration as is essential is recited in the opinion.

J. H. Webster, for the plaintiff.

S. D. Lindsey, for the defendant.

1. It is not alleged in the writ that any property of Chase has been transferred to or concealed by the defendant; or that Chase possessed any property that could have been attached or seized on execution.

The dwelling-house was never the property of Chase, so it could have been attached or seized. Taking the conveyance of the same from French, cannot bring the defendant within R. S., c. 113, § 47.

2. The plaintiff must have proved her claim in the court of bankruptcy. She will be entitled to receive her proportion of the debtor's estate, and his discharge in bankruptcy will be a bar to this action.

Appleton, C. J. This is an action brought under the provisions of R. S., c. 113, § 47, against the defendant for aiding in the fraudulent concealment or transfer of the property of one David P. Chase, a debtor of the plaintiff.

The allegations in the plaintiff's writ are to be regarded as true, for the purpose of determining whether or not the action is maintainable.

The writ alleges that the plaintiff by the name of Amanda Lawrence, obtained judgment against said Chase, which still remains unsatisfied; that prior to and at the time of the rendition of said judgment, said Chase was "the owner of a large amount of money, choses in action or other property to the amount of eleven hundred

dollars;" that he invested the same in a dwelling-house and land, which, "for the purpose, and with the design of concealing the same, and to secure it from creditors, and to prevent its attachment or seizure on execution by his creditors," he caused to be conveyed to the defendant; that the defendant "well knowing the fraudulent intent and design of the said Chase, and knowingly intending to aid and assist said Chase fraudulently to conceal said property, and to secure the same from attachment, or seizure on execution by his creditors, and particularly this plaintiff, did take a conveyance of said house and land, and now holds the same, and so the plaintiff says" the said defendant "did knowingly aid and assist said Chase in such fraudulent transfer and concealment of the said property, to secure the same from creditors, and prevent its attachment or seizure on execution," &c., "by reason whereof the plaintiff has been wholly defrauded of her debt," &c.

It is objected that the plaintiff does not show that the debtor Chase owned the dwelling-house, so that it could be attached or levied upon as his property, and that therefore the action is not maintainable.

But the allegation is, that Chase owned certain money and other property which he invested in a dwelling-house. If so, as against his creditors, the dwelling-house was his, and was subject to his debts by process at law and in equity. The dwelling-house was purchased with his funds. To prevent its attachment he caused it to be conveyed to the defendant.

By R. S., c. 113, § 28, the poor debtor, when taking the oath to procure his discharge, swears that he has "not directly or indirectly sold, conveyed, or disposed of, or intrusted to any person" any of his "real or personal property to secure it, or receive any benefit from it" to himself or others, "with an intent to defraud" any of his creditors.

By § 29, when it appears from the disclosure of a debtor, arrested or imprisoned on execution, that "he possesses or has under his control any bank-bills, notes, bonds, or other contracts or property, which cannot be come at to be attached, and the creditor and

debtor cannot agree to apply the same towards the debt" provision is made for the appraisal of the same, and their application to the satisfaction of the creditor's demand.

By § 46, when a debtor in his disclosure "willfully discloses falsely, withholds or suppresses the truth, the creditor may bring a special action on the case against him . . . particularly alleging the false oath and fraudulent concealment of his estate or property . . . and if the creditor prevails in the suit, judgment shall be rendered against the debtor for double the amount of the debt, and charges on the former judgment," &c.

The statute under which this suit is brought, § 47, gives an action against any person, who "knowingly aids or assists a debtor or prisoner in a fraudulent transfer or concealment of his property, to secure it from creditors and prevent its attachment or seizure on execution," &c.

Now the money of the debtor, Chase, was liable to be taken on execution. R. S., c. 84, § 2. His "choses in action and other property," the creditor had a right to take on appraisal. If disposed of by the debtor to secure any benefit to himself therefrom, he would not be permitted to take the poor debtor's oath, and if he willfully disclosed falsely, withheld or suppressed the truth, he would be liable to a special action on the case at the instance of his creditor, in which judgment might be rendered against him for "double the amount of the debt and charges in the former judgment."

The property of Chase, before its investment by him in a house, was property for the fraudulent transfer or concealment of which the debtor and the person aiding or assisting him in such fraudulent transfer or concealment would be liable under the provisions of the statute to the creditor.

The fraudulent transfer and concealment of the house purchased with the property of the debtor, is none the less within the purpose and meaning of the act under consideration, than would be the fraudulent transfer and concealment of the property of the debtor by which the purchase was made. The property concealed was none the less liable for the debts of the debtor, though the processes

by which it would be come at to be available to satisfy the claims of the creditor, might be more devious than if the property had not been thus transferred and concealed. The house purchased with the funds of the debtor is, as to his creditors, his property. Its fraudulent transfer and concealment is equally established, whether the transfer is directly from the debtor or from another by his direction and procurement, the property transferred having been purchased with his funds. The object of the statute is to afford a remedy to the creditor against any one to whom the property of his debtor, no matter in what it consisted, or how situated, has been fraudulently transferred for the purpose, and with the intent on the part of the debtor transferring, and the individual receiving such transfer to conceal the same, so as "to secure it from creditors and prevent its attachment or seizure on execution."

It appears that David P. Chase has filed his petition in bankruptcy, and has not obtained his discharge. It is objected that the plaintiff is not such a creditor as is entitled to maintain this action. It is uncertain whether Chase will ever obtain his discharge. If he does not, the plaintiff remains a creditor, having a debt undischarged, equally as if his debtor had never attempted to procure a discharge in bankruptcy.

What would be the effect of a discharge in bankruptcy, if obtained by Chase, is a question not argued, and as to which we give no opinion. *The action is to stand for trial.*

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

CHARLES A. SEVERY *vs.* JOSIAH D. BARTLETT.

Chapter 157 * of the Public Laws of 1868, providing that the plaintiff may, under certain circumstances, strike a bankrupt defendant's name from the suit without costs, applies to cases in which there is but one defendant, as well as to those where there are more than one.

ON EXCEPTIONS.

TRESPASS against the defendant as a deputy-sheriff for taking certain property of the plaintiff on a writ against this plaintiff in favor of a third person, in June, 1867, which property the plaintiff claimed was, at the time of the taking, exempt from attachment.

Writ is dated June 12, 1867.

On the first day of September, 1868, the bankruptcy of the defendant being suggested on the docket, the plaintiff moved for leave to strike the name of the defendant from the suit without the payment of costs, and that the plaintiff become nonsuit.

The presiding judge ruled that c. 157 Public Laws of 1868, did not apply to cases having but one defendant.

A nonsuit was entered, and the presiding judge instructed the clerk to allow and tax the defendant's cost in his name.

The plaintiff alleged exceptions.

Whitcomb, for the plaintiff.

D. D. Stewart, for the defendant.

APPLETON, C. J. The bankruptcy of the defendant having been suggested, the plaintiff moved to strike the defendant's name from the suit, without payment of costs.

The court ruled that c. 157 of the statutes of 1868 did not apply where there was but one defendant in the writ, and denied the plaintiff's motion.

By c. 157, § 1, it is provided that "where it shall appear that the defendant, or any one of the defendants, has filed his petition in

* See opinion.

bankruptcy, either before or after the commencement of the suit, the action shall be continued unless the plaintiff shall thereupon strike out such bankrupt defendant's name from the suit, which he may do without costs."

The statute specially provides for the case of one or more defendants. It is in the alternative. If the words "or any one of the defendants" were striken out, it would then apply to the case of a single defendant, and would authorize the striking out of his name without cost, in express terms.

The language is not technical, but it was the intention of the legislature that a defendant, whether alone or one of many defendants, taking advantage of his bankruptcy, should not recover costs, if the plaintiff should elect to strike his name from the writ. The striking the defendant's name from the writ is a discontinuance as to him. It was not necessary that the technical term, discontinuance, should be used. The intention of the legislature is manifest. It was that there should be one and the same rule of law, whether there was a single defendant, or many.

The report does not show by whom the suggestion of bankruptcy was made, but as it was to be made by the defendant if he relied upon it, and as it is not for the plaintiff to make it for him, the presumption is, that it was made by the defendant.

Exceptions sustained.

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

SAMUEL BUNKER *vs.* JOHN TUFTS.

Where, in a trustee process, the plaintiff claims to charge the person summoned as trustee, under R. S., c. 86, § 63, for holding personal property of the principal defendant under a conveyance fraudulent and void, as to the latter's creditors; and that issue is tried in the disclosure of the alleged trustee, and he is thereupon discharged; the judgment is conclusive between the parties, and is a bar to a subsequent action between them brought under R. S., c. 113, § 47, involving the same transactions.

On report.

Case under R. S., c. 113, § 47 for knowingly aiding one Albert Williams in an alleged fraudulent transfer of his personal property to the defendant to secure it from Williams' creditors.

Writ dated Jan. 30, 1859.

The transfer of property, alleged to be fraudulent, was made on August 2, 1865; at which time the plaintiff was surety, with other persons for Williams, on two notes of $1000 each, to the Second National Bank, Skowhegan, but had paid nothing on either.

On August 18, 1865, the plaintiff, without suit, or special demand by the bank, and after Williams had left the State, gave a joint note, with other sureties, for the amount of the two former notes; and on Aug. 23, 1865, the plaintiff sued Williams, alleging an implied promise of indemnity against the notes, and summoned this defendant (Tufts) as trustee of Williams upon the alleged ground, that the aforesaid transfer was fraudulent and void, as against creditors. Tufts duly appeared, disclosed, and was interrogated at great length by the plaintiff, as to the transfer, his motives and intentions, and those of Williams in making it, and the consideration paid therefor. Tufts was duly discharged by the court. Subsequently, to wit, on the 30th Jan., 1869, the plaintiff brought this suit.

A. Libbey, for the plaintiff, contended:

That the trustee's case was a suit to obtain judgment against the property, and depended on facts different from those necessary to support this suit, and must be different rules of law. That, therefore, the judgment in that suit can be no bar to this. *United States* v. *Lane*, 8 Wall. 185. *Thomas* v. *Goodwin*, 12 Mass. 140. *Crowningshield* v. *Kittredge*, 7 Met. 521.

D. D. Stewart, for the defendant.

Appleton, C. J. This is an action under R. S., c. 113, § 47, for an alleged fraudulent conveyance of personal property by one Al-

bert Williams, a debtor of the plaintiff to the defendant. The writ is dated Jan. 31, 1869.

It is admitted that the plaintiff, on 23d August, 1865, brought a suit against said Williams, and summoned the defendant, as trustee, by reason of the aforesaid conveyance. The defendant appeared and disclosed, and upon his disclosure was discharged, and recovered his costs.

By R. S. 1857, c. 86, § 63, "If any alleged trustee has in his possession any goods, effects, or credits of the principal defendant, which he holds under a conveyance fraudulent and void as to the defendant's creditors, he may be adjudged as trustee on account thereof, although the principal defendant could not have maintained an action therefor against him."

The plaintiff in this suit was a plaintiff in the suit in which the defendant was summoned as the trustee of Williams. He is bound by the judgment rendered in that suit, equally, as he would be by one rendered in this. The validity or invalidity of the sale from Williams to this defendant was in issue between the plaintiff and the trustee in that suit precisely, as it is in this. The plaintiff failed in the contest between him and the trustee, and the judgment of the court was, that the sale was valid, and consequently that the alleged trustee must be discharged; for if the court had regarded the sale as fraudulent, he must have been charged.

The record of the judgment, in the suit *Bunker v. Williams*, and *Tufts trustee*, is binding upon the parties in this suit. *Glass* v. *Nichols*, 35 Maine, 328. *McLellan* v. *Longfellow*, 32 Maine, 494.

If the defendant disclosed falsely when summoned as trustee, the statute affords the plaintiff an ample remedy. By § 77, "If any person summoned as trustee, upon his examination willfully and knowingly answers falsely, he shall be deemed guilty of perjury; and shall pay to the plaintiff in the suit so much of the judgment recovered against the principal as remains unsatisfied, with interest and costs to be recovered in an action on the case." The plaintiff in this mode is allowed to impeach the judgment rendered in the trustee process.

As the judgment, discharging the defendant as trustee, is binding on the plaintiff, he being a party thereto, it becomes unnecessary to discuss the other questions arising in the case.

Plaintiff nonsuit.

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

JAMES CUNNINGHAM *vs.* ALBERT HORTON.

By virtue of Pub. Laws of 1863, c. 199, no tenancy at will shall be determined unless thirty days' notice in writing for that purpose is given by one party to the other, except in the cases therein enumerated.

The bringing of a suit for use and occupation is evidence tending to show that the relation of landlord and tenant subsisted between the parties.

If a landlord, without determining a tenancy at will, forcibly enter upon the demised premises ten days after rent-day, and hold them against the tenant, he thereby becomes a trespasser.

A party to whom instructions are favorable rather than otherwise, cannot be aggrieved by them.

ON EXCEPTIONS.

TRESPASS *quare clausum.*

The defendant leased by parol his store to one Patten for three years, from April 1, 1865, rent payable quarterly. In September following, the lessee assigned his interest to the plaintiff, who, in the succeeding November, assigned to one Freeman, who, in February following, reassigned to the plaintiff, who thereupon reëntered and continued in possession until the 10th of April following, when the defendant entered, in the absence of the plaintiff, removed the lock and fastened the door, which is the trespass complained of. On the 18th of April, the defendant sued the plaintiff in assumpsit for rent of the store from October next preceding up to April 10th, which the plaintiff soon paid.

This action was before the law court in 1867 (55 Maine, 33), and was sent back to be tried because the evidence of a tenancy at will was not submitted to the jury. Since that time, the case has been submitted to a jury who found for the plaintiff, and the defendant alleged exceptions.

The instructions are recited in the opinion.

A. L. Simpson, for the plaintiff.

A. W. Paine, for the defendant.

DICKERSON, J. Trespass *quare clausum*. The defendant owned the store mentioned in the plaintiff's writ, and entered and took possession of the same while the plaintiff was in the occupation of it, which is the trespass complained of.

In order to prove that he was the defendant's tenant when the alleged trespass was committed, the plaintiff, without objection, introduced a copy of the writ which the defendant sued out against him, for the use and occupation of the premises, up to the time of the trespass charged in the present suit.

The presiding judge instructed the jury that the bringing of such suit was an act, with other evidence, tending to show that the plaintiff was a tenant of the defendant during the time for which he thus claimed rent, the effect of which was to be determined by the jury.

The general principle is, that an action of assumpsit for use and occupation cannot be maintained unless the relation of landlord and tenant exists between the parties. Hence the bringing of such action has a tendency to negative the theory that the possession of the occupant was tortious, and to prove a tenancy. The instructions go to this extent only, and are clearly unobjectionable. *Cunningham* v. *Holton*, 55 Maine, 33.

A landlord cannot lawfully enter upon the demised premises of his tenant at will until such tenancy is terminated. Chapter 199, of the statutes of 1863, prescribes the mode of terminating such an estate as follows: "all tenancies at will may be determined by either party by thirty days' notice in writing for that purpose,

given to the other party, and not otherwise," except in certain specified instances, which do not include the case at bar.

This statute supersedes the mode of determining such tenancies at common law. Its meaning is the same as if it had provided in terms that no tenancy at will shall be determined, unless thirty days' notice in writing is given by one party to the other, for that purpose, except in the enumerated cases. A more restricted construction of the statute would not give it that comprehensive application which its broad language, "all tenancies at will," and "not otherwise," clearly imports.

The object of the statute undoubtedly was to prevent a breach of the peace, by protecting the tenant from molestation at the hands of his landlord, until he shall have had a reasonable opportunity to provide himself with other accommodations, and also, to seasonably advise the landlord of the intention of the tenant to vacate the premises, that he may engage another tenant.

The jury must have found that the plaintiff was the defendant's tenant at will when the alleged trespass was committed. There is, indeed, no pretence that any other tenancy existed between the parties. The defendant did not give the notice required by the statute, but forcibly entered upon the premises, and held them in defiance of the tenant's rights. He thus became a trespasser, and is liable in this suit.

From a fair construction of the second branch of the instructions complained of, the jury might have inferred, that the defendant would have been justified in entering and holding the premises against the plaintiff, though no statute notice had been given, if the plaintiff failed to pay rent on rent-day, on demand, and the defendant entered for forfeiture; but as the instructions, viewed in this light, were favorable to the defendant rather than otherwise, he was not aggrieved thereby, and has no valid ground of exceptions.

Upon a review of the evidence we are unable to find sufficient ground for setting aside the verdict on the motion, and the entry must be, *Exceptions and motion overruled.*

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

JAMES CRATTY *vs.* CITY OF BANGOR.

Section 20, c. 124 of R. S., as amended by Pub. Laws of 1864, c. 281, § 3, prohibiting traveling on the Lord's day, makes no distinction between those who travel in town and those who travel from town to town.

Nor between those who travel on foot and those who travel with horses and carriages.

A person cannot maintain an action to recover damages for an injury sustained in consequence of a defect in the highway, while he was walking a short distance, on Sunday evening, in company with several other persons, all going by invitation to the house of a friend for the purpose of spending the evening for pleasure.

ON EXCEPTIONS.

CASE for an injury alleged to have been caused by a defect in a highway in the city of Bangor.

The evidence tended to show that the injury was received by the plaintiff on Sunday, December 13, 1868, between seven and eight o'clock in the evening, and while the plaintiff, in company with some eight or ten other young persons, were traveling on foot and without any horses, teams, or carriages, and all going to the house of one Sweeney, for the purpose of spending the evening for pleasure, upon invitation extended to them the day before by members of the Sweeney family.

Upon this evidence, the defendants contended that inasmuch as the injury was received on the Lord's day, while the plaintiff was traveling for pleasure, and not for works of necessity or charity, the action could not be maintained. But the presiding judge overruled the objection; and the verdict being for the plaintiff, the defendants alleged exceptions.

Mace & Laughton, for the plaintiff.

The plaintiff was not traveling within the meaning of Public Laws of 1864, c. 281, § 3, when he received the injury. In construing the statute, the object in view, remedy intended, and the mischief to be remedied, are to be considered. *Winslow* v. *Kimball*, 25 Maine, 495.

If a violation of the statute could not be made out against the plaintiff on complaint upon these facts, they cannot avail the defendants as a defense.

To travel is to journey; to go from town to town. He who "travels," within the meaning of § 3, is a "traveler" in § 4. But interpret the two alike, and § 4 would be a nullity.

See *Hamilton* v. *Boston*, 14 Allen, 475, where the history of Sunday legislation in Massachusetts is reviewed.

A. L. Simpson, city solicitor, for the defendant, cited *Bosworth* v. *Sweeney*, 10 Met. 363; *Commonwealth* v. *Knox*, 6 Mass. 76; *Hinckley* v. *Penobscot*, 42 Maine, 89; *Nodin* v. *Doherty*, 5 Am. L. Regr., N. S. 346; *Jones* v. *Adderson*, 10 Allen, 18; *Stinson* v. *Gardiner*, 42 Maine, 249; *Low* v. *Chadbourne*, 42 Maine, 429; *Bryant* v. *Bradford*, 39 Maine, 193; *Tilloch* v. *Webb*, 56 Maine, 100.

DANFORTH, J. That the statute renders towns and cities liable for injuries, on account of a defect in the highway, to travelers on foot, as well as those with horses, has been too often and too long recognized by the courts, to be now reversed without an act of the legislature. Upon this point the ruling is right, and we think in accordance with a fair rendering of the statute.

A person traveling upon the sabbath, unless for charity or necessity, is so far in the violation of law that he cannot maintain an action for injuries by a defect of the way. *Hinckley* v. *Penobscot*, 42 Maine, 81.

No distinction is made between those who travel in town, and those who travel from town to town. The former are as much in violation of the law as are the latter. *Tillock* v. *Webb*, 56 Maine, 100.

Nor does the statute for the due observance of the sabbath make any distinction between those who travel on foot and those who travel in carriages. It is the traveling which is prohibited. R. S., c. 124, § 20, as amended by Public Laws of 1864, c. 281.

The plaintiff was not out for a walk only, as in *Hamilton* v. *Boston*, 14 Allen, 475, but was going to a place other than his home, and that, too, for pleasure. In the opinion in the case last cited, Gray, J., says: "But, confining ourselves to the facts disclosed by this bill of exceptions, we are of the opinion that a person walking with a friend on Sunday evening, less than half a mile, with no apparent purpose of going to or stopping at any place but his own home, much less of passing out of the city, and no object of business or pleasure, except open air and gentle exercise, is not guilty of traveling," &c., thus plainly intimating that in such a case as the one at bar, the decision would have been different.

If our statute is wrong, if those who pass to a place other than their home, within their own town, for purposes of pleasure, should be exempt from the provisions of the statute, the legislature is the proper tribunal to make the change. It is, however, very clear that the plaintiff met with his accident while in the violation of the plain provisions of the statute, and it is not competent for the court to make exemptions from the law which the legislature have not.

Exceptions sustained.

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

LEVI DENNETT *vs.* PENOBSCOT FAIR GROUND COMPANY.

The law does not imply a promise to pay rent for the occupation of real estate under a contract of purchase ultimately consummated; and if there be no express promise on the part of the purchaser, an action for use and occupation cannot be maintained against him.

ON REPORT.

ASSUMPSIT for use and occupation of lands and buildings called "Bangor Trotting Park," fourteen months and three days from April 9, 1864, to June 22, 1865, at $500 per year.

It appeared that the plaintiff, in April, 1864, gave a bond to the defendants, obligating himself to convey a parcel of land in Bangor (consisting of eighty-five acres, and comprising the Bangor Trotting Park), on payment of eighty-five hundred dollars within the time specified in the bond; that this bond was renewed from time to time, until June, 1865, when the purchase was completed in accordance with the terms of the bond, and the conveyance made.

There was also evidence tending to show that the defendants occupied after the execution of the bond, gathered the hay, and that $500 per year was a fair rent.

If the action was not maintainable, the plaintiff was to become nonsuit.

J. S. Rowe, for the plaintiff, cited *Howard* v. *Shaw*, 8 M. & W. 118, and note; *Hull* v. *Vaughn*, 6 Price, 422; *Gould* v. *Thompson*, 4 Met. 224; *Clough* v. *Harford*, 5 N. H. 231.

N. Wilson, also, for the plaintiff, cited *Soper* v. *Pratt*, 51 Maine, 558; *Proprietors of No. 6* v. *McFarland*, 325.

C. P. Stetson, for the defendant, cited *Larrabee* v. *Lambert*, 34 Maine, 81; *Smith* v. *Stewart*, 6 Johns. 46; *Bancroft* v. *Wardwell*, 13 Johns. 489; *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Winterbottom* v. *Ingham*, 53 Eng. C. L. 616; *Stacy* v. *Vermont Cent. R. R. Co.* 32 Verm. 553; *Little* v. *Pearson*, 7 Pick., 301; *Dakin* v. *Allen*, 8 Cush. 34; *Woodbury* v. *Woodbury*, 47 N. H. 22; *Gould* v. *Thompson*, 4 Met. 229.

WALTON, J. When a person occupies real estate under a contract for the purchase of it, and the contract is ultimately carried into effect, and there is no express promise on the part of the purchaser to pay rent, the law will not imply one, and an action for use and occupation cannot be maintained against him. The circumstances under which he occupies repel any such implication. The price agreed upon is presumed to be a sufficient consideration for the intermediate occupation of the land, as well as the ultimate conveyance of the title to it. The title of the purchaser, so far as

his right to occupy is concerned, relates back to the time when he first took possession under his contract to purchase; or, as the rule is sometimes expressed, the previous tenancy is merged in the subsequent conveyance of the fee. Thus, in *Gould* v. *Thompson*, 4 Met. 224, where the plaintiff recovered because the defendant continued to occupy the premises after having refused to execute his contract to purchase, the court say, that "had the deed in fact been given, pursuant to the parol agreement, then the tenancy at will would be considered as merged in the executed contract, which by its terms would relate back to the time that possession was given under that agreement." Similar language is used in *Woodbury* v. *Woodbury*, 47 N. H. 11. And in *Dakin* v. *Allen*, 8 Cush. 33, Chief Justice Shaw says: "But it is sometimes said that one who is in thus under a contract for a sale is tenant at will to the owner; in a certain sense he is a tenant at will, as a mortgager is tenant at will to the mortgagee, because he may enter upon and eject him, if he can do it peaceably, or maintain a real action on his title, and thus gain the possession; he is like a mortgager in relation to a mortgagee in another respect; he is under no obligation to pay rent unless upon an express agreement."

No express promise to pay rent is proved in this case. The defendants entered under a contract to purchase. This contract was not executed within the time first agreed upon, and the plaintiff could have treated it as rescinded if he had chosen so to do. But he did not so treat it. He renewed it from time to time, making no claim for rent, till it was finally consummated, and the conveyance actually made. Under these circumstances the law will not imply a promise to pay rent. The relations of the parties, and the circumstances under which the defendants occupied, repel any such implication. *Plaintiff nonsuit.*

APPLETON, C. J.; CUTTING, KENT, DICKERSON, and TAPLEY, JJ., concurred.

JOHN PATTEN *vs.* WILLIAM T. PEARSON.

It is competent for one who has indorsed a negotiable promissory note in blank in a suit brought against him by his immediate indorsee to show in defense, that he indorsed the note merely to pass the title, and that the understanding tween the parties was, that the defendant's indorsement was made solely for the purpose of transferring the note, and that he assumed no liability, conditional or otherwise, thereby.

When the plaintiff's testimony shows enough to justify the jury in finding that the indorsement was made for such purpose only, and that such an understanding did subsist between the parties, it is erroneous to instruct the jury to find for the plaintiff, if they are satisfied that the note was indorsed by the defendant prior to its delivery to the plaintiff.

The plaintiff held, by assignment from the defendant, a mortgage on real estate in Massachusetts, containing a power to sell upon breach of condition, in pursuance of which, after due notice, a sale was made at public auction, in August, 1859, and the property struck off for $1,950 to the plaintiff's agent, who, without paying the price, conveyed the property to the plaintiff, who indorsed upon the note the amount of the agent's bid, less expenses of sale and amount paid by him on a prior mortgage, and some years later brought this suit to recover a balance due on the note against the defendant, as indorser. The defendant offered to prove, that in March, 1861, the property was sold for $2,300, and claimed that that sum should be allowed as paid on the note, and that the sale, made in 1859, should be treated as a nullity. *Held*, that in the absence of any evidence tending to show fraudulent practices on the part of the holder of this mortgage in making the first sale, or that the property was fairly worth more at that time than the auction price, this claim must be disallowed, and the evidence that the property sold for a larger sum at a later period rejected.

Semble,—That a sale under such circumstances, where the mortgagee or trustee becomes the purchaser, is voidable by the mortgager, or *cestui que trust*, in equity within a reasonable time, but cannot be treated as absolutely void in a suit at common law where there is no evidence of actual fraud or unfair practices.

ON EXCEPTIONS.

ASSUMPSIT to recover a balance alleged to be due on a negotiable promissory note, given by one Pratt to the defendant, and by the latter indorsed to Bragg & Patten, or order, and by them to the plaintiff.

The defendant contended that he indorsed the note for the accommodation of Bragg & Patten, of which firm the plaintiff was

then a member, having sold the same for what the defendant owed Bragg & Patten on account.

The defendant testified, that some fifteen or twenty minutes after he had settled with Bragg & Patten, and had delivered the note in suit to them, he, at their request, indorsed the note for their convenience.

The plaintiff contended that the note was not delivered until after the defendant had indorsed it; and that the defendant voluntarily indorsed it without any request from the plaintiff.

On this part of the case, the presiding judge instructed the jury that the indorsement made out a *prima facie* case for the plaintiff; that the defendant might show that the indorsement was made without consideration; that if they believed that the note was not indorsed by the defendant when he first delivered it to Bragg & Patten, and received from them his account receipted, but was thereafterwards indorsed by him at Patten's request, the defense would be made out, and the defendant entitled to a verdict; but if they were satisfied that the note was indorsed by the defendant prior to delivering it to Bragg & Patten, and receiving from them his account receipted, they would find for the plaintiff for the amount of the note less the partial payments indorsed.

Against the plaintiff's objections the presiding judge admitted, *de bene esse*, evidence of the consideration of the deed of the premises mortgaged, from Bragg to Sargent, and the defendant contended that whatever was received by Bragg should be accounted for as payment on the note.

The presiding judge instructed the jury to disregard this evidence, and the defendant alleged exceptions.

The remaining facts are sufficiently stated in the opinion.

J. A. Peters, for the plaintiff, contended, *inter alia*, that the objection to the sale from Fiske to Bragg & Patten cannot be taken at law, but only in equity; and cited 1 Pars. on Con. 76, note *jj*, and cases there cited; Story's Agency, § 211, and authorities in note; *Shelton* v. *Homer*, 5 Met. 462, 467; *Litchfield* v. *Cudworth*, 15 Pick. 23, 31.

Rowe & Appleton, for the defendant.

A mortgage, with power to sell on breach of condition, creates a trust; and the mortgagee, in exercising that power, is subject to the laws regulating trustees. 2 Story on Eq., § 1013. 1 Wash. on Real Prop. 497, § 25. *Hyndman* v. *Hyndman*, 19 Verm. 9.

The law will not permit one to buy an estate which he was intrusted to sell, so as to make a profit to himself; but will be considered as holding for the benefit of the *cestui que trust*, if the latter so elect. 1 Story on Eq., § 318. 1 Wash. on Real Prop. 500, 439. *Jennison* v. *Hapgood*, 7 Pick. 1, 7. *Howard* v. *Ames*, 3 Met. 309, 311.

Bragg & Patten, after conveyance by Fiske, held the property under the original trust as security for the note. *Middlesex Bank* v. *Minot* 4 Met. 325, 329.

By the conveyance to and from Fiske, the title appears on record discharged of the trust, so that Sargent holds absolutely; and as the defendant, in payment of the note, cannot get the land back, he claims to have the purchase-money, in the hands of his trustee, allowed on the note. Hill on Trustees, 159, 536.

Barrows, J. The plaintiff, as indorsee of a promissory note, dated Oct. 15, 1858, given by one Pratt, for the sum of $2,215, secured by a mortgage on real estate, in Malden, Mass., and made payable in three years, with interest, to the order of the defendant, and by him indorsed, claims to recover a balance due thereon, with costs of protest against the defendant as indorser.

The defendant denies his liability on the ground that his indorsement was without consideration, and was made for the accommodation of Bragg & Patten, of which firm the plaintiff was a member at the time of the indorsement. If the defendant indorsed the note merely to pass the title, and the understanding between these parties was, that the defendant's indorsement was made solely for the purpose of transferring the note, and that the indorser assumed no conditional liability thereby in case the maker failed to pay, and the property mortgaged for security proved insufficient, it was

competent for the defendant, under recent decisions of this court, to show these facts, and thereby entitle himself to a verdict. *Smith* v. *Morrill*, 54 Maine, 48. *Patten* v. *Pearson*, 55 Maine, 39.

Touching these matters, the plaintiff himself testified "that this note was given Bragg & Patten by Pearson, in payment for some lumber the firm had sold him in July or August, 1858. At the time Pearson's paper was not good; he was in embarrassed circumstances, insolvent. . . . He offered us this note, and a mortgage given to secure it. We did not like to take it; but found we could get nothing else, probably. The note was $120 or $125 more than the amount of our bill against Pearson. He offered to let us have the note and mortgage for the bill, and call it square; to throw in the difference, and we take the note and receipt the bill. Finally, we concluded to do so."

Now this is the plaintiff's version of the transaction; and upon this statement alone there would be fair ground for maintaining, and asking the jury to find that the true intent and understanding of the parties to that transaction was, that Bragg & Patten accepted the note and mortgage, looking only to the maker and the real estate as a full equivalent for their bill against Pearson; that they did not expect nor understand that their insolvent debtor, from whom they were taking what they could get, and agreeing to "call it square," was assuming, by that very transaction, a liability to them for a greater sum than their original demand. If this be so, and if it would have been competent for the jury to have found, upon the plaintiff's own statement, that such an understanding as to the object and effect of the defendant's indorsement as was claimed by the defendant, actually subsisted between the parties to the negotiation, it follows that the instruction which made the verdict to depend solely upon the time when the indorsement was made, and whether it was before or after the note was first delivered to Bragg & Patten, was erroneous.

The jury were told, that, "if the note were not indorsed when he first delivered it and received his bill receipted, and defendant

indorsed it afterwards at the request of Patten as he stated, the defence would be made out; but if they were satisfied that the note was indorsed prior to his handing it to Patten, and receiving his bill receipted, they would find for the plaintiff."

This single point, of the time of the indorsement, was the only one of the slightest consequence as to which there was any conflict between the testimony of the plaintiff and the defendant. It was doubtless of some importance as bearing upon the question at issue. But was it necessarily decisive of that question so as to require a verdict for the plaintiff if the indorsement was made before the first delivery? We think not. For obvious reasons, if the jury found that Bragg & Patten had accepted the note and mortgage, and receipted their bill before the indorsement was made, and that the plaintiff subsequently requested the indorsement for the expressed purpose of enabling them to collect the note, as the defendant testified, it might be conclusive against the plaintiff. But it is not so clear that the defendant's ground was entirely gone if the jury failed to find this conclusive fact in his favor against the plaintiff's denial.

But for the instruction complained of, they might still have found, from the circumstances of the negotiation, as testified to by the plaintiff himself, that Bragg & Patten took the note and mortgage as the best thing they could get from an insolvent debtor, and were to "call it square,"—neither party understanding that that debtor was thus assuming a conditional liability for an amount greater than the original debt which he was trying to pay off.

Parties frequently indorse negotiable paper solely for the purpose of facilitating collections, and would be in bad condition if the fact of indorsement before delivery were to be taken as conclusive evidence of their liability as indorsers to the party to whom they pass it. As between the indorser of such paper and his immediate indorsee, or any one but a *bona fide* holder for value, all the circumstances of the negotiation may be inquired into for the purpose of ascertaining what the contract really was, and whether the indorser, for a valuable consideration, assumed any liability to the person to

whom he passed the paper. *Prima facie*, his blank indorsement imports a conditional liability; but it is competent for the indorser to show that no such liability, in fact, exists, by proof of such circumstances connected with the transaction as may satisfy the jury, that neither of the parties to it understood that any such liability was to be assumed. And this he may do, although the indorsement preceded the delivery; perhaps not so easily as if the indorsement had been requested afterwards, for a specific purpose, but still, to the entire satisfaction of the tribunal with whom the decision rests.

The time of the indorsement and this particular conversation between the plaintiff and defendant, testified to by the defendant, and denied by plaintiff, were but a part of the proof upon which the defendant had a right to rely. Inasmuch as the instruction made the case to turn upon that point only, the exceptions must be sustained.

For the sake of avoiding, if possible, future delays in this much-vexed suit, it may be well, though it is not necessary for the present disposition of the case, to state the reasons for holding that the defendant has no cause of complaint in the instructions touching the question of payment.

The facts proved are these: Pratt's mortgage, given to secure the note, contained a power of sale upon breach of the condition by the non-payment of principal or interest. Upon non-payment of the first half year's interest, Bragg and Patten took measures to sell, employing one Fiske as their agent. A sale took place in August, 1859, and the property was struck off to Fiske for $1,950, of which $667.69 was reserved to pay off a prior mortgage. The testimony is, that the bidding by Fiske was on his own individual responsibility, without instructions from Bragg and Patten to bid it in for them, and contrary to their wishes; but, subsequently, Fiske conveyed to Bragg and Patten, receiving compensation for his services in making the sale, and never, in fact, paying any part of the $1,950. Bragg and Patten deducted from the auction price the amount of the prior mortgage, and the sum paid Fiske for the expense of agency, advertising, and sale, and indorsed what would have been

the net proceeds of the sale if Fiske had paid the price and kept the property, on the note as a part-payment thereof. Then, when they dissolved, Patten released his interest in the property to Bragg, who, in March, 1861, sold it to one Sargent for about $2,300. Hereupon the defendant claims that the sale to Fiske was a sham, and that there should be allowed, as paid on the note in March, 1861, the $2,300 which Bragg obtained for the property at that time.

This claim is manifestly inequitable in its full extent, because it allows nothing for relieving the property from a prior incumbrance, and nothing for the necessary expenses of sale.

Very clearly in this suit at law upon the mortgage note against an indorser, the defense of payment, beyond the amount indorsed, cannot be considered as maintained by such evidence.

The mortgaged property operates an extinguishment of the mortgage debt, or a reduction of it *pro tanto*, only when the equitable rights of the mortgager have become extinguished, and the value of the property at that time, and not at some subsequent period, is the measure of such reduction. The fact that the mortgagee has taken possession of the property for the purpose of foreclosure does not make it a payment; but the debt is to be considered as subsisting, and the holder of it is entitled to his full remedy at law for the collection of it against all parties liable upon it until the property has become absolute in him by the extinction of all outstanding equities. *Portland Bank* v. *Fox*, 19 Maine, 99. *Southard* v. *Wilson*, 29 Maine, 56. *West* v. *Chamberlain*, 8 Pick. 336.

Afterwards, he can recover only the balance remaining unpaid when the fair net value of the property at that time has been deducted. If, then, the sale by auction in August, 1859, was regularly made in good faith, the equitable rights of the mortgager (and of the defendant, if he had any) were extinguished then; and it was the net value of the property at that date, and not the price obtained for it more than a year and a half afterwards, which is to be looked at in order to determine the amount which shall be allowed as a payment upon the note. And we know of no mode of ascer-

taining the value of property that can be more satisfactory than a fairly conducted sale at public auction.

The only suggestion made in behalf of defendant to impeach this sale is, that Bragg and Patten became the purchasers of the property indirectly through Fiske. There is no intimation that the sale was not fairly conducted, or that there was not a full compliance with all the requirements of law in other respects; no offer to prove that the property was, at that time, worth anything more than the $1,950, at which price it was struck off to Fiske.

Now even if it were conceded that it would have been competent for the jury to find (notwithstanding the uncontradicted testimony that Fiske bought for himself without instructions from his principals) that Bragg and Patten were the real, though indirect, purchasers at this sale, and that this defendant is not such a stranger to the property as to preclude him from calling the validity of the sale in question in the proper forum, there would still remain an insuperable objection to the use which the defendant proposes to make of the fact.

Sales where trustees, having power to sell, become the purchasers, though undoubtedly voidable in equity at the election of the parties interested seasonably interposing, are not void; and it does not seem to be held, in jurisdictions where courts having equity powers exist, that they can be treated as void or avoided at the instance of the principal in suits at common law, without proof of actual fraud and bad faith, or of disregard of positive instructions on the part of the trustee.

Herein the case at bar differs essentially from that of *Howard* v. *Ames*, 3 Met. 308, cited for defense. In that case the defendant (the maker of the note and mortgage) offered to prove, that the mortgagee had fraudulently and corruptly managed the sale, and sold the property under its value for the purpose of obtaining a title for himself at a price less than its value, and that a sale fairly made, would have realized more than enough to pay the note.

The barren facts proved in the case at bar warrant no such assumption, and cannot authorize us, in a suit at law, to treat as

invalid a sale which no one has sought, in all these years, to set aside in equity.

For the cause first herein discussed only,

The exceptions are sustained.

New trial granted.

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

APPLETON, C. J., did not concur.

CITY OF BANGOR *vs.* JAMES S. ROWE and others.

Under R. S., c. 14, § 16, the "owner" of land is liable for the expenses of removing a nuisance therefrom, although a tenant for a term of years caused the nuisance, and continued to be the "occupant" of the premises under his lease when the nuisance was removed. [WALTON, BARROWS, and DANFORTH, JJ., dissenting.]

ON FACTS AGREED.

Action against the alleged owners of certain lands in Bangor to recover the expenses of removing therefrom a nuisance, consisting of filthy "cellars, privies, yards, drains, hog-styes, sink-drains, and decaying animal and vegetable matter."

The expenditures sought to be recovered were rightfully made, and notices were duly served upon the defendants.

The land, on which the nuisances existed, consisted of ten small lots belonging to the late William Emerson in his lifetime, and was leased by him to various persons, for the term of five years. All the buildings, standing on the premises at the date of the notice for removal, were erected by the lessees during the lifetime of Emerson, and the leases were in force at the time of his death.

By his last will and testament, Emerson devised the premises to the defendants as residuary devisees, who have renewed the several

leases, and they have never been in possession of the land, or buildings thereon, but the lessees have ever been rightfully in possession under their leases.

The court to render judgment by nonsuit or default, as they shall find the legal rights of the parties.

Charles Hamlin, for the plaintiff.

Rowe, for the defendants.

The defendants were the "owners" of the reversionary interest in the naked land, having no interest in any erections, betterments, or improvements, all of which belonged to the lessees and "occupants."

The nuisance was the filthy state of the property of the "occupants."

The "private property," as used in R. S., c. 14, § 16, was in the case at bar, the erections, shops, houses, and curtilages thereof belonging entirely to the "occupants."

A landlord is not bound to clean out the privy of his tenant, and see that the latter's hog-styes and drains emit no offensive odor. Neither has he a right to enter the premises and discontinue his tenant's pig-pen, privy, or drain.

The "owner" of land, in a strict sense, is one in possession, having the unincumbered fee-simple.

In common use, the term is applied to the holders of several of the lesser estates carved out of the fee. In the statute giving damages to the "owner" of land taken for a street, the term "owner" includes "every person having an interest in the land either as lessee for years, tenant for life, or for any greater estate of freehold, as also being in reversion or remainder." *Ellis* v. *Welch*, 6 Mass. 246.

"There may be a lease for years to one, with a life-estate to another, and a vested remainder in a third, each of whom will sustain damage by taking a part of the estate" in widening a street, each of whom is an "owner."

Same meaning is given to "owner" in statutes providing for

compensation for land taken by railroad corporations. *Gilbert* v. *Hasemayer*, 2 Sandf. 506. *Balt. & Ohio Railw.* v. *Thompson*, 10 Md. 76, cited in 1 Redfield on Railways (Ed. 1867), 349.

In an indictment, founded on Pub. Laws of 1825, c. 312, for maliciously injuring a dwelling-house not having the consent of the "owner" thereof, he who occupies the house under a parol agreement, is the "owner." *State* v. *Whittier*, 21 Maine, 341.

Occupant is owner under R. S., c. 131, § 10; and, in this sense, the lessees were the only owners intended in R. S., c. 14, § 16.

The object of R. S., c. 14, § 16, is to enforce the performance of the moral duty which the common law has embodied in its maxim, *sic utere tuo*, &c. The party to perform the duty is the occupant, if there be one.

"The cleansing and repairing of drains and sewers is, *prima facie*, the duty of him who occupies the premises, and does not devolve upon the owner merely as such." *Russell* v. *Shenton*, 43 Eng. C. L. 814. *Cheatham* v. *Hampson*, 4 T. R. 318.

Owner, as used in this statute, implies one having the right of possession. Did the legislature intend to make an omission and misdemeanor in one who has no legal right to the act omitted. If the land was leased for 999 years at an annual rent, are the successive generations of the holders of the reversion to be liable under this statute?

How would it be in case of disseisin; would the owner, while kept out of possession and using all means to recover, be subject to a penalty for not removing the filth made by the disseisor?

CUTTING, J. This case was brought against the defendants as alleged owners of certain lands and buildings in the city of Bangor, under R. S., c. 14, § 16, which provides that,—

"When any source of filth, or other cause of sickness, is found on private property, the owner or occupant thereof shall, within twenty-four hours after notice from said officer, at his own expense, remove or discontinue it; and if he neglects, or unreasonably delays to do so, he shall forfeit not exceeding one hundred dollars;

and said committee or officer shall cause said nuisance to be removed or discontinued; and all expenses thereof shall be repaid to the town by such owner or occupant, or by the person who caused or permitted it."

The case finds that a due notice was given, a neglect on the part of the defendants, and a removal of the nuisance by the municipal officer, the expenses of which are sought to be recovered in this action.

The principal ground for defense set up is, that the premises were leased to certain individuals, who created or suffered the nuisance, for whose acts the defendants are not responsible. Whether they be so or not depends upon the construction of the statute.

The remedy against the owner or occupant, in common parlance, would be construed to be against either at the option of the officer, as he should decide as to the responsibility of the respective parties; for it is notorious that many occupants under owners are totally irresponsible, and are only suffered to occupy except on condition of paying rent in advance. The statute implies that the owner can select his own tenants, and impose upon them all reasonable restrictions; but the town has no such authority. Such a contingency must have been contemplated by the legislature, therefore, to avoid the evil, and to afford a speedy and ample remedy, the term owner or occupant was inserted in the law.

But it is contended that the occupant is the owner for the time being. If such be the construction, then one of those words becomes either superfluous or synonymous. Such is not to be inferred, and such is opposed to their respective definitions.

"*Occupant.* One who has the actual use or possession of a thing."—BOUVIER, *Law Dic.*

"*Owner.* The right of the owner is more extended than that of him who has only the use of the thing."—*Ib.*

Defendants defaulted.

APPLETON, C. J.; KENT, DICKERSON, and TAPLEY, JJ., concurred.

WALTON, BARROWS, and DANFORTH, JJ., declared their views in the following dissenting opinion drawn by DANFORTH, J.

This action is founded upon c. 14, § 16, R. S. It is conceded that the plaintiffs, through their board of health, have done all that is necessary to give them a cause of action against some party; and the only question is, whether the defendants are the persons liable. This depends upon the meaning of the word "owner," as used in the section referred to. The case finds that, at the time of the injury complained of, the defendants were the owners of the land described, subject to an outstanding lease for a term of years. The cases cited by the counsel for defendants, as well as the definition of the word as given by lexicographers, show that the lessees were owners of the land for the terms described in their several leases. Both the defendants, then, and their lessees were owners of different interests in the land described in the writ; the one as absolutely so as the other. But who were the owners of the interest upon which the nuisance was permitted? Evidently those who have the present right of possession, the ownership for the time being, and not those whose right to the occupancy and control of the premises rests in the future, and has no present existence. If the nuisance complained of had been caused by a stranger, so as to have given a right of action against him, that action could have been maintained only by the lessees, for it was an injury to their interests alone. The lessees, then, are the sole owners of the property in relation to the nuisance, and the inference would seem to be inevitable, that in a case like the present, the statute has reference to them alone.

This view is very much strengthened by other words in the section referred to. The same persons, who are liable to pay the expense of removal, are also liable to a penalty not exceeding one hundred dollars. This liability accrues only after notice and "neglect or unreasonable delay" in removing the nuisance; in other words, only after a wrong has been done, a duty omitted. How can that be a duty which the party has no legal right to do. Though these defendants, in their leases, reserved a right of entry

for certain purposes, they had no such right for the purpose of removing this nuisance. In this respect they were mere strangers. The nuisance caused no injury to their interest in the land, and gave them no rights, except such as pertained to the public generally. It follows, that a "neglect or unreasonable delay" to remove the nuisance is a wrong which cannot legally be imputed to these defendants.

Our conclusion is, that the action cannot be maintained.

WALTON, and BARROWS, JJ., concurred.

JACOB O. ROGERS *vs.* INHABITANTS OF GREENBUSH.

The plaintiff's land was sold for taxes to the defendants, whose agent cut and carried away timber and hay therefrom. *Held*, that in the absence of any evidence that the timber and hay had been converted into money, the plaintiff cannot maintain assumpsit therefor.

KENT, J. This in action of assumpsit, for money had and received, and on account annexed for hay and timber cut on a lot, which plaintiff claims to own. The case states that the lot was sold for taxes, and a deed given to the town, and that an agent of the town cut the grass and timber. There is no fact stated which shows any contract, direct or implied, between the parties. The cutting, apparently, was under a claim of a title, adverse to that of the plaintiff, and against his will or consent.

There is no allegation in the agreed statement, that any money had been received by the town from said hay or timber, or that it had ever been sold and converted into money. We see no ground on which the tort can be waived, and assumpsit be maintained.

Plaintiff nonsuit.

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

William T. Hilliard, for the plaintiff.

Peters & Wilson, for the defendants.

EPHRAIM C. GATES and another *vs.* JAMES THOMPSON.

The sale by the master of a vessel of such parts thereof as belong to part-owners who were not, but might have been, notified of her peril in season to act in the premises before the sale, is void.

A master may sell the whole or a part of a vessel according to his authority.

ON EXCEPTIONS.

DICKERSON, J. TROVER for the alleged conversion of one-sixteenth of a brig. The plaintiffs claim title as original part-owners, and the defendant as vendee of the vessel at a sale by the master from alleged necessity.

At the time of the sale the master owned one-eighth, his brother one-sixteenth, which the master controlled; Wadsworth Brothers five-eighths, the plaintiffs one-sixteenth, and the remaining one-eighth was owned in New York and Philadelphia.

The master, his brother, and Wadsworth Brothers had their shares well insured; the plaintiffs had no insurance. The master resided in Eastport; L. L. Wadsworth, jr., of the firm of Wadsworth Brothers, resided in Calais; the plaintiffs had their place of business, and one of them, Gates, resided in Calais.

The vessel went ashore on an island known as one of the "Wolves," in the province of New Brunswick, about twelve miles from Eastport, on the morning of July 6, 1866. The master, leaving her in charge of the mate, arrived in Eastport about noon of the same day. He notified L. L. Wadsworth, jr., of the disaster, in season for him to reach Eastport that evening. No notice whatever was given to the plaintiffs, nor were they apprized of the disaster till after the sale.

Protest was duly noted, surveyors were appointed, and the vessel was sold at auction on the afternoon of the following day, by the master, and struck off to the defendant, as the highest bidder, for $1,650. L. L. Wadsworth, jr., was present at the sale.

The defendant got the vessel off about three hours after the sale, and she was towed into Eastport the next day after the sale, where

she was repaired for $5,000. When repaired the vessel was worth $14,000 to $15,000.

All the owners, except the plaintiffs, and the owners residing in New York city, acquiesced in the sale, and received their shares of the proceeds.

The verdict was for the defendant, and the learned counsel for the plaintiffs have reserved several questions of law, but the one most confidently relied upon in the argument, and specially calling for the careful consideration of the court, relates to the rulings of the presiding judge as to the legal effect of the neglect of the master to notify the plaintiffs of the disaster.

In general, the master has no authority to sell the ship. There is, however, an exception to this rule, when she meets with a disaster which renders it necessary to sell her, in order to save a part of her value, rather than to run the risk of a total loss.

The master's right to sell in such an emergency, arises from the necessity of acting before the owners can be consulted. He acts for them, because they have no opportunity to act for themselves. If they are present, his authority to sell ceases. He is bound to exercise the same discretion that an uninsured owner or agent of the underwriters, would exercise if present. Hence it is his duty to notify the parties interested of the disaster, when it can seasonably be done, that they may send him instructions, or be present to judge of the situation for themselves. When their discretion may be called into exercise, there is no occasion for the master to exercise his; there is no necessity for him to sell, when they may judge of the necessity for a sale themselves. The chance of recovering the vessel is worth as much to the owners as it is to the purchasers. They have a right to the benefit of the choice of the alternatives of risking or selling her, when there is an opportunity for the master to give them seasonable notice of the disaster; and he cannot devest them of this right. If he undertakes to do so by selling the vessel, the sale will be void as to such owners. Nor is it necessary that the master should fraudulently neglect to give such notice to invalidate the sale. It is the mas-

ter's duty to use the earliest means, ordinarily available, to convey intelligence of the disaster to his owners, when they may thus be reached in season to act before the sale; and if he neglects to do this, either from indifference, carelessness, or ignorance of duty, the sale will be void as to such part-owners.

This doctrine has been established, and recognized in a harmonious series of decisions of courts of the highest authority, ever since the right of the master to sell the ship from necessity was conceded.

"The true criterion for determining the master's authority to sell," observes Mr. Justice Hayne, in *New England Ins. Co.* v. *The Sarah Ann*, 13 Pet. 387, "is the inquiry whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel, in time to direct the master before she will probably be lost."

In *American Ins. Co.* v. *Center*, 4 Wend. 55, the court say, "The master is not authorized to sell the ship or cargo, except in case of absolute necessity, when he is not in a situation to consult with his owner, and when the preservation of the property makes it necessary for him to act for whom it may concern."

"If the property can be kept safely," say the court in *Hall* v. *Franklin Ins. Co.*, 9 Pick. 466, "until the owners or insurers can be consulted, and have an opportunity, in a reasonable time, to exercise their own judgment in regard to the sale, the necessity to act for them will cease." This was the case of a ship insured in Boston, which went ashore on the Florida shoals, and was taken to Key West, condemned by a survey, and sold by the master. The doctrine is here distinctly laid down, that the necessity which will justify the master of a ship in selling her, is one in which he has no opportunity to consult the owners or insurers, and which leaves him no alternative.

In *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick. 543, the court set aside the third verdict rendered for the plaintiff, it appearing that the master sold the cargo, and broke up the voyage, without

consulting the owners when he might have done so in season for them to act before the sale.

So, also, the sale of a vessel by the master on the alleged ground of necessity, was held void, in respect to the insurers, because he neglected to notify them when he had the opportunity. In this case no notice was given to the other part-owners, by the master who was himself a part-owner, though it might have been given, and on this account the court say, that "if the plaintiff's claim for a total loss stood alone upon the fact of the sale, on the ground that such a sale was authorized by the exigencies of the case, and that thereby the property of the owners was rightfully and legally devested, it is very clear that it could not be maintained." *Pierce* v. *Ocean Insurance Co.*, 18 Pick. 83. The same doctrine has been recognized in this State. *Stephenson* v. *Piscataquis Ins. Co.*, 54 Maine, 55.

The requested instruction affirmed, as matter of law, that it was the duty of the master to notify the plaintiffs of the peril of the vessel, if he had the opportunity to do so, in season for them to act before the sale; and that if he neglected this duty, and sold the vessel, the sale would be void as to them. It would be difficult to state the law, applicable to this case, with greater precision. It appears from the evidence that the master had ample opportunity to communicate with the plaintiffs in season for them to be present before the sale, and that he neglected to do so. Nor is there any pretense that he was prevented from so doing by any misadventure, mistake, or accident. Indeed, the only grounds upon which the learned counsel for the defendant undertakes to justify the conduct of the master in this particular are, that it is not necessary to notify all the part-owners in such cases, though the master may have the opportunity to do so, and that notice to one of the part-owners was sufficient.

Part-owners of a vessel are not copartners, but tenants in common. Notice to one part-owner is not notice to another, nor has one part-owner any right to sell, authorize or consent to the sale of the interest of his associate part-owner. The duty of the master

to give the notice in question extends to all the part-owners within his means of intercommunication. In this respect there is no distinction between "the small owner" and the large one; each has an equal right to be present and decide for himself whether he will sell his share, or run the risk of losing it, when the master has an opportunity to give him seasonable notice of the peril of the vessel. This duty of the master is not one which he is at liberty to perform or neglect at pleasure. Nor will the same consequences alike follow its neglect and its performance. The law will not sanction acts done in violation of a legal duty. The requirement which the law makes upon the master in this behalf, means something or nothing; if it means anything, the plaintiffs were entitled to the benefit of the instruction requested. The relaxation of this rule as contended for by the counsel for the defendant, would fritter away one of the great safeguards the law has thrown around the commercial and navigation interests of the country, and put in peril those efficient instrumentalities which have contributed so largely to produce the present advanced state of civilization.

The instruction of the presiding judge as to the effect of the omission to notify "a small part-owner," is also objectionable, as calculated to give the jury the impression that the master, as matter of law, must sell the whole, if any, and cannot sell a part of the vessel. The master may sell the whole, or a part of the vessel, according to his authority. He may sell his own share and no more, if he be a part-owner; he may also sell the shares of such owners as, being notified, give him authority to sell, and the interests of such part-owners as cannot be seasonably notified of the disaster.

"When," says C. J. Shaw in *Pierce* v. *Ocean Ins. Co.*, 18 Pick. 83, "a master stands in a double capacity, in one of which, namely, as master, he has no authority to make a sale, and, in the other, as owner, he has such authority, and makes a sale; in whatever right or capacity he may profess to act, his act would take effect according to his authority." This case is conclusive of the right of the master to make a valid sale of the whole or a part of the vessel,

according to the extent of his authority. If he sell the whole, when he has authority to sell only a part, the sale will be valid as to that part, and void as to the rest.

As the case must go back for another trial, it is unnecessary to consider the other questions raised in the bill of exceptions, or the motion to set aside the verdict as against evidence.

Exceptions sustained.

Verdict set aside. New trial granted.

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

Granger & Pike, for the plaintiff.

Bion Bradbury & French, for the defendant.

ELECTA L. P. WITHAM *vs.* GEORGE W. WITHAM.

One tenant in common cannot maintain replevin for the common property against his co-tenant.

Where the plaintiff fails to sustain an action of replevin on the ground that the parties thereto are co-tenants of the property replevied, the defendant is entitled to a judgment for return.

ON EXCEPTIONS.

REPLEVIN for one mare, wagon, and harness.

Plea, general issue, with a brief statement claiming title to be in the defendant, and not in the plaintiff, and that the plaintiff is the wife of the defendant.

The defendant put in a bill of sale from one Smith to the plaintiff and defendant.

There was no evidence of title in any person other than the parties to the action.

The jury found the parties were co-tenants of the property in controversy, and returned a verdict for the defendant, upon whose

motion the presiding judge ordered a return of the property. And thereupon the plaintiff alleged exceptions.

Plaisted & Clark, for the plaintiff.

The plaintiff has not only the same right to the possession as the defendant, but her possession is his. *Ingraham* v. *Martin*, 15 Maine, 373. *Bath* v. *Miller*, 53 Maine, 308.

As is often the case, the action is not maintained, but the plaintiff is entitled to the possession which she now has, and judgment for a return is not lawful.

H. Hudson, for the defendant.

APPLETON, C. J. The plaintiff and defendant are co-tenants of the property replevied. If one takes the common property, the other has no remedy by action, unless in case of unlawful conversion or destruction. *Strickland* v. *Parker*, 54 Maine, 322. He may take it back if he can, but the law is well settled that he cannot maintain replevin, for one co-tenant has an equal right with the other co-tenant to the possession. *Hardy* v. *Sprowle*, 32 Maine, 322. *Wells* v. *Noyes*, 12 Pick. 324.

The jury having found the fact of co-tenancy, and in favor of the defendant, the presiding judge ordered a return. This was the necessary result. The action not being maintainable, the parties are to be restored to their condition before the suit was instituted. Were it not so, a plaintiff, without right to maintain an action, would have the same benefits as if he had the right. He would succeed in obtaining and retaining possession of the desired property by virtue of a suit, which by law he had no right to bring, and in which, having brought it, he is defeated. The plaintiff, to recover, must show he is the exclusive owner, and has an exclusive right to the possession and control of the property replevied. This he has failed to do. The right of the defendant is equal to his. The goods replevied were not "unlawfully taken or detained from the owner or person entitled to the possession thereof." They were rightfully in the possession of the defendant, and the action not being

maintainable, must be restored to him. *Rogers* v. *Arnold*, 12 Wend. 30.

While the defendant is entitled to a return, yet, if the property replevied be not returned, the measure of damages would seem to be only to the extent of his interest. *Bartlett* v. *Kidder*, 14 Gray, 449.

The exceptions relate only to the order for a return. They present no question as to whether the wife could maintain a suit against her husband. None such has been argued by counsel, or is before us. *Exceptions overruled.*

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

SARAH A. B. COLLAGAN, executrix, appellant, *vs.* HARRISON B. BURNS and others.

A will, made in 1854, and presented for probate soon after the death of the testator in November, 1863, had been torn into fragments and pasted together upon another sheet of paper. On the trial of the issue involving a revocation by tearing, *Held*, by APPLETON, C. J., KENT, BARROWS, and TAPLEY, JJ., (1) That declarations of the testator, during his last sickness, made when having the will in his possession, and while pasting the torn parts together, or while reading the same after the torn parts were so pasted together by him, that the will had been torn by his mother; and (2) That declarations of good will and affection for his wife, the principal legatee, are admissible for the purpose of negativing the fact of its intentional cancellation by him.

By CUTTING, WALTON, DICKERSON, and DANFORTH, JJ., that such declarations are not admissible on the trial of such an issue.

When an illegal answer to a legal question in a deposition is read, and the presiding judge immediately, in the presence and hearing of the jury, announces that the answer is inadmissible, but that as it has been read he cannot exclude it, but that he shall instruct the jury to disregard it; a new trial will not be given on the ground that no further instruction was given, unless the attention of the presiding judge was specially called thereto.

By Public Laws of 1870, c. 100, § 1, in any civil action in which there is a subsisting verdict of a jury, if a majority of the justices qualified to set in the case, do not concur in granting a new trial, it shall be the duty of the court to order judgment on the verdict.

APPEAL from a decree of the judge of probate for this county, disallowing what was propounded as the last will and testament of the late William Collagan, formerly the husband of the plaintiff, on the ground that he in his lifetime revoked it, by tearing it in pieces.

The will was dated February, 1854.

The case came up for trial at the April term, 1867. The alleged will had been destroyed, together with all the probate records of the county, in the great conflagration of July 4, 1866.

The appellant introduced a copy of the alleged will; and it was proved that when the will was presented for probate, it had been torn in pieces and pasted upon another sheet of paper; that the names of the witnesses, the name of the testator, and the seal, had each been torn off separately; and that the will was otherwise torn. The witnesses did not agree as to the number of pieces, but the defendants claimed that the tearing bore *prima facie* marks of design, raising the presumption that it was torn by the testator, *animo revocandi*. This was not questioned by the plaintiff; but testimony was introduced by her to explain and account for the tearing, and rebut the presumption that it was torn by the testator.

Much testimony in behalf of the plaintiff was admitted against the objection of the defendants, of the following kinds, a part of each being as follows: 1. Declarations of the testator made during his last sickness, relating to his will, but objected to on the ground that they did not explain nor accompany any act material to the issue.

Thus, *Hannah Harding* testified, *inter alia*, that a short time before testator died, she saw him have the will in controversy; that he read it, reading the names of the witnesses aloud; that plaintiff was present; that the testator told his wife the will was good; that it was right; that she would have no trouble in proving it; and that Mr. Deblois would tell her where the witnesses were.

Martha E. Holmes testified, that she went to testator's room in July or August, 1863; that he was on his couch with a board before him, on which was the will in controversy; that she read it as it lay there; that it was moist; that it had been pasted, but that the testator did nothing to it while she was there; that he said, "Mother has been making a fuss, and has torn my will." Witness asked him if it would not have been better to make a new one, and he replied, "it would not, some would say he was sick, and not fit to make a new will."

Joseph Harding testified, that he was present at the same time with Mrs. Holmes; that testator had a paper before him on a board, working on it, which testator said was his will made in Boston; that the testator finished pasting it in witness' presence; and that testator then said, "the old woman had got in one of her tantrums, and had torn it, but that he could fix it together again."

Harriet H. Leonard testified, that she was in testator's room some time in August, 1863; that he took the will in controversy from his portfolio; that he said it was his will made in Boston; "that his mother had torn it in one of her tantrums;" but that he "had repaired it so that it was just as good as ever."

Rachel Pierce's deposition contained similar testimony.

2. Declarations of the testator, made during his last sickness, relating to his property, but objected to on the ground that they did not relate to his will, nor explain or accompany any act material to the issue.

Thus, *Harriet H. Leonard* testified, that she saw the testator a few weeks before he died; that he then said he "had given Sarah (plaintiff) all his property, and she would pay witness' father, and all honest debts."

Mary Gordon testified, that she called on the testator about three weeks before he died; that he said nothing about any will; that he said, "all he possessed was Sarah's," and he "wished it was more."

3. Declarations of the testator concerning the plaintiff, not relating to the will, or the property, objected to as not only irrelevant, but as tending to prejudice the minds of the jury.

Thus, *Mary Gordon* testified, that during the same conversation before named, the testator said the plaintiff "had been untiring in her devotions night and day, and that there was nothing that she could do for him that she had not done."

Harriet Gordon testified, that she called on the testator a few weeks before he died; that he said nothing about the will; that he said that all he possessed was Sarah's; and that she had been a faithful wife, untiring in her attentions.

Joanna Farrington testified, that she was with the testator about three weeks before he died; that after speaking of his will, saying that he had willed everything to Sarah, he said she had done everything for him, night and day; and he did not know as he appreciated her so much as he ought to.

4. *Mary J. Bailey*, a witness called by the defendants, testified, that in June, 1863, she saw the plaintiff paste together a paper, which the witness afterward identified as the will in controversy.

She had testified to the same fact at the trial of this case at the October term, 1866. At that trial, Moses Kimball was called by the plaintiff, and testified, that Mrs. Bailey (witness) had previously said to him that she did not think plaintiff pasted the will; that she did not think plaintiff had brains enough to do it; but that she thought the testator might have done it.

Kimball was not present at the present trial, but his deposition, taken by the plaintiff, was read to the jury. It contained the following question and answer, to both of which objections were made and noted when the deposition was taken: "When and where did you next have an interview with Mrs. Bailey, and what was said, state fully?" "When I was coming out of the court-house at Portland, after testifying in this case, in November last, she commenced and used very abusive and profane and obscene language. I passed her in silence."

When the plaintiff's attorney, in reading the deposition to the jury, came to the foregoing question and answer, the defendants' counsel renewed the objection, saying, "that is objected to."

The question was read, and the presiding judge overruled the objection, and allowed it to be read to the jury, and the attorney then read the answer also to the jury. After it was read, the presiding judge said to the counsel, that the answer was inadmissible, but as it had been read to the jury, he could not exclude it; that he could do no more than to instruct the jury to disregard it; and that, he thought, his duty to both parties required him to do.

But no such instructions were given, otherwise than in the remark to counsel, as above stated, at the time of the reading; and the deposition was given to the jury as it was read.

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

Woodbury Davis and *H. P. Deane*, in support of the exceptions, cited Redfield on Wills, 539, § 1, 544, § b, 543, § b; *Comstock* v. *Hadlyme*, 8 Conn. 254; *Robinson* v. *Hutchinson*, 26 Verm. 83; *Kinne* v. *Kinne*, 9 Conn. 102; *McTaggart* v. *Thompson*, 14 Penn. 159; *Waterman* v. *Whitney*, 1 Kernan, 157; *Bartlett* v. *Nottingham*, 8 N. H. 300; *Wadsworth* v. *Ruggles*, 6 Pick. 63; *Hodges* v. *Strong*, 10 Verm. 247; *Farrar* v. *Ayers*, 5 Pick. 404; *Barrett* v. *Wright*, 13 Pick. 45; Greenl. on Ev. 290; *Brown* v. *Saltonstall*, 3 Met. 423; *Weston* v. *Foster*, 7 Met. 297; Redfield on Wills, 569, note 66; 1 Jarman on Wills (Perkins' 2d ed.), 77; *Stevens* v. *Vanclerc*, 4 Wash. C. C. 265; *Jackson* v. *Kniffen*, 2 Johns. 31.

J. S. Abbott, *J. F. Pickering*, and *N. Webb*, for the plaintiff, cited *Betts* v. *Jackson*, 6 Wend. 187; *Davis* v. *Davis*, 2 Addams, 225; 2 Am. Lead. Cas. 655 *et seq.*; *Macbeth* v. *Macbeth*, 11 Ala. 596; *Brady* v. *Cubit*, 1 Doug. 30, 39; *Flentham* v. *Bradford*, 10 Barr. 82; *Yerby* v. *Yerby*, 3 Call, 334; *Sumner* v. *Bayne*, 7 Vesey, jr., 508; *Johnson* v. *Johnson*, 1 Phill. 460; *Colvin* v. *Fraser*, 2 Hag. 361; *Emerson* v. *Barille*, 1 Phill. 343; *Fox* v. *Marston*, 1 Curtis, 496, 1 Jarman on Wills, 119.

Appleton, C. J. This is an appeal from a decree of the judge of probate, disallowing what was propounded as the last will and testament of William Collagan, the appellant's husband, on the ground that he in his lifetime revoked the same, by tearing it in pieces.

The will, when produced for probate, had been torn in pieces and pasted upon another sheet of paper; the names of the testator and of the witnesses had been torn off separately, as well as the seals; and the will was otherwise torn. The appellees claimed that the tearing bore *prima facie* marks of design, raising the presumption, that it was torn by the testator *animo revocandi*. This legal presumption was not questioned by the appellant; and testimony was

introduced by her to explain and account for the tearing, and rebut the presumption that it was torn by the testator.

That the will produced was once a legal instrument was not denied, nor that it had been torn by some one. By whom torn, and with what intent torn, were the issues presented to the jury.

A will is ambulatory during the life of the testator. It is his present act, when made; but it cannot take effect till after his decease. Until that time it is under his control, to be changed, modified, or revoked, according to his good pleasure. It derives its prospective efficiency from his present intention. Its continuing and final validity depends on such continuing intention. That intention the law regards as continuing unless a change of purpose is shown in the manner required by the statute. The intention is the element which gives vitality; and that is only ascertainable by and from the acts and declarations of the testator.

As the continuing validity of the will depends on the intention of the testator that the instrument purporting to be his last will and testament shall be and continue to be such, it would seem to follow that his declarations, equally with his acts, would be receivable to prove or disprove an intention existing at a given time; or the intention with which a particular act was done. The declarations of a grantor or assignor are admissible against his grantee or assignee, if made when the title to the estate granted or assigned is in him. So the declarations of a testator as to his acts and intentions in reference to an instrument under his control, would seem to be equally competent testimony. Accordingly, by the common law, the revocation of a will could be shown by the verbal or written declarations of the testator, or by acts proving a design to deprive the will of validity, or to disaffirm its existence as a subsisting and operating instrument. 2 Am. Leading Cases, 643. *Card* v. *Grinman*, 5 Conn. 164. Evidence of this description should be received, except so far as it is made inadmissible by statutory enactments.

A will, executed in accordance with the provisions of R. S., 1857, c. 74, "is valid, until destroyed, altered, or revoked by being

intentionally burnt, canceled, torn, or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will," &c., § 3.

The will produced, from whose custody was it obtained? From that of a depositary, or of the testator? In the latter case, a presumption of intentional cancellation by the testator arises from its torn and fragmentary condition. When a will is left in the charge of the testator, and is not found, or is found torn or obliterated, the presumption is, that the tearing or obliteration was with the intent to cancel. These acts, if done by the testator, imply an intent to revoke what before it was his intent to establish. If the will is traced out of the possession and custody of the deceased, it rests with the other party, either to show that it came again into his possession, or that it was destroyed by his direction, or with his privity and consent. *Colvin* v. *Fraser*, 2 Hag. 266 (4 Eng. Eccl. 113).

The will was torn in pieces. By whom and why was it so torn? The will was the testator's act when made and perfected. His intention, then, was conclusively established. The tearing may have been by the testator, or by some one else without his knowledge. If torn by a stranger, it is, notwithstanding this, his will. So it is equally the testator's will though he may have torn or destroyed it, if done by accident or mistake, without the intent to cancel. "Now it is perfectly true," observes Sir John Nichol, in *Thynne* v. *Stanhope*, 1 Addams, 52 (2 Eng. Eccl. Rep. 23), "that, in legal consideration, a will may be canceled without being revoked. The canceling itself is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*. A will, therefore, canceled through accident or by mistake (as in the instances put by Lord Mansfield, in the case of *Burtenshaw* v. *Gilbert*, Cowp. 52, and similar ones), is not revoked. . . . I assent, therefore, to the general legal position, that the cancellation of a will does not, necessarily, infer any intentional abandonment of the dispositions contained in, or, consequently, any revocation of it. At the same time, it is obvious that this is the ordinary inference, deducible from every act of canceling. And I may venture to lay down, that in

order to bar its application to any particular case of canceling, two things at least are requisite: first, it must be proved by indisputable evidence, that the canceled paper once existed as a finished will; secondly, it must be shown, by evidence equally indisputable, that the testator adhered to it throughout, in mind and intention, notwithstanding its cancellation. In the absence of either of these indispensable requisites, the ordinary presumption is that upon which a court of probate is bound to act."

The will was before the court. The fragments into which it had been torn were carefully collected and pasted upon a sheet of paper, so that the will, in its completeness, was preserved. While the tearing, if done by the testator, would indicate an intent to destroy, the careful collection of all the parts by him would show an intention to preserve; and his preservation of them would indicate, that in his mind the instrument was his will, and would negative, in some measure, the inference otherwise arising, that the will was torn by him and with the intent to revoke.

In the goods of Colburg, 2 Curteis, 832 (7 Eng. Eccl. 327), the testator, in a moment of irritation, tore the will into four pieces, but afterwards repenting of what he had done, desired his housekeeper to stitch the will together again, saying he did not mean to destroy the will. At the hearing, the next of kin were absent. "The deceased," remarks Sir Herbert Jenner, "having torn the will into four pieces, it must be presumed, *prima facie*, that he intended to revoke it; if the questions were propounded in an allegation, and witnesses examined in support of it, I should probably be of opinion that it was not revoked, as in *Doe* v. *Perkes*, 3 B. & A. 489. But the court cannot, upon an *ex-parte* motion, decree probate in the absence of the next of kin. Upon a proxy of consent from the next of kin, probate may pass." In *Doe* v. *Perkes*, 3 B. & A. 489, the testator, in a fit of passion against one of the devisees, tore his will into four pieces, but upon a remonstrance of a bystander, he desisted from further tearing it; and, after having fitted the pieces together, and finding no material word obliterated, remarked, "It is well it is no worse." The will was found, after his death, in four parts.

It was submitted to the jury to determine whether the act of cancellation was complete, and they found a verdict establishing the will, which the court, upon a motion for a new trial, sustained. In the case to which reference was last had, the fragments of the will were neither pasted nor stitched together; acts tending to disprove an intent to cancel. *In the goods of David Doane*, Spinks, 106, the testator, having duly executed his will, became afterwards of unsound mind, and, while in that state, destroyed it. Having partially recovered, he expressed regret and gave directions for the preparation of another to the same effect. Before this was done, he committed suicide. Probate was granted of the unexecuted draft of the will." There was no *animus revocandi*, says Sir John Dodson. In *Clarke* v. *Scripps*, 22 Eng. L. & Eq. 627, one W. A. S. left a will; from the bottom of the several pages of this will the name of the testator had been torn or cut; part of one page had also been torn off, but was reannexed by a pin. The signature of the testator of the subscribing witnesses at the end of the will remained. *Held*, that the will was not revoked, partially or entirely. "It is not the mere manual operation of tearing or cutting the instrument, or the act of throwing it in the fire, or of destroying it by other means," remarks Sir John Dodson, "that will satisfy the requisites of the law, but the act must be accompanied with the intention of revoking. There must be the *animus* as well as the act; both must concur to constitute a valid legal revocation." To show the *animus* with which the act is done, recourse would seem naturally to be had to the declarations of the testator, as well as to the surrounding and attendant circumstances.

But the presumption, when the will, left in the custody of the testator, is found torn, that the tearing was by him and with the intent to cancel the same, may be rebutted.

To rebut this presumption, the appellant offered in evidence the acts of the testator,—as collecting, drying, and pasting together the parts of the torn will,—and his declarations while so collecting and drying the same, and after it was dried, and when reading the same, all being parts of one and the same transaction, to the

effect that the will was torn by his mother-in-law "in one of her tantrums;" that it was his will; thus negativing its destruction by himself and all intent of cancellation on his part.

These acts were done and these declarations made during the testator's last sickness, and were received subject to objection. Their importance as evidentiary of his intention, cannot be doubted. Their truth, the jury have affirmed. They tend to negative the presumption of law. They explain the fragmentary condition of the will. They disprove alike the fact of canceling and the intention to cancel on the part of the testator. They best, if truly reported, indicate his mind and purpose. Unless received, being true, an act of spoliation becomes triumphant, and the deliberate will of the testator, in relation to the final disposition of his estate, is defeated. Seeking to ascertain his intention, shall the most obvious and natural mode of ascertaining such intention be disregarded? What act more significant of preservation than that of pasting carefully together the torn fragments of a will? What more decidedly negativing all purpose of its destruction? What more cogent and convincing evidence of intention than the deliberate statements of the testator, when on the bed of sickness and in the very presence of death? True, the force of this latter species of testimony may be weakened by the infirmative considerations with which it is ever attended. The declarations of the testator may have been false, and uttered to deceive; or, being true, they may have been misunderstood, in whole or in part, from inattention; they may have been misrecollected from forgetfulness, or misreported from design. But all this affects the degree of credit to be given the testimony, not its admissibility. It shows that caution should be used in weighing it, not that it should be excluded. The exclusion of evidence relevant and material, from the fear that it may not receive its just degree of credence, is the rude resort of barbarism. Civilization hears, weighs, examines, compares, and then decides.

Proof of the acts of the testator, as gathering and pasting together the torn parts of his will, were unquestionably admissible. They were equally so as would be the act of mutilating or tearing the

same. Whether the act be one indicating destruction or preservation, it is equally for the consideration of the jury.

But when the act is one material and relevant, and proper for the consideration of the jury, the declarations of the actor accompanying and explanatory of the acts done, are uniformly admissible as part of the *res gestæ*. If the tearing was by mistake, as if the testator should commence the destruction of his will under the impression that it was another and different instrument, and should so say, while in the act of destruction, his declarations as a part of the *res gestæ* would clearly be admissible. So if the tearing is for the purpose of destroying his will, his declarations indicating his purpose, are properly received to give the true character to the act done. Equally so must be his declarations made, when attempting to preserve the parts of a will, by whomsoever torn, for the purpose of showing the object of his then action. In *Stuart* v. *Hanson*, 35 Maine, 507, Wells, J., says, "It may be difficult to determine, at all times, when declarations shall be received as part of the *res gestæ*. But when they explain and illustrate it, they are clearly admissible. Mere narrations of past events, having no necessary connection with the act done, would not tend to explain it. But the declaration may properly refer to a past event as the true reason of the present conduct." The declarations of the testator, while in the act of pasting together the torn fragments of his will, stating the reasons and purpose of his action, and evidencing his then intention, and so far negativing the inference apparently arising from the condition of the will, are properly received as part of the *res gestæ*.

In courts of common law as in those having jurisdiction of the probate of wills, declarations of the testator have been received to strengthen or repel the presumption, that a will once legally executed, but not found at the death of the testator, had been destroyed by him. In *McBeth* v. *McBeth*, 11 Ala. 596, in case of an alleged lost will, the declarations of the testator were admitted, that he had made one. In *Smock* v. *Smock*, 3 Stockton, 157, the declarations of the testator were received to rebut the presumption, that the mutilation of the will was by his act. Revocation is a question of

intention, and the acts and declarations of the maker of the will are admissible for the purpose of ascertaining whether it was revoked. *Smiley* v. *Gambill*, 2 Head, 164. It was decided in *Youndt* v. *Youndt*, 3 Grant (Penn.), 140, in an issue to try the validity of a will alleged to be revoked by a subsequent will which had been destroyed, that the declarations of the testator, up to near the time of his death, concerning it, were competent evidence to show that the destruction was not by his direction. "It became necessary," observes Lowrie, J., "to show that the testator himself did not destroy the will (of 1859), and for this purpose his conduct and declarations concerning it, up near to the day of his death, were very direct evidence in establishing the negative."

In *Sawyer* v. *Smith*, 8 Michigan, 412, after the death of the testatrix, a will twenty-five years old was discovered in a barrel among other waste papers, and either torn or worn into several pieces, which were scattered loose among the papers in the barrel. Whether the injury to the instrument was done by the testatrix or by some other person; and if by her, whether accidentally or intentionally, and for the purpose of revoking the will, were questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, were held competent evidence. In *Whitely* v. *King*, 10 Jurist, N. S. 1079, the facts were these: A will, after its execution, was retained by the testator in his own custody, but after his death it could not be found. To rebut the presumption of law, that it had been destroyed, evidence was offered of certain declarations made by the deceased, up to within a few days of his death. It was objected, that these declarations, unaccompanied by any act, were not evidence. But the evidence was held admissible. "It being a presumption of fact," observes Erle, C. J., "that, as the will cannot be found, it has been destroyed by the testator, evidence is admissible to rebut the presumption. When any evidence of revocation has been given, evidence of a contrary character is always admitted; and declarations by the testator are among the

most cogent means of discovering his intention. They form the most safe guide to the judge in deciding whether the testator intended to revoke or not." In *Bulkely* v. *Redmond*, 2 Bradford's Surrogate Rep. 284, referring to the declarations of the testator, that he had destroyed the will, the court says: "Such declarations would, of course, have no weight in the face of the instrument if produced uninjured. A revocation cannot be proved by parol, in opposition to a valid will known to exist. Such declarations can only be competent in connection with proof of an act of cancellation, or to repel or strengthen a presumption of cancellation. It may be material to show, *quo animo*, an act is done, or to elucidate facts and circumstances bearing upon the question of cancellation." If the fact of the tearing of a will is brought home to the testator, and he fails to publish another, it is held *prima facie* evidence of his intention to revoke the will destroyed; but this presumption may be rebutted by proof "of the acts and declarations of the testator himself, as being the natural and appropriate indications of his inward thoughts and intention." *Steele* v. *Price*, 5 B. Mon. 58.

There is another class of declarations to the admission of which exceptions are taken, such as, that the testator, in his last sickness, said that he had given the appellant all his property, that all he possessed was hers, that she had been untiring in her devotions day and night, that there was nothing she could do for him that she had not done, and that he had willed everything to her, &c.

That there was originally a valid will was not denied. The questions to be determined were, whether the testator had destroyed his will, and if so, whether the destruction was intentional or not.

The intentions of a party may be inferred from his acts, or may be known from his declarations. The declarations introduced show the amicable relations between the testator and his wife. They assume the existence of a valid subsisting will. They negative by necessary implication its intentional destruction. They were made when there was no apparent motive for concealment or deception. They indicate a firm belief on his part that his will

was in full force, and was to control the disposition of his estate. Had it been shown by similar testimony that there was strife between the parties, that there was neglect or unkindness on the part of the wife, and ill feeling or hate on that of the husband, would not proof of these facts strengthen the presumption of intentional cancellation, arising from the torn condition of the will, as the proof of the opposite facts tends to disprove such presumption?

The condition of the testator, his relation to the objects of his bounty in case the will is established, his relations to those to whom it would descend in case it fails to be established, their condition, their conduct to him and his to them, his past acts and declarations in relation to his estate and its disposition, the state of his affections, when proved may raise an improbability almost amounting to an impossibility, that the testator himself intentionally destroyed his will; they may rebut the *prima facie* presumption arising from the will not being found, or being torn when found; they may show that up to the time of his death he believed his will was existing and would act upon his property, and consequently that its non-appearance, or its torn appearance, was the result of some cause other than the wish or intentional act of the deceased. Evidence of this character is uniformly received in the ecclesiastical courts, and is rarely excluded in the courts of common law. *Lillie* v. *Lillie*, 3 Hag. 184, n. In *Laxley* v. *Jackson*, 3 Phill. 128, the testatrix made a will by which she gave the bulk of her property to a nephew. Finding afterwards that he was living in adultery with a servant-girl, she secretly made a new will, giving the most of her property to others. At her death the last will was not found; and the nephew was permitted to give evidence of the declarations of the testatrix, that after the making of the last will, she had ascertained that he had discarded the servant, and abandoned his dissolute habits, to strengthen the presumption that the testatrix had destroyed the last will for the purpose of reviving the first. Declarations of the testator of a similar character were received in *Richards v. Mumford*, 2 Phillimore, 23. These and other cases are cited with approbation by Mr. Chancellor Walworth, in *Betts* v. *Jackson*,

6 Wend. 173. In *Paulton* v. *Paulton*, 4 Jur. N. S. 341, the declarations of the deceased, and the probability of her adherence to a will were held to rebut the presumptions of its revocation, from its not being forthcoming. "This presumption is one," observes Creswell, J., "that prevails only in the absence of circumstances to rebut it, and it is therefore called a *prima facie* presumption. It may be falsified, and may be rebutted by many circumstances. Those most commonly relied on are declarations, either of good will to the parties benefited by the will, and of adherence to the will as made, or, on the contrary, of dissatisfaction and change of mind respecting them." The presumption that a will, not forthcoming at the testator's death, was destroyed *animo revocandi*, may be rebutted by proof of declarations of unchanged affections. *Paulton* v. *Paulton*, 1 Swabey & Tristram, 55. If admissible to negative the presumption arising from the will's not being forthcoming, no reason can be perceived why they are not equally admissible to negative the presumption arising from the torn condition of a will when produced.

In *Noel* v. *Patten*, 40 Penn. 484, the testimony, to the admission of which exceptions were taken, was of the declarations of the testator running back to a period of thirty years, and up to within a much later period, that he intended "to leave his farm in the name of Noel," and similar expressions at different times and intervals. "We are of opinion," remarks Thompson, J., "that it was clearly competent, certainly on the point of undue influence. It would strongly rebut the idea of any such influence on the mind of the testator when making his will, if it were shown he made it in accordance with a long-cherished purpose, and especially when, in the execution of that purpose, he was keeping it not only in the name, but amongst his blood relations. This was the purpose of the evidence, and it is sustainable on express and clear authority. *Sterrill* v. *Douglass*, 2 Yates, 46." Equally would the declarations of the testator rebut the idea that he destroyed a will deliberately made, and in accordance with his expressed intentions. The case of *Whitely* v. *King*, 112 E. C. L. 756, has been already referred to, where

the declarations of the testator expressive of his satisfaction at having settled his affairs, and intimating that his will was left with an attorney, were received to rebut the presumption arising from the will not being found, that it had been destroyed by the testator, *animo cancellandi.* "Surely," says Earle, C. J., "you may look at a man's words to see what his intentions are. The question here was, whether the testator had the intention to destroy his will and codicil. Down to the last moment of his life, he is found expressing his satisfaction that he has settled his affairs." Byles, J., says, "I see no reason why the declarations of the testator should not be admitted as part of his conduct, to show his intentions as to the disposition of his property." Now it is difficult to perceive any difference in principle in receiving the declarations of a testator to rebut an inference arising from the inability to find a will, or from the condition of the will when found.

So in *Tynan* v. *Paschall*, 27 Texas, 268, it was held, that the declarations of a supposed testator are admissible in evidence to rebut the presumption of a cancellation or revocation of a will, which arises from its destruction or loss previous to his death. In *Eskersby* v. *Platt*, Law Rep., 1 P. & D. 281, it was decided that the presumption that a will, which cannot be found, was destroyed by the testator with the intention of revoking it, and not with the intention of setting up an earlier will, can be rebutted only by clear and satisfactory evidence. In *Finch* v. *Finch*, Law Rep. 1 P. & D. 371, a will which had been in the testator's custody could not be found among his papers after his death. He had recognized its existence up to three weeks of his death, and no change of intention was shown during that period. The only person interested in an intestacy had searched the testator's papers, and did not appear before the court. The court refused to presume that the will had been revoked, and granted probate of the draft.

In Dennison's Appeal, 29 Conn. 402, the appellants offered evidence that the testator had declared "that none of his property should go to Ledyard Park's family." This evidence was rejected, and a new trial was had in consequence of such rejection. "Dec-

larations and acts of kindness and affection toward a legatee are usual and common circumstances often relied upon in case of a will," remarks Hinman, C. J. "They go to show that a legacy, otherwise inexplicable upon the ordinary motives of human conduct, is a natural and probable act, and therefore a reasonable and free one. Of course it would seem to follow, that contrary declarations and acts must have a contrary effect."

In *Doe* v. *Shallcross*, 16 Ad. & Ell. N. S. 758, Lord Campbell says, "Not only where the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making the will, the declarations of the testator are admitted respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or pass them by, in the disposition of his property."

Now whether it be the making of a will or the destroying of one, the evidence in each case is alike, and for the same reasons admissible.

In the case at bar, one issue was fraud on the part of the appellants in setting up a will alleged to have been cancelled by the testator.

It may not be amiss to examine briefly the cases relied upon as adverse to the admission of the declarations of the testator for the purposes and under the circumstances which have just been the subject of consideration.

The argument against admission amounts to this: that the evidence may be false; that it may be easily fabricated; that if fabricated, the detection of such fabrication will be difficult; that being thus deceptitious, it will lead to misdecision and consequent injustice.

The reasons urged are valid for the exercise of caution in weighing evidence of this character; but there is a material difference between caution and exclusion. They are substantially the same as those formerly urged against the admission of most important testimony heretofore excluded, but now received, the insufficiency of which reasons is now almost universally acknowledged.

The declarations of the testator will be either true and truly reported or misreported, or they will be false and lead to deception.

If the declarations are true and truly reported being material (and if not material, they should no more be received than any other immaterial evidence), they constitute reliable proof of more or less importance, and then exclusion is the exclusion of true, relevant and material testimony, which is an evil great in proportion to the importance of the evidence excluded, and leading to misdecision and injustice.

The danger of misunderstanding and misreporting these declarations is no other or different from that in case of confessions, &c., and it was never deemed sufficient for their exclusion, when the most stringent exclusionary rules of the common law were in force.

If the declarations are false, or declarations are reported as having been made which were never made, yet it by no means follows that injustice will ensue. The judge of fact has the same capacity to detect falsehood in this as in any and all other cases, and, if detected, the falsehood becomes an article of circumstantial evidence of no slight probative force against the party by whom it is offered. But fraud and falsehood are not to be presumed, and evidence is not to be excluded, because of its possible falsehood, for there is no species of evidence of which possible falsehood may not be predicated.

The argument for exclusion assumes that the tribunal, whose duty it is to weigh the evidence, is incompetent for the task, and that those who have never seen the witnesses, nor heard their testimony, are more competent to determine its trustworthiness before and without an hearing, than a jury would be with and after an hearing.

That the evidence, if received and relevant, would have probative force, more or less, is conceded. Exclusion is a judgment by those who know nothing of the just weight of the evidence excluded; that it is untrustworthy and false, and that those who would hear it would be unable justly to appreciate it; and, as they cannot appreciate it, they shall not hear it.

But no reason can be given why a jury cannot as justly appreciate this as any other species of testimony. To say that a more correct judgment of the trustworthiness of testimony can be found, and its truth or falsehood can be more satisfactorily determined by those who do not hear it, than by those who do, is to adopt, as an axiom, the proposition that hearing testimony incapacitates the hearer to judge of its trustworthiness and probative force.

Evidence of the declarations of a testator are received where the issue involves the question of sanity, fraud, or undue influence, as well as in cases of latent ambiguity.

But if the admissions of the declarations of a testator are intrinsically dangerous; if there is more likelihood of danger to the cause of truth from their admission than from their rejection, then exclusion should be the universal rule. No good can possibly arise from the reception of evidence preponderantly probable to produce misdecision and consequent injustice. There is nothing, when the issue involves sanity, fraud, undue influence, or ambiguity, which would change, or tend to change, evidence deceptitious in its character into evidence reliable and trustworthy. There is nothing to entitle such evidence to more credence in those cases than in the one under consideration. It may be said that it would be difficult to show the mental condition of the testator except by what he said. This may be true. But if the danger arising from his reported declarations preponderate over any and all anticipated benefit to the cause of justice, why receive such testimony? There is the same danger from admitting the declarations of a testator, that they will be misrecollected, or not being made, of their fabrication whether the issue be the sanity of the testator or his intention.

If it be said this is the only way of proving the fact of sanity, what then? If a bad way, one likely to lead to misdecision, why adopt it? Why do evil that good may come?

But then there is no difference in principle between the cases in which this kind of evidence is received and the one at bar.

As the statute directs how a will shall be made, so it prescribes as to its revocation. A will, not in accordance with the statute, is not valid. A revocation, not within its terms, leaves the will in full

force. The cancellation of a will cannot be shown by the declarations of the testator, the will being produced, for there would not be the statutory revocation. His declarations would be unavailing against a formal uncanceled will. Many of the cases relied upon to sustain the doctrine opposed to this opinion, will be found of that character.

The evidence of the testator's declarations was offered to negative the intention to destroy, and the fact of destruction of the will in question, by showing the true relation of the parties, the entire absence of intention to destroy, and hence the improbability of any destruction, intentional or otherwise, of the will by the party by whom it is conceded to have been duly made.

An examination of the cases relied upon to justify or require the exclusion of this evidence will show that they fail, in most instances, to sustain such a position.

In *Dan* v. *Brown*, 4 Cowp. 490, the will was proved. "The testator," observes Woodworth, J., "several months before his death, called for a will, and wished to add a codicil. There is no other act that indicates an intention to make the least alteration. No act was done or dissatisfaction expressed upon which to raise a presumption." This assuredly was not evidence of a revocation. The most the case decides is, that a will cannot be revoked by the mere declarations of the testator, and it is not contended that it can be.

In *Jackson* v. *Coe*, 2 Johns. 31, parol evidence was received to show the testator executed a will under duress, but not the subsequent declarations of the testator himself. The court was divided, standing three to two. The ground upon which Mr. Justice Thompson relied in his opinion was, that a revocation could not be shown by parol, and such undoubtedly is the rule.

But, if executed under duress, how could that duress be proved? Not by the parties to it. It could hardly be expected that the parties to the duress would invalidate their own act. When freed from duress, the testator might be expected to state what had been done under such duress. It is the very source from which proof of such fact might be expected. Why not receive it? Are not juries

competent to discriminate between genuine and fabricated proof? If not, what are they good for? Spencer, J., and afterwards chief justice, favored the admission of the testimony, citing the case of *Nelson* v. *Oldfield*, Vern. 96, where similar evidence was received, and remarking, "as well on principle as precedent, I think the evidence offered should have been admitted, and, especially, after it was proved that the devisee had been guarded and watched over, after the date of the will; that it had been taken out of his custody and detained, notwithstanding his application for it for the purpose of canceling it, and that his children were denied access to him." Certainly, one might reasonably suppose that a testator, who had been induced to sign a will under duress or undue influence, would be as likely to state the facts when the pressure is removed, as when acting upon him in full force.

In *Jackson* v. *Betts*, 6 Cow. 377, it was held that the declarations of a testator, as to the existence of a will, and where to be found, there being proof that a will had been executed, were inadmissible, though made *in articulo mortis*. This case rests upon that of *Dan* v. *Brown*, 4 Cow. 490. The will destroyed wrongfully, how otherwise could an act of spoliation be defeated? Mr. Chancellor Walworth, in 6 Wend. 173, expressed grave doubts of the correctness of this decision. It is directly opposed to that in *Whitely* v. *King*, 112 E. C. L. 756, where declarations of the testator, that he had made his will and left it with an attorney were held properly admissible, as has been before stated.

In *Waterman* v. *Whitney*, 1 Kernan, 157, the declarations of the testator, made after the will, were offered, stating how he had disposed of his property in his will, which was entirely different from the actual disposition of it by the will in question. This evidence was excluded, and the decision turned upon the correctness of such exclusion. But no such question was raised in the case at bar. Nor was it claimed that a will could be revoked by words, the will being in issue.

In *Smith* v. *Fenno*, 1 Gallison, 170, the court admitted the declarations of the testator before and at the time of making the will, and afterwards, if so near as to be part of the *res gestæ* to show

fraud in obtaining the will, but excluded statements of his intention to alter his will.

But no one contends that the statements of an unexecuted intention are admissible, which is what is there decided.

The case of *Marden* v. *Roe*, 8 Ad. & Ell. 14, is this. "The testator, when an unmarried man, without children by his former wife, devised all his property at the time of making his will, and made no provision for any child of a future marriage. In such case, the law annexes a tacit condition that if he afterwards marries and has children, the will shall be revoked."

Evidence short of a republication cannot be received in a court of law to show that the testator meant his will to stand good, notwithstanding the subsequent marriage and proof of issue.

"The broad question," remarks Tindall, C. J., "therefore, which has been argued between the parties, is whether the evidence of the testator's intention, that his will shall not be revoked, is admissible to rebut the presumption of law, that such revocation shall take place? And we all concur in the opinion, that the revocation of the will takes place in consequence of a rule, or principle of law, independently of any question of intention, and, consequently, that no such evidence is admissible."

In other words, the will was revoked by the subsequent marriage and birth of a child, and being revoked, it could only be made valid like any other will. It ceases to be a question of intentional revocation. The will is *ipso facto* revoked. It is not a question of presumption, if it were, one presumption might be rebutted by another.

A will revoked by operation of law is as if it had never been made. To give it vitality, it must be republished "with all the solemnities required by the statute," and this cannot be done by parol. 1 Redfield on Wills, 373 (14). Hence it is apparent that this decision has no bearing upon the question under discussion.

In *Doe* v. *Allen*, 12 Ad. & Ell. 451, parol evidence of the delarations of the devisor, that she had left her property to the grandson, who had only one brother and sister, were held admissible to show which grandson should take under the devise, and it was held no

objection that the declarations were subsequent to the making of the will. Lord Denman, C. J., remarked, "The only remaining point is, whether the time when those declarations were made, viz., some months after the will was executed, makes any difference. Cases are referred to in the books to show that declarations contemporaneous with the will are alone to be received; but on examination, none of them establish such a distinction. Neither has any argument been adduced which convinces us that those subsequent to the will ought to be excluded, whenever any evidence of declaration can be received."

In *Stevens* v. *Vancleve*, 4 Wash. 462, the same law is recognized as applicable to a will as to a deed. But such is not the case. By the delivery of a deed, the title passes to the grantee. By the making of a will, nothing passes at the time. The estate remains as before. It may be conveyed. It remains subject to any disposition the owner may choose to make up to the time of his death. Until that time he alone had an interest in its disposition. The declarations of a party in relation to his own property stand on a different footing from those relating to that conveyed by him to others, whose rights have become vested.

The case of *Doe* v. *Palmer*, 16 Ad. & Ell. N. S. 707, applies to alterations apparent on the face of the will, and establishes the law thus; that they are presumed to be made after the will is executed, until evidence to the contrary is shown; that the declarations of the testator before the execution of the will were admissible evidence from which the jury might infer that they were made before the execution, since the alteration was in furtherance of an intention shown to have existed before the execution of the will; and that declarations after the will was made, tending to show that the alterations had been made before, were inadmissible.

That is to say, from the declarations of the testators, before the execution, it may be inferred, that the alterations were made in furtherance of such expressed intention; but if they were made after its execution, they are not admissible to show that such intention had been carried into effect.

In *Provis* v. *Reed*, 5 Bing. 435, the declarations of a testator, in

subversion of his will, were not received. The declarations were, in substance, that he had signed a paper, and that it was not worth one farthing, &c. It was really offering the judgment of the testator, to determine the validity of a will.

In the case at bar, the evidence of the declarations of the testator were received, to show his state of mind in reference to his wife, and thus to disprobabilize the fact of his intentional cancellation of his will. The decisions relied upon as sustaining an adverse doctrine, apply generally to a different state of facts, and rest on different principles.

In the deposition of one Kimball are found a question and answer, to which objections were made when the deposition was taken. At the trial, when the appellant's counsel came to the question and answer referred to, the respondent's counsel renewed the objection, saying, "that is objected to." The question was read, and the presiding judge overruled the objection, and allowed it to be read to the jury; and the counsel then read the answer also to the jury. After it was read, the presiding judge said to the counsel, that the answer was inadmissible; but as it had been read to the jury he could not exclude it, that he could do no more than to instruct the jury to disregard it, and that he thought his duty to both parties required him to do it. But no such instructions were given, except in the remark to counsel as above stated.

The question proposed was proper. The ruling of the presiding judge, in permitting it to be read, was correct. He might well presume that a proper answer would be made to a legal inquiry.

The answer, however, was not admissible. The attention of the judge was not called to it, by presenting it to him for examination. Upon its being read, and being perceived to be illegal testimony, the presiding judge at once stated to counsel that the answer was inadmissible, and that he should direct the jury to disregard it. This was in the presence and hearing of the jury. It was a substantial instruction at the time. It must be presumed the jury regarded it. In *Tapley* v. *Forbes*, 2 Allen 20, "The declarations of the insolvent," remarks Bigelow, C. J., "made subsequent to the sale, were clearly incompetent; but the error of admitting them

was afterwards cured by the explicit statement, in the hearing of the jury, that they were to be disregarded by them." In *Hawes* v. *Gustin*, 2 Allen, 403, Dewey, J., uses the following language: "If any error was committed by the presiding judge, in allowing the mother, in the first instance, to testify to this fact, it was at once corrected, and the answer of the witness as to the inquiry stricken out; and the jury were instructed not to regard this as a part of the evidence in the case."

It frequently happens, in the trial of causes, that to a pertinent and proper question an answer is made, which, by law, is inadmissible. What, in such case, is the judge to do? To strike out the answer, as in the English practice, or, as is equivalent in ours, to direct the jury to disregard it, or at once to discharge the jury from the consideration of the cause. Unless a direction to the jury to disregard evidence, which is not properly before them, as in the cases referred to, or in the one at bar, is to be deemed sufficient, it becomes the duty of the judge, upon the reading or the hearing of the answer, immediately to withdraw the cause from the jury. The judge, in the case before us, should, if this be law, have terminated the trial, and a new jury should have been impanelled.

If the caution to the jury, uttered at the time, was not deemed sufficient, and the presiding judge omitted to present the matter again to the jury, the counsel for the appellees should have called his attention to the subject, and have requested a more peremptory instruction. They are not to neglect this, and then if a verdict is against them, take advantage of what might have been so easily remedied. "If," remarks Bigelow, C. J., in *Tapley* v. *Forbes*, 2 Allen, 20, where a similar question arose, "the defendant wished for a more distinct instruction on this point, it was his duty to have asked it." *Moore* v. *Ross*, 11 N. H. 547. So, when evidence is received with proper limitations, but those limitations are not repeated in the charge to the jury, and counsel neglect to call the attention of the court to such omission at the time, it is too late for them to object, because of it, after the verdict. *Lee* v. *Lamprey*, 43 N. H. 13. *Goodrich* v. *Eastern Railroad*, 38 N. H. 391.

There being a subsisting verdict in this case, and a majority of the justices qualified to sit not concurring in sustaining the exceptions, there must, in accordance with Pub. Laws of 1870, be

Judgment on the verdict.

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

WALTON, J. A relaxation of the well-established rule of law, excluding hearsay evidence, has, in my judgment, enabled fraud and perjury to do a successful work in this case. How this estate (large though it is) shall be distributed; whether it shall all go to a childless widow, or whether the city of Portland, and the Widow's Wood Society, shall receive such portions of it as the testator designed, are questions comparatively of little moment. But whether there shall be such a relaxation of the rules of evidence as will not only make the fraud attempted in this case successful, but will also make such frauds easy in the future, is a question of the gravest importance.

The evidence is not reported in full, but I know its character, for the case was once tried before me; and I have no hesitation in saying that it is my firm belief that an old will, which the testator had revoked and torn into fragments, has been pasted together, and is now presented for probate, while a later and legally executed will is fraudulently suppressed.

By the admission of evidence of the pretended declarations of the testator, that his wife's mother tore the will, and that he pasted it together (evidence in the highest degree improbable), a verdict in favor of its validity was obtained.

Were these pretended declarations legally admissible? I think not. They were not admissible as the admissions of a party to the suit, for the testator was not a party. Nor were they admissible as *res gestæ*, for they accompanied no act of making, republishing, or revoking the will offered for probate. Nor were they admissible to show the mental condition of the testator, for no such question was in issue. They purport to be statements of what had been done in the past, their probative force depending entirely upon the sup-

posed truthfulness of the narrations. As such, they were mere hearsay, and clearly inadmissible.

Judge Redfield has examined, very fully and very ably, the admissibility of such evidence. He says it is certain that the declarations of the testator are not admissible for the purpose of proving any distinct fact, depending upon the force of the admission, since the testator is not a party to the question of the validity, or interpretation of his will. 1 Redfield on Wills, c. 10, § 39, pl. 1.

The same doctrine is laid down in Greenleaf on Evidence, 10th ed. vol. 2, § 690, note 3.

And the learned editors of the American Leading Cases, in the later editions of the work, have stated the law upon this subject very clearly and accurately. They say: "It must be remembered that although the declarations by which the testator accompanies a symbolical revocation of his will, as by burning, canceling, or obliterating it, are admissible in evidence as part of the *res gestæ*, and proof of the animus with which he acts, yet prior or subsequent declarations will be wholly inadmissible, either to prove or negative a revocation; or for any other purpose than that of showing his mental condition at the time when they were uttered, and thus throwing light on what it was at the time when the will was revoked." 2 Am. L. C., 4th ed. 688.

Since this case has been before us, the admissibility of such declarations has been thoroughly examined by the supreme court of Massachusetts, and, fortunately for the cause of truth and justice in that State, the conclusion of the court was that the declarations of a testator, when offered as a narrative, for the purpose of proving a distinct fact, are not legal evidence. Pretended declarations of the testatrix were offered in evidence in that case, to prove the fact of undue influence. The court say, that, for such a purpose, "they are mere hearsay, which, by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him; and obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such a purpose would go far to destroy the security which

it is essential to preserve," and that "by the better reason and the most authoritative decisions," they are not admissible; that "statements and declarations, when the state of the mind is the fact to be shown, are received as mental acts or conduct; that the truth or falsity of the statement is of no consequence; that, as a narration, it is not received as evidence of the fact stated; that it is only to be used as showing what manner of man he is who makes it." *Shailer* v. *Bumstead*, 99 Mass. 112.

The admissibility of such evidence was very fully examined in *Comstock* v. *Hadlyme*, 8 Conn. 254; and again in *Waterman* v. *Whitney*, 11 N. Y. (1 Kernan), 157.

In the latter case the court say, that upon a question of revocation, no declarations of the testator are admissible except such as accompany the act by which the will is revoked; that the only decision to the contrary is *Durant* v. *Ashman*, 2 Rich. (So. Car.), 184; and that the case is in conflict with authority as well as principle; that the fact to be proved in such cases is the act claimed as a revocation, together with the intent with which it was done; and all declarations of the testator which do not accompany the act, are to be regarded as mere hearsay, and treated as such.

These authorities establish the proposition, that when the alleged declarations of the testator are offered as an admission or statement of a past transaction; or, as the rule is stated by Judge Redfield, when such testimony is offered for the purpose of proving any distinct fact, depending upon the force of the admission; or, as stated in the American Leading Cases, when such declarations are offered to prove or negative the revocation of a will, or for any other purpose than that of showing the mental condition of the testator at the time when they were uttered; or, as stated by the supreme court of Massachusetts, when offered as a narration,—they are mere hearsay, and not admissible.

It seems to me that the opinion of the chief justice (long and elaborate as it is) nowhere meets this objection. It shows clearly enough, what no one disputes, that for some purposes the declarations of the testator are admissible. But it nowhere meets, singly

and distinctly, the question of the admissibility of such declarations when offered, as in this case, for the purpose of proving distinct facts, which occurred, if they ever occurred at all, long prior to the time when the supposed declarations were made.

"I heard the testator say his mother had been making a fuss, and had torn his will." "I heard the testator say the old woman had got in one of her tantrums, and had torn it." "I heard the testator say his mother had torn it in one of her tantrums." "I heard the testator say he had repaired it so that it was just as good as ever." "I heard the testator say he had given Sarah (his wife) all his property." "I heard the testator say that all he possessed was Sarah's, and he wished it was more." "I heard the testator say that Mrs. Collagan had been untiring in her devotions, night and day, and that there was nothing she could do for him that she had not done." "I heard the testator say that all he possessed was Sarah's, and that she had been a faithful wife, untiring in her attentions." "I heard the testator say he had willed everything to Sarah, that she had done everything for him, night and day, and he did not know as he appreciated her so much as he ought to."

Such is the character of the declarations which were admitted in evidence in this case. They were not offered to show the mental condition of the testator at the time they were uttered, for no such question was raised. And they accompanied no act pertinent to the issue, and do not purport to be in explanation of any act then being done, and were not therefore admissible as *res gestæ*. In the main, they are simple narrations or statements of what had been done in the past. What are not of that character seem to possess no other force than to create prejudice in the minds of the jury, and thus unfit them for a candid investigation of the case.

To such as believe that the statute for the prevention of frauds and perjuries is a relic of barbarism, and that all kinds of hearsay evidence ought to be admitted in our courts of justice, the admission of these declarations will not appear objectionable. But to those who believe that the rule excluding hearsay evidence is founded in practical wisdom, and that such testimony, if admitted, will

oftener lead to error than truth, such a relaxation of the law will appear unfortunate, and, as the verdict in this case well illustrates, better calculated to defeat than to promote the ends of justice.

Jackson v. *Betts*, 6 Wend. 173, often cited as an authority for the admission of such evidence, is erroneously reported. The reporter's abstract, as printed, and copied into Jarman on Wills, and other text-books, states that, upon a question of revocation, the declarations of the testator, during his last sickness, are admissible in evidence. This is erroneous. No such point was decided. When the case was before the supreme court, it was decided that such evidence was not admissible; and such is the settled law in New York at this day. See *Jackson* v. *Betts*, 6 Cowen, 377, and *Waterman* v. *Whitney*, 11 New York (1 Kernan), 157.

The error above referred to has undoubtedly been the cause of much of the confusion and apparent conflict to be found in the books upon this subject.

Judge Washington says, that nothing could be more dangerous than the admission of such evidence. *Stevens* v. *Vancleve*, 4 Wash. C. C. 265. Judge Story says, that such evidence is exceedingly suspicious, of very easy fabrication, and yet of very difficult refutation, and ought not to be allowed one jot beyond what the authorities have already decided. *Smith* v. *Fenner*, 1 Gallison, 170. Chief Justice Best says, that if such evidence were admitted, witnesses would constantly be brought forward who would swear to enough to set aside the most solemn instruments. *Provis* v. *Reed*, 5 Bing. 435. Such is my belief. Once open the door to such evidence, and, in my judgment, more falsehood than truth will pass through. I am, therefore, in favor of keeping it closed.

In my judgment, the exceptions should be sustained and a new trial granted.

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

DICKERSON, J., expressed his views as follows:

There is no ground for admitting many of the declarations of the testator in question, as part of the *res gestæ*, since they did not

accompany any act of his, in relation to the will. So far from this, the declarations, for the most part, were not made of or concerning the will in any respect whatever.

It is observable that no question is raised of the competency of the testator, or of any undue influence exercised over him in making his will, or of other fraud or deception practiced upon him in that transaction.

The only ground upon which it is claimed that the declarations are competent evidence is, that they tend to rebut the presumption of revocation arising from the spoliation of the will. In order to make such an act of the testator a revocation, there must be an intention to revoke accompanying it; the act of cancellation and the intention to revoke must be simultaneous. But to make the declarations admissible evidence upon this question of intention, it should clearly appear that they have the tendency claimed, and are legally admissible because of such tendency. However important it may be to prove the intent with which the will was mutilated, it by no means follows that every kind of evidence, tending to show that, is admissible. The fact of intention must be established by legal evidence; it cannot be proved by hearsay any more than any other fact.

The question is thus distinctly presented, whether the declarations of a testator, made long after the alleged revocation of his will, and not of or concerning that act, or the will itself, or the disposition of his property, but relative to the general character of the domestic relations subsisting between himself and the object of his bounty, are competent evidence upon the question of revocation. The statement of this question can scarcely fail to elicit from ordinary legal minds an emphatic negative, and, at once, to throw the *onus* of showing the competency of such declarations upon the party asserting it.

Such declarations cannot of themselves affect the interests of the testator, or his heirs or devisees, as he cannot revoke his will by parol. He has, therefore, no interest to declare the truth, and is not in the situation of the grantor in a deed, who makes declarations respecting his title, which, if made while he is the owner, and

in disparagement of his title, are receivable in evidence touching the claim of his grantee.

The argument in favor of the competency of such evidence, assumes that the state of the testator's mind upon the subject in question, and the circumstances of his pecuniary condition, were the same when the declarations were made, as when the will was mutilated. But what rational assurance can there be that this was so? How can it be determined that age, disease, the loss of friends, or other misfortune, or the influence of favorites, or designing and interested parties had not, in the interval, wrought a change in his feelings toward his wife, or that she had not, during that period, rendered herself more worthy of his adulation than formerly?

But *non constat* that, if there had been no change in his feelings toward her between the two occasions, he did not revoke his will, or would not have been likely to do it. A change had taken place in his pecuniary circumstances between the time of making the will and the alleged act of revocation. Her dower in his estate, at the latter period, probably exceeded his whole estate in value when he made his will; and he might, therefore, have revoked it, not only with the kindest feelings toward her, but from a sense of justice toward others whose claims upon his favor could not have been met when his will was made, without injustice to her.

Amidst these, and a thousand other varying considerations, operating upon the mind of the testator, with what rational confidence can it be asserted that his declarations of affection for his wife, made long after his will had been mutilated, legally tend to show, that, if he committed that act of spoliation, he did not do it *animo revocandi.*

Many of the declarations admitted in evidence, not only did not accompany the act of cancellation itself, or relate to his will, or the disposition of his property, but were mere loose talk about his wife's attentions to him and his affection for her, declarations, as has been seen, by no means necessarily inconsistent, but actually reconcilable with an act of revocation. To admit such declarations seems to me

to be repugnant to well-established rules of evidence, and to abolish the clearly defined and uniformly recognized distinction between direct and hearsay evidence. If such declarations are admissible upon the question of revocation, pray what declarations of the testator are inadmissible?

In passing from principle to authority I fail to find, in the cases cited by my associates in favor of admitting such testimony, a single one that goes to the extent claimed. In all of them, the declarations admitted were made of, or concerning the will itself, the alleged act of revocation, or the disposition of the testator's property; or they were admitted upon the question of the testator's competency, of undue influence, or of fraud in making his will, topics clearly different and distinct from the subject-matter of the declarations under consideration.

On the contrary, the authorities cited by my associates against the admissibility of such testimony, clearly show that it has been uniformly excluded, and that testimony far less objectionable has been held inadmissible upon the question of revocation, by courts of the highest authority. I cannot consent to a relaxation of the rules of evidence so repugnant to reason and contrary to authority.

JOSEPH A. LEE *vs.* PEMBROKE IRON COMPANY.

The owners of a dam across tide-waters, erected in accordance with a legislative grant, are not thereby protected from liability to the owner of an ancient mill injuriously flowed by such dam.

If such grant provides no means for ascertaining and recovering the damages thus directly resulting to such mill, the owner thereof has a remedy at common law therefor.

ON EXCEPTIONS.

CASE to recover damages to an ancient mill owned by the plaintiff, alleged to have been caused by a dam erected across the Pen-

nemaquan river, at Bluff Head, in accordance with Special Laws of 1853, c. 164.*

The case is sufficiently stated in the opinion.

Bion Bradbury, for the defendants, in support of the exceptions, contended

1. That the State has the sovereign property and dominion over all tide-waters, and the soil under them, within its jurisdictional limits. A navigable stream may cease to be made such by the appropriation of the soil, under legislative authority, to other purposes; as if the legislature were to authorize the erection of a solid dam across a navigable creek, and permit the land to be wholly filled up and converted into house-lots. *Charlestown* v. *County Commissioners*, 3 Met. 202.

2. The legislature of the State has the authority to grant to individuals the property or control of its tide-waters, and the soil under them, and are the sole judges of its propriety and expediency. But the courts are to consider as public property all the inlets of the sea, leaving the question of comparative public convenience respecting their regulation, management, and disposal to the legislature, and upon such terms, conditions, and reservations as the latter power may prescribe. *Commonwealth* v. *Breed*, 4 Pick. 460.

3. The Bluff Head dam having been erected and maintained by the defendants under the authority of the State, and upon the terms and conditions prescribed by the State, they are thereby protected from the claim of damages set up by the plaintiff by reason of the occasional overflowing of the plaintiff's mill. *Spring* v. *Russell*, 7 Maine, 273. *Parker* v. *The Cutler Mill Dam Co.*, 20 Maine, 353.

* Special Laws of 1853, c. 164. Certain persons named "are hereby authorized to maintain a dam across Pennemaquan river, on their own land, below the ship-yard, in the town of Pembroke, the waste way to be in or across the channel, and not to be less than thirty-seven feet wide, and to be kept open all times except when it may be necessary to raise the water for the purpose of floating vessels from said ship-yard to and through said dam. And said waste way shall not be closed more than thirty-six hours at any one time, neither after being opened shall it be reclosed until it has been open thirty-six hours, if any person wishes to pass through the same."

4. The case presents no question touching the taking of private property for a public use, but merely one as to damages occasioned by the license of the legislative power over tide-waters within the limits of the State.

5. The damages are consequential, resulting from the change in the flux and reflux of the tide produced by the erection of the dam. *Parker* v. *The Cutler Mill Dam Co.*, *supra*.

J. Granger, for the plaintiff.

BARROWS, J. The plaintiff claims in this action to recover damages done to his grist-mill, situated on the Pennemaquan river, by means of back water caused by the defendants' dam at Bluff Head, a short distance below the plaintiff's mill. The Pennemaquan is a small stream having a succession of rapids near its mouth. Technically speaking, it is navigable at the plaintiff's mill, the tide flowing there, as the jury have found, six or eight inches.

The plaintiff, and those under whom he claims, have been in the occupancy and use of the mill and privilege, continuously, since 1832; and were so for more than twenty years before the passage of the private act by the legislature, under which the defendants claim that they are relieved from the payment of damages.

Plaintiff's title to his mill, his right to the undisturbed use and enjoyment of it as his own private property, cannot be successfully impeached. Defendants' dam was built in 1853, and has been maintained under the authority conferred by c. 164, Private and Special Laws of 1853, which makes part of the case.

The only ruling complained of is, that "if the plaintiff is otherwise entitled to recover, and the maintaining the dam at Bluff Head was the immediate and sole cause of the overflowing of the plaintiff's mill, the legislative grant of authority to maintain said dam on tide-waters would not protect the defendants from a liability to pay such damages as were the direct and natural consequences of the overflowing of the plaintiff's mill." The act of 1853 authorizes the parties, whom the defendants represent, to maintain the dam on their own land at a point described, in a manner speci-

fied, affording certain conveniences to those wishing to make use of the stream as a highway, but making no provision for assessing the damages caused to private property thereby.

The ruling simply disaffirms the position that a party can justify a direct infringement upon another's property, under an act of the legislature which provides no mode of assessing the damages to the property thus encroached upon. It affirms, that for such direct injury the common-law remedy still remains to the injured party.

Such a limitation of the effect of a grant of legislative authority to do a particular act is necessary if we would conform, in their true spirit, to the constitutional provisions that private property shall not be taken for public uses without just compensation, and that "every person, for injury done him in his . . . property, . . . shall have remedy by due course of law."

It cannot be necessary to waste time or words to establish the proposition that he who assumes, under color of legislative authority, to overflow an ancient mill, "takes" that mill and privilege from the owner as directly and effectually as though he entered upon the premises and demolished the building. The truth of it is self-evident.

That a legislative grant of authority to do an act which is the immediate and sole cause of such a destruction of his neighbor's property, shall not be so construed as to protect the party doing it from being required in some form to make just compensation, or to preclude the injured party from a remedy by due course of law, is a necessary sequence from the constitutional provisions referred to.

In *Perry* v. *Wilson*, 7 Mass. 393, where the defendant undertook to justify, as a member and servant of a corporation which was created by statute, for the purpose of "making, laying, and maintaining side-booms at convenient places in the Androscoggin river," Parsons, C. J., in an opinion overruling the justification, and sustaining the plaintiff's action, says: "The legislature might have appropriated the plaintiff's close to public uses without his consent, provided a reasonable compensation had been made him therefor. But in this statute no compensation is provided, nor any means of ascer-

taining or securing the payment of it declared. If, then, this act was construed to be an appropriation of the plaintiff's lot for the use of the public, such appropriation would be unconstitutional and void." "Therefore" the justification alleged was held insufficient. In *Stevens* v. *Proprietors of Middlesex Canal*, 12 Mass. 466, Parker, C. J., says: "In the declaration of rights prefixed to our constitution, it is provided that private property shall not be taken and appropriated to public uses without compensation to the owner. So that, if the legislature should, for public advantage and convenience, authorize any improvement, the execution of which would require or produce the destruction or diminution of private property, without affording at the same time means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law against those who should cause the injury, for his damages. For although it might be lawful to do what the legislature should authorize, yet to enforce the principles of the constitution for the security of private property, it might be necessary to consider such a legislative act as inoperative, far as it trenched upon the rights of individuals."

In *Coggswell* v. *Essex Mill Corp.*, 6 Pick. 94, it was held that where the legislature authorized a corporation to build across a navigable river a mill-dam of a given height, and to keep up the same head of water throughout the year, but provided no remedy for any person whose lands should be thereby injuriously flowed, the remedy must be by an action at common law, Parker, C. J., remarking: "What, then, is the remedy, if any one is injured by the execution of the act of the legislature? An action at common law. The act gives the right to erect the dam in a form supposed to be sufficient to protect from injury the property of the landowners. If it turns out insufficient, they will have an action for the consequent injury."

In *Thacher* v. *Dartmouth Bridge Co.*, 18 Pick. 501, Shaw, C. J., after holding that if the act of incorporation were to be construed as conferring a power to take private property for public uses without the payment of an adequate indemnity, it would be unconstitutional

and void, proceeds as follows: "The consequence would be that the party damaged would be remitted to his remedy at common law; the wrongful act would stand unjustified by legislative grant. This has been so often decided in this Commonwealth that it must be taken as a settled principle." The same principle is recognized in *Comins* v. *Bradley*, 1 Fairf. 447, Weston, J., remarking that "compensation must be made or provided for when the property is taken. It is upon that condition alone that such taking is authorized."

In *Crittenden* v. *Wilson*, 5 Cowen, 165, it was decided that an act authorizing one to build a dam on his own land across a river that is a public highway, protects him only against an indictment, and not against the claim of a party whose land is thereby flowed.

The form of the remedy has often been the subject of judicial inquiry; but that the party, whose property has been thus invaded under the sanction of legislative authority, must have some remedy, under the common law, if no statute remedy is furnished or found applicable, has never before now been denied.

The cases cited to support the denial will all be found, on examination, to be claims of indirect and consequential damages accruing from the abridgment or subversion of those rights which the party complaining had in common with the rest of the public; a class of rights which, of course, it was competent for the legislature, in the exercise of their sovereign power of domain, to surrender or to grant to those who would improve them, whenever it was found to be for the public interest so to do. Such a grant is no infringement upon private property.

It is the power of the legislature to control such rights only, that is asserted in *Commonwealth* v. *Breed*, 4 Pick. 460.

It was precisely such damages, and such only, that were claimed in *Spring* v. *Russell*, 7 Maine, 273.

So it is also in *Parker* v. *Cutler Mill Dam Co.*, 20 Maine, 353, the case chiefly relied on in defense. The injury to his fishing privileges, and the obstruction to his free access to his land from the sea were the matters of which the plaintiff there complained. The case expressly finds that "no part of his land was flowed." He had

no erections of any kind on his premises. He had "a place to build a wharf," but no wharf. If he had a mill-site for a tide-mill (as one expression in the opinion seems to intimate) it does not appear that he ever had a mill. The defendants, under their act of incorporation, were the first appropriators of the water for milling purposes, and of that he would have no right to complain, even if he were thereby prevented from making a like use of it. See 2 Washburn on Real Property, 66. In fine, it is only by a perversion of the opinion, and the omission of an important member of the sentence quoted from it, that it can be made to bear the construction which the defendants here seek to give it. The opinion declares that "the corporation is not, therefore, liable for any injury which the plaintiff may have suffered by obstructions to the navigation by altering the flux and reflux of the tide.

No private or exclusive rights of Parker had been invaded. His was not the case of an ancient mill entitled to the flow of the water *ut currere solebat.* His rights of fishing and navigation were those which he possessed as one of the public, and these rights were subject to the power of eminent domain, vested in the representatives of the public to whom they belonged.

But for the security of private rights in property they are placed beyond the reach of arbitrary specific legislation, by the fundamental law of the State, and guarded by constitutional barriers which are always to be carefully regarded.

The case of *Parker* v. *The Cutler Mill Dam Co.* is not an authority for the doctrine that a legislative grant can afford immunity to a party in the infliction of a direct injury upon private property or vested individual rights.

Redress for such injuries the courts have always been ready to afford in some form, though caused by the acts of a company which are authorized by their charter.

Thus injuries necessarily caused by a railroad company to adjacent lands or buildings, in the careful exercise of their right of construction and grading are to be included in the estimate made by commissioners or jury sitting for that purpose. *Whitehouse* v. *An-*

droscoggin Railroad Co., 52 Maine, 208. *Dodge* v. *County Com. of Essex*, 3 Met. 380.

The provision in the charter, or by general law, of a specific mode of ascertaining and securing proper indemnity, confers no right to damages which did not exist before. Under our constitution the omission to make such provision can take away none but those that pertain to the common privileges that belong to the public, and which the legislature, as guardians of the public weal, have the power to control. Private property,—individual rights are preserved without specific mention made of them by virtue of the constitutional guaranties.

The legislative authority to do the act which, however carefully done, will naturally result in damage to private property, must be coupled with provisions for ascertaining such damage and securing an indemnity to the injured party, in order to prevent those who act under it from being dealt with at common law as wrong-doers. The legislature has no power under the constitution to make over to any individual or corporation any rights save those of the public, without securing a just compensation. It is but just to presume that they have no intention to exceed their powers, and that where no specific mode of ascertaining damages is provided, they design to leave the parties to the common-law method of ascertaining them.

So if it be said by those who regard form more than substance, words more than the ideas they are designed to express, that the plaintiff's mill was not taken, but only overflowed, it will make no difference. The other constitutional provision, to which reference has been made, securing to every person, for an injury done him in his property, a remedy by due course of law must cover the case. The doctrine contended for by the defendants is as novel as it is untenable. *Exceptions overruled.*

CUTTING, KENT, WALTON, AND DANFORTH, JJ., concurred.

ABBIE J. WILSON, complainant, *vs.* EDWARD H. WOODSIDE.

The voluntary statement of a complainant in bastardy, during the time of her travail, without being interrogated in relation thereto, that the child of which she is about to be delivered "is the child of the" respondent, "and he knows it is his child," is a sufficient compliance with R. S. c. 97, § 6, providing that having "been put upon the discovery of the truth of such accusation at the time of her travail," she "thereupon accused" the respondent with being the father of the child.

ON EXCEPTIONS to the ruling of *Goddard*, J., of the superior court, for the county of Cumberland.

COMPLAINT under the bastardy act made before a magistrate, January 24, 1870, entered at the February term, 1870, of the superior court, and tried by the judge without the intervention of a jury, upon a declaration filed at the same term, subject to exceptions in matters of law.

Catherine Cahoon, nurse, testified that she was with the complainant from February 23 until the evening of February 25; that between eleven and twelve o'clock on Wednesday night, February 23, while the complainant was in labor, and no other person present, the complainant said to witness, voluntarily, "Who would have thought that Edward Woodside would have wanted me to lay it on to," a certain other person named by her, "when he is innocent? It is his child, and Edward Woodside knows it is his child."

It appeared that the complainant was not delivered until three o'clock in the forenoon of February 26, and that she made no further accusation, and was at no period of her travail or confinement in any manner inquired of touching the paternity of her child, either by the attending physician or any other person.

The presiding judge ruled, as matter of law,—

That the voluntary statement testified to was not a compliance with R. S., c. 97, § 6, which requires that the complainant shall be "put upon the discovery of the truth of such accusation, and there-

upon have accused the same man with being the father of the child, of which she is about to be delivered."

The respondent was found not guilty, and the complainant alleged exceptions to the foregoing ruling.

Davis & Drummond, for the respondent, contended,

That the casual remark of the complainant was not a compliance with the statute.

It is a condition precedent to her right to recover, that "being put upon the discovery of the truth," she shall charge the accused. *Payne* v. *Gray*, 56 Maine, 317.

The legislature appreciating the fact that the complainant, in this class of cases, is very often a person whose sworn testimony in any other case would receive little, if any, credit, required that she must be "put upon the discovery of the truth of the accusation when in danger." It was intended to throw all the safeguards possible around a person making a true accusation, and also around the accused in case of a false accusation. The act of putting a person upon the discovery of the truth in such cases is equivalent to the administration of an oath, the formality being intended as a reminder of her condition and danger, and the necessity of her declaring the truth. It was never intended that a mere casual conversation, when free from the apprehensions of danger, but in a condition to converse upon ordinary matters, should be received as the solemn declaration contemplated by the statute.

The reasons given for the decision in *McManagil* v. *Ross*, 20 Pick. 99, are utterly insufficient to do away with this express provision of the statute. That decision was followed in *Bailey* v. *Chesley*, 10 Cush., without comment.

The point did not arise in *Totman* v. *Forsaith*, 55 Maine, 560. But the court, following the Massachusetts cases above-named, go further than the case required, and state the law in the same manner.

Henry Orr, for the complainant.

APPLETON, C. J. It is immaterial how the complainant is "put upon the discovery of the truth during the time of her travail," whether by investigation from without, or by impulse from within. The accusation is what the statute regards as material. When that is made, inquiry becomes unnecessary. The object of the statute is accomplished. *Totman* v. *Forsaith*, 55 Maine, 360. *McManagil* v. *Ross*, 20 Pick. 99. *Bailey* v. *Chesley*, 10 Cush. 285.

Exceptions sustained.

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

GEORGE G. PHELPS *vs.* JAMES S. DENNETT.

When a debt is discharged, by consent of the creditor, for less than its amount, a subsequent promise to pay it will not be binding.

Thus, where the defendant, in accordance with the terms of a compromise agreed upon between the parties, paid to the plaintiff the amount claimed of him except fifty dollars, and afterwards the defendant voluntarily gave the plaintiff his note for the fifty dollars remitted in their settlement, *Held*, there was no consideration for the note.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note for fifty dollars by the payee against the maker.

The action was submitted to the presiding judge, reserving the right to allege exceptions to his rulings in matters of law.

The presiding judge found that there had been a controversy between these parties in relation to the payment of rent on certain real estate in Boston, of which they held a lease; that the plaintiff, in order to avoid a forfeiture, had paid the rent and then claimed repayment of the same amount from the defendant; that they finally agreed upon a compromise, whereby the defendant repaid the amount claimed from him, less fifty dollars; that after the execution of this agreement and they had entered into a written agree-

ment as to the future management of the leasehold estate, the defendant voluntarily executed and delivered to the plaintiff a note for fifty dollars remitted, which is the note in suit.

The presiding judge ruled, as matter of law, that there was a sufficient consideration for the note; to which ruling the defendant alleged exceptions.

Alvah Black, in support of the exceptions.

Geo. A. Wilson, for the plaintiff.

WALTON, J. In 1841, the supreme court of the State of New York held that where a debt has been discharged by accord and satisfaction for less than its amount, there remains no such moral obligation to pay the balance as will support a subsequent promise to that effect; although the law was conceded to be otherwise of a discharge, which is not the mere act of the party, but by operation of law; as, for example, an insolvent discharge. *Stafford* v. *Bacon*, 1 Hill, 532.

The propriety of this distinction has been questioned. In 1850, in a case before the supreme court of New Hampshire, the question was examined, and the decision in *Stafford* v. *Bacon* was shown to be in conflict with an earlier decision of the same court, and not very well sustained by the authorities cited in support of it. *Trumbull* v. *Tilton*, 21 N. H. 129.

But in this State, in a case decided in 1845, the decision in *Stafford* v. *Bacon* was cited with approbation, and the doctrine approved. That doctrine is, that where a debt is discharged by operation of law, a subsequent promise to pay it will be binding; but when it is discharged by consent of the creditor, a subsequent promise to pay it will not be binding. *Warren* v. *Whitney*, 24 Maine, 561. The debt was fully discharged, although less than the whole sum was paid and accepted. R. S., c. 82, § 44.

Whatever may be our opinion of the propriety of such a distinction, we think the question must be regarded as now settled in this State, and no longer open for debate.

The promise relied upon in this suit falls within the latter class. It was a promise to pay the balance of a claim which had been discharged by consent of the creditor, and has no other consideration to support it than such previous indebtedness. Such a promise is not obligatory. *Exceptions sustained.*

New trial granted.

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

EDWARD R. MCINTIRE *vs.* MOSES H. HUSSEY.

During the term, and before the trial of this case, the foreman of the jury, by invitation spent the Sabbath at the defendant's house, when and where the defendant showed to the foreman, and conversed with him about the glass, which was the subject-matter of the suit. While the cause was on trial, the foreman gave to his associates the information he received from the defendant, and described to them the condition of the glass which was not exhibited to them. *Held*, that the verdict, being for the defendant, be set aside.

ON MOTION that the verdict be set aside and a new trial granted, because of the misconduct of the defendant.

ASSUMPSIT on an account annexed, comprising, among other items, one for "1050 ft. 8x10 glass at $7.75=$81.37." The defendant offered to be defaulted for all of the items except the glass.

The facts sufficiently appear in the opinion.

G. C. Yeaton, for the plaintiff.

N. Hobbs, for the defendant.

APPLETON, C. J. By R. S., 1857, c. 82, § 75, "If either party, in a cause in which a verdict is returned, shall, during the same time of the court, before or after the trial, give to any of the jurors, who try the cause, anything by way of treat or gratuity, or pur-

posely introduce among the papers in the case, which are delivered to the jury when they retire with the cause, any papers which have any connection with it, but were not offered in evidence, the court, on motion of the adverse party, may set aside the verdict and order a new trial."

The defendant in this case seems to have been singularly oblivious of the provisions of this section, as well as of the principles upon which it is based. During the term, and before the trial, the defendant met the foreman of the jury, before which the cause was subsequently tried, at the depot at North Berwick on Saturday on his return from court, and invited him to spend the sabbath with him, which the foreman did, and remained until the next Monday morning. While there the defendant showed him the glass, which is the subject-matter of this suit, and held conversation with him relative to the same. While the cause was on trial, and before the verdict was rendered, the foreman gave to his associates the information by him received, and described to them the condition of the glass, which had been shown him, but which was not exhibited to the jury.

While a cause is on trial, the parties should hold no conversation with or in the presence of the jurymen, before whom the cause may be tried. Still less should they extend to them special courtesies, or furnish them in advance with *ex-parte* proofs. Were there no statute on the subject, the conduct of the defendant is such as imperatively requires the verdict to be set aside. In *Cottle* v. *Cottle*, 6 Green, 142, when the prevailing party, in a cause tried by a jury, previous to the trial, but during the same term, conveyed one of the jurors several miles, in his own sleigh, to the house of a friend where he was hospitably entertained for the night; the verdict was, for this reason, set aside. Any tampering with a juryman by a party, during the trial or prior to it, is a good cause for setting it aside. *Tucker* v. *South Kingston*, 5 R. I. 528. In *Heffron* v. *Gallupe*, 55 Maine, 563, a new trial was granted because the defendant gave a juryman the printed evidence of a former trial. Much more should it be granted, when real evidence, concerning

the subject-matter of the dispute, is shown by a party to one juryman in the absence of his fellows and of the parties, and conversation is had with him in relation to its value, &c., and their verdict is, or may be, influenced thereby. *Motion sustained.*

New trial granted.

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

CAROLINE A. KNOWLES, complainant, *vs.* PHILIP P. SCRIBNER.

In the trial of civil causes the court will not first determine whether the facts stated in the plaintiff's declaration constitute a criminal offense, and then require of the plaintiff more or less evidence according to the conclusion reached.

In the trial of a declaration in bastardy charging a married man with being the father of the child, the complainant is not required to establish the respondent's guilt beyond a reasonable doubt.

ON EXCEPTIONS.

COMPLAINT under the bastardy act, charging the respondent, who is a married man, with being the father of the child.

At the trial the complainant contended that this is a civil proceeding, and that the rules of evidence applicable in the trial of civil actions should be applied to this case.

The presiding judge charged the jury, *inter alia*, as follows:

"In the cases which have come before you, you have predicated your verdict for the plaintiff upon a simple preponderance of testimony. Something more is required in this case. It is a suit which charges the defendant with crime, he being a married man; and before you can return a verdict for the complainant, you must be satisfied, beyond a reasonable doubt, of the fact of his guilt; and you will require at the hands of the complainant the same amount of

proof that you would require at the hands of the State, if he were on trial upon an indictment for adultery."

The jury returned a verdict of not guilty, and the complainant alleged exceptions.

A. F. Watson, for the complainant.

E. K. Boyle, for the respondent.

WALTON, J. Since the decision in *Thayer* v. *Boyle* (30 Maine, 475), in which the defendant was charged with willfully and maliciously setting fire to the plaintiff's barn, and in which it was held, that an instruction to the jury that "they should decide upon the balance of testimony, as in other civil cases, and that the defendant was not entitled to a verdict in his favor upon merely raising a reasonable doubt, as would be the case in a criminal prosecution," was not so favorable as the defendant had a right to require; it has been assumed, that in all civil suits in which the cause of action implies an offense against the criminal law, the defendant has a right to have the jury instructed, that the truth of the allegations must be proved beyond a reasonable doubt, to entitle the plaintiff to a verdict. In other words, that the court must first determine whether the facts stated in the plaintiff's declaration constitute a criminal offense, and then to require of the plaintiff more or less evidence according to the conclusion reached.

Such a course of proceeding is clearly wrong. It is as unreasonable to require a civil suit to be determined by the rules of evidence applicable to a criminal prosecution, as it would be to require a tailor to measure A., when he is going to make a suit of clothes for B. The measure of proof must be determined by the character of the issue being tried, and not by the character of an issue which is not being tried. If the measure of proof is the same in the two cases, such a proceeding is useless; it burdens and distracts the attention to no purpose. If the measure of proof is not the same, it is pernicious; it is a misapplication of the rules of evidence, and confounds and destroys the distinction between the two classes of cases.

The amount of evidence required must depend, in a great measure, upon the character of the issue to be tried. If there are no opposing presumptions, a mere preponderance of evidence, however slight, must necessarily turn the scale; as in the familiar example, where the question between the owners of adjoining lots was whether a particular tree, near the dividing line, was on the land of the one or the other. But where there is an opposing presumption, a mere preponderance of evidence is not sufficient. The strength of the preponderating evidence must be in proportion to the strength of the presumption to be overcome. Or, perhaps, it is more accurate to say, that there is no preponderance unless the evidence is sufficient to overcome the opposing presumptions as well as the opposing evidence. Thus, the proof must be stronger to support a charge of willful and malicious burning, than one of negligent burning merely; for there are many more careless persons than there are malicious ones, and the presumption of innocence to be overcome in the one case, is much stronger than it is in the other. "It is well understood," says Judge Swift, in his work on Evidence (page 151), "that a jury will not require so strong proof to maintain a civil action, as to convict of a crime; and that in criminal prosecutions, the greater the crime the stronger must be the proof." And Mr. Best, in his work on Presumptions, § 190, says: "As in criminal trials, the interests at stake are greater, and the consequences of an erroneous decision infinitely more serious, a higher degree of assurance is required than in civil proceedings." Mr. Greenleaf, in his work on Evidence (vol. 1, § 13 *a*), says: "In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth: but in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied, beyond any reasonable doubt, of the guilt of the accused, or it is their duty to acquit him; the charge not being proved by that higher degree of

evidence which the law demands." Roscoe, Philips, and Starkie are authorities to the same effect. In fact, we are not aware of any writer on the law of evidence that lays down a contrary doctrine. In the third volume of his work on Evidence (section 29), Mr. Greenleaf again says: "A distinction is to be noted between civil and criminal cases, in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases, it is their duty to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials, the party accused is entitled to the benefit of the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. Neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt." We do not think the rule, in either class of cases, is here stated very accurately; for a mere preponderance of evidence is not always sufficient, in civil suits, unless, as before remarked, we include in the opposite scale the presumptions, if any, against the truth of the proposition in controversy, as well as the opposing evidence; and the rule for criminal cases is encumbered with too many expletives to give a clear idea of the measure of proof required. But the statement is sufficiently accurate for the object the writer had in view, namely, to show that there is a clear and well-settled distinction between civil and criminal cases with respect to the degree of assurance required to found a verdict upon.

In the suit now under consideration, the defendant is charged with being the father of a bastard child, of which the plaintiff had been delivered. The object of the suit is to compel the defendant to contribute toward the support of the child; and its determination will be followed by no penal consequences. It is well settled, that such a prosecution is simply a civil and not a criminal proceeding. It was, therefore, the right of the plaintiff to have it tried according to the rules of evidence applicable to civil suits. But the presiding

judge instructed the jury, that "it was a suit which charged the defendant with crime, he being a married man; that before they could return a verdict for the complainant, they must be satisfied beyond a reasonable doubt of the fact of his guilt; that they would require, at the hands of the complainant, the same amount of proof that they would require at the hands of the State, if he were on trial upon an indictment for adultery." The same amount of proof as if the defendant was on trial for adultery. Did the presiding judge mean to have the jury understand that it was necessary for the plaintiff to prove, that at the time the child was begotten, the defendant was a married man, and had a lawful wife then alive?" Or, that she was a married woman, and had a lawful husband alive? Of course, he did not mean to have them so understand. And yet, in endeavoring to comply with the erroneous practice that has been gaining ground, of measuring the amount of proof necessary to maintain the suit, being tried by the amount necessary to maintain another and a different suit not on trial, he fell into the error of telling the jury, in substance (if the exceptions are to be relied upon), that the plaintiff must prove the defendant guilty of adultery, and beyond a reasonable doubt, or she would not be entitled to recover, that they would require the same amount of proof as if the defendant was on trial upon an indictment for adultery. Of course, the exceptions must be sustained. The suit did not charge the defendant with adultery, and the plaintiff was not required by law to produce the same amount of proof as if the defendant was on trial for that crime. She charged him with being the father of her illegitimate child, and that she was bound to prove to the reasonable satisfaction of the jury, and nothing more.

Exceptions sustained. New trial granted.

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

Osgood Sawyer *vs.* Town of Skowhegan.

In passive trusts, where the right to possess and enjoy the property is in the *cestui que trust*, the trustee cannot maintain a writ of entry against him or those holding under him.

Thus, where the second-story of a building was conveyed to a committee of an incorporated odd fellow's lodge, chosen to receive the conveyance for the benefit of the lodge, and subsequently, by a vote of the lodge, the premises were conveyed, by another committee duly chosen for that purpose, to the defendants' predecessors in title; *Held*, that the former committee cannot maintain a writ of entry against the defendants to recover the premises.

Neither the lodge nor its trustee acting for it will be allowed to convey its property, receive and retain the consideration, and then repudiate the conveyance upon the sole ground, that, in making it, they acted in violation of their own constitution and by-laws.

On report.

Writ of entry to recover the upper story of town-house in Skowhegan. Writ dated Feb. 8, 1866. Plea, *nul disseisin.*

It appeared that on the 30th of April, 1849, the town of Skowhegan, at a legal meeting, and under a proper article, voted to convey to the Carrabassett Lodge of Independent Odd Fellows, the "second story of the town-house" in consideration of the sum of $400, and that John G. Neil, Reuel Weston, Francis Tego, be a committee to execute the deed; that at a meeting of the lodge, holden on Dec. 8, 1849, Osgood Sawyer, Samuel W. Weston, and Josiah Varney, were chosen a committee to purchase and receive a deed of the second story of the town-house; that, in accordance with the votes, the town committee, on the 3d of January, 1850, in the name and in behalf of the town executed and delivered a deed of the premises to "Osgood Sawyer, Samuel W. Weston, and Josiah Varney, a committee appointed by the Carrabassett Lodge of Independent Odd Fellows, a society in Skowhegan, incorporated by law, their successors and assigns," "to have and to hold the same to the said grantees, their successors and as-

signs, to their use and benefit forever;" that the lodge continued in possession of the premises, under their deed, until Dec. 5, 1855, when, at a meeting held for the "purpose of choosing officers, and to see what action the corporation will take in reference to disposing of their hall," they "voted that the corporation sell their hall to Moses Littlefield for $500," and "that Josiah Varney and James B. Dascomb be a committee for said corporation to deed said hall to said Littlefield;" that in pursuance of the vote, and in consideration of $500 actually paid by Littlefield and received by the corporation, the committee, in the name and in behalf of the corporation, on Dec. 7, 1855, executed and delivered to Littlefield a quitclaim deed of the premises; that Samuel W. Weston and Josiah Varney died prior to the commencement of this suit; that the plaintiff was present at the meeting of Dec. 5, 1855, but opposed the sale of the hall as being in violation of the constitution and by-laws of the lodge; that the lodge became extinct about the time of the conveyance to Littlefield; that the plaintiff received his dividend of the consideration paid by Littlefield for the hall; that the title of Littlefield came through sundry mesne conveyances to the defendants; that the lodge was renewed in 1862, and it still continues; that a majority of the lodge voted to sell to Littlefield; that a form of the deed was agreed upon by the committee, and submitted to and approved by the lodge.

After the evidence was all in, the case was reported to the full court, who were to enter judgment in accordance with the law of the case.

D. D. Stewart, for the plaintiff.

The conveyance, by the defendants to the plaintiff, and Weston and Varney, was in trust. *Bancroft* v. *Cousen*, 13 Allen, 50. *Sturtevant* v. *Jaques*, 14 Allen, 523. And although no words of inheritance are in the deed, still the conveyance being in trust, the plaintiff and his co-trustees took an estate in fee-simple, but in trust for the benefit of the lodge. *King* v. *Parker*, 9 Cush. 81. *Gould* v. *Lamb*, 11 Met. 84. *Wells* v. *Heath*, 10 Gray, 24. *North* v. *Philbrook*, 34 Maine, 532.

The attempted conveyance by Varney and Dascomb was void; for all of the trustees must join. *Austin* v. *Shaw*, 10 Allen, 553. 2 Washb. on Real Prop., 206. *Pearce* v. *Savage*, 51 Maine, 410. *Wilbur* v. *Almy*, 12 How. 180. *Sinclair* v. *Jackson*, 8 Cow. 543.

The death of plaintiff's co-trustees vested the whole property in him as survivor. *Webster* v. *Vandeventer*, 6 Gray, 428. *Chapin* v. *Chicopee*, 8 Gray, 580. 2 Washb. on Real Prop., 201. *Peabody* v. *Lyman*, 5 Allen, 540.

This action is brought solely for the benefit of the plaintiff's *cestuis que trust.* The pretended conveyance to Littlefield was in violation of the constitution and by-laws of the lodge, and nothing passed by it.

The legal estate still remaining in the plaintiff, can he as trustee maintain a writ of entry against his *cestuis que trust*, or their grantees, who do not justify their possession as being under the trustee by a plea of special non-tenure, but plead *nul disseisin?*

Lord Mansfield held that a trustee could not maintain ejectment against his *cestui que trust.* 3 Burrow, 1901. Because the *cestui que trust* was entitled to the use and income of the property, and of course of the possession, under his trustee. 1 Greenleaf's Cruise, 385 (414). Ejectment under the old common law was not a real action but substantially trespass, the general issue being "not guilty." 3 Chit. on Plead. 1141. 1 Saunder's Plead. and Ev. 995.

There is a wide difference between ejectment under the common law (which was a possessory action only), and a writ of entry which turns wholly upon the title. Stearns on Real Actions, 80, 81, and 82. *Hodsdon* v. *Staple*, 2 D. & E. 700. *Fay* v. *Taft*, 12 Cush. 448 (as corrected in 2 Bennett & Heard's Dig. 547, note).

The opinion of Lord Mansfield, 3 Burrow, *supra*, was soon overruled in the English courts, and the settled law there, for nearly a century, has been that a *cestui que trust* cannot successfully defend against an action of ejectment, much less a writ of entry brought by his trustee.

The Lord Mansfield doctrine would destroy the legal title of the trustee, and vest the trust estate in the *cestui que trust* as abso-

lutely as the statute of uses did in the *cestui que use*. No conveyance of the property could be required by the *cestui que trust* in a court of equity, because he could have a complete remedy at law.

"Courts of law cannot take recognizance of trusts." *Goodtelle* v. *Jones*, 7 D. & E. 50. "The legal title must prevail in a court of law." *Goodtelle* v. *Jones*, *supra*. *Hodsdon* v. *Staple*, 2 D. & E. 384.

"Ejectment brought by a trustee against his *cestui que trust* is not distinguishable from ejectment brought by any other person." *Roe* v. *Read*, 8 D. & E. 122.

"The doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust*, has been long repudiated." *Doe* v. *Wroot*, 5 East, 132. 1 Chit. on Plead. 190 (Ejectment). *Weekly* v. *Rogers*, 5 East, 138 (note). *Neare* v. *Avery*, 30 Eng. L. & E. 471. 1 Chit. Gen. Pr. 7.

Same doctrine is found in almost every court in America. Thus, under the plea of *nul disseisin*, see *Newhall* v. *Wheeler*, 7 Mass. 199; *Russell* v. *Lewis*, 2 Pick. 509; *Stearns* v. *Palmer*, 10 Met. 35; *Crane* v. *Crane*, 4 Gray, 323; *Fitzpatrick* v. *Fitzgerald*, 13 Gray, 402; *Essex Co.* v. *Durant*, 14 Gray, 447; *Chapin* v. *So. in Chicopee*, 8 Gray, 583; *Raymond* v. *Holden*, 2 Cush. 268; *Phelps* v. *Tounsley*, 10 Allen, 555; 2 Washb. on Real Prop. 206, 210.

Also, in New York, *Jackson* v. *Pierce*, 2 Johns. 221; *Jackson* v. *Chase*, 2 Johns. 84–86; *Jackson* v. *Deys*, 3 Johns. 422; *Jackson* v. *Van Slyck*, 8 Johns. 380; *Sinclair* v. *Jackson*, 8 Cow. 543.

In *Moore* v. *Spellman*, 5 *Denio*, 225, the ancient and modern cases are all reviewed, and the doctrine adhered to.

So in the United States supreme court, *Watkins* v. *Holman*, 16 Peters, 58; *United States* v. *King*, 7 How. 847; *Green* v. *Mezees*, 24 How. 275.

And in Vermont, *Beach* v. *Beach*, 14 Verm. 28.

And in Illinois, *Wales* v. *Bogue*, 31 Ill. 465.

And in Iowa, *Page* v. *Cole*, 6 Clarke, 153.

And in Kentucky, *Stinebaugh* v. *Wisdom*, 13 B. Mon. 467. See also, 2 Greenl. on Ev. §§ 331, 556; 2 Washb. on Real Prop. 206,

210; Hilliard on Rem. for Torts, 108, § 18; Adams on Ejectment, 32; Hill on Trustees (Whart. ed.), 274 (note); Lewin on Trusts, 482; *Cox* v. *Walker*, 26 Maine, 504.

Warren v. *Ireland*, 29 Maine, 62, simply sustains the doctrine that a creditor of a trustee shall not levy on the trust estate. To the same is a large class of cases, such as *Bostick* v. *Keiven*, 4 J. J. Marsh. 597 (3 U. S. Dig. 611, § 91); *Smith* v. *McCaun*, 24 How. 398; *Williams* v. *Fullerton*, 20 Verm. 346; *Bancroft* v. *Cousen*, 13 Allen, 50.

The last sentence in *Warren* v. *Ireland*, was inadvertent. Nothing in the reasoning, or authorities cited, called for, or sustained it. It was not intended to overrule the vast weight of authorities without even referring to them. It even twice quotes approvingly *Russell* v. *Lewis*, 2 Pick. 510. No elementary writer quotes *Warren* v. *Ireland*, as an authority overruling the well-settled doctrine contended for by the plaintiff.

Nul disseisin raises the issue of title and no other. It admits not only possession by the defendant, but that he has ousted the plaintiff. Stearns on Real Actions, 205 (232). Under this plea the whole question is, which party can show the best legal title. Stearns on Real Actions, 205. *Wyman* v. *Brown*, 50 Maine, 144. *Green* v. *Kemp*, 13 Mass. 520. *Dunbar* v. *Mitchell*, 12 Mass. 373. *Chapin* v. *So. in Chicopee*, 8 Gray, 582.

If, instead of denying the plaintiff's title by their plea of *nul disseisin*, the defendants could have shown that they were in possession of the demanded premises, under the trust, and by the permission and consent of the plaintiff as trustee they might, by pleading special non-tenure under the plaintiff, have defeated the action. *Russell* v. *Lewis*, 2 Pick. 510. Stearns on Real Actions, 205, 208. But after pleading *nul disseisin*, such proof was inadmissible. Same authorities.

J. Baker, for the defendants.

WALTON, J. This is a writ of entry in which the plaintiff claims to recover seisin and possession of the second story of the town-house in Skowhegan.

April 30, 1849, the town of Skowhegan voted to deed to a lodge of odd fellows the second story of the town-house, and that John G. Neil, Reuel Western, and Francis Tego be a committee to make the conveyance. December 8, 1849, the lodge of odd fellows chose Osgood Sawyer (the plaintiff), Samuel W. Western, and Josiah Varney, a committee to receive the deed. January 3, 1850, a conveyance was made by the town committee to the lodge committee. Since that time two of the lodge committee have died; Osgood Sawyer (the plaintiff), is the sole survivor. December 5, 1855, the lodge of odd fellows voted to sell their hall to Moses Littlefield, and chose Josiah Varney and James B. Dascomb a committee to make the conveyance, and the conveyance was made the next day; and through sundry intervening conveyances, Littlefield's title is now held by the defendants.

The plaintiff contends that the attempted conveyance by the lodge to Littlefield was void; that the conveyance to him and his two associates by the town committee vested the title in them in trust for the lodge of odd fellows; that they held as joint tenants; that the decease of the other two trustees (Western and Varney) vested the whole estate in him as survivor, and entitles him to maintain this suit against the defendants to recover possession of the premises.

The defendants, among other propositions, contend that the plaintiff is, at most, but a naked trustee, holding the legal title for the sole use and benefit of the lodge and their grantees, and that such a title is insufficient to oust either the lodge or their grantees.

Trusts are of two kinds, active and passive. The latter are sometimes called dry, naked, or simple trusts. In the former, active duties are imposed. In the latter, no active duties are imposed; the trustee is a simple depositary of the title. In the former, the trustee controls the trust property. In the latter, the *cestui que trust* controls it. The former are useful, and are em-

ployed to secure and protect the property of spendthrifts, minors, married women, and the like. The latter are not useful; they tend to obscure titles, mislead the public, and facilitate fraud; and it was the object of the statute of uses to abolish them. Hence we find the courts encouraging the former and discouraging the latter.

It was formerly held in England, that the title of a simple or passive trustee should not prevail against the equitable title of the *cestui que trust* even in actions at law. In *Hart* v. *Knot* (1 Cowper, 46), Lord Mansfield declared that "it had often been determined, that an estate in trust merely for the benefit of the *cestui que trust*, should not be set up against him." And again in *Doe* v. *Pott* (Douglas, 721), that "it had been settled for years that a mere trust estate should not be set up against a *cestui que trust*." And in a case referred to in *Buller's Nisi Prius*, on page 110 (*Lade* v. *Holford*), he is quoted as saying that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee.

And in this court in *Warren* v. *Ireland* (29 Maine, 62), it was held, that a demandant, holding the land subject to a passive or simple trust, could not recover it from the grantee of the *cestui que trust*. On page 68 the court say: "In cases of simple trust, the title being held for the sole benefit of the *cestui que trust*, entitled *sui juris*, they may retain possession, may convey the estate, and may compel the trustees to convey it for their benefit." Authorities are then cited in support of the proposition, and the court proceeds: "As the demandant holds this lot, if the levy be regarded as valid, subject to a simple trust, he cannot recover it from the grantee of the *cestui que trust*."

The same doctrine is established in New York by statutory enactments. And Chancellor Kent says, the provision is founded in sound policy. 4 Kent's Com. 308. If we adhere to the decision in *Warren* v. *Ireland*, we reach the same result by judicial adjudications, which has been there established by legislative enactment. If the doctrine be good, founded in sound public policy, in fact so desirable as to call for legislative enactments in its favor, why

should we unsettle it by overruling a solemn decision of our own court? If the question were now presented to this court for the first time, we might be justified in hesitating how to answer it. But such is not the fact. The doctrine is already established, and we see no good reason for overturning it.

This rule does not apply to active trusts, where the duties to be performed by the trustee make it necessary for him to have the possession, and the right to dispose of the trust property; it applies only to simple trusts, where the duties of the trustee are passive, and the *jus habendi* and the *jus disponendi* are intended to be in the *cestui que trust.* Professor Washburn says, that although it is so often laid down by courts and writers, that *cestuis que trust* have a right to compel their trustees to suffer them to occupy the trust estates, and to require of them to make conveyances thereof as the *cestuis que trust* shall direct, it is apprehended that the general proposition can be true to its full extent, only in respect to simple, or what are sometimes called, dry trusts, where the *cestui que trust* is entitled to the exclusive benefit of the land, and the trustee is, by the nature of the trust, merely passive with respect to it. 2 Washb. on Real Prop. 209, § 19. Thus limited, the doctrine is reasonable and just.

The only objection to it is, that it tends to confound the distinction between legal and equitable jurisdictions. And, on this account, the doctrine has been very much shaken, if not wholly repudiated in England. See *Doe* v. *Wroot*, 5 East, 137, and authorities there cited in note a. And it is by no means universally adopted in this country. See authorities cited by plaintiff's counsel, and 2 Washb. on Real Prop. 206, 210, §§ 6, 18.

But this objection, however weighty, where courts of law and courts of equity are separate tribunals, can have but little weight with us, where both jurisdictions are vested in the same court. It has no merit beyond what relates to matter of form. The authorities all agree that in equity the title of the *cestui que trust* will prevail over that of a mere naked or passive trustee. Why may not this equitable rule be as justly applied when the parties are before

the court on a writ of entry, as when they are before the same tribunal on a bill of complaint? We think it can. It was so applied in *Warren* v. *Ireland* (29 Me. 62), and we see no sufficient reason for overruling the decision in that case. In active trusts, where the duties to be performed by the trustee require him to have possession of the trust property, he may undoubtedly maintain a writ of entry, not only against strangers, but against the *cestui que trust* himself. But in passive trusts, where the right to possess and enjoy the property is in the *cestui que trust*, the trustee cannot maintain a writ of entry against him, or those holding under him. This distinction is recognized in *Fitzpatrick* v. *Fitzgerald* (13 Gray, 400). The court there say that there would doubtless be an exception to the rule that the trustee may maintain a writ of entry against his *cestui que trust*, where by the terms of the trust, or by agreement of the trustee, the *cestui que trust* is entitled to actual possession of the trust estate.

When a conveyance of real estate is made to one person, and the consideration is paid by another, a trust is created by implication of law. Such a trust may be established by parol evidence. R. S., c. 73, § 11; *Baker* v. *Vining*, 30 Maine, 121. If there are no express stipulations to the contrary, it is a naked, passive trust, one of the implied conditions of which is, that the *cestui que trust* shall have the right to possess and enjoy the trust estate, and dispose of it at his own will and pleasure, and may compel the trustee to execute such deeds as he may direct; and the trustee can maintain no action against the *cestui que trust*, or those claiming under him, to oust them of their possession.

If this rule is applied to the case now under consideration, it is decisive against the plaintiff. He does not claim to have any other than a trust estate in the demanded premises. The whole consideration was paid by the lodge of odd fellows, and the conveyance was made to him and his two associates in trust for them. Nothing appears to show that their trust was clothed with active duties to be performed by them. They appear to have been naked depositaries of the title only. Their trust, therefore, was passive, not active.

The legal presumption is, that the *jus habendi*, as well as the *jus disponendi*, the right to possess and enjoy, as well as the right to dispose of the property, was in the lodge; and this presumption is undoubtedly in accordance with the truth, and the understanding of the parties. Why should such a naked depositary of the title merely be allowed to dispossess the equitable owners or those claiming under them? We think he should not.

We have not overlooked the fact that the plaintiff claims that the attempted conveyance by the lodge was in violation of their constitution and by-laws, and therefore void; that the hall still remains the property of the lodge as *cestui que trust;* and that he is endeavoring to recover possession of it for their benefit under their new organization. But regarding the law as settled that it was competent for the lodge to convey their equitable title, we think the law will not allow them, or their trustee acting for them, to repudiate the conveyance upon the sole ground that in making it they acted in violation of their own constitution and by-laws. To allow them to do so would be monstrously unjust. Odd fellows is the name of a secret society with whose constitution and by-laws the world at large is not supposed to have much knowledge. To allow such a society to sell a piece of property, receive and retain the consideration, and then repudiate the sale and reclaim the property from a *bona fide* purchaser, upon the ground that in making it they violated some of their own secret rules and regulations, would be an outrage upon justice. It would be allowing them to reap an advantage from their own wrong, if it can be called a wrong for such a society to vote to-day to do what they had previously voted not to do. Nor can it make any difference that in this case the plaintiff and others protested against the sale. It is a case where the will of the majority must control.

The defendants set up several other grounds of defense, but the one already examined being decisive of the case, it is unnecessary to consider them. *Judgment for defendants.*

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

The following dissenting opinion was submitted by

TAPLEY, J. This is a writ of entry to which the defendants have pleaded *nul disseisin.* The legal title of the premises in controversy is in the plaintiff.

Under this plea the defendants offer, in defense, evidence showing that the legal title thus held was held in trust for their grantors, and claim by the deed of their grantors all the equitable rights which they possessed passed to the defendants, and they now interpose this equitable estate against the recovery by the plaintiff in this case.

It appears to me that such a defense cannot, in an action at law under such pleadings, prevail. The legal title being in the plaintiff, he must prevail, and the defendants, having only rights in equity, cannot set them up for inquiry and execution in an action at law under this general issue pleaded.

If the defendants have equitable rights in the premises, the equity court will ascertain, upon proper pleas and proofs, what they are, and make such decrees concerning them as equity requires. It is for such purposes the equity court is established. If it were competent for the common-law courts to make such inquiries, and then direct execution in accordance with equity rules, there would be no need of, or use for the equity court. By the statute of this State, an equity court has been established, and its powers and jurisdiction defined. Among other things, it "has jurisdiction, as a court of equity, in cases of trusts." R. S., c. 77, § 8.

The mode of proceeding is clearly pointed out in the "Rules for the regulation of practice in Chancery Cases," and when under those rules the case is completed, and ready for hearing, it must be heard and determined by at least five judges. Rules of Court, and R. S., ch. 77, §§ 14 and 17.

In direct contravention of these statutory enactments the defendants claim to set up, prove, and execute, in a court of law, a case of trust.

If the trustee had been in possession, and the *cestui que trust* had commenced a real action at law to dispossess him, relying upon his

equitable right to possession, I think we should have regarded the proceeding as a novel one at least. Nevertheless, if the equitable rights of the *cestui que trust* can be inquired into, determined, and executed in answer to an action at law, commenced by the trustee, I do not see why those rights may not be relied upon to sustain the same kind of action commenced by themselves.

If they prevail in the first instance, it is because their rights are superior in the court where they are being examined to those of the trustee, and it would indeed be a strange anomaly of the law that they should become inferior when they, as moving party, seek to protect them.

If they may thus obtain possession, and thus resist the action of the trustee, both by themselves and their assigns, the trusteeship is a nullity. If they can invest a purchaser with all the privileges, immunities, and incidents of a perfect estate without the knowledge or action of the trustee, he is indeed a "dry trustee" in every sense of the word.

If they may thus convey at pleasure, there is indeed no trust. There is nothing held by the trustee. The *cestuis que trust* have it all, and control and dispose of it at their will and pleasure.

Neither trustee, courts of equity, or courts of law have any control over the matter; in short, as before remarked, there is no trust.

To admit such defences, involves, in the trial of a real action at law under the plea of *nul disseisin*, the determination of these questions, viz.:

1. Have the defendants any equitable (not legal) rights in the premises?

2. Do these rights amount to a trust, as understood in equity?

3. Is the trust an active or passive trust?

Now these questions, as before remarked, have been, by the law-making power, committed to the court of equity, consisting of at least five judges, for determination. If they are submitted to a single judge, or a judge and jury, it is in contravention of those statutes and the rights of the parties under those statutes, and completely ousts the equity court of its jurisdiction and transfers it to another,

practising under entirely and essentially different rules of investigation and execution.

A practical illustration of the rule will show this.

A real action is commenced by A. against B. B. appears and pleads *nul disseisin.* A. shows a perfect legal title in himself. B., under this plea, says to the court, this is all true, but I have an equitable estate in these premises, and A. holds them under such circumstances, that in equity he must be regarded as holding it in trust for me. Now I ask the court to determine these matters, and execute the trust by keeping the plaintiff out.

Here is the case as presented to the court, and it proceeds to hear evidence, *pro* and *con*, to ascertain if this claim of B. is sustained.

The evidence being in, who is to determine these questions, the judge or the jury, or both? If either or both, is not the finding conclusive upon the parties? If it is, is not the equity court completely ousted of its jurisdiction? And, be it remembered, all this takes place under the allegations of a writ of entry, and a plea of *nul disseisin.* If this be a legitimate defense under this plea, then every judgment for the plaintiff, in such actions, is a bar to proceedings by the *cestui que trust* in equity.

Questions of this kind are mixed questions of law and fact, and if all questions of fact are submitted to a jury, they must be instructed in equity law as well as the common law.

That this is an innovation upon the practice in this State, there can be no doubt. During the half century of its existence, no case is known where such a defense was admitted, and the reports of the Massachusetts courts attest, in an unmistakable manner, that the practice never prevailed there before or since we became a State; and, more than this, no case can be found in England since the decision of Lord Kenyon, in *Hodgden* v. *Staple*, 2 Term Rep. 684, or in any State of the United States where a court of equity exists, where such a defense is admitted, and prevails over the legal title in this class of actions.

Mr. Greenleaf says, "The plea of *nul disseisin* in a writ of entry puts in issue the legal title to the land, or, in other words, the seisin

on which the demandant has counted, and the lawfulness of the tenant's entry. If, therefore, it is pleaded in bar of an action brought by a trustee against the *cestui que trust*, it would entitle the demandant to recover. 2 Greenl. Ev., § 556.

Mr. Washburn says, "But a trustee can only be divested of his right of possession by a decree of court of equity. In a court of law, on the contrary, a *cestui que trust* is a tenant at will, or, at sufferance, of his trustee, and the latter may recover against him in an action of ejectment for the possession of the premises." 2 Washb. on Real Actions, § 18, p. 210.

In *Wyman* v. *Brown*, 50 Maine, 139, Mr. Justice Walton says, "the real struggle, therefore, under the general issue in a real action, is to see which party can show the better title in himself."

In *Stevens* v. *Palmer*, 10 Met. 32, the court say, "it is now well settled that the legal estate must prevail at law, unless the trustees should be enjoined by a court of equity."

In *Raymond* v. *Holden*, 2 Cush. 264, the court say, "in a court of law the legal estate must be taken to be the title, and, as such, must here prevail."

Crane v. *Crane*, 4 Gray, 324, is a case directly in point. The court say, "the only question to be settled in the action is that of the legal title. The question for whose benefit the land is to be held, is not in issue."

The same view is sustained in a number of other cases in Massachusetts. See *Chapin* v. *Chicopee*, 8 Gray, 583; *Fitzpatrick* v. *Fitzgerald*, 13 Gray, 402; *Essex Co.* v. *Durant*, 14 Gray, 447; *Phelps* v. *Townsley*, 10 Allen, 554.

To the same point in Vermont, Kentucky, Illinois, and Iowa. See *Beach* v. *Beach*, 14 Verm. 28; *Wales* v. *Bogue*, 31 Illinois, 465; *Stenebaugh* v. *Wisdom*, 13 B. Monroe, 467; *Page* v. *Cole*, 6 Clarke, 153.

To the same point see the following cases in the supreme court of the United States. *Watkins* v. *Holman*, 16 Peters, 58; *United States* v. *King*, 7 How. 847; *Greer* v. *Mezees*, 24 How. 275.

The only case cited to sustain, in any degree, such a defense to an action at law, is the case of *Warren* v. *Ireland*, 29 Maine, 62.

This case raised no such question, and decided no such question. There are some remarks of the learned judge, who drew the opinion, which might lead one, upon a hasty and cursory reading, to regard such a doctrine declared by the judge; but a careful examination of the case will show, that the point, now decided, was neither raised nor decided.

The question involved was the validity of a levy. It appeared that the premises levied upon was held by the execution debtor, in trust for another party. The execution debtor holding only the legal title. The question was, whether "the lot might be levied upon as his estate by a judgment creditor."

By a course of reasoning and the citation of authorities the judge arrives at the conclusion, that the statute was not designed to operate upon such an estate, and then proceeds to show, as one of the reasons leading to this conclusion, that such a construction of the statute as would make the statute apply, would be of no avail to the creditor, because, having notice of the trust, he would take land subject to it, and, under that trust, he could not withhold it from the tenant. In support of this proposition, he adduces equity principles and authorities.

In the commencement of this part of his discussion he says, "the question will be again presented, whether the demandant can recover the possession of the premises, "and withhold them from the tenant."

Having made this inquiry he proceeds to show that the creditor did not make the levy without notice of the trust, and concludes by saying, "this would be sufficient to prevent his holding the legal title discharged of the trust."

The purpose seems to be to show, that if the levy should be regarded effectual, it would convey no beneficial estate, and, therefore, not within the statute concerning levies. The concluding remarks of the opinion, disconnected from the question presented, and the course of reasoning pursued, might lead to the adoption of them as authority for the doctrine advanced in the case at bar; it will, however, be noticed, that the citations made in the discussion

of this last point are from equity authorities, to show the condition of the parties in equity.

The great question was, whether the levy reached any beneficial interest; whether the debtor had anything to which the levy could attach.

In the examination of this question, he had before him and cites as authority, *Russell* v. *Lewis*, 2 Pick. 508, wherein this identical question was raised and decided.

The court, in that case, by Wilde, J., say, "Two questions, therefore, are raised: 1. Whether, on the plea of *nul disseisin* in a writ of entry by the trustee against the *cestui que trust*, the demandant is entitled to recover. 2. Whether a trust estate is extendible, or may be set off to a creditor on execution. As to the first question, it is perfectly clear that the plea of *nul disseisin* puts in issue the legal title, and as this is in the demandant, he is entitled to judgment."

As to the second question, he says, finally, "we have no statute making trust estates chargeable with the debts of the *cestui que trust*, and as they were not so chargeable by the principles of the common law, we are brought to the conclusion that the tenant acquired no title by extending his execution on the premises."

With this clear, plain, explicit decision of the question now under consideration before him, is it reasonable to conclude that he meant to adopt the case as authority for one point, and overrule it as to the other when the case he had under consideration did not require it, and when he well knew such a decision was against not only the uniform practice of this court for more than a quarter of a century before, but against an unbroken course of decisions in all the States where the question had arisen. He had also before him, and cited the case of *Buck* v. *Pike*, 11 Maine, 1, wherein the court say, "as jurisdiction of trusts generally, without qualification or exception, is given to this court wherever they arise, according to the settled practice of a court of equity, they must be recognized and enforced;" and I cannot bring myself to the conclusion, that he meant to override this authority, as well as the statutes, by recog-

nizing and enforcing them in the common law courts under inapt pleadings.

It is said "the same doctrine is established in New York by statutory enactments." I do not understand the statutes of New York permit an equitable interest to be set up as bar to a common law action founded on the legal title. That practice has never been adopted in New York by the court, or directed by the legislature.

The statutes of New York declare, that in cases of passive trust, where the trustee has only a naked formal title, and the whole beneficial interest, or right in equity to the possession and profits of land, is vested in the person for whose benefit the trust was created, such person so entitled in interest shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions as his beneficial interest. If any such passive trust be created by any disposition of lands by deed or devise, no estate or interest whatever vests in the trustee. 4 Kent's Com. 308.

It will be perceived, that in New York it is not an equitable interest that the *cestui que trust* interposes, but it is the legal estate. The trustee has none.

This change, it will be perceived, was not made by judicial edict, but made by the law-making power, the only power competent to make it. If legislation was necessary to produce the change there, is it any the less so here? It appears to me that the admission of such a defense is not only against the uniform practice of the court, from its earliest existence to the present time, but it is irreconcilable with the statutes of the State concerning the jurisdiction and execution of this class of rights and interests.

INHABITANTS OF ORONO *vs.* JOHN W. VEAZIE.

Where, in the trial of a writ of entry, the plaintiff's title depends upon a tax sale, his production, in pursuance with R. S., c. 6, § 145, of the "treasurer's deed, duly executed and recorded, the assessments signed by the assessors, their warrants to the collector," and proof "that the taxes were advertised according to law," make only a *prima facie* case.

While the plaintiff is making out a *prima facie* case, by proofs on his part, the defendant may contest the sufficiency of the plaintiff's evidence to establish the requirements of the statute, without being required to pay or tender the amount of "taxes, charges, and interest."

If the defendant would go further, and introduce proof, he must pay or tender the "amount of all taxes, charges, and interest," as required by the latter clause of § 145, whereupon he may take advantage of all illegalities in the raising, assessing, and collecting of the tax.

ON REPORT.

WRIT OF ENTRY to recover about ten acres of land in Orono.

The plaintiffs' claim under a tax sale had, by virtue of R. S., c. 6, § 142 *et seq.* The land in question was taxed to the defendant, as a non-resident.

The defendant proposed to contest the tax-title, but the presiding judge ruled that he could not do so without paying or tendering the amount of taxes, charges, and interest. Thereupon the case was reported to the full court to obtain a construction of R. S., c. 6, § 145.

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

Rowe & Appleton, for the defendant.

APPLETON, C. J. This is a writ of entry in which the demandants claim to recover the premises in controversy by virtue of a tax-title.

By R. S., c. 6, provision is made for the sale of real estate for the non-payment of taxes assessed thereon. By § 145, "In any trial involving the validity of any such sale, it shall be sufficient for the party claiming under it, to produce the treasurer's deed, duly exe-

cuted and recorded, the assessments signed by the assessors, their warrants to the collectors, and to show that the taxes were advertised according to law; but no person shall be entitled to commence, maintain, or defend any action or suit in law or equity, on any ground involving the validity of such sale, until the amount of all taxes, charges, and interest, as aforesaid, shall have been paid or tendered by the party contesting the validity of the sale, or by some person under whom he claims."

The production of "the treasurer's deed, duly executed and recorded, the assessments signed by the assessors, their warrants to the collector," and proof "that the taxes were advertised according to law," make out a *prima facie* case for the party claiming under a tax-title. They do nothing more. This is obvious, for if proof of these facts were to be held conclusive it would be in vain, when they are established, to attempt to maintain an action or a defense against a tax-title. These papers, and the advertisement being in accordance with law, the burden shifts, and the party, contesting the validity of any sale, must show illegality in these proceedings.

But the party contesting the validity of the sale is required to tender the amount of "all taxes, charges, and interest." Assuming the proofs deemed sufficient by § 145 make out only a *prima facie* case, when are the "taxes, charges, and interest" to be paid or tendered? Is the payment or tender to be made before or after the party, claiming under a tax sale, has made out his *prima facie* case? If before, the owner of the tax-title may never make out the proofs deemed sufficient. It cannot be foreknown that they will all be established. If the party, claiming under a tax-title, fails in showing legal assessments, warrants, or advertisements, he fails in showing any title to the land in dispute or to the taxes assessed thereon. If he fails in one essential, he fails in all. Is the owner of the land to pay taxes before it is shown that any are due? Is the mere assertion of a claim under a tax-title sufficient to require the contestant of such title to tender and to pay taxes, &c., before he can be permitted to contest the alleged *prima facie* case. Whether a party, claiming under a tax-title, can prove what the law says is "suf-

ficient," is the very question in issue. While he is proving them, the party, contesting the validity of the sale, is not bound to pay "taxes, charges, and interest," for the requirements of the statute may never be made out. Until they are all made out, he is not shown to have been in default. When the owner of the tax-title has made out his *prima facie* case, he has established what, unless rebutted, is a "sufficient" title to the premises. While he is endeavoring to prove these essentials, his opponent may contest the validity of every step in the proceedings. When he has offered all the proof in his power to show the required proceedings regular, he may stop. Thus far the contestant of the validity of the sale may defend without a payment or tender. He may risk his estate upon the regularity and legality of the proceedings adduced by his opponent. But he may wish to proceed further. He may desire to defeat this title. He may wish to offer evidence *ex adverso*. He may claim, on his part, to show that the "requirements of the law" have not been complied with "in raising the money, assessing the tax, or in the subsequent proceedings for the collection thereof." If so, he must pay "the amount of all taxes, charges, and interest."

The conclusion is, that the party contesting the validity of a tax sale, may require the party, claiming under the same, "to produce the treasurer's deed, duly executed and recorded, the assessments signed by the assessors, their warrants to the collector, and to show that the taxes were advertised according to law," before he is bound to pay or tender "taxes, charges, and interest." Until their validity is *prima facie* made out, there is no tax which the land-owner is bound to pay to exonerate his estate. Resting the case there, the rights of the parties are determined solely upon the proof offered by the party claiming under the tax sale. Desirous of disproving the title thus claimed to be made, the contestant must pay or tender, if, by proof on his part, he would defeat or impeach the title of his adversary.

There may be numerous sales and tax deeds. One deed may be valid and the others convey no title. The land-owner may require the party, claiming under the tax-title in each case, to make out a

prima facie case. If he would contest such case by proof of any description, he must make the required payment or tender.

If a payment or tender is made, the defendant may, by any proof in his power legally admissible in this suit, contest the demandant's title. The payment is to enable him to contest. It authorizes the party contesting to maintain or defend an action.

If no tender is made, the party contesting the tax-title may maintain or defend as against the *prima facie* case of the plaintiff. If it is valid, it must prevail. If invalid and defective, it cannot be of any avail to the party claiming under it, for it could never have been the intention of the legislature that a party without, should prevail against one with the legal title; or that the court should adjudge a defective title to be one without defect. If the demandant fails to make out his *prima facie* case, he fails in proving what the statute says shall be "sufficient," and he then has, by his own showing, no title to his land, and no right to receive the taxes assessed thereon. *Case to stand for trial.*

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

SULLIVAN GRANITE COMPANY *vs.* JOHN GORDON.

In the trial of a writ of entry to recover a part of lot seventy-one, the declarations of an owner (since deceased) of a lot adjoining seventy-one on the west, while surveying it for the purpose of conveying it, that a certain monument at which he was then standing was the declarant's north-east corner, are not admissible.

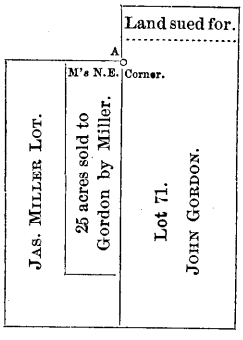
Thus, the defendant in such action, seeking to show that a certain monument was the true north-east corner of an adjoining lot, and on the west line of seventy-one, testified against objection, that he bought of one Miller (since deceased) twenty-five acres of the Miller lot adjoining seventy-one on the west; that when it was run out to him, he and Miller were present with the surveyor; that they run to the spot now claimed by the defendant as the true Miller corner; and that Miller then and there showed him the place, and told him it was Miller's north-east corner. *Held*, that the declarations of Miller were inadmissible.

ON EXCEPTIONS.

WRIT OF ENTRY for land in Sullivan, including a granite quarry, and covering about ten acres.

The defendant claims that the land in dispute forms a part of lot number seventy-one, known as the John Gordon lot.

The town plan and the field-books of Mr. James Peters show that lot seventy-one is bounded on the west by the James Miller lot, and that it extends northerly about twenty-one rods further than the Miller lot, making its western side line about twenty-one rods longer than the eastern side line of the Miller lot.



The defendant sought to show that a certain monument (A), viz.: a stake and stones in a crevice of a ledge, was the true north-east corner of the Miller lot, and on the west line of lot seventy-one, and among other things testified against objection, that in 1841 (as by his deed produced) he bought of James Miller twenty-five acres of the Miller lot; that when it was run out to him, he and James Miller (now deceased) were present with the surveyor; and that they run to the spot (A) now claimed by the defendant, as the true Miller corner; and that Miller showed him the place at the time, and at the place where said corner is, and when the land was being run out to the defendant by Miller as by his deed, told him it was his (Miller's) north-east corner.

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

E. Hale, for the plaintiffs.

A. Wiswell, for the defendant, cited *Haynes* v. *Butler*, 24 Pick. 242, 13 Met. 546; *Corinth* v. *Lincoln*, 34 Maine, 312; *Stewart* v. *Hanson*, 35 Maine, 506, 1 Greenl. on Ev., §§ 108 and 109; *Daggett* v. *Shaw*, 5 Met. 223.

APPLETON, C. J. This is a real action to recover what is claimed as a portion of lot seventy-one, in the town of Sullivan.

The defendant purchased part of an adjacent lot of one Miller in 1841. The land was run out at the time the defendant received his deed. The act of Miller, who has since deceased, at the time the land was so run out, in pointing out the north-east corner of his lot, and his declaration that the spot thus pointed out was such north-east corner, were received subject to all legal objection.

It is well settled that the declarations of the owner of a tract of land, as to its boundaries, while in possession, are admissible against him, and all persons claiming title under him. But here the acts and declarations have no reference to the corners of lot seventy-one. The act of pointing out a corner is no transaction with which these parties, so far as relates to this suit, have any connection. Neither party derives title to the premises in controversy from Miller. The corners of his lot are not those of the one in dispute. The declarations of Miller are but hearsay. They are none the less hearsay, because the declarant may have been, at the time, in possession of the lot, to the corner of which his declarations relate. In all the cases in this State and in Massachusetts, in which declarations have been received, they related to the land in controversy, were made by the declarant while in possession, and were offered in evidence against him or those deriving title under him. *Chapman* v. *Twitchel*, 37 Maine, 59. *Bartlett* v. *Emerson*, 7 Gray, 174. "The exception to the general rule excluding hearsay evidence," remarks Gray J., in *Hall* v. *Mayo*, 97 Mass. 418, which permit the introduction of reputation or tradition, or of declarations of persons deceased, as to matters of public or general interest, or questions of pedigree, do not extend to a question of private boundary, in which no considerable number of persons have a legal interest."

In *Daggett* v. *Shaw*, 5 Met. 223, the declarations related to the same land of which the declarant was in possession, when they were made. They were declarations against interest, and therefore received. *Exceptions sustained.*

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

KENT and BARROWS, JJ., did not concur.

EDWARD SWASEY, administrator with the will annexed, *vs.* THE AMERICAN BIBLE SOCIETY & others.

A bequest to the "first Calvinist Baptist Society that may be organized in" a certain school-district and town named, "for the purpose of buying a lot of land and erecting thereupon a meeting-house for the use of said society," is valid as a charitable bequest.

So with a bequest of a certain sum with its accumulations, to be funded as directed, "for the support of the ministry of the first Calvinist Baptist Society organization named in the previous item, provided that the" amount at the testator's decease, "shall be put in trust, for the purpose specified, of a committee or trustees appointed by the said Baptist association, together with the legal trustees of the school fund in the town" named; "and provided that if said society or church organization shall ever cease to have such ministry, then the income of the fund shall revert to" the testator's "most needy heirs, and if the society or organization shall ever cease to have a ministry as specified for the term of seven years, then said sum and its accumulations shall be forfeited by the said society." And *Held*, that as there is no Baptist organization as yet, the fund should be managed by "the legal trustees of the school fund in the town."

So with a bequest of the income of a certain sum, funded as directed, for "the education of a pious relative above the age of fourteen years, and a resident of" a town named, "who shall be of the Calvinistic faith, and shall be a student for the ministry."

So with a bequest of a specific sum "for the benefit of needy single women and widows," whenever an equal sum shall be contributed by some other person, and a suitable building is provided for their reception.

So with a bequest of a certain sum "for the education and instruction of poor and needy children in the first school district in the town" named, to furnish them with necessary clothing while attending school.

So with a bequest of a certain amount "to keep in suitable repair the" Buck family burying-ground, so called.

So, also, with a bequest of the residue of his estate "for the benefit of the poor and needy of the" testator's "relatives."

In case of a deficiency of assets, general legacies must abate proportionally.

APPLETON, C. J. This is a bill in equity brought by the administrator, with the will annexed, on the estate of Moses G. Buck, in pursuance of R. S. of 1857, c. 77, § 8, to determine the construction of said will and the mode of executing the trusts arising under the same. It suggests the invalidity of certain legacies, and, if valid, the insufficiency of the estate to provide for their payment; that the trustees named in the will have declined to act, and asks the directions of the court in reference to these several matters.

The will is obscure and confused. It is, however, the duty of the court, as far as possible, to ascertain the intent of the testator, and to give full effect to the same.

It is said that the estate is insufficient to meet the numerous legacies in the will. But whether so or not, by its terms the first nine items are to be paid in full, and the funds are amply sufficient for that purpose.

The annuities given by the fourth, fifth, sixth, and seventh items must be provided for.

The eighth item of the will is in the words, "I give and bequeath and leave in trust to the first Calvinist Baptist Society that may be organized in what is now the first school-district in the town of Bucksport, one thousand (1,000) dollars, for the purpose of buying a lot of land and erecting thereupon a meeting-house for the use of said society," &c.

It is urged that this is void, because there is no such incorporated society. But the will assumes such to be the case, and makes this provision for one when it shall come into existence. If a corporation, for whose use a charity is designed, is not *in esse*, and cannot come into existence save by an act of the crown, as a gift to found a college which requires an act of incorporation, the will will be valid, and the court will execute it. 2 Story Eq., § 1170. *Attorney-*

general v. *Downing*, 3 Ves. jr. 714. In *Sanderson* v. *White*, 18 Pick. 336, Shaw, C. J., said, "When a gift is made with a view to found a hospital or college not in being, and which requires a future act of incorporation, the gift is nevertheless valid, and the court will carry it into effect." The same doctrine was held by the court in *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99. So a devise to an unincorporated religious society will be regarded as a bequest to charitable uses, and will be enforced. *Preachers' Aid Society* v. *Rich*, 45 Maine, 553.

The 9th item is, "I give and bequeath one thousand dollars and interest from this date, till by accumulation it shall amount to a sum not exceeding two thousand dollars; to be funded as hereinafter defined, for the support of the ministry of the first Calvinistic Baptist Society or organization named in the 8th item above, provided that if I shall be living at the time of the organization of said society, the interest shall cease and no more than the sum accumulated as above shall be appropriated for the object specified in this item. Provided further, that the said one thousand dollars, with its accumulations, upon my decease shall be put at interest for the purpose above specified in this item, of a committee or trustee appointed by the aforesaid Baptist association, together with the legal trustees of the school fund in the town of Bucksport; or if the town shall be divided, then of the said committee or trustees, together with the legal trustee of said school fund belonging to that part of said town, which shall include what is now the first school-district in the town of Bucksport; and provided, if the said society or church organization shall ever cease to have such ministry as above specified, then the income of said fund shall revert to my most needy heirs; and if the society or organization should ever cease to have a ministry as above specified for the term of seven years, then the said one thousand dollars and its accumulations shall be forfeited by the said society or organization."

A legacy toward establishing a bishopric in America was held good in *Attorney-general* v. *Bishop of Chester*, 1 Bro. C. C. 987. A direction by will to pay into a certain bank "a yearly sum of

£100, for the sole use and benefit of any ministers and members of the churches now forming upon the apostolical doctrines brought forward by the late Edward Irving, &c., was held to be a valid charitable bequest of a perpetual annuity in *Attorney-general* v. *Lawes*, 8 Hare, 32.

The trustees, into whose care this sum is to be placed, are designated as "a committee or trustees appointed by the aforesaid Baptist organization, together with the legal trustees of the school fund in the town of Bucksport." But as there is no Baptist organization as yet, the fund should be managed by the existent trustees, that is, "the legal trustees of the school fund in the town of Bucksport;" for such seems the will of the testator. In other words, the testator appointed certain trustees. Of those so designated, a portion only are existent for the purposes of the trust. Undoubtedly the court might, upon a bill for that purpose, appoint trustees, in case of a failure on the part of those designated to act; but that is not necessary at present, if there be legal trustees of the school funds, under the statutes of the State, competent to take and execute the trust.

The tenth, twelfth, thirteenth, and seventeenth items provide for "the education of a pious relative above the age of fourteen (14) years, and a resident of Bucksport, who shall be of the Calvinistic faith, and shall be a student for the ministry," &c.; "for the benefit of needy single women and widows," &c.; "for the education and instruction of poor and needy children in the first school-district in the town of Bucksport, to furnish them with necessary clothing while attending school," &c.; and "to keep in suitable repair the Buck family burying-ground, so called;" and "for the benefit of the poor and needy of my relatives."

A bequest for the purpose of endowing a professorship in a theological seminary is valid. *Auburn* v. *Kellogg*, 16 N. Y. 83. So is a bequest of money to trustees, with directions so to invest it that the interest may be, from time to time, applied toward the education of students in the ministry of a specified congregation, under the direction of the vestry-men of specified churches. *Welman* v.

Lex, 17 S. & R. 88. A bequest for the assistance of Unitarian congregations was held to be valid, notwithstanding the argument of counsel that such teaching was illegal. *Shrewsbury* v. *Hornby*, 5 Hare, 406. So one "for poor pious persons, male and female," *Nash* v. *Morley*, 5 Beav. 177; "to the suffering poor of the town of A.," though no trustee to execute the trust is named in the will, *Howard* v. *American Peace Society*, 49 Maine, 288; "to the widows and orphans of the parish of L.," *Attorney-general* v. *Combee*, Sim. & Stu. 93; "for the benefit, advancement, and propagation of education in every part of the world, as far as circumstances will permit," *Whicher* v. *Hume*, 10 Eng. L. & Eq. 218. A bequest for the repair of a family vault is a charitable use. *Mellick* v. *The President and Guardians of the Asylum*, 1 Jac. 180. So, for the repair of a tomb. *Lloyd* v. *Lloyd*, 10 Eng. L. & Eq. 139. So a legacy for making our poor relations apprentices, in *White* v. *White*, 1 Sc. & Lef. 111; and for distributing among my poor kinsmen and kinswomen, and among their offspring and issue, which shall live on in the county of Brecon. *Attorney-general* v. *Price*, 17 Ves. 371. A bequest to executors in trust to hold and invest the same and the income thereof, and appropriate so much or the whole of the principal and income as they might think proper "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence and charity, public or private, or temperance, or for the education of deserving youths," was held a good charitable bequest. *Saltonstall* v. *Saunders*, 11 Allen, 446.

According to the decisions of the English courts, and those of this as well as of other States, we think the various bequests must be upheld, and the intention of the testator carried into effect.

But it seems the assets of the estate are insufficient. The first nine legacies by the terms of the will have precedence. Adequate provision must be made for them, for the intention that those legacies shall have priority of payment over the others is clearly expressed.

The remaining legacies in the will must abate upon a deficiency

of assets. There is nothing indicating a preference of one over the other. The intention of the testator was, that all his legacies should be satisfied, but he gave a preference to the first nine. They being satisfied, the remainder were equally, as between each other, entitled to payment. But the assets being insufficient, they must all abate proportionally. If a testator express himself thus imprimis, or, in the first place, I give so much to A., and in the next place I give so much to B., these words will neither give a preference to A. above B., nor to them over the other general legatees, so as to exempt them from the obligation of abating with the other legatees. "The reason is, they merely point the order in which the bequests are made in succession, and do not import with certainty an intention to prefer one to another." 1 Roper on Legacies, 426. Neither does priority of payment indicate sufficiently an intention to give precedence to a legacy. The general rule of abatement is founded upon equality, and upon the justice of an equal distribution among all the general legatees, and will not be departed from, unless the testator's intention to the contrary is clearly and definitely expressed.

Of the trustees designated by § 20 of the will in question, one has deceased, and the others have refused to accept the trust arising under it. When there are trustees who have declined to act, the court, upon a bill to that effect, will appoint other trustees to act in their stead. *Bliss* v. *American Bible Society*, 2 Allen, 337; *Odell* v. *Odell*, 10 Allen, 1. If there are no trustees, the want of a trustee will be supplied by an appointment by the court. *Preachers' Aid Society* v. *Rich*, 45 Maine, 553. In case of charitable gifts, it is no objection that no person is named capable of taking the legal interest, for equity will supply the want of an appointment. If it becomes necessary to appoint a trustee, it will be done, notwithstanding the estate is insufficient to pay all the legacies. *Winslow* v. *Cummings*, 3 Cush. 359. A court of equity will not permit a trust to fail for want of a trustee.

In the bill before us, there is no specific prayer for the appointment of trustees.

The cost of these proceedings are a charge of the estate, the rea-

sonable amount of which must be referred to a master to determine. *Drew* v. *Wakefield*, 54 Maine, 301.

According to the true construction of the will of Moses G. Buck, it is declared:

(1) That the several legacies referred to, for charitable uses, are valid and to be upheld;

(2) That the nine first items are to be paid in full;

(3) The remaining legacies are to abate proportionally in case of a deficiency of assets.

That a master be appointed to ascertain:

(1) What sum will be required to satisfy the nine first items in the will?

(2) What sum will remain to be apportioned among the remaining legatees, after deducting the expenses and cost of settlement of the estate therefrom?

(3) To report the reasonable costs and charges incurred in these proceedings, which are to be charged on the estate?

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

Rowe, for the complainant.

T. C. Woodman, for the respondents.

ALBERT HALL and wife *vs.* INHABITANTS OF UNITY.

From a well-wrought, safe, and convenient traveled path on a highway, a passage-way, not made by the town, led by a slightly circuitous course to a watering-trough, erected without authority of the town, within the limits of the highway, for the purpose of enabling travelers to water their animals, and thence turned into the main track again several rods from the point of departure. The plaintiff with his wife, traveling along the highway with a horse and carriage, drove out to the trough and watered his horse; and while leaving the trough, the wheel of his carriage was drawn upon a rock lying in its natural bed in the passage-way, ten feet from the usually traveled track, and thereby the plaintiff's wife was thrown from the carriage upon the trough and

injured; *Held*, by CUTTING, WALTON, DICKERSON, and TAPLEY, JJ., that the actual condition of the passage-way being, in fact, such as it appeared to be, and containing nothing to allure, deceive, or ensnare travelers into concealed or unperceived danger or difficulty, the town is not liable.

By APPLETON, C. J.; KENT, BARROWS, and DANFORTH, JJ., that the town is liable.

By Pub. Laws of 1870, c. 100, § 1, in any civil action in which there is a subsisting verdict of a jury, if a majority of the justices, qualified to sit in the case, do not concur in granting a new trial, it shall be the duty of the court to order judgment on the verdict.

ON EXCEPTIONS.

CASE for injuries received by the female plaintiff, while traveling upon an alleged public highway, which it was averred the defendants were bound to keep in repair.

The proof tended to show that the highway, opposite the place where the injury occurred, was, and had been, for more than ten years, well defined, safe and convenient for travelers; that from the main path and within the limits of the highway there was a path, or passage-way, leading round to a watering-trough, and thence turning into the main track again beyond the trough, frequently resorted to by travelers, for the purpose of watering their animals; that the trough was placed there some ten years before the injury, by an inhabitant of the town of Unity, but with outany authority from the town; that the plaintiffs, traveling along said highway with a single horse and wagon, drove from the main track, or straight and usually traveled part of the way, along and upon said path or passage-way, to the trough for the purpose of watering their horse; that the horse drank, and, on starting along from the trough, one of the wagon wheels struck a small rock, not before observed by the plaintiffs, lying in its original place in the wheel-track of the path, the shock of which, threw the wife from the wagon upon the trough, and produced the injury complained of.

The plaintiffs contended that the rock constituted a defect in the highway, for which the defendants were liable.

The presiding judge instructed the jury, among other instructions upon the subject not excepted to, as follows:

If the jury find that the traveled part of the road was safe and

convenient for travelers, that the rock in question was situated outside of such traveled part, and nine or ten feet distant from the center thereof; that the space between the rock and the trough, was used by travelers only for the purpose of watering their teams, and that said passage-way, including the rock, was as it appeared to be, containing nothing to deceive the traveler or allure him into unperceived difficulty or danger, and that the plaintiffs left the traveled part of the road to go through the passage-way to water their horse, and the injury was occasioned by motion of the wheel going over the rock, the town would not be liable, if the rock was as high as the plaintiffs claimed.

But, if there were two roads at the place of the accident, within the limits of the highway, used indifferently by travelers for the ordinary purposes of travel, and the plaintiffs took the one running by the trough, and the injury was received by the wheel going over the rock while the plaintiffs were in the exercise of ordinary care, and without any fault or defect in their horse, wagon, or harness, that the rock would constitute a defect, and the town would be liable.

The jury found specially that the way was not defective, and returned a general verdict for the defendants, and thereupon the plaintiffs alleged exceptions.

A. G. Jewett, for the plaintiffs, contended:

1. That a fair construction of the statute required the defendants to keep the pathway by the trough "safe and convenient," while they permitted the trough to remain there, an object of temptation to travelers' teams, and allure them out of the main path by an attractive artificial fountain of water; and that the legal presumption is, that the defendants intended by such fountain to invite travelers thereto; and that all persons traveling thither, had a right to presume in law that the pathway to the place of temptation was safe and convenient, and was expected to be traveled by those whose teams needed watering.

2. That no construction of this statute has, as yet, narrowed the

liability of towns to the gauge prescribed by the instruction excepted to.

3. *Cobb* v. *Standish*, 14 Maine, 198, settles the principle involved here.

Then the plaintiff went from a safe and convenient path to a natural fountain for the sole purpose of watering his horse, and the horse sank in the water and was drowned, lost by an unknown and unseen defect in the by-path; while here the plaintiff left a safe and convenient way, went to an artificial fountain, where by an unknown, and unseen, and hence concealed defect, the wife was thrown upon the artificial object, and crippled for life.

4. An artificial reservoir of water, thus situated, makes a stronger case of liability than a natural one, because it was made by man, and placed there to attract the thirsty horse from the main path into the one leading to the fountain; and the law holds towns to a stricter accountability for damages sustained through artificial objects than natural ones.

5. State policy, established twenty-five years ago, by R. S., c. 18, § 52, has brought into existence many thousands of such watering-troughs. They are all for public convenience, and to be "easily accessible for horses and carriages," and they are paid for by the town's money. "Easily accessible for horses and carriages," does not mean that the traveler is to pass over them at his own peril.

A. G. Watson, for the defendants.

Dickerson, J. This is an action for an injury received on account of an alleged defect in a public highway. It appears that the way opposite to the place where the accident happened was well defined, safe, and convenient for travelers; that from this road, and within the limits of the highway, there was a passage-way, not made by the town, leading round to a watering-trough (placed there by an inhabitant without authority from the town), and coming into the road beyond; that the plaintiff drove his horse from said highway, or traveled part thereof, around said passage-way to the trough, for the purpose of watering him, and that while in the

act of leaving the trough, after he had drank, the horse drew the carriage-wheel upon a rock lying in its original place in the passage-way, in consequence of which the plaintiff's wife was thrown from the carriage upon the trough, and injured. The jury found that the passage-way was what it appeared to be upon the face of the earth, containing nothing to allure, deceive, or entrap travelers into concealed or unperceived difficulty or danger, and was used by travelers only for the purpose of watering their animals.

The exceptions raise the single question, whether the town is liable for an injury received by a traveler, while using such a passage-way for such a purpose, by reason of its being defective and out of repair, so as to be unsafe for travelers.

The statute requiring towns to keep their ways safe and convenient for travelers is to be reasonably construed, both with respect to the state of repair and the width of the way to be traveled. Both of these considerations depend, in a great degree, upon the amount of travel over the particular way. A broader width for travel and a higher state of repair are required in cities than in less populous places. The statute requires that so much of the highway only shall be kept safe and convenient, as the safety and convenience of travelers demand. It is the right of towns, subject, however, to these conditions, to prescribe, set apart, and prepare the particular portion of the way to be kept in repair and used for travel, upon their responsibility. When towns have done this, they will not be liable for injuries sustained by travelers in departing from the path prescribed for travel, unless there is something connected with such way, calculated to allure, deceive, or entrap the travelers into concealed or imperceptible danger or difficulty. If, for instance, a passage is permitted to exist, leading from the traveled part of the road across a natural stream, or by a watering-trough, made or erected without authority of the town, to enable travelers to water their animals, within the limits of the highway, the town will not be liable for an injury to a traveler in using such passage-way for this purpose, if its actual condition is obviously such as it appears to be, though it would be liable if such side-way contained

concealed dangers, pit-falls, or man-traps, into which the traveler had been allured by the desire and prospect of refreshing his horse. *Cobb* v. *Standish*, 14 Maine, 198.

The reason for this distinction is obvious. Towns are not required to provide watering-places for the accommodation of travelers, or passage-ways to such as are provided without their authority, whether by name or nature; but, if they suffer such conveniences to remain within the limits of a highway, they are bound to take care that the passage-way thereto shall not serve to allure the traveler into unforeseen and imperceptible danger. In such case the town is presumed, and it is its duty to foresee the danger, and guard the traveler against it. Not so with the traveler; he has a right to presume that such way is, as it obviously appears to be, free from hidden snares or pit-falls, and if it prove otherwise, and he is injured thereby, without fault on his part, the town will be liable. If the rule of law were otherwise, towns, as a matter of self-protection from liability, would either be obliged to erect barricades against access to such conveniences, or make the passage-way to and from them as safe and convenient, as that part designated for the public travel.

The decision in *Cobb* v. *Standish*, 14 Maine, 198, rests upon this identical distinction. In that case the passage-way from the road was a well-beaten track down to what appeared to be a safe and convenient watering-place for cattle and horses, but which proved to be a mud-hole so deep and miry that the horse sank into it, and was submerged and killed. The decision was not placed upon the ground that the passage-way was out of repair, or that the pool of water, *ipso facto*, constituted a defect within the limits of the highway, but because the town had suffered a trap to remain within the limits of the highway, into which it ought to have foreseen that animals, attracted by the water, might fall. "A traveler," say the court, "aware of the danger, might have escaped it, but there was nothing provided to point out or indicate the danger," plainly indicating that if the danger had been apparent to a common observer, the town would have been exonerated from liability.

The case we are considering is clearly distinguishable from that of parallel roads, suffered by a town to be indifferently used for the purposes of travel. Towns are required to make their highways safe and convenient for travelers, and if they choose to make two tracks where one would be sufficient, or allow travelers to use either of two tracks for the purposes of travel within the limits of the highway, they are required to make both safe and convenient. But towns are not bound to make side-roads to and from watering-places, established without their authority, for the accommodation of travelers. The one is a general purpose contemplated by statute, while the other is a special one, not coming within its purview. To deduce the liability of towns to keep side-roads to watering places safe and convenient for travel, from their liability to keep parallel roads in the same condition, is to argue the same result from different and dissimilar premises, and to confound the case of a liability created by statute, with one where the statute imposes no liability.

The plaintiff chose to leave a safe and convenient road, designated by law for his accommodation, and to drive his horse out upon a side-path, not made by the defendants, nor used by the public, except for a special purpose, to a trough to drink, which had been placed there without authority of the defendants. The side-path was in the same condition that it appeared to be, containing nothing to allure or mislead the plaintiffs into concealed or imperceptible danger. The defendants had wrought, and made safe and convenient, that part of the highway allotted for the public travel. The law does not require them to do more in the premises. The plaintiff, therefore, deviated from the traveled part of the highway, at his own risk, and must suffer the consequences.

Our conclusion, therefore, is, that the exceptions should be overruled.

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

Opinion of APPLETON, C. J.; KENT, BARROWS, and DANFORTH, JJ., drawn by

KENT, J. After a highway has been duly laid out and established, it is the duty of the town to make the same safe and convenient for travelers thereon. The highway, in its entire width, is set apart and opened for this purpose, and a traveler has a legal right to use any part of it. But, as a general rule, a town is not obliged, on common country roads, to make a traveled path the whole width of the road as laid out. *Dickey* v. *Maine Tel. Co.*, 46 Maine, 483. But there is no fixed rule on this subject. The rule that governs, is that given in the statute. "Highways, townways, and streets, legally established, are to be opened and kept in repair, so that they are safe and convenient for travelers with horses, teams, and carriages." R. S., § 37, c. 18. Safety and convenience are the essential requisites. A single well-made pathway ordinarily meets this requirement, if it be of sufficient width. But there may be cases where safety and convenience require a very wide path, or a double track, — or even in cities, the preparation of the whole width of the way for common travel. In every case the question is, whether the way is sufficient to meet the requirements of the statute.

If there are two distinct paths which have been made, or opened for public travel, and equally inviting the traveler to enter and pass along thereon, the town is bound to keep both safe and convenient, even if one of the paths would have been sufficient. Why? Chiefly, if not entirely, because the town has made or allowed to exist both paths, inviting travel on each, and giving the travelers to understand and believe, that both are intended for his use, at his option. Here, then, is something more required of the town than to show one good and sufficient pathway.

The ruling of the presiding judge in this case admits this, and holds the town bound to keep both paths in repair.

If, then, there may be a liability, even when there is one straight and sufficient wrought way, the question is, what are the limits of that liability. Is it limited to the existence of two substantially parallel paths, or may it extend to other used portions of the road?

The question in the case at bar arises under this state of facts. A watering-trough had been placed on the side, and within the limits of the highway, ten years before the accident or injury to the plaintiffs. It was placed there by an individual, without any authority from the town, but had been resorted to frequently by travelers to water their teams. A path or passage-way had been made from the straight wrought road to the trough, and from the trough, in a circular form, back to the road at a point different from the point of departure. The main way from which the path diverged, and to which it returned, was safe and convenient.

The case, as presented by the rulings, assumes that this path was defective and out of repair. In fact, as we understand the matter, the question is, whether the town can be held liable for an injury caused by a defect in this path, however great it may be. Is the town bound to take any care or oversight over it?

The judge ruled that the town might be held, "if there were two roads at the place of the accident, within the limits of the highway, used indifferently by travelers for the ordinary purposes of travel. But there was no evidence of any such state of things, according to the case as stated in the exceptions, and no claim of any second way thus used. There was one well made, usually traveled path. The side-path was used only by the travelers, who turned from this main path to give water to their animals.

The judge ruled, that the path thus used was not a part of the highway which the town was, by law, bound to keep in repair, if the pathway, as it appeared to be, containing nothing to deceive the traveler, or allure him into unperceived difficulty or danger.

There seems to have been nothing of the kind in the path to the trough. It was what it appeared to be, a common way, with nothing more to deceive or to allure into concealed, or not obvious difficulties or dangers, than on ordinary roads, which yet may be legally defective.

The question, then, is plainly this, Is a town responsible at all, or in any degree, if such a path is defective, and out of repair, so as to be unsafe for travelers?

Assuming, in the first place, that the town was not bound to make it, or to allow the trough to stand on the side of the way, yet, if it is thus allowed to be there for ten years, with a well defined and trodden path to it, all or most of this time, why does not the same rule apply to it, as to a second parallel pathway, not required, but actually existing? The same reason for charging the town exists in both cases. This path is within the limits of the highway, is a standing invitation to all travelers to use it, as part of the traveled way. It is true that it is a deviation from the principal way, but it is for a legitimate purpose, and one which the traveler has a right to use, and which common humanity often requires him to use. He finds a path or way opened for him. He does not know whether the town or an individual erected the trough, or made the road to it. They are there, and he is tacitly invited to enter and refresh himself and animal. We are at a loss to see why the town should not be liable in this case, on the ground before alluded to, viz., that it permits or prepares or allows to exist, a path which the traveler has a right to regard as a way open for him to use, for a legitimate purpose, on his journey. Whenever a part of the highway is thus allowed by the town to be in a condition inviting travelers to use it, as a traveled way, for the legitimate purposes of their journey, the town must keep it in a reasonable state of safety and convenience, although there may be another safe and convenient path in the direct line of travel, and although no legal obligation or duty required the existence of this second or side-path, in order to make the highway safe within the statute.

The case of *Cobb* v. *Standish*, 14 Maine, 198, rests upon this principle. It is true, that in that case the side-path led to a natural pool of water, partly in the highway, which was miry and unsafe. But there was a well-beaten path from the commonly traveled part of the highway down to the water. The court say, "Towns are not obliged to provide watering-places for the public convenience; but when they are provided by nature in the highway, they ought not to be suffered to become pitfalls, first to allure and then to destroy horses or other animals, turned aside to partake the refresh-

ment to which they are thus invited." Does not the same principle apply where the defect is in the way itself, and not at the end of the path, to the extent of rendering the way, thus inviting the traveler, unsafe and dangerous? The liability in each case arises, not from a want of a good and sufficient traveled way, but in allowing an unsafe and dangerous side-path, apparently intended to invite the travelers to enter and use it.

Since the decision in the above case, the general sentiment of the public, in favor of these side refreshments within the public highways, has led the legislature to give encouragement to the erection of such watering-troughs, by providing that three dollars annually shall be allowed by abatement on the tax, of the person who shall construct and maintain one beside a highway. R. S., § 52, c. 18. Although this statute does not in terms require that the towns shall erect them, yet it plainly shows that they are regarded as of great public utility, and almost a necessity to the traveler, with his team, and are a part of what the law requires to make the way "safe and convenient." The statute also contemplates that the traveler will, as occasion may require, turn aside from the usually traveled path to seek the refreshment, and that in so doing, he will not be departing from the proper purposes of his journey. The statute requires that the trough shall be so located as to be "easily accessible for horses and carriages." It cannot be so, ordinarily, unless a path is cleared or made, so that horses and carriages can safely pass to and return from the trough.

We are not called upon, in this case, to determine whether in all cases the town is bound to make such path to every watering-trough that may be set up. There would seem to be strong grounds for holding a town bound to see that such safe way should be made to every such trough, which, in the language of the statute, has been "thought by the assessors for the public convenience," and which entitles the person erecting and keeping it, to the allowance named. It would be manifestly wrong for a town thus to adopt, and sanction, and offer to the public, as for the traveler's use, such a watering place, and then leave the approach to it

unsafe and dangerous to the wayfarers, who might turn to it by day or by night.

We have no doubt, however, if such path has been made and has existed for years, and been used for this purpose, that the town is bound to keep it reasonably safe and convenient. And this liability does not depend upon the question by whom erected, or whether its convenience has been passed upon by the assessors or not. It rests upon the general principles before stated.

We do not intend to say that every side-path, made by individuals for private use, leading from the main road to their dwellings or fields, come within the rule before stated. These are not detours returning to the road at a different point from the one of departure, and all within the limits of the highway, but a single straight line, leading out of the limits, and from their location and extent showing to the travelers that they are no part of the way for general travel or use, in going from place to place. Such paths mislead no one, nor do they invite any one to use them for refreshment or to make progress on their way. Every one, at a glance sees that they are no part of the way prepared for travel along the highway, but simply paths which one may use to leave the highway, if he so desires. Towns are not bound to provide such side-paths for the accommodation of persons living on the road, and no one can be misled as to their character or use.

The rulings of the judge were not in accordance with the views we have taken, and we think that a new trial should be granted.

But by virtue of Pub. Laws of 1870, c. 100, § 1, since there is a subsisting verdict for the defendants, and a majority of the justices qualified to sit in the case do not concur in granting a new trial, there must be, *Judgment on the verdict.*

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

THEOPHILUS CUSHING, administrator, *vs.* INHABITANTS OF FRANKFORT.

Although a town meeting, at which certain persons were elected selectmen of the town, was invalid by reason alone of a defect in the constables' return upon the warrant, they were, nevertheless, selectmen *de facto;* and, as such, had a right to call other town meetings during their official term.

The question of the validity of the election of selectmen, who issued a warrant for a town meeting during their official term, is not open to the town when it appears that they were officers *de facto*, and that the meeting was otherwise legal.

ON REPORT.

ASSUMPSIT to recover a bounty for one John M. Lawry, deceased.

It appeared by the record of a town-meeting duly called, and held Jan. 28, 1865, that the town, under an appropriate article in the warrant, voted that the selectmen be authorized to pay a bounty of three hundred dollars, in addition to any State or United States bounty, to each and every person who should be regularly mustered into the military or naval service of the United States, as a volunteer or as a substitute for an enrolled or drafted man, and counted on the quota of Frankfort, under the then late call of the president.

It also appeared from a certificate of the provost marshal of the 5th district, dated Feb. 1, 1865, that Lawry was duly enlisted and mustered into the military service of the United States, on the quota of Frankfort, as a substitute for T. H. Cushing, an enrolled man in Frankfort.

It also appeared that the plaintiff made a demand of payment upon the proper town officers of Frankfort, before the commencement of the action.

The defendants, against the plaintiff's objection, read constables' returns upon warrants for annual meetings of March, 1860, 1861, 1862, 1863, and 1864, all of which were defective, the last named reciting that true instead of attested copies were posted at the different places named. The meeting was otherwise regularly called.

And the only objection to the meeting of Jan. 28, 1865, when the bounty was voted, was, that the selectmen were elected at the annual meeting of March, 1864, and the return was defective as above.

The case was reported to the full court for a legal judgment.

N. H. Hubbard, for the plaintiff.

C. H. Pierce, for the defendants.

DICKERSON, J. The meeting at which the bounty sued for was voted, was legally notified, if the persons, who issued the warrant therefor, as selectmen, had authority to act as such.

Though the meeting at which they were elected was invalid by reason of a defect in the return upon the warrant, they were, nevertheless, selectmen *de facto*, and, as such, had a right to call the meeting in question. The question of the validity of the election of the selectmen, who issued the warrant for the town meeting, is not open to the town, where it appears that they were officers *de facto*, and that the meeting, at which the proceedings in question were had, was regularly notified, and, in other respects, legal. It would be dangerous to permit such inquiry, since there would be no limit to the extent to which it might be carried, nor to the consequences that might result from its allowance. *Williams* v. *School District*, 21 Pick. 80. *Brown* v. *Lunt*, 37 Maine, 423.

Judgment for the Plaintiff.

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

HENRY S. BRIDGES *vs.* WILLIAM C. SPRAGUE & PEMBROKE IRON CO., trustees, & WILLIAM MITCHELL, claimant.

A contract between the owner and master of a vessel, whereby the latter is to sail her at the halves, man and victual her, and the former to have half the earnings, constitutes the master owner *pro hac vice*, and creates no partnership between them.

Freight-money earned during the subsistence of such a contract belongs to the master alone; and it may be holden by a creditor of the master by a timely foreign attachment.

The *dicta* in *Williams* v. *Williams*, 23 Maine, 17, so far as they conflict herewith, overruled.

The owner, having by his contract substituted the master in the place of the former, cannot claim the freight as owner.

ON EXCEPTIONS.

DEBT on a judgment commenced by trustee process, dated Aug. 10, 1866, and served on the Pembroke Iron Company, named as trustees of the principal defendant, Aug. 11, 1866.

The trustees disclosed in substance, that on or about the 7th of August, 1866, the schooner Frances Arthemus delivered to the company a cargo of iron ore, upon which the freight amounted to five hundred and twenty-seven dollars and ninety-one cents; which sum of money was in their hands at the date of the service of the writ upon them; that on Aug. 24, and Sept. 8, 1866, they received notifications in writing, from William Mitchell, claiming the money; that after the service of the writ upon them, they paid to the principal defendant, Captain W. C. Sprague, two hundred and fifty dollars, who paid the crew and other disbursements of the vessel; that the bill of lading was signed by Captain Sprague; that the freight was payable to Captain Sprague's order as captain of the schooner Frances Arthemus.

It appeared from the deposition of the principal defendant, that he sailed the schooner at the halves, he to victual and man her, and William Mitchell, the owner, to have one-half her earnings; that he contracted for the bringing of the freight through a commission

merchant in New York; that it is customary for the master to collect the whole freight whenever he runs a vessel on shares, unless loaded and consigned to the agent of the owners; and that the Frances Arthemus was not so loaded and consigned.

The claimant made the proper allegations under the statute, and offered to prove that the funds in the hands of the trustees at the time of the service of the writ, were not those of the principal defendant, but belonged to the claimant; that they arose from the freight of a cargo of ore brought to the trustees in the schooner Frances Arthemus, August, 1866; that the schooner was the claimant's own property; and that the whole of the freight-money was his, and no part thereof belonged to the principal defendant.

The presiding judge ruled that the trustees were chargeable for one-half of the amount of the freight, and the claimant, William Mitchell, alleged exceptions.

George Walker, for William Mitchell.

B. Rogers, for the plaintiff.

BARROWS, J. The creditor of a shipmaster who was sailing a schooner on shares,—he to victual and man her, and the owner to have half her earnings,—after the freight-money had been earned and the cargo delivered, as appears by the disclosure of the trustee, summoned the consignee (who was to pay the freight), in a process of foreign attachment, seeking to hold the amount due for freight for the master's debt. After the service of the trustee writ, the owner of the schooner notified the trustee of his claim to the funds; the trustee paid the master one-half the freight-money, which he used to pay the crew and other disbursements for the vessel, and now the owner of the vessel appears and claims the remainder of the money.

At *nisi prius* the trustee was charged for half the amount of the freight-money, and the case is before us on exceptions to this ruling.

We think that neither the claimant nor the trustee can have any

just grounds to complain of this ruling. The plaintiff does not, because the half is sufficient to cover his debt and cost.

The owner of the schooner, who makes this claim, had made the master the owner for the voyage. It is well settled that such an arrangement between the owner and master, as existed in this case, according to the testimony of the master, makes the master owner, *pro hac vice*, and creates no partnership between them. *Thompson* v. *Snow*, 4 Greenl. 265, and cases there cited.

By such an arrangement, the owner is relieved from any personal liability upon the contracts of the master for supplies furnished to the vessel. *Winsor* v. *Cutts*, 7 Greenleaf, 261; *Houston* v. *Darling*, 16 Maine, 413. Or to the shipper of goods on board the vessel for any malfeasance in the performance of the contract for carrying them. *Sproul* v. *Donnell*, 26 Maine, 185. And he is also precluded from maintaining any action for freight earned by the vessel during the continuance of such an arrangement, and from interposing his claim as owner, to prevent the party liable for the freight-money from offsetting against it any claim which he may have against the master, who is held to be the only person entitled to maintain an action for the recovery of it. *Manter* v. *Holmes*, 10 Met. 402.

When the owner thus voluntarily divests himself of his ownership temporarily, he must be content to take his place among the other creditors of the master, to whom he has intrusted his property. To the master he must look, for the faithful performance of his contract; he cannot call upon the shipper or consignee for a share of the freight-money. That is payable to the master only, and, like any other credit of the master's, must be holden to any vigilant creditor who makes a timely foreign attachment.

The owner, by his contract, has substituted the master in his place for the time being, and cannot claim as owner.

In *Richardson* v. *Whiting*, 18 Pick. 530, the schooner was engaged in a general coasting business for the owners. Whiting, the master and principal defendant, had no interest in her except as master, and no lien for wages or disbursements, for all which he

had been fully reimbursed. He was not the owner for the voyage, and had no interest in the freight-money which had been earned, or any claim to it except as agent for the owners. Certain *dicta* in *Williams* v. *Williams*, 23 Maine, 17, seem opposed to the doctrine which we here affirm, but they were not necessary to the decision of that case; for there the freight-money had been collected, and the master had received his share, and the remainder of it had come into the defendant's hands with a knowledge that the plaintiff was equitably entitled to it as owner of the vessel, and he had promised to pay it to the plaintiff when received. The *dicta* implying that it could not be holden by a creditor of the master attaching it by trustee process before it had been collected, and the master's share severed by his own act, cannot be deemed an authority that will avail the claimant here. *Exceptions overruled.*

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

ALBERT MAYO and another *vs.* HENRY P. HUTCHINSON and another.

Under Pub. Laws of 1866, c. 52, a contract of suretyship is valid and binding on a married woman.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note of the following tenor.

$169. WINTERPORT, Sept. 19, 1868.

Sixty days from date, we jointly and severally promise to pay James H. Clark or order, one hundred and sixty-nine dollars with interest.

Witness, D. M. BELCHER. H. P. HUTCHINSON.
C. E. THAYER.

The note was indorsed in blank.

The case was submitted to the presiding judge, each party reserving the right to except to any rulings in matters of law.

The presiding judge found that the second signer of the note was a married woman at the time she signed the note, and that she was only a surety on the note; and thereupon ruled, as matter of law, that the action was maintainable under the statutes of this State, both against the principal and surety; to which ruling the defendants alleged exceptions.

N. H. Hubbard, for the plaintiffs.

C. H. Pierce, for the defendants.

APPLETON, C. J. The legislature of this State have been gradually enlarging the rights and extending the liabilities of married women. By an act approved Feb. 23, 1866, c. 52, "The contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole," &c. The wisdom or expediency of this act is a matter solely for the legislature. Its language is most general, and there can be no reasonable doubt as to its meaning. A contract of suretyship is a lawful contract, and for a lawful purpose. It is valid and binding on a married woman. The married defendant may have been indiscreet in entering into it, but that is not the fault of the plaintiff. Almost all who sign as surety have occasion to remember the proverb of Solomon: "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure." But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail.

Exceptions overruled.
Judgment for the plaintiff.

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

ISAAC HACKER *vs.* RICHARD EVERETT.

Under R. S., c. 81, § 114, the maker of a promissory note given in this State, who has always resided, and who still resides with his family in the Province of New Brunswick, but who has, since the note became due, frequently, but temporarily, and with the knowledge of the payee, been in the payee's place of residence within this State, with attachable property, and paid him money several times, cannot avail himself of the statute of limitations in an action on the note by the payee.

ON REPORT.

ASSUMPSIT on a note of the following tenor.

"$169.83. FORT FAIRFIELD, June 12, 1857.

For value received we promise to pay Isaac Hacker or order, one hundred and sixty-nine dollars and $\frac{83}{100}$ and interest on demand. (Signed) WILLIAM EVERETT.
RICHARD EVERETT."

On the back of the note was an indorsement of one hundred and six dollars and eighty-nine cents, dated Dec. 19, 1860.

The writ was dated Dec. 30, 1867. Plea, general issue and the statute of limitations. No service having been made on William Everett, and no property of his having been attached, and he never having been an inhabitant of this State, the plaintiff discontinued as to him.

The plaintiff, after having read the note to the jury, testified that the indorsement on the note was made by him at its date, on settlement of accounts, and was *bona fide* and correct, and that no part of the balance of the note had been paid.

The plaintiff, to avoid the statute of limitations, claimed that the defendant, Richard Everett, had never been an inhabitant of this State, and had never come into the State so that the statute would run in his favor. And it was admitted that the residence of said Everett had always been, and that it still is, with his family in New Brunswick.

The defendant offered to prove that his residence in the Province of New Brunswick was within a mile and a half of the boundary line between the State of Maine and the Province, and in a place adjoining the town of Fort Fairfield, in the county of Aroostook; that since giving the note, and since the indorsement on it, the defendant has constantly, week after week, and sometimes day after day, been within the State and town of Fort Fairfield, remaining sometimes three weeks at a time in Fort Fairfield, where the plaintiff has resided all the time, and near to the plaintiff's place of business and residence; that he has paid the plaintiff money within the time mentioned, at four different times, and negotiated other business with him at different times, at Fort Fairfield; that he frequently went for his milling to the village of Fort Fairfield, near the plaintiff's residence; that he has traveled by the plaintiff's store and house with a team, at least one hundred times, when engaged in hauling lumber, within the same time.

The defendant offered to prove also, that the plaintiff knew the defendant was within the State, as before stated, at various times; and that the defendant frequently had attachable property with him at such times, which the plaintiff must have known.

Thereupon the case was withdrawn from the jury, and reported to the full court. If the court should be of the opinion, that the facts which the defendant offered to prove would avail him to sustain the defense under the statute of limitations, the case should stand for trial, otherwise the defendant should be defaulted.

C. M. Herrin, for the plaintiff, cited, R. S., c. 114, § 81; R. S. of 1841, c. 146, § 28; *Drew* v. *Drew*, 37 Maine, 389; *Bucknam* v. *Thompson*, 38 Maine, 171; *Crehore* v. *Mason*, 23 Maine, 413; *Brown* v. *Nourse*, 55 Maine, 230; *Brigham* v. *Bigelow*, 12 Met. 270; *Putnam* v. *Dike*, 13 Gray, 535; Mass. R. S., c. 120, § 9; *Seymour* v. *Deming*, 9 Cush. 527; *Milton* v. *Babson*, 6 Allen, 322; *Goss* v. *Bean*, 5 Gray, 395; Same in New York on a similar statute; *Ford* v. *Babcock*, 2 Sandf. 518; *Cole* v. *Jessup*, 6 Selden, 96.

Madigan & Donworth, for the defendant.

The statute of limitations was intended to be a statute of repose. It was also enacted with a view to punish the creditor for his negligence, which becomes lost in permitting a creditor to maintain a suit ten years after his right of action accrued, with the debtor "constantly" in his vicinity, and within the jurisdiction of the court, with property.

If the creditor may deduct the aggregate of times during which the debtor was absent, by what rules shall it be done? Shall it be computed by hours, days, or months? The intention was simply to give the creditor an opportunity of bringing his action.

When once the statute has begun to run, it does not stop on account of any subsequent disability. 1 Bouviers's Just., 338. *Fowler* v. *Hunt*, 10 Johns. 464. *Byrne* v. *Crowningshield*, 1 Pick. 263. *Crosby* v. *Wyatt*, 10 Shepl. 156. Angell on Lim. 223.

If the intention of the law had been to collect the scattered intervals of time and deduct them from the aggregate, the statute would have read "the times of his absence," or "the time of his absences."

When a debtor returns to the State, the time of his absence is at an end, and the statute begins to run, and the creditor has an opportunity to avail himself of his legal rights.

If the statute does not begin to run at the time of the debtor's return after his first absence, when and at which return does it?

The statute does not connect the idea of his taking a residence in the State with his return, even by implication. The absence is the disability, and the time of return is the time from which the limitation commences. 29 Maine, 219. *Crosby* v. *Wyatt*, 23 Maine, 164. *Little* v. *Blunt*, 13 Pick. 359.

The creditor was in the State when the cause of action accrued, the note being payable on demand and given in the State. The debtor could have sued it then. The right of action then and there accrued. The creditor has had numberless opportunities to enforce his claim, and having neglected them for ten years shall the debtor now be compelled to produce vouchers of its satisfaction?

"Laws limiting suits, are founded in the noblest policy; they are

statutes of repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs from the ambiguity and obscurity of transactions. They presume that claims are extinguished, because they are not litigated within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or laches of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times which are unexplained, and have now become inexplicable. It has been said by Voet, with singular felicity, that "controversies are limited, lest they should be immortal, while men are mortal." Story's Confl. of Laws. § 576.

APPLETON, C. J. By R. S. of 1857, 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 within the State; and if any person is absent from and resides out of the State after a cause of action has accrued against him, the time of his absence shall not be taken as a part of the time limited for the commencement of the action."

It is not pretended that the defendant has resided within the State for a period of six years since the debt in suit became due. The defendant was absent from and resided without the State when the cause of action accrued, and has not since resided within it, though he may have occasionally been within its limits. He cannot avail himself of the statute bar. *Brown* v. *Nourse*, 55 Maine, 230. The statute of Massachusetts is identical with that of this State. In *Milton* v. *Babson*, 6 Allen, 322, it was held, that one who has never lived in that State, but who has been there temporarily and occasionally, though less than six years in all since the cause of action accrued, cannot avail himself of the statute of limitations in this State, of an action upon a note given in that State.

Judgment for plaintiff.

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

EBEN N. PERRY *vs.* ABIEL SOMERBY and another.

The interest which the real owner has in a steamer, in his possession, may be attached, although another person has the record title as collateral security for a debt.

The delivery, by the attaching officer of property attached by him, to receiptors, and taking from them a written agreement, reciting the attachment, promising to return the property to the officer holding the execution, within thirty days after judgment, and limiting their liability to a specific sum, does not dissolve the attachment.

Section fourteen, of the United States bankrupt law, preserves all attachments made more than four months before the commencement of the debtor's proceedings in bankruptcy.

An attachment thus made, may be enforced by an execution issued by a special judgment, rendered by the court in which the action was entered and prosecuted.

ON EXCEPTIONS to the rulings of *Goddard*, J., of the superior court, for the county of Cumberland.

ASSUMPSIT on a receipt of the following tenor.

"Received of Eben N. Perry, deputy-sheriff, the steamer Lady Lang, the property of Charles Spear, and which was attached by him on a writ in favor of Lyman, Son & Tobey, against said Spear, and which we promise to return to said Perry, or the officer holding the execution, within thirty days after judgment, without demand. Liability on this receipt limited to fifteen hundred dollars.

Dec. 14, '66. J. H. WILLIAMS,
ABIEL SOMERBY.

U. S. I. R.
Five Cents.

Approved: W. L. PUTNAM."

Dec. 14, '66.

To show the attachment of the steamer Lady Lang, mentioned in the receipt, the plaintiff put in the writ in the suit of *Lyman* v. *Spear*, dated Dec. 14, 1866, returnable to the supreme judicial court for this county, on the third Tuesday of January, 1867,

together with the return thereon, reciting an attachment of "the Lady Lang as the property of the within-named defendant."

The defendants offered in evidence, the discharge of Spear in bankruptcy, dated Sept. 19, 1868, on his petition, filed Dec. 14, 1867.

It was admitted that the record title of the steamer was in N. L. McCready, at the time of the attachment, but that the equitable title was then in Spear, McCready then claiming and holding the title as collateral security, and Spear having the possession.

It was also admitted that the claim sued in the action of *Lyman* v. *Spear*, was provable in bankruptcy against Spear.

The plaintiff put in an order in bankruptcy, issued by the United States district court for the district of Massachusetts, upon the application of Lyman *et als.*, praying for leave to prosecute to final judgment and execution, a suit in their behalf against Charles Spear, a bankrupt, on claims provable in bankruptcy against him, for the purpose of preserving certain attachments. The order, after setting out the petition, was (omitting formal parts) of the following tenor.

"Now it is ordered that said petitioners have leave to prosecute said suit to judgment and execution thereon, in such manner as said supreme judicial court may direct, for the purpose of preserving any valid attachment they may be found to have in any estate of said bankrupt, if made more than four months before the commencement of the proceedings in bankruptcy of said bankrupt, and for no other purpose; and no judgment or execution shall run against, or be levied upon the person of said bankrupt, or any other property except as aforesaid."

Judgment was recovered in the action of *Lyman* v. *Spear*, and made up in accordance with the order in bankruptcy, and execution issued to be "levied only on the goods, chattels, and estate of said defendant, attached upon plaintiff's writ in this action, the same not having been attached within four months next preceding the commencement of proceedings in bankruptcy by said defendant; and not otherwise against either said defendant or his property."

The return on the execution showed a demand by the officer to whom the receipt was given, upon the persons signing it, and a refusal by them to deliver the Lady Lang.

It nowhere appeared that either McCready, or any assignee in bankruptcy ever claimed or received possession of the steamer from the receipters.

The justice rendered judgment for the plaintiff for nine hundred and forty-three dollars and twenty-one cents; and the defendants alleged exceptions.

Howard & Cleaves, for the defendants.

1. The attachment of the steamer created no lien upon it, either at common law or by the statute, in this State.

2. But if any lien was created by such attachment, it was dissolved by the officer's taking the receipt, approved by the counsel of the creditors in the suit.

3. The supposed liability of the receipters was conditional, as stated in the receipt,—conditioned that the creditors (plaintiffs) should obtain judgment legally against Spear. But this was not done.

For, after the discharge of Spear, Lyman *et als.* could not prosecute their suit against him, for their claim, which was provable in bankruptcy, unless by special authority from the United States district court in Massachusetts, or by some special authority.

4. The discharge in bankruptcy was a complete bar to the suit of *Lyman* v. *Spear*, on which the steamer was attached. U. S. Bankrupt Law of 1867, §§ 21 and 28. *Bowley* v. *Bowley*, 41 Maine, 542.

The defendants, though not a party to that suit, may avail themselves of the discharge of Spear,—in bar of this suit.

5. If the steamer was the property of Spear when attached in the suit by Lyman *et als.*, it passed to his assignee when he was declared a bankrupt,—by operation of the bankrupt law. U. S. Bankrupt Law, 1867, § 14.

And so both Spear and the receipters were divested of all right to it, *vi majore*, and the receipters were discharged. *Payson* v.

Payson, 1 Mass. 290. *Flagg* v. *Taylor*, 6 Mass. 36. *Shaw* v. *Laughton*, 20 Maine, 266. *Grant* v. *Lyman*, 4 Met. 470. *Peck* v. *Jenness*, 7 Howard, 612. *Atlas Bank* v. *Nahant*, 23 Pick. 488. *Ex-parte John S. Foster*, 2 Story, 157.

If the steamer did not belong to Spear, when she was attached, the receipters may show that fact, as a complete defense. *Fisher* v. *Bartlett*, 8 Maine, 122. *Sawyer* v. *Mason*, 19 Maine, 49. *Lathrop* v. *Cook*, 14 Maine, 414.

The steamer was, in fact, the property of McCready, whose claim upon it was in the nature of a mortgage.

The attachment was not in conformity to the provisions of law. R. S., c. 81, §§ 64, 65. Sts. 1859, c. 115, § 2; 1860, c. 168.

The defendants were, therefore, not holden on their receipt, because the property belonged to McCready, who held it as security; and because the interest which Spear might have had in it was not attached according to the provisions of the statute above cited.

6. If there was a breach of the contract of the defendants, still no action lies upon it until the plaintiff has sustained some damage by the breach. *Hussey* v. *Collins*, 30 Maine, 190.

The liability of the defendants is limited, in any event, to the actual damage, not to exceed fifteen hundred dollars.

W. L. Putnam, for the plaintiff, contended, *inter alia*, that, like all other bailees, servants or other persons receiving the possession of property with an obligation to return it, they cannot defend themselves by setting up title in a third party, unless they have been required to yield to it. *Sprague* v. *Wheatland*, 5 Met. 416. *Fisher* v. *Bartlett*, 8 Maine, 124. *Penobscot Boom Corporation* v. *Wilkins*, 27 Maine, 345.

Neither if this judgment were irregular, can defendants avail themselves of that fact. *Drew* v. *Livermore*, 40 Maine, 266.

TAPLEY, J. On the 14th day of December, 1866, Sylvanus R. Lyman commenced an action at law against Charles Spear, in this court, and the plaintiff, then a deputy of the sheriff of the county of Cumberland, having the writ for service, attached the

steamer Lady Lang, as the property of said Spear. On the same day, the defendants executed and delivered to the plaintiff the receipt in suit.

The action, *Lyman* v. *Spear*, was duly entered in this court, and continued from term to term, until the 13th day of October, 1868, when judgment was recovered against said Spear, "the same to be levied only of the goods, chattels, and estate of the said defendant, attached upon the plaintiff's writ in said action, the same not having been attached within four months next preceding the commencement of proceedings in bankruptcy by said defendant, and not otherwise against either the said defendant or his property, for the sum of eight hundred and eighty-eight dollars and forty-three cents, debt or damage, and forty-two dollars and forty-seven cents costs of suit."

Upon this judgment execution was duly issued October 14, 1868, and on the 22d of the same month and year, demand was duly made by the plaintiff for the property described in the receipt, and the defendants thereupon and thereafter refused and neglected to return the same in accordance with the terms of their agreement. For the breach of this agreement this action is brought and commenced on the 18th day of November, 1868.

Several objections have been urged by the counsel for the defense against the maintaining of this action.

1. It is said the attachment of the steamer created no lien upon it at common law, or by statute in this State.

It appears by the report, that the record title of the steamer was in one McCready, but that the equitable title was in Spear, and that she was in Spear's possession. The defendants in this case declare, in their receipt, that she is the property of Spear. We have no doubt Spear had an attachable interest in her, and that the attachment created a lien upon her.

2. It is said, if this be so, it was dissolved by the officers taking the receipt, approved by the counsel of the creditors in the suit.

We do not understand that the taking of the receipt discharged the lien upon the steamer. There is nothing in the paper showing

any such design. Whether in an action to recover the possession from a third party who had purchased, *bona fide*, with no knowledge of the attachment, it would have been effectual to obtain it, is not now a question. These defendants had knowledge of it and recognized it, and because of it they became the keepers, and agreed to return it within thirty days after judgment, that the lien might be perfected by sale; and the possession thus delivered them is a sufficient consideration to support their agreement in the receipt.

3. It is said the liability of the receipters was conditional, that the creditors should obtain judgment against Spear. This is apparent from the terms of the receipt. They were not required by its terms to return the steamer until after judgment, and their liability was limited to the sum of fifteen hundred dollars.

Judgment was obtained October 13, 1868, and thus this condition was fulfilled.

4. It is said further, however, that Spear had been adjudged a bankrupt, and duly obtained his discharge in bankruptcy, and that this discharge was a complete bar to the suit of Lyman and others, against him.

We do not understand that such a discharge was interposed in that suit, or, if interposed, that it would have furnished a bar to the further maintenance of the suit. The attachment of the steamer, as we before remarked, created a lien upon her, and having been made more than four months before the proceedings in bankruptcy were commenced, it was not affected by those proceedings, but was, at the time when the judgment was rendered in this case, a subsisting lien, and one that could be perfected by the sale of the property attached upon the execution issued in this case.

In the case of *Leighton* v. *Kelsey*, *ante*, 85, this matter was considered and settled; a further discussion of it in this case is unnecessary.

A valid attachment having been made and preserved until a legal judgment was rendered, it became the duty of the defendants to return the steamer in accordance with their agreement, and for

such damages as flowed from the breach of their agreement, they must be held responsible.

The damages awarded in the court below seem not to have been the subject of exceptions, nor indeed do we perceive the assessment to be erroneous. *Exceptions overruled.*

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

THOMAS GRAY and another, in equity, *vs.* THOMAS S. CHASE and wife.

By virtue of R. S., c. 61, § 1, property conveyed to a married woman, but paid for by her husband, may be taken as the property of her husband, to pay his debts contracted before such purchase.

The fact that the husband has other property which may be reached by another process, does not oblige a creditor of the husband to pursue that course, and take that property before he can be allowed to take this.

BILL IN EQUITY heard on demurrer.

The bill alleges substantially that Thomas S. Chase, one of the defendants, in January, 1844, contracted with one King for the purchase of lot eighteen, in first range in Concord, in this county, for two hundred and fifty dollars, to be paid according to the terms of an agreement then made, and in pursuance of such agreement, Chase gave King the note of one Lowell, for two hundred and fifty dollars, taking from King a bond running to Lowell, conditioned to convey the lot in payment of the note; that the bond was taken for Chase's sole benefit, and subsequently delivered to Chase for his sole benefit, he agreeing to pay Lowell's note to King; that Chase did pay, from time to time, certain sums on the note, until one Getchell purchased King's interest in this lot with other lands, subject to Chase's right to a conveyance of lot eighteen, on paying the note;

that after Getchell's purchase, Chase paid to Getchell, from time to time, certain sums on the note, until the amount remaining due was but sixty dollars, when Chase procured one Parlen instead of Lowell to become responsible to Getchell for the balance due on the note, after which Chase either paid himself, or furnished the money to Parlen to pay the sixty dollars, so that Getchell was wholly paid on Oct. 21, 1862, when by the request and direction of Chase, Getchell conveyed lot eighteen to Dorcas Chase, the other defendant, and wife of Thomas S. Chase.

That Dorcas never paid anything toward the purchase of the land, and never had anything to pay with, but that the conveyance was procured to be made to her by the husband, for the purpose of delaying and defrauding the creditors, more particularly the complainants, and it was received by her with a full knowledge of the object and design of her husband, and with the design, aim, and purpose of aiding him in his design.

That at the time of the conveyance to her, which was by deed of quitclaim, Thomas S. Chase was indebted to sundry individuals in large sums, but more particularly to the complainants.

That the complainants commenced an action against Thomas S. Chase for the sum due them, returnable at the December term, 1861, of this court, and caused all his interest in any real estate in this county to be attached on the writ; that such proceedings were had in that suit, that, at the September term, 1862, they obtained a judgment therein against him, for three hundred and ninety-four dollars and seventy-four cents debt, and eighteen dollars and ninety-one cents, costs; that execution issued on the judgment, on the 14th of October, 1862, which they caused to be levied on lot eighteen, on the 3d of November, 1862, within thirty days of the rendition of judgment, and after full payment of the sixty dollars to Getchell, and the conveyance by him to Dorcas; that the lot was set off to these complainants at the sum of three hundred and seventy-six dollars and eighty-six cents, in part satisfaction of the execution; that seisin was duly given to the complainants under the levy, and the execution and levy duly and seasonably recorded.

That Thomas S. Chase has occupied the premises as his own, from the time of the original contract with King, and still occupies and improves the same to his own exclusive use and benefit, and prevents the complainants from entering and occupying the same.

The prayer was for answer; that the respondents might be decreed to make such a conveyance of lot eighteen as may be deemed necessary to perfect the complainants' title thereto; and for general relief.

The respondents demurred for want of equity.

D. D. Stewart, in support of the demurrer.

The legal title never having been in Thomas S. Chase, the levy was a mere nullity. *Haskell* v. *Hilton*, 30 Maine, 420. *Hartshorn* v. *Eames*, 31 Maine, 93.

No allegation that Thomas S. Chase had no property except this equitable interest; or that the execution had been returned by an officer unsatisfied for want of property; or that he could find no property except the equitable interest in lot eighteen.

For aught that appears, he may own an abundance of both real and personal property.

There is neither allegation nor pretence that the complainants have exhausted or even tried any of their remedies at law.

If the complainants had received judgment against the wealthiest land-owner in Maine, levied their execution on a tract, the legal title of which was never in the judgment debtor, and then asked the aid of the equity power of this court to enable them to collect their debt by proof that such judgment debtor had paid for the tract levied on, would the court act before an officer's return of *nulla bona?*

There is no presumption of law that the wealthiest man in the State has more property than Chase. The burden is on the party seeking the aid of the court sitting in equity, to show affirmatively that he has exhausted all his remedies at law. Such proof is the very foundation of the jurisdiction of the court, and without it, no jurisdiction exists. The only mode of proof is the return of an officer, that he has diligently searched for property of the judgment

debtor, and can find none, or none except that levied on. *Hartshorn* v. *Eames*, 31 Maine, 93. *Hadden* v. *Davis*, 20 Johns. 554. *Caswell* v. *Caswell*, 28 Maine, 232.

1. The legal title never having been in Thomas S. Chase, and the levy therefore void, the only mode by which the complainants could seek the interposition of this court was by placing their execution in an officer's hands, and first exhausting their remedies at law. And this could be shown only by his return of *nulla bona*. All which must be alleged to give jurisdiction. *Corey* v. *Greene*, 51 Maine, 115. *Hartshorn* v. *Eames*, 31 Maine, 93. *Webster* v. *Clark*, 25 Maine, 313. *Webster* v. *Withey*, 25 Maine, 326. See, also, as specially in point, *Griffin* v. *Nitcher*, 57 Maine, 270, and the cases there cited.

The want of the allegation that the execution has been placed in the hands of an officer, and that he had made a return of *nulla bona* upon it, is considered fatal.

2. If the allegation that the wife never paid anything toward the purchase of the land, but that the conveyance to her was procured by her husband for the purpose of delaying and defrauding creditors, more particularly the complainants; and that it was received by her with a full knowledge of the object and design of the husband, and with the design, aim, and purpose of aiding him in his design be true, then the case would fall directly within R. S., c. 113, § 47, and the complainants might maintain an action under this statute against Mrs. Chase, for aiding and assisting her husband in a "fraudulent concealment" of his property.

Such an action would afford an ample remedy at law; and a bill in equity under such circumstances cannot be maintained. *Fletcher* v. *Holmes*, 40 Maine, 364. *Mill River Loan Fund Association* v. *Claflin*, 9 Allen, 101.

3. The allegations are not sufficient to show that the alleged levy was valid in form. The proceedings of the officer are not set out; nor are they alleged in general terms, or in any terms, to have been legal in form. It does not appear that the execution was in legal form or directed to any officer. Nor is enough set out to show a valid judgment. *Burnham* v. *Howard*, 31 Maine, 569.

J. H. Webster, for the complainants, cited R. S., c. 61, § 1; *Dockray* v. *Mason*, 48 Maine, 178; *Low* v. *Marco*, 53 Maine, 45; *Traip* v. *Gould*, 15 Maine, 82; *Webster* v. *Clark*, 25 Maine, 313; *Hartshorn* v. *Eames*, 31 Maine, 93; *Reed* v. *Cross*, 14 Maine, 261; *Clouston* v. *Shearer*, 99 Mass. 209.

TAPLEY, J. The demurrer admits that the husband purchased and paid for the land levied upon, and procured the conveyance of it to be made to his wife. In such cases the property may be taken for the existing debts of the husband, as if it was his own property. R. S., c. 61, § 1.

Under the decisions of this court, construing this statute, it has been held, that when the husband never had the legal title, it must be transferred to the creditor, by means of a process in equity.

This property being subject to the debts of the husband, may be taken by this process, and if the husband has any other property than this, the plaintiff may take that or this at his own election. The fact that he has other property, which may be reached by another process of the court, does not impose upon him the legal duty to pursue that course and take that property, in preference to this. The defendant cannot, by means of such conveyances, elect which property shall be first applied in the payment of his honest debts.

The plaintiff in this case has done all he could do to obtain a title to this land, in part satisfaction of his claim. He can get a title to it in no other way than that now pursued. The levy shows he has exhausted all other means to obtain it. The statute law gives him the right to take it. It is the same authority which confers the right upon him to take other property of the husband by levy. It is, strictly speaking, pursuing a remedy at law, finally perfected and executed through the instrumentality of a decree, obtained by an application to the court, sitting as a court of equity

The legislature say you may take this land, as if it was the husband's. They do not say you may take it if you can find nothing else, but the right to take it for such debts is as unlimited in this

particular, as the right to take any other property of the husband by levy.

The legislature having given the right, without specifically pointing out the mode, the court, after certain preliminary proceedings, provide the mode and accomplish the end, by a decree requiring the party holding the legal title to make a conveyance.

Demurrer overruled.

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

NAHUM T. NEALLEY *vs.* ALEXANDER SEGAR.

By virtue of R. S., c. 66, §§ 17, 13, 9, and 10, actions pending on non-preferred claims, when a representation of insolvency is made, may (1) be discontinued without costs; or (2) continued, tried, and judgment rendered; which judgment is to be returned to the probate court as a contingent claim; and a sum sufficient to pay the percentage paid to others, to be left in the hands of the administrator, to be by him paid, if the claim becomes absolute within four years from the grant of administration, if it can be done without disturbing prior dividends, and not otherwise.

Where the commissioners of insolvency gave notice of their meetings for the presentation of claims, and the plaintiff left his writ with them, but never proved his claim set out in the writ, *Held*, that the claim was thereby presented; and if it was not allowed, the claimant's remedy thereafter was by appeal and an action for money had and received under § 13.

ON REPORT.

ASSUMPSIT on a contract to make two voyages instead of one, in carrying timber for a vessel's frame, from Frankfort Marsh river to Stockton, and on an account annexed.

The writ was dated April 14, 1866, and entered at the following May term, and continued until the January term, 1869, when it came on for trial.

After entry of the action, the defendant died; letters of administration taken out; estate rendered insolvent, commissioners of insolvency appointed, who gave the notice provided in R. S., c. 66,

§ 4. The plaintiff notified the commissioners of his claim against the estate, by leaving with them the writ in this action, but did not support the claim therein set out by affidavit or other proof. The commissioners subsequently made their final report to the probate court, making mention of, but disallowing the plaintiff's claim. After the administrator had settled his final account, and a decree of distribution made, to wit, at the October term, 1868, an order from this court was issued, to cite the administrator to appear at the January term, 1869.

It was admitted that the administrator had personal knowledge of the pendency of the suit before being cited to answer to this suit.

After the testimony was all in, the case was withdrawn from the jury, and reported to the full court, who were to render such judgment as the legal rights of the parties required.

The view taken by the court renders a report of the testimony unnecessary.

T. W. Vose, for the plaintiff.

Willard P. Harriman, for the defendant.

Barrows, J. Two courses were open to the plaintiff under § 17, c. 66, R. S. (1) To discontinue without costs. (2) To continue, try, and have judgment rendered with the effect, and satisfied in the manner provided in cases of appeal, which contemplates a return made to the probate office, as of a contingent claim (§ 13), and a sum to be left in the hands of the administrator, sufficient to pay the percentage paid to others, which is to be paid, provided the claim becomes absolute within four years from the grant of administration, if it can be done without disturbing prior dividends, and not otherwise. (§§ 9 and 10.)

The plaintiff did neither of these things, but waited until after a final account was settled, and distribution was made, before citing in the administrator, thus cutting off the administrator from all opportunity of having the costs allowed against the estate, under § 16,

and making it impossible for himself to have his judgment (if he obtained one) satisfied "without disturbing prior dividends."

Moreover, we think the case shows a presentation to the commissioners. They gave notice of their meetings for the presentation of claims. He left his writ with them. It was not their fault if he did not prove his claim. They did not allow it. His remedy thereafter was by appeal and new action under the statute. *Bates* v. *Ward*, 49 Maine, 87. If he did not design to make proof of it before them, he should have seen to it that it was returned as a contingent claim, and proceeded with his suit, instead of allowing it to slumber until it became impossible to have a judgment (if he obtained one) satisfied in the manner contemplated by the statute. He may attribute his loss to his own laches, if he has lost anything. A review of the testimony leaves it very doubtful whether he has lost anything by his delay. He has got the sum for which he agreed to carry the timber. He yielded to the defendant's doubts whether he could carry it safely in any other way than by making two loads of it. Why should he have more than the contract price for doing that which he undertook to do?

Judgment for the defendant.

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

DANIEL C. RUMRILL *vs.* FRANCIS ADAMS, executor.

Although a requested instruction may be sound, as an abstract proposition, still if there was no testimony from which the jury could legitimately have inferred facts sufficient to base the instruction upon, a refusal to give it could not be ground for exceptions.

In the trial of an action for labor and services rendered to the defendant's testator, the value of an unconditional devise to the plaintiff by the testator, is immaterial, in the absence of any evidence that it was made or received in payment of the services claimed.

Rumrill *v.* Adams.

When services, valuable to another, are rendered with his consent, he is liable to pay a reasonable compensation therefor; and if he would avoid payment on the ground that they were a gratuity, or that the person performing them did so only with the expectation, that he should receive a portion of the other's property by will, the burden of proof is upon him who affirms such facts.

On exceptions.

Assumpsit for services alleged to have been rendered the defendant's testator, John Given, during the last six years of the testator's life, he having died Jan. 29, 1869.

The plaintiff, being admitted as a witness, without objection, testified, *inter alia*, that he lived with his uncle Given (testator) on the place; he was married April, 1860, and went to New Hampshire in 1864, where he remained one year; that Given said he did not want him to leave, and that witness would do better to stay with him; that he had some property, and witness would do better to stop; that Given made no offer then, but promised him some land before that; that Given wanted witness to come back, sent for him, said he could not get along without him, and that witness would do better to stay with Given than remain in New Hampshire, but did not say why witness would fare better; that about nine years ago Given promised witness all the land witness now has, and said by and by they would see about some more. The five acres he promised to give when witness returned from New Hampshire. He did not give that.

On cross-examination, he testified that he worked on Given's farm most of the time the year he went to New Hampshire; that witness had some of the produce from the farm, cannot tell how much; that he never carried on the place on shares; worked on the place the last year Given lived; had some corn and potatoes to use along; worked all the season; kept no account of what he had when he worked away from home; neither kept any account.

The defendant offered evidence of the value of the property described in the will, as devised and bequeathed to the plaintiff. But the presiding judge excluded all evidence of the value of the property.

The following extract of John Given's will was put into the case:

"2. I give and devise to Daniel C. Rumrill, the following described real estate, in Topsham aforesaid, viz., a lot of land containing about twelve acres, which I purchased of Collomore Mallett, lying on the westerly side of Cathance river, and between land of John Graves and land of Alfred C. Graves. Also, my interest in the field upon which the house of the said Daniel C. Rumrill is situated, being one undivided half of the same, owned in common with my brother, Samuel Given, including my barn on said field, to have and to hold to the said Rumrill, his heirs and assigns forever.

"I also give and bequeath to said Daniel C. Rumrill, my horse and wagon, and harness and sleigh."

The presiding judge charged the jury as follows:

[In this case the plaintiff commences his action to recover a sum of money which he says is due him for six years' services, rendered one John Given, who has since deceased. The services were rendered the last six years before his death. And the simple question is, did he render such, or any services to the testator, under such circumstances as to entitle him to pay, and if so, how much? That there were some services rendered does not seem to be denied. The amount of services, however, seems to be disputed. The plaintiff claims in his writ for but six years, and, of course, can recover for no more. In order to ascertain whether he is or is not entitled to recover, it became important, in the first place, to ascertain whether he did render the services, and also the kind of services. For he would be entitled to recover a reasonable compensation, considering the circumstances. He has proved to you that he has rendered some services, how much, of course, is for you to decide. Having found he has rendered more or less services, he will be entitled to recover a reasonable compensation for these services, unless the proof satisfies you from some reason or other, that he is not entitled to recover.

The ordinary rule of law is, when services have been rendered to another, which are valuable to him by his consent, or with his

knowledge, and without any objection on his part, he is liable for such services rendered. For the law implies a promise on the part of the one receiving services, to pay for them. So that if this case rested here there would be no question about his right to recover. But the defendant says, that these services were rendered without any expectation of pay; that he rendered them with the expectation of receiving a portion of the testator's property by his will. The burden of proof is upon the defendant, to satisfy you of this fact. If they were rendered as a gratuity, and so understood by the parties, it would be too late for him to turn round and ask pay for them. That there was a legacy to this plaintiff, is not denied, and the will has been introduced before you. This will is in writing, and, therefore, it becomes my duty to give it a construction as matter of law. We find in this will an absolute, unconditional legacy to the plaintiff, whether of more or less value is not material in this case. The legal construction is, that it was a gift, nothing more and nothing less.

If it had been intended as a payment, then there should have been a condition attached to the legacy, providing that the legatee should receive it in payment, or full discharge of all claims against the estate. Then if the plaintiff had received it, he could not recover in his suit. But there is no such condition attached, it is a bare, naked legacy, and is, therefore, a naked gift. The result is, there is no proof in the will that this was to be payment or compensation in any way for services rendered. If one person renders service to another, and that other voluntarily makes him a present, he may have various reasons for doing it, but the person rendering the service is just as much entitled to receive his compensation as though he had not received the gift. Whether the legacy is of little or great value is of no consequence. Then it is said that these services were rendered as a gratuity, with the expectation of receiving, in some way, a legacy for them. If the services were rendered as a gratuity, then he would not be entitled to recover; for no person, after having made a present to another, can afterwards, in a court of law, recover compensation for it. Therefore, if these

services were rendered as a gratuity, plaintiff, not expecting or intending to claim pay for them, although he may have been expecting favors in return, he cannot recover. It therefore becomes important under this state of the case for you to examine the testimony and see how far it will sustain such a view of the case. The burden of proof is upon the defendant to satisfy you upon this point. It is possible you may view that will as of some weight on this ground; that if it was to be a compensation for his services, or a gratuity rendered in consideration of a gratuity having been received from this plaintiff, whether the testator would not have been likely to mention it in the will. He has left it a mere naked gift.

The real point in the case, as I understand it, is this: has the defendant satisfied you that the plaintiff performed these services, be they more or less, without any expectation of pay, other than what he was to receive by will as a gift, or performed them as a gratuity. If he did so perform them, he is not entitled to recover. If he did not so perform them, he is entitled to recover.

The presiding judge also instructed the jury that if the plaintiff is entitled to recover, they could not take into account anything received by plaintiff from defendant's testator, unless they found it was received in payment, as no account had been filed in set-off.]

At the close of the charge, the defendant requested the presiding judge to give the jury the following instructions:

1. "If the plaintiff performed services for the defendant's testator with a view to a legacy, without making any charge for such services, he could not recover, whether he received by the will property of as great value as the services, or not.

2. "If the plaintiff rendered services for the testator, with an understanding that compensation was to be made by will, and the plaintiff received by the will property of as great or greater value than the services rendered, it will be presumed to be in satisfaction of such services.

3. "If services were rendered for the testator by the plaintiff, without charge at the time, but with an expectation that he was to receive a gift of real or personal estate, either during the lifetime

of the testator, or by testamentary provisions at his decease, and he received by the will property of as great value as the services rendered, he can recover nothing further."

The presiding judge declined to give the foregoing requested instructions, saying he had already given them in substance.

The verdict was for the plaintiff; and the defendant alleged exceptions to the exclusion of testimony, refusal to give the requested instructions, and to all the instructions contained in the charge embraced within the brackets.

F. Adams, pro se.

1. From the testimony of the plaintiff, the jury might properly have found that the services were rendered neither as a gratuity or gift, nor with any expectation of pay other than such as he expected by the will; but that it was understood between the parties that the plaintiff was to receive as much by the will as his services were worth.

Such an understanding would amount to a contract, and the right of the plaintiff to recover would depend upon whether or not it was fulfilled by the testator.

If the testator failed to leave sufficient property to the plaintiff by the will, he could recover the value of his services; otherwise, not. Chit. on Cont. (10th Am. ed.) 591, note (z), and cases cited there, particularly *Jacobson* v. *Ex'r of Le Grange; Patterson* v. *Patterson*, 3 Johns, 199; *Eaton* v. *Benton*, 13 Johns. 576.

Performance on part of the testator would not depend upon the form of the devise in the will.

Hence, value of the devise was admissible.

2. The second and third instructions should have been given; they are not substantially given in the charge.

3. The burden of proof is always on the plaintiff to satisfy the jury that the defendant (testator) promised in manner and form, &c.; and if there is any evidence to raise a doubt in the minds of the jury, the ordinary presumption of a promise does not apply. Chit. on Cont. (10th Am. ed.) 591, note (a).

Gilbert & Cleaves, for the plaintiff.

KENT, J. The defendant excepts to the refusal of the judge to give a specified instruction. He insists that, "from the testimony of the plaintiff (no other testimony being stated, or relied upon), the jury might properly have found, that the services were rendered neither as a gratuity or gift, nor with any expectation of pay, other than such as he expected by the will, but that it was understood between the parties that the plaintiff was to receive as much by the will, as his services were worth."

In other words, that there was in fact a contract of this nature, binding on the parties, for the breach of which, this action could be sustained, if the devise or legacy to the plaintiff did not equal in value the services rendered.

With this view, the defendant requested an instruction that, "if the plaintiff rendered services for the testator, with an understanding that compensation was to be made by will, and the plaintiff received by the will property of as great, or greater value, than the services rendered, it will be presumed to be in satisfaction of such services."

The judge did not give this instruction.

As an abstract proposition, it may, perhaps, not be objectionable, But we cannot find in the evidence of the plaintiff relied upon, proof of any such distinct contract, nor any thing from which a jury could legitimately have inferred its existence. The most that it tends to prove for the defendant is, that the work was done without any precise contract for remuneration, or expectation of pay, but with the expectation, or hope, or indefinite understanding, that the plaintiff would have a legacy or devise in the testator's will, leaving it to his own determination what, and how much, to give.

The judge very distinctly stated to the jury, that if the services were thus rendered, "plaintiff not expecting or intending to claim pay for them, although he may have been expecting favors in return, he cannot recover."

This was presenting the evidence in the most favorable light for the defendant. If the jury could not find the existence of even this loose understanding, there would seem to have been but little

reason to suppose that they could have found a specific and distinct contract between the parties, that one should work and the other pay what would be due under a *quantum meruit* count, by a legacy or devise of sufficient value to cancel the debt.

The value of the property devised was immaterial, unless it was established that it was to be regarded as payment, under such a count.

The other rulings seem unobjectionable.

Exceptions overruled.
Judgment on the verdict.

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

BARROWS, J., did not concur.

JOHN JONES, appellant from the decision of Judge of Probate, *vs.* SIMON TEBBETTS.

A minor son of a legatee, also named as executor in a will, may be a competent witness to its execution under R. S., c. 74, § 1, as amended by Public Laws of 1859, c. 120.

ON FACTS AGREED.

APPEAL from a decree of the judge of the probate for this county, admitting to probate a certain instrument dated Jan. 26th, 1867, purporting to be the last will and testament of one Susan Jones, deceased, in which Simon Tebbetts is therein named as executor and legatee of one-fourth part of the estate of the deceased.

It was agreed that Simon Tebbetts was a brother of the deceased, that two of three subscribing witnesses to the will were the children of Simon Tebbetts, and that one of them was a minor of the age of twenty years.

If either of these witnesses was an incompetent subscribing witness to the will by reason of age or being a child of Simon Tebbetts, legatee, and executor of the will, then the decree of the judge of probate was to be reversed; otherwise the case to stand for trial.

W. J. Copeland, for the appellant, cited *Smith* v. *Thwaite*, 1 Raym. 91; *Hatfield* v. *Thorpe*, 5 B. & Ald. 589; *Austey* v. *Downing*, 2 Strange, 1253; *Winslow* v. *Kimball*, 25 Maine, 493.

Asa Low, for the defendant, cited *Nash* v. *Reed*, 46 Maine, 168; *Jones* v. *Larrabee*, 47 Maine, 474; *Warren* v. *Baxter*, 48 Maine, 193; *Hawes* v. *Humphrey*, 9 Pick. 350; *Haven* v. *Hilliard*, 23 Pick. 10; *Carlton* v. *Carlton*, 40 N. H. 14; Redfield on Wills, 253, 254, and 255, and cases cited.

APPLETON, C. J. By R. S., 1857, c. 74, § 1, "a person of sound mind, and of the age of twenty-one years, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him, and at his request, and in his presence, and subscribed in his presence by three disinterested and credible attesting witnesses."

By an act approved April 4, 1859, c. 120, the above section was amended so that it reads as follows: "a person of sound mind and of the age of twenty-one years, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him, and at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under the provisions of the will."

The words "not beneficially interested under the provisions of the will" were inserted in lieu of the word "disinterested."

The object of this change was probably to authorize the attestation of a will by executors or trustees, they not being "beneficially interested," under its provisions, as devisees or legatees. It was to remove doubts. It was to enlarge, rather than to restrict the rules of evidence.

The will in controversy is attested by the children of Simon Teb-

betts, who was named executor therein and was a legatee. But his children are not beneficially interested under the provisions of the will. There is no devise nor legacy to them. The beneficial interest of the father is not the beneficial interest of the son. The interest contemplated was direct, not remote and contingent.

All who are credible, that is competent witnesses, provided they are not beneficially interested under the provisions of a will, may attest its execution. The statute imposes no restriction as to age. The court have no power to impose any, or to adopt any rule other than that prescribed by the statute. A minor, not beneficially interested under the provisions of a will, may be an attesting witness thereto, precisely to the extent that he is a witness generally. *Carlton* v. *Carlton*, 40 N. H. 14.

The case to stand for trial.

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

STATE OF MAINE *vs.* JOHN F. LAWRENCE.

Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved.

To establish a defense on the ground of insanity, the burden is on the defendant to prove, by a preponderance of evidence, that at the time of committing the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did, that he did not know he was doing what was wrong; partial insanity, if not to the extent above indicated, will not excuse a criminal act.

When the defendant, in a criminal case, does not testify as a witness in his own behalf, it is not improper for the presiding judge, in his charge to the jury, to call their attention to the fact, and to instruct them, that it is a circumstance proper for their consideration.

ON EXCEPTIONS.

INDICTMENT FOR MURDER.

It appeared, on the part of the government, that Elmira Atwood had been living at the house of one Mrs. Marsh, on Hammond

street, Bangor, some four weeks prior to the murder; that the defendant, Lawrence, went there more or less; that on Saturday, January 1, 1870, he went there considerably intoxicated, conversed with Elmira Atwood, and called her by an opprobrious epithet, she answering, that if he called her that, she would make him prove it, whereupon he went away without any reconciliation taking place between them at that time; that on the next (Sunday) evening he went there again; that he, living by himself on Main street, and Mrs. Marsh having been in the habit of preparing food for him, handed her a little tin pail and requested her to put up some hashed fish; that he asked Mrs. Marsh if she were alone; that Mrs. Atwood had gone into a little bedroom; that after Mrs. Marsh went into the pantry, Lawrence went into the bedroom, where he saw Mrs. Atwood; that Mrs. Marsh heard voices talking, but could not understand what was then said until she heard Mrs. Atwood say, "I will, I will, I will, John;" that when Mrs. Marsh came out of the pantry, she saw Mrs. Atwood coming out of the bedroom, Lawrence having already come out and gone across the kitchen, facing the door as if going out; that Mrs. Atwood said, "Oh, the pistol! the pistol!" and came near fainting; that Lawrence turned round, drew out his pistol, and without taking any more aim than merely raising his arm and pointing it toward Mrs. Atwood, fired twice; that Mrs. Atwood fell; that Mrs. Marsh rushed out of the house, and heard two more pistol shots, at least, fired after she went out; and that Lawrence passed Mrs. Marsh, going out of the house as she returned.

It also appeared from the testimony of the attending surgeon, that Mrs. Atwood had three bullet-wounds, one of which was in the right side, between sixth and seventh ribs, through the liver and intestines; and that she died from the wound in about forty-eight hours after the wound was received.

It also appeared, that about seven o'clock on the same Sunday evening, Lawrence was found in his room, on Main street, with his throat cut; that he still had a knife in his hand; that when found, his first words were, "Do you think I am cut enough to die?" "Is

that damned whore dead?" "I hope she is. If she is, I can die happy."

It also appeared, that the defendant was jealous of Mrs. Atwood, who, he alleged, had agreed to marry him, and then went with other men.

The defense was insanity, and considerable testimony tending to show the condition of Lawrence at the time of shooting Mrs. Atwood, and before and afterwards, was introduced.

The presiding judge, *inter alia*, charged the jury as follows:

"Was it a case of jealousy, or was it an insane delusion? You are to determine whether insanity of any kind existed at the time of the homicide. If it is not established, then the defense of insanity fails, and the case stands upon the facts.

"If you find a general or partial insanity, then what is the rule? If you take the monomania upon the subject of the woman, as he expresses it, "going back upon him," if there was an insane delusion upon that subject, then how far did that excuse him for the killing? Suppose he was insanely jealous, it would not necessarily follow, that he should not know it was not right for him to kill her.

"But if it is shown that he not only had an insane delusion on that subject, but that he supposed he had a right to kill her, that covers the whole. But the mere fact that a man is jealous with cause, does not justify him in killing a woman, if she is his lawful wife. So if he is insane with a monomania, he is not justified in killing her, unless it is shown that he had a faith that it was right for him to do it, and had lost all sense of responsibility for it. I have now reached the point where I can give you the general instructions that I intended.

"To excuse a man from responsibility on the ground of insanity, it must appear, that at the time of doing the act he had not capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he was doing. That he had not knowledge, consciousness, or conscience enough to know, that the act he is doing is a wrong act, and a criminal act, and one that he will be subject or liable to punishment for doing. In order

to be responsible, he must have sufficient mind and memory to understand and remember the relation he stands to others, and others to him, and that the act he is doing is contrary to the plain dictates of right, wrongfully injurious to others, and a violation of the dictates of duty. If there be partial derangement, or insanity of mind, so that it is not in all respects perfectly sane and sound, yet if not to the extent above indicated, it will not excuse a criminal act. In other words, a man may be a monomaniac, his mind may be disordered, and, to a certain extent, it may be proved that he is of unsound mind, and yet, if he has mind and understanding enough, and is not carried away so but that he understands the difference between right and wrong, as to the act he is then doing,—that is to say, if the man knew that what he was doing was wrong, and he was liable to be punished for it, and that the act would not be excused, then he is subject to punishment, although there might be some partial derangement.

"But if he does not understand the relation of parties, as, for instance, where a son killed his father, and was so deranged that he did not know it was his father, he could not be responsible. But if the party feels and knows that he is doing wrong, although he may have wrought himself up by hatred and jealousy, to a determination to kill, yet if it appears that at the time he had capacity sufficient, and did know he was doing wrong, as before explained, he would not be excused. The rule is as I have stated. If there be a partial insanity, yet if it is not proved he was insane and unsound, to the extent I have stated, it will not excuse criminal acts.

"I am requested, by the counsel, to give some instructions.

1. "That if, at the time of the commission of the act, the defendant was under the influence of an insane delusion, impelling him to the commission of the act for which he had no rational motive, notwithstanding he may have appeared able to distinguish right from wrong, they shall find for the defendant on the ground of insanity.

"On that request I will say, if he was under an insane delusion, it would be a defense if the act, under that delusion, would be justifiable in assuming the delusion to be a fact. If he acts under

the delusion, for instance, that he has a right to kill, then he is justifiable; but if he acts under another delusion, not the cause, then he may not be.

"For instance, take the case of Abraham offering up his son Isaac. There he had a special commission to do it; he had faith, and believed it was the command of God, and was about to do it. Now suppose some gentleman here should think he heard, in the night, a voice coming to him distinctly and audibly, and saying, 'Take your son and build a pile and sacrifice him,' and he fully believed it, and took his little son and carried him out the next day, and actually sacrificed him.

"There, insanity would be fully proved, because he actually believed it as much as Abraham believed that it was the commandment of the Almighty. A thing would be excused from delusion, where it would be excused if that delusion were true, as before explained.

"I do not think that the evidence, in this case, calls upon me to give any ruling as to a case of blind, unreasoning impulse to take life, irrespective of motive as to the person assaulted, and having no connection with any existing relation between the assailant and the assailed, which impulse overcomes reason, power of the will, conscience, and all fear of consequences, and all power to resist the impulse to kill, although the person might not be shown to have lost all sense of right and wrong. That would be like cases read by the counsel for the defense, in his very clear and able opening. A French woman had a desire to kill young children,—an insane desire to kill, without any jealousy, and without any occasion whatever. There have been cases of that kind, and it is a question how far that impulse might excuse. I think there is nothing of the kind shown in this case.

2. "That in capital cases the prosecution must prove the felonious killing, and if the jury have a reasonable doubt of the murder, the verdict must be for acquittal.

3. "That the plea of insanity does not deprive the accused of the benefit of this principle of law, and does not relieve the govern-

ment from proving, beyond a reasonable doubt, the guilt of the prisoner."

On these requests the judge said he had already given them in his charge, but would repeat the substance of what he had said, viz., That the government was not relieved from proving the guilt of the accused beyond a reasonable doubt by such plea, or on any other ground; but if it had proved beyond such doubt, all that was required to constitute the offense charged before any evidence of insanity was offered; that insanity must be established by a preponderance of evidence, as before fully stated and explained in the charge.

4. "That where insanity is offered in defense, it is not necessary for the prisoner to prove his insanity by a preponderance of testimony, but, on the contrary, if the jury find a reasonable doubt of the sanity at the time of the commission of the act, there must arise in their minds a doubt of the malice, which alone constitutes murder."

By the court. "I give you no other ruling than what I have given you before."

5. "In this case, where insanity is set up as a defense, the court is requested to instruct the jury, that they are to be satisfied, from all the testimony in the case, beyond a reasonable doubt, of the guilt of the prisoner, and if they have a reasonable doubt of his sanity, they are bound to acquit."

No new instruction was given under this request.

6. "Will the court also instruct the jury, that if they find that at the time of the commission of the act, the defendant was laboring under an insanity which would excuse him from legal responsibility for its commission, they will render a verdict of acquittal, whether or not they are satisfied as to the causes which produced the insanity, or its particular form."

The judge stated, in regard to this request, that he had already instructed the jury, that if the prisoner was laboring under insanity at the time of the commission of the act, sufficient to excuse him, they will acquit him whatever may be the cause of the insanity, or whether ascertained or not.

The judge then proceeded as follows: "There is only one other thing I wish to call your attention to, and I think it is my duty to say a word upon it. That is the non-production of the prisoner, as a witness in this case. It is only a few years since the prisoner was allowed to testify in criminal cases. The law has been altered, giving the prisoner the privilege of testifying if he chooses. He is not bound to testify to anything criminating himself, or bearing on the case. But if he is not put upon the stand, you must necessarily understand and know the fact, that he is not put upon the stand to state his knowledge to the jury. The jury would not be bound to and should not convict simply on the ground that the prisoner does not testify. But it is a fact in the case, more or less potent or important, as you may consider it. In this case the counsel say the plea being insanity, they did not propose to put on the prisoner himself. Ordinarily, where insanity is alleged to have continued, if he was a crazy man when tried, this suggestion would have more weight than when not laboring under insanity at the time of the trial. While he was not obliged to go on, you are not to draw forced inferences. Perhaps he might have explained his conduct more fully, but he chose to rely upon the evidence presented. At all events, it is for you to consider that he did not choose to go on to the stand, and the government say there are many facts that he might have explained."

The jury returned a verdict of guilty of murder in the first degree; and the defendant alleged exceptions.

A. Knowles & John F. Godfrey, for the defendant, cited, *Commonwealth* v. *York*, 9 Met. 93, dissenting opinion; *United States* v. *Mingo*, 2 Curtis, 2; *Commonwealth* v. *Hawkins*, 3 Gray, 463; *Powers* v. *Russell*, 13 Pick. 69; *Delano* v. *Bartlett*, 6 Cush. 364; *Tourtellot* v. *Rosebrook*, 11 Met. 460; *Morrison* v. *Clark*, 7 Cush. 313; *Sawyer* v. *Spofford*, 4 Cush. 598; *Lane* v. *Crombie*, 12 Pick. 177; *Commonwealth* v. *McKie*, 1 Gray, 61; *United States* v. *McClare*, 7 Law Rep. (N. S.), 439; 1 Ben. & Heard's Lead. Cr. Cas. 253; *State* v. *Merrick*, 19 Maine, 398; *State* v. *Flye*, 26 Maine, 312; *Tarbox* v. *East. Steamboat Co.*, 50 Maine, 345; 4

Blackstone's Com. 195; *Gerrish* v. *Mason*, 22 Maine, 438; *Loring* v. *Aborn*, 4 Cush. 608; *Harrison* v. *Edes*, 15 Mass. 347; *State* v. *Crowell*, 25 Maine, 171; *State* v. *Woodward*, 34 Maine, 293; *State* v. *Churchill*, 25 Maine, 306; 1 Ben. & Heard's Lead. Cr. Cas. 353.

W. P. Frye, attorney-general, *contra*.

DANFORTH, J. The instructions and refusals to instruct, in relation to the responsibility of the insane, complained of in the first exception, are in strict conformity to the most approved judicial authorities. *United States* v. *Holmes*, 1 Clifford, 117; *Commonwealth* v. *Rogers*, 7 Met. 500, and cases cited. It is possible that the increased knowledge of the nature and effects of insanity, may, in appropriate cases, require instructions more in harmony with the requests in this case. But, however this may be, a careful examination of the testimony, which is reported in full, shows that this is not one of those appropriate cases, and that the respondent is not, in any legal sense, aggrieved by the instructions given or withheld upon this point.

So of the last instruction excepted to, if such it may be called. It would seem to be rather a suggestion of a fact already existing in the case, than a ruling in a matter of law. That the prisoner did not go upon the stand is a fact in the case, and is made no more or less so, simply because the presiding judge saw fit to call the attention of the jury to it.

It could hardly have escaped the notice of the jury if the judge had not alluded to it in his charge. It will exist in every case, so long as the act permitting parties to testify remains the law, unless the party himself chooses to make it otherwise. It will, too, have its legitimate effect upon the minds of the jurors, more or less convincing according to the circumstances of each case, whatever may be the ruling of the court in regard to it. Belief is controlled by principles more potent in their action than artificial rules of evidence. When a person has an opportunity to testify in relation to a matter of which he has knowledge, and in which he is deeply

interested and refuses to do so, such refusal will have its weight, modified only by the accompanying circumstances. We act upon such testimony constantly. It is the instinct of our nature, and will not be eradicated by the ruling of any court. If this leads to injustice, the wrong is inherent in the law permitting parties to testify, and the remedy is with the legislature alone.

The remaining question, as to the burden of proof in criminal cases, where insanity is set up as a defense, is one of much more difficulty, though until recently the authorities seem to have been uniform in imposing it upon the defendant. Quite lately doubts have been suggested, and, in a few instances, judicial tribunals, entitled to the highest respect, have come to a conclusion the reverse of the former decisions. As a matter of principle the question lies in a very narrow compass. The difficulty is in the starting-point, in determining the premises. These being once settled the conclusion is evident. Those who maintain that the burden is upon the prosecutor, contend that sanity is an elemental part of the crime, and is a necessary part of its definition, and as such the jury must have the same satisfaction of its truth as of any other part. It is undoubtedly true, that there can be no guilt except as the result of the action of a sound mind, there can be no crime except there be a criminal; nevertheless, there is a palpable distinction between these two; one cannot exist without the other, still they are two and not one and the same. The person doing the act is not the act itself. He may or may not be responsible for the act, but in no sense can he be the act. So, too, whether he committed the act is one question, and whether he is responsible for that act is another and entirely different question. Now it should not be forgotten that we start with the legal presumption that all men are sane and responsible for all their acts,—in other words, that no man is insane and irresponsible, precisely as we do with the proposition that no man has legal authority for doing that which otherwise would be a crime or a trespass. Hence the statute defines murder to be "the unlawful killing of a human being, with malice aforethought, either express or implied." Here are all the elements necessary to con-

stitute the crime assuming a responsible agent. Not one word as to what is, or is not required to make him responsible. And so of all other statute definitions, whoever shall do the certain acts set out, shall be guilty. Here, as everywhere in the law, sanity is assumed and treated as an essential attribute of humanity. The indictment follows the statute, setting out all the acts deemed essential to the crime, but omitting all reference to the capacity of the accused. Of all that is set out in the indictment he is presumed innocent, and that must be proved and nothing else. When that is proved he is convicted, unless he interposes some defense other than a sane denial of the allegations against him. A simple plea of not guilty, puts in issue the allegations and only the allegations in the indictment, and as to them the prosecution has the affirmative. But if the accused would put in issue any other allegation, any question as to his capacity or responsibility, be must do it by an affirmative statement. If he puts in the plea of insanity, he assumes the affirmative, he changes the issue. And it is immaterial whether it is in writing or merely verbal; in either case it just as effectually raises a new issue. It is true it may be resorted to in connection with the plea of not guilty, but it is not and cannot be a part of it. The plea of insanity is, and of necessity must be, a plea of confession and avoidance. It does not deny a single allegation in the indictment, but simply says, grant all these allegations to be true, that all these acts have been done, and still guilt does not follow, because the doer of them is not responsible therefor. It does not meet any question propounded by the indictment, but raises one outside of it. It is not a mere denial but a positive allegation. It is, however, said in the argument that the plea of insanity does deny the allegation of malice, because the insane is not capable of such a state of the mind. If the term malice is used in the common meaning of that word, it is not necessary now to discuss the question as to how far those who are insane, may or may not indulge it, though it may well be doubted whether, in many instances, a person may not be so unsound in mind as to be irresponsible, and yet be actuated by malice as implying hatred. But

however this may be, he may have malice in the legal and technical sense, or he may be so wilful and deliberate in his action, that the law, in the absence of proof of insanity, will conclusively infer malice. When insanity is found, it does not show that the act was any less willful, or deliberate, or intentional even; but it does show an excuse, an irresponsibility for what would otherwise have been criminal. So here, as in other respects, the plea of insanity does not deny, but avoids; confesses this element as well as the others, but excuses. It would seem, then, that the question of insanity can never be raised, unless by the prisoner; and by him only in an affirmative allegation, such as carries with it the burden of proof.

Every man is presumed to be innocent. This presumption stands till every reasonable doubt is removed. The law presumes every man sane. Why should not this presumption stand till removed by at least a preponderance of evidence? Does it not, and must it not necessarily still stand, though we may have some doubts of its truth? That which exists is not destroyed simply because it may be enveloped in a thin cloud. However we may theorize, it will still exist until demolished. If this presumption is to be overthrown by a doubt, as well might it be abolished at once, and leave the question of sanity, like that of malice, to be proved by the government or implied from the circumstances of each case. But this presumption cannot be abolished. It is inherent in human nature, and will exist as long as rationality is an attribute of man, and existing, it should have some meaning, some force; enough, at least, to enable it to withstand something more than a reasonable doubt.

In *Commonwealth* v. *Mackie*, 1 Gray, 61, is very clearly stated the limits of the burden of proof in criminal cases as resting upon the government, where the issue is raised by a simple denial of the allegations in the indictment. It is there held that "where the defendant sets up no separate independent fact in answer to a criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful." It is

further said in the opinion, "there may be cases, when a defendant relies on some distinct, substantive ground of defense to a criminal charge, not necessarily connected with the transactions on which the indictment is founded (such as insanity, for instance), in which the burden of proof is shifted upon the defendant."

In the more recent case of *Commonwealth* v. *Eddy*, 7 Gray, 583, where the question as to the effect of the plea of insanity came directly before the court, it was held that the burden of proof was upon the defendant, and that he must satisfy the jury of his insanity by a preponderance of evidence.

In accordance with this authority, are many others entitled to great respect. *United States* v. *Holmes*, 1 Clifford, 117. Wharton's Am. Crim. Law, § 16, 7, 11, and cases cited. 2 Greenl. on Ev. § 373, and notes.

But in this matter, we are not left to the principles of the common law alone. Our statute law, by implication, at least, leads to the same conclusion. By the R. S., 1859, c. 137, § 2, it is provided, that "when the grand-jury omits to find an indictment against any person arrested by legal process to answer for any offense by reason of insanity, they shall certify that fact to the court; and when a traverse jury, for the same reason, acquits any person indicted, they shall state that fact to the court when they return their verdict." And, in either case, he is to be restrained in prison or the insane hospital till restored to his right mind, or delivered according to law. It can hardly be supposed that the legislature expected or intended that the jury should return as a fact the insanity of the prisoner when they have only a reasonable doubt of his sanity, or that he should be detained in custody till restored to his right mind, when there is not sufficient proof to make even a *prima facie* case that he is otherwise than sane. Our conclusion is, that upon this point, as well as upon the others, the ruling was sufficiently favorable to the prisoner. *Exceptions overruled.*

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

ELLEN S. TUNKS *vs.* MARK GROVER and trustees.

By virtue of R. S., c. 61, § 3, a married woman may commence by trustee process, and maintain in her own name an action for the recovery of the wages of her personal labor not performed for her own family, and summon her husband as trustee of her debtor.

If in a trustee process brought by a married woman against her debtor, and her husband as trustee, the disclosure does not reveal the relationship between the plaintiff and trustee, it is not competent for the principal defendant to contest the liability of the trustee by filing such an allegation.

ON EXCEPTIONS.

ASSUMPSIT on an account annexed to recover the wages of the plaintiff's personal labor performed for the principal defendant, from Sept. 7, to Oct. 10, 1868, at $3.50 per week, amounting to $17.50.

The action was commenced by trustee process in the municipal court for the city of Lewiston.

On the return day of the writ, James H. Tunks, one of the alleged trustees, appeared and disclosed an indebtedness to the principal defendant, making no mention of any relationship between the plaintiff and himself.

On the same day, the principal defendant filed a plea of the following tenor, omitting the formal parts:

"That he is ready to prove when and where the court shall direct, and now offers to prove, that, in the above-entitled action, in which the said Ellen S. Tunks is plaintiff, and the said Mark Grover principal defendant, and the said James H. Tunks, and the said Hill Manufacturing Company, trustees, that the said James H. Tunks, one of the said trustees, is the husband of the said Ellen S. Tunks, plaintiff in said cause, wherefore he prays judgment that the said James H. Tunks may be discharged, and for his costs."

To this plea the plaintiff demurred, and the defendant joined.

The demurrer was sustained, and thereupon the defendant appealed.

On the second day after entry in the supreme judicial court for this county, the defendant moved that the demurrer and joinder be stricken out, because the same were irregular, informal, and contrary to the rules of pleading. The presiding judge overruled the motion and sustained the demurrer, and the defendant alleged exceptions.

Knowlton & Cornish, for the defendant.

1. The demurrer admits that James H. Tunks was the lawful husband of the plaintiff. And the only question is, whether he, while sustaining that relation to the plaintiff, can lawfully be charged as trustee in an action by her against a third person.

This is neither anthorized by the common law nor by statute. 2 Kent's Com. 112. *Dennison* v. *Benner*, 36 Maine, 227.

2. The statutes enlarging the rights of married women being derogatory to the common law, must be construed strictly.

3. If the wife can sue alone and trustee her husband in the suit, she can sue jointly with her husband, and make him trustee therein. *Smith* v. *Gorman*, 41 Maine, 405. *Crowther* v. *Crowther*, 55 Maine, 358.

4. If the wife may legally summon her husband as trustee in such action, the husband, upon being discharged as such trustee, may have execution against her for his costs, and cause her to be arrested thereon. R. S., c. 86, §§ 13, 21.

5. The process of *scire facias* against a trustee "is an action at law." *Denny* v. *Metcalf*, 28 Maine, 389.

6. If plaintiff can hold her husband as trustee in this case, she may, upon his being discharged and refusing to pay over to her on demand, sue out her writ of *scire facias* against him, and thus by a mere indirection and by force of the statute, which affords such remedy indiscriminately to all parties plaintiff in such cases, array herself against her husband "in an action at law," in direct violation of the cardinal rule of the common law. The common law says this cannot be done; no statute says it can.

Wm. P. Frye and *John B. Cotton*, for the plaintiff.

BARROWS, J. The plaintiff in this action, a married woman, summoned her husband as trustee of the principal defendant; or, at least, this is what the principal defendant proposes to offer in defense of the action.

The suit is brought to recover the wages of her personal labor, not performed for her own family, for which by the express provisions contained in § 3, c. 61, of the Revised Statutes, she may maintain an action in her own name, and hold them in her own right, against the husband or any other person.

Is she entitled to the benefit of a process of foreign attachment to recover them where the husband is the garnishee of the debtor? Under such a statute provision as that above cited, we see no valid reason to debar her from it, even if it followed as a necessary result that she must "array herself against her husband in an action of law" to obtain it.

Ubi jus, ibi remedium; and when the legislature has conferred rights of this description upon married women in such emphatic terms, it is not for us to deny the appropriate process to enforce them, although long-cherished and familiar doctrines of the common law are thereby overturned.

The case stands upon a different footing from those of *Smith* v. *Gorman*, 41 Maine, 406, and *Crowther* v. *Crowther*, 55 Maine, 358, cited for the defendant, by reason of the more specific statute provision enabling the wife to maintain suit in her own name for the wages of her personal labor, not performed for her own family, as well as by reason of other enactments since those cases arose. Moreover, the alleged trustee does not seek to raise the question, and it is not competent for the principal defendant to intervene in this manner with allegations of fact *dehors* the record to affect the decision as to the liability of the trustee. Legally speaking, there is nothing before us to show that the relation of husband and wife exists between the plaintiff and the supposed trustee. Upon the disclosure which he submits, the trustee is apparently chargeable; and while by § 29, of c. 86, R. S. the plaintiff and trustee is allowed to allege and prove additional facts material in deciding the

question of the trustee's liability, the principal defendant is not thereby authorized to file such allegations, and we know of no law permitting him to contest the validity of the plaintiff's attachment in the manner proposed. The question of the trustee's liability is to be settled between the plaintiff and trustee. The principal defendant is called upon in this suit to answer to the plaintiff's claim against him, and has had his opportunity to be heard thereon. If he has nothing to say except that by reason of something not disclosed by the record, nor appearing in the disclosure of the trustee, the plaintiff's attachment of his rights and credits is invalid, his answer is nugatory, and the demurrer thereto was properly sustained.

Exceptions overruled.

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

WILLIAM H. GUILFORD *vs.* GEORGE M. DELANEY and others.

If it is does not appear that the justices who approved a poor debtor's bond given to procure his release from arrest on execution, were selected in accordance with R. S., c. 113, §§ 22 and 40, it cannot be deemed a statute bond.

A disclosure, commenced on the last day of the six months, and lasting until three o'clock of the succeeding morning when it was concluded, and the poor debtor's oath administered, will not save a forfeiture of the bond, unless the delay was had at the request of the creditor, or the forfeiture was waived by him.

A creditor's participation in the examination of the debtor after the expiration of the six months, does not constitute a waiver of such forfeiture.

ON REPORT.

DEBT, on a poor debtor's bond of the usual form, dated Nov. 21, 1868; given by the defendants to procure the release of the defendant, Delaney, from arrest on an execution, issued on a judgment recovered in this court, in and for the county of Hancock, on Nov. 14, 1868, for $619.71 debt, and $27.51 costs.

Below the bond was the following certificate:

"KENNEBEC, ss. Nov. 23, 1868.

"We, the subscribers, two disinterested justices of the peace and quorum, for said county, do approve the above bond.

(Signed) S. C. HARLEY,
Selected by Wm. H. Libbey, officer.
S. TITCOMB,
Selected by W. P. Whitehouse."

The plaintiff put into the case certified copies of the writ, and judgment in *Guilford* v. *Delaney*, the execution issued thereon, together with the officer's return thereon, and the bond declared on.

The defendants introduced the disclosure of Delaney, signed and sworn to by him, the record of the magistrates before whom the disclosure was made, the discharge granted to Delaney by them, and the deposition of Asa Gile, one of the magistrates.

The magistrates' record, after reciting their citation, and that on the 21st day of May, 1869, at ten o'clock, A. M., George M. Delaney appeared before them, in accordance with a citation duly issued and served, the administration of the oath to make a full disclosure, &c., concluded as follows:

"At six o'clock P. M., said debtor not finishing his disclosure, a further adjournment was had for the space of one hour; and at the expiration of said hour, said debtor and creditor's attorney appeared before said justices, and the said debtor proceeded to make further disclosure of his business affairs, and continued until two o'clock the following morning, at which time said debtor finished his disclosure and signed the same. And, after hearing the arguments of the debtor's and creditor's attorneys, the said justices duly considered the said debtor's disclosure and the arguments of counsel on the one side and the other, and were not able to agree to administer the oath to said debtor; and the said justices chose Richard M. Mills, Esq., a justice of the peace and quorum for said county, as the third justice, in accordance with R. S. c. 113, § 40; that said Mills appeared and met with said justices at three o'clock A. M.,

May 22, 1869; that said justices heard the debtor's and creditor's attorneys concerning the said debtor's disclosure; that after duly examining said disclosure, and duly considering the same, said R. M. Mills and said Asa Gile, being two of the said justices, were of the opinion that said debtor was entitled to have the oath, provided in R. S., c. 113, § 28, administered to him; and that in accordance with that opinion said justices did administer said oath to him." (Signed.)

From the deposition of Asa Gile, it appeared that he was one of the justices before whom Delaney disclosed; that Vose and Whittemore appeared as attorneys for the creditor; that they continued to participate in the examination until past midnight; that they did not object or protest against the selection of the third justice; that after the selection of Mills, no objection to the administration of the oath to the debtor was made on the ground that the time had expired; that remarks were submitted by the attorneys, on both sides, to the court of three justices, as to the right of Delaney to take the oath; and that the creditor's attorneys requested that the record should be full, in order to show the exact time when the oath was administered.

On cross-examination, he testified that all the adjournments were had at the suggestion of the court for the purpose of taking their meals.

A copy of the disclosure was also put in.

After the testimony was all in, the case was withdrawn from the jury and reported to the full court, who, if the action was maintainable, were to render judgment by default, and assess the damages.

W. P. Whitehouse, for the plaintiff.

A. Libby, for the defendants.

Dickerson, J. Debt on a poor debtor's bond.

Without considering the other objections to the bond in suit we think it is not a statute bond, because the justices, who approved it, were not selected according to law. By R. S., c. 113, §§ 22 and 40, when the creditor does not approve the bond of a poor debtor

taken upon his arrest or imprisonment on execution, it may be approved by two justices of the peace and quorum, one to be selected by the debtor, and the other by the creditor, his agent or attorney; and if the creditor neglects or refuses to select a justice, the officer may select one.

One of the magistrates, who approved the bond in suit, was selected by the officer without any reason assigned for it, and the other by W. P. Whitehouse, without stating to the jury for whom he acted in making the selection. For aught that appears in the case, both the creditor and the debtor may have had no voice in selecting the magistrates who approved the bond. If it were to be presumed that the officer acted in the line of his duty in selecting one of the justices, there would still be wanting evidence that the debtor selected the other.

Though the bond is not a statute bond it is good at common law. *Winthrop* v. *Dockendorff*, 3 Greenl. 156. *Pease* v. *Norton*, 6 Greenl. 333. *Call* v. *Foster*, 49 Maine, 453.

But though the bond is good at common law, in order to save a forfeiture of it, there must have been a performance of one of its alternative conditions. The only condition claimed to have been performed is that which provides for a disclosure before two justices of the peace and quorum, &c., within six months from the date of the bond. This was not done. Although the disclosure was commenced within, it was not completed, nor was the oath taken, until after the six months had expired. The delay was not had at the request of the debtor, nor did he waive his right to claim a forfeiture of the bond, by participating in the examination after the six months had elapsed. So far from intending to waive this right, by this proceeding, the creditor requested the justices to make up their record so as to show the exact time when the oath was administered. It was for the debtor to take care, and cite the creditor in such season, as would enable him to finish his disclosure within the time specified in the bond. The creditor had no voice in appointing the time for making the disclosure; and the mode and extent of the examination were matters for the determination of the mag-

istrates. It does not appear that the debtor or the justices made any objection to the continuation of the examination, beyond the allotted time, or that the creditor requested it. The disclosure and oath were, therefore, in no respect a fulfillment of the condition of the bond. *Morrison* v. *Corlis*, 44 Maine, 98. *Fales* v. *Goodhue*, 25 Maine, 423. *Newton* v. *Newbegin*, 43 Maine, 293. *Jewett* v. *Rines*, 39 Maine, 9. *Burnham* v. *Howe*, 23 Maine, 489.

The bond being good at common law is subject to chancery according to the actual damages. *Call* v. *Foster*, 49 Maine, 453. In accordance with the agreement of the parties, the defendants must be defaulted, and the damages assessed by the court.

The only evidence upon the question of damages is contained in the debtor's disclosure. That negatives the ownership of any attachable property by him, during the time covered by the bond, in the direct examination, and the cross-examination does not seem to elicit anything that substantially discredits the answers drawn out in chief. The damages, therefore, are only nominal.

Defendants defaulted for one dollar damages.

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

GEORGE DAVIS and another, complainants, *vs.* EBENEZER STEVENS and another.

In trial of a complaint for flowage, the complainants introduced nine deeds of warranty, given to them by as many heirs of A. C., deceased, each conveying an undivided tenth part of the real estate of which A. C. died seized and possessed; a deed of quitclaim to them, of the remaining tenth given by an execution creditor of the tenth and last heir of A. C., based on a void levy; and a deed of quitclaim to them, given by the widow of A. C., in which deed the grantor is described as the "widow of A. C., deceased," and the premises therein as "all the real estate that the said A. C. owned at the time of his death," all which deeds were duly executed, delivered, and recorded, after the decease of

A. C., *Held*, (1) That the evidence did not show the complainants to be sole owners of the premises mentioned in the deeds; and (2) That the deed of quitclaim from the widow conveyed only a right of dower in the premises.

An execution, issued on a judgment rendered on default of an absent defendant in a personal action, as provided in R. S., c. 82, § 3, within one year after the rendition of such judgment, and without the plaintiff's first giving bond to the defendant, as provided in § 4, is void; and so also is any levy upon real estate made under it, against whomsoever it is adversely set up.

ON REPORT.

COMPLAINT, under R. S., c. 92, for flowing the "homestead farm of Aaron Collins, late of Liberty," in this county, "deceased."

Plea, general issue, with brief statement denying the complainants' title to the land flowed, and alleging title in the respondents.

The maintenance of the mill and dam, and the flowing of the land described in the complaint, were admitted as alleged in the complaint. It was also admitted that the complainants were in possession of the land flowed.

To prove their title to the premises flowed, the complainants introduced nine deeds of warranty to themselves, each conveying one-tenth part undivided of the "homestead of the late Aaron Collins," and signed by the following persons respectively, heirs of the said Aaron Collins, viz.: Rachel Stubbs, dated April 21, 1864; Eleanor Butler, dated July 27, 1864; Angeline B. Wiggin, dated July 5, 1864; M. A. Fogg, dated April 29, 1864; J. R. Collins, dated April 29, 1864; Ira O. Collins, dated April 19, 1864; A. C. Collins, dated April 19, 1864; Hosea Collins, dated April 18, 1864; S. Sturdivant, Aug. 8, 1864. And a deed of quitclaim to themselves, signed by Joel W. Haskell, dated April 5, 1865, purporting to convey the grantor's "right, title, and interest" to an undivided tenth part of the "homestead farm of the late Aaron Collins," his right, title, and interest being what was secured by a levy, hereinafter mentioned, on an execution against one John C. Collins, who was also heir of the late Aaron Collins.

And a deed of quitclaim, dated April 19, 1864, given to the complainants by Cassa E. Collins, who describes herself in her deed as "the widow of Aaron Collins, late of Liberty, deceased," and the

premises to which she "quitclaims her right, title, and interest," as "all the real estate said Aaron owned at the time of his death."

All of the deeds mentioned were duly executed, delivered, and recorded.

The respondents introduced, against the seasonable objections of the complainants, a writ in favor of one Joel W. Haskell, against John C. Collins, dated Aug. 3, 1864, by virtue of which, as by the return thereon appeared, a general attachment of John C. Collins' interest in real estate, in this county, was attached; but no service was made on Collins because he resided in Magnola, Illinois. Also a record of the court, showing that the writ was entered at the term to which it was made returnable, to wit, October term, 1864, of this court, for this county; that at the same term, notice of the pendency of that suit was ordered to be published in the "Progressive Age," a newspaper printed and published in Belfast, and the action continued to the January term, 1865, when the notice, as ordered, was proved; that there was no appearance for said John C. Collins, whereupon he was defaulted and judgment rendered against him on Jan. 18th, and execution thereon issued on Feb. 18, 1865.

A copy of the execution, officer's return, and certificate thereon, were also put in.

It was admitted that Haskell did not file the bond provided in R. S., c. 82, § 4.

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

J. W. Knowlton, for the complainants.

1. The deed from Cassa E. Collins to complainants, with the possession of the complainants, makes out their title. *Blethen* v. *Dwinel*, 34 Maine, 133. *Williamson* v. *Carlton*, 51 Maine, 449.

Cassa E. Collins' deed does not convey any greater or less estate because she describes herself as the widow of Aaron Collins, than it would have done if she had described herself as the widow of Aaron Burr.

The court are not to draw inferences, but to render a legal judgment upon the legal evidence.

The widow might have become the sole owner of her husband's estate by will of her husband; or by purchase from the heirs, or administrator; and then her husband would have "owned" the whole "at the time of his death."

2. The complainants' title is perfect by the other ten deeds. *Blethen* v. *Dwinel* and *Williamson* v. *Carlton*, *supra*.

The record introduced by the respondents was inadmissible, because

1. If the execution was illegally issued, the respondents cannot avail themselves of it. They are not a party to that action; claim no title to the land; nor does it appear that their grantors ever had any title to it. Nor are their liabilities or interests anywise affected by it. The damage done by the claim is no greater or less by reason of the levy. The claim of the complainants, under the levy, is no more adverse to the respondents' title or rights, than were those of John C. Collins.

"It is open to all who are in any way connected with the title, or against whom it is adversely used." *Smith* v. *Dow*, 51 Maine, 21. And where a judgment is recovered contrary to law, and is prejudicial to a third party, he should have a right to avoid it." *Downs* v. *Fuller*, 2 Met. 139.

This levy not appearing to be "adverse" or "prejudicial" to the respondents' title or rights, the record evidence is not legally admissible.

2. The respondents, by their brief statement, claim title in themselves, and not in John C. Collins, as their evidence tends to prove. *Day* v. *Frye*, 41 Maine, 326. *Simpson* v. *Hardy*, 42 Maine, 196. *Solon* v. *Rowell*, 49 Maine, 330. *Cooper* v. *Ames*, 6 Cush. 87.

W. G. Crosby, for the respondents.

1. The claimants must prove themselves sole owners of the land flowed; it is not enough for them to prove that they own an undivided part thereof. *Tucker* v. *Campbell*, 36 Maine, 346.

The levy transferred no title to Haskell, because the execution was not issued in accordance with R. S., c. 82, §§ 3 and 4.

The giving of the bond was a prerequisite to the issuing of the execution; and it not having been given, the execution issued illegally, and the levy was void. *Penniman* v. *Cole*, 8 Met. 496. *Buffum* v. *Ramsdell*, 55 Maine, 252.

According to modern decisions, the right to contest such proceedings is not limited as formerly, but it is open to all who are in any way connected with the title, or against whom it is adversely used. *Smith* v. *Dow*, 51 Maine, 21. *Downs* v. *Fuller*, 2 Met. 135.

2. The ten deeds, of a tenth part each, embrace a title to the whole.

What was there left, or what had Cassa E. Collins to convey?

All the interest she had in the land was a right of dower; and her quitclaim of her "right, title, and interest" was intended to be, and was, merely a release of her right of dower.

The title disclosed by the complainants' deeds is to the whole, in tenth parts (if the objection made to the conveyance from Haskell is not sustained), and a release of the widow's right of dower; but if that objection is sustained, they show title to nine-tenths only.

Blethen v. *Dwinel*, 34 Maine, 133, decides that "in the absence of other evidence, a quitclaim deed raises a presumption that the grantor had sufficient seisin to enable him to convey, and also operates to vest the legal seisin in his grantee."

The "other evidence" introduced by the complainants, consisting of ten deeds of an undivided tenth part each; nine deeds of warranty from nine heirs of Aaron Collins, the other a deed of quitclaim from a party (Haskell) claiming under the tenth heir, controls the "presumption."

According to the complainants' evidence, the title was in them, and the widow could have had nothing in the estate save a right of dower.

Had the complainants introduced the deed from the widow only, and then stopped, they might have brought their case within the principle stated in *Williamson* v. *Carlton*; but they went further.

To be sure the "widow might have become the sole owner;" but the ten deeds introduced by the complainants, show that she had not.

The respondents are attempting to "use" Haskell's judgment against John C. Collins "adversely" to these respondents, in trying to compel them to pay for flowing a parcel of land, of which they claim to be sole owners, when, in fact, they own but nine-tenths of it.

If the levy is void, and the complainants still prevail here, could not John C. Collins avoid the judgment, have his tenth set off on petition for partition; or some grantee or creditor of his do so; and then upon complaint for flowage compel the respondents to pay the past and future flowage of that tenth again? The respondents have a right to protect themselves from paying twice for the same thing, by impeaching such a judgment.

The respondents' brief statement denies the complainants' title to the land flowed, which allegation is made good by showing that they own only nine-tenths.

J. W. Knowlton, in reply, contended

That *Williamson* v. *Carlton*, *supra*, was precisely in point; that other deeds were introduced in that case too; that the complainants there were not as here in possession; that there is no evidence that Aaron Collins had ten children; or owned all the premises in his lifetime; or that he died seized of the same; or that Cassa E. Collins had only a right of dower. All these facts could have been easily proved if true, and should be to overcome the complainants' *prima facie* case, or judgment should go for them.

DANFORTH, J. The only question raised in this case relates to the title of the complainants to the land described in their petition.

That they are the owners of nine undivided tenth parts is conceded. The other tenth is in dispute. To maintain their title to this, the complainants introduce a quitclaim deed, from Joel W. Haskell to themselves. It, however, appears that Haskell claimed

under one John C. Collins, by virtue of an attachment and levy. During the pendency of the suit, in which the attachment was made, Collins was not an inhabitant of this State, had no notice except by publication, and made no appearance. Judgment was entered on default and execution issued within the year, without filing the bond, as required by R. S., c. 82, § 4. This being contrary to law, the execution and the levy under it were not voidable merely, but absolutely void. *Penniman* v. *Cole*, 8 Met. 496. And it is immaterial who the adverse party may be. *Downs* v. *Fuller*, 2 Met. 135. *Smith* v. *Dow*, 51 Maine, 21, and cases cited. As Haskell took nothing by his levy, his deed conveyed nothing to the complainants; so far as appears, the title to this undivided tenth still remains in John C. Collins.

But the complainants further claim title by virtue of a quitclaim deed from Cassa E. Collins. This deed covers all of the premises described in the petition. In it, as we learn from the argument of complainants' counsel, the grantor describes herself as the widow of Aaron Collins, and the land, "as all the real estate that the said Aaron owned at the time of his death." This would convey her interest in the land owned by said Aaron at his death, obtained by her as his widow, and would seem to be an appropriate description for this purpose, and not for any other. It recognizes the title of Aaron at his decease, and suggests no change of title other than that made by the law of descent. It does appear that she had a right of dower in the premises, but it does not appear that she had, or intended to convey, any greater estate. It is also evident that the complainants did not rely upon it as conveying any interest greater than that of dower, from the fact that they have taken and produce deeds from the several heirs, purporting to convey the remainder of the estate. Giving the deed, then, such a construction as will best give effect to the intention of the parties, it conveys but a right of dower. Nor will it avail the complainants if we so construe it as to convey a greater interest. As already seen, it recognizes the title of Aaron Collins as better and prior to that of the grantor. There is no proof that he ever parted with his title, ex-

cept by death, nor that his title ever became vested in her. It having been once in him, the presumption of law is, that it so remains until there is proof to the contrary. In this case there is no proof to the contrary, except the deeds from the heirs, one of which, as we have seen, conveys nothing. The result is that the complainants have proved a title to only nine-tenths in common and the widow's dower. Under such a title the complaint cannot be maintained. *Tucker* v. *Campbell*, 36 Maine, 346.

Complainants nonsuit.

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

MARGARET WRIGHT and another *vs.* EDWARD ROACH.

In an action for deceit in the sale of a farm, the measure of damages is the difference between the actual value of the farm, when sold, and the value of such a farm as it was represented to be.

To such sum may be added as damages a sum equivalent to interest from the date of the conveyance.

ON EXCEPTIONS to the rulings of *Goddard*, J., of the superior court for the county of Cumberland.

Action for alleged deceit in the sale of a farm in Falmouth.

There was considerable evidence tending to show fraudulent misrepresentations as to the quantity and quality of the crops usually raised upon the premises in question, and as to the quality of its soil.

The sale and conveyance were made in February, 1868, when the place was covered with snow.

After giving unexceptionable instructions touching the particular propositions necessary for the plaintiffs to establish in order to enable them to recover, the presiding judge instructed the jury on the question of damages.

That the measure of damages was the difference between the price the plaintiffs paid for the farm and what the farm was worth.

The verdict was for the plaintiffs, for $957.48, and the defendant alleged exceptions.

Bion Bradbury and *J. O'Donnell*, for the defendant, on the question of damages, cited *Herrin* v. *Libby*, 36 Maine, 350; Sedgwick on Dam. (5th ed.) 655, 658; *Whitney* v. *Allaire*, 1 Coms. 305; *Stiles* v. *White*, 11 Met. 356; *Tuttle* v. *Brown*, 4 Gray, 60.

J. D. & F. Fessenden and *N. Webb*, for the plaintiffs, cited, on the question of damages, Sedgwick on Dam. 559; *Moulton* v. *Senter*, 39 Maine, 290; *Morrell* v. *Colden*, 13 Johns. 403; *Sherwood* v. *Sutton*, 5 Mason, 1; 2 Hillard on Torts, c. 17, § 6.

DANFORTH, J. No question is raised by the exceptions but that in relation to damages. The jury were instructed that the damages would be the difference between the actual value of the farm conveyed and the price paid for it.

This is not the measure adopted by the later and better authorities. The true rule, as now settled, is the difference between the value of the farm as represented, and the actual value as it was when conveyed. In other words, how much more would the farm have been worth if the several representations made by the defendant, which were proved to be at once false, fraudulent, and material, had been true. Sedgwick on Dam. (5th ed.) 333, 655, and 658. *Stiles* v. *White*, 11 Met. 356.

To such sum may be added as damages a sum equivalent to interest from the time when the conveyance was made. *Moulton* v. *Senter*, 39 Maine, 287. *Brannin* v. *Johnson*, 19 Maine, 362.

Exceptions sustained.

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

SHEPARD BOODY *vs.* JOHN GODDARD.

Exceptions do not lie to the refusal of a presiding judge, after the testimony in a case is closed, to order a nonsuit, or to instruct the jury to return a verdict for the defendant, the exercise of such power being discretionary.

A person contracting to drive logs for the owner, cannot defend an action for carelessness in driving such as he undertook to drive, upon the ground that the owner did not turn out to be driven all the logs he contracted to turn out.

Testimony cannot be received, upon the part of the defendant, to change, alter, or vary a written contract, signed by the plaintiff, though it is not the contract upon which the action is founded.

Where a question as to the ownership of personal property depends upon oral as well as written evidence of it, the decision of it is properly left to the jury.

A person taking a lien upon lumber to secure advances "until the same is finally marketed and payment received therefor," is not authorized to manufacture the lumber at the risk of the general owner, and to account only for the net proceeds, provided they do not amount to the market value of the lumber at the time possession was taken under the contract.

ON EXCEPTIONS and MOTION to set aside the verdict as being against the evidence. As no question of law arose upon the motion, it is not necessary to report the testimony.

The case, upon the exceptions, is sufficiently stated in the opinion.

Goddard, pro se, in support of the exceptions.

Peters & Wilson, for plaintiff.

CUTTING, J. This action is assumpsit on a verbal contract set forth substantially in the writ as follows, viz.: "Also for that at said Portland, to wit, at said Ox Bow on the first day of March, A. D. 1859, in consideration that the plaintiff then and there promised to pay said defendant one dollar and twenty-five cents per thousand feet, for every thousand feet, said defendant then and there promised the plaintiff to drive certain logs of plaintiffs, marked T. × M., N. H., and F. × D., being 850 thousand, from their then landing at said Ox Bow into Fredericton boom, as soon as the

driving season for driving logs there would permit; but said defendant then and there wholly neglected and refused so to do. Whereby said plaintiff was greatly damaged by loss of said logs, and not getting same to market, so as to make sale of same in due season, to wit, the sum of five thousand dollars."

That such a contract was made was proved by the plaintiff, and not denied by the defendant, but by him contended as a matter of fact for the jury that he had fulfilled it, and much evidence was introduced upon that point. But it seems the defense failed, and, after a protracted trial, the verdict was for the plaintiff, which the defendant now seeks to have set aside as against evidence and for erroneous rulings.

As to the motion, we see no cause to disturb the verdict. It was a case peculiarly within the province of the jury, and if they were rightly instructed, we cannot say that they have not come to a correct conclusion.

We will now proceed to consider the exceptions. The case finds that "The presiding judge was requested to instruct the jury that the plaintiff could not recover for damages, for not driving logs according to contract of March, 1859, as no such contract, as he had therein set forth, had been shown or pretended to be by any written evidence, or testified to by any witness. The presiding judge declined to give such instruction, but did instruct the jury that they might consider the contract so far as applicable to the N. H., T. M., and F. D. logs."

This request was in substance calling upon the judge after the testimony was closed, either to order a nonsuit or to instruct the jury to return a verdict for the defendant; neither of which could he rightfully demand. The exercise of such power is discretionary with the presiding judge.

But was there no evidence of the contract? The defendant swears that, "In the early part of May, 1859, he agreed with the plaintiff to drive the logs," &c. This on his part was a verbal contract, and he introduced a written contract bearing date the same

month, signed by the plaintiff, securing the payment for the price of driving, and of the tenor following, viz. :

"Whereas, John Goddard drove the past season a quantity of logs marked I. S. from the Ox Bow and its vicinity to Fredericton, and as he has this day agreed to drive the balance of said mark the ensuing season, as also to drive a lot of logs marked F. D., T × M., and N. × H., it is agreed that he shall receive, out of the proceeds of said logs, the sum of one dollar and twenty-five cents per M. for driving, said lumber to Fredericton, he receiving it in the Aroostook river. [Signed] SHEPARD BOODY."

We perceive no material variance between the proof and the declaration, since it appears that the "Ox Bow" is a part of the Aroostook river. And "to Fredericton" and "into Fredericton boom" must be understood to mean the same place, for it is unusual to leave logs afloat in tide-waters without some protection.

Again, it is contended that the plaintiff cannot recover on the contract, inasmuch as he did not turn all his logs of the above mark into the Aroostook river. If this be so, the defendant undertook to drive what were turned in, and if the plaintiff's neglect was not waived, it did not authorize a want of vigilance in driving what the defendant took possession of, and undertook to drive. But upon this part of the case no rulings are reported.

In relation to the second exception, testimony was properly excluded, tending to change, alter, or vary the contract of May, 1859, signed by plaintiff and produced by defendant, and no objection has been taken to the court's construction.

The third exception taken was, because the judge did not instruct the jury that, it appearing at one time N. H. Sawtell had an interest in certain permits, under which the N. H. and T. M. logs were cut, the plaintiff could not recover for those logs in this action.

If the assignment to Sawtell, of one-half of the plaintiff's interest in the permits, had been the only evidence introduced as to the title in the logs, perhaps the judge would have been justified in

giving the requested instruction. But it appeared in all the verbal testimony, throughout the trial, that the plaintiff was the sole owner, subject to certain liens for stumpage, supplies, &c., as by the several permits to him appears, that Sawtell never advanced anything, or assisted in any way in the lumbering business, or ever was recognized by the defendant in any of his active operations. On the other hand, the contract was made with the plaintiff; the promise was made to him alone. Under these circumstances, no judge would have been justified in withdrawing the question of ownership from the jury.

We come, at length, to the fourth and last exception, which really presents the only question on the merits. We have seen that much evidence was introduced as to the terms of the contract, the number of logs assumed to be driven and started by him on the Aroostook, the diligence, fidelity, and good faith, and extraordinary exertions of the defendant in driving, obstructed by "pokelogons and Roffer's hole," as would appear by testimony introduced by him, contradicted by that of the plaintiff. But all this, both as to the number of logs started, the number of logs accounted for, and his proper exertions on the drive, were questions for the jury.

There was no question that the defendant had heavy legal claims upon the logs; he had advanced large sums of money, out of which he was to be remunerated. But his claims were to be paid from the proceeds of the logs in a legal way. His claims were only as collateral security, in which, when paid, the operator had a reversionary interest, which the law will protect.

It seems that the logs, or a portion of them, which were started, were not only run to Fredericton, but down to St. John to the defendant's mills, and by him manufactured, and the net proceeds attempted to be accounted for, which, if the exhibit be true, would render him *minus* his advances and liabilities. In support of his proposition, he refers to that portion of the assignment of the permit which provides, that "this assignment and sale, being as collateral security for all advances, goods, money, supplies of all kinds, and all payments which said Goddard may make, furnish, or pay

for, or on account of said logs and timber, until the same is finally marketed, and payment received therefor."

Upon this point "the judge instructed the jury, that the contract creating a lien on logs did not authorize the defendant to manufacture the lumber at the risk of the plaintiff, and to account only for the net proceeds, provided they did not amount to the marketable value of the logs, at the time possession was taken under the contract."

This ruling we consider to be strictly correct, otherwise there can be no force in language, or protection to the operator, or the person granting the lien. Mark the language of the contract, "logs and timber finally marketed,"—not the proceeds after manufactured, subject to years' delay, and the rise or fall in the market, and besides the mode and manner of manufacture, and the operation of the mill, whether occasionally or otherwise. The plaintiff may well invoke the legal maxim, "*In hæc vincula non veni.*"

Motion and exceptions overruled.

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

INDEX.

INDEX.

ASSUMPSIT.

ATTACHMENT.

BASTARDY.

BILL OF SALE.

BILLS AND PROMISSORY NOTES.

BIRTH, CONCEALMENT OF.

BOND.

In an action of debt on a bond conditioned "to fully indemnify and save harmless" the plaintiff "from all loss, damage, and harm whatsoever, by reason of a suit for the infringement of any patent, in selling paper collars which the plaintiff has had or may hereafter have of the defendants;" and to "pay all fair and reasonable charges for expenses in defending said suit," *Held*, that the plaintiff is entitled to recover damages, (1) for the depreciation of his stock of goods while necessarily withheld from sale by the attachment made on the writ in the suit for infringement; (2) for the reasonable debt contracted, though not yet paid, for the services of counsel in defending the suit; and (3) for the reasonable expenses of himself and counsel incurred in relieving his stock from the attachment. *Ripley* v. *Mosely*, 76.

See DAMAGES, 2. DEED, 1. MILL, 1. POOR DEBTOR, 3, 4.

COLLECTOR'S BOND.

See COLLECTOR.

BOTTOMRY.

See ABANDONMENT, 3.

BRAKEMAN.

See CARRIER, 4, 5.

BRIDGE.

See INDICTMENT, 3, 4.

BURDEN OF PROOF.

See CONTRACT, 6. EVIDENCE, 19, 20.

CARPET.

See MECHANICS' LIEN, 2.

CARRIER.

1. The delivery of a trunk into the possession of a railroad station baggage-master, at his station, for transportation, and his reception of the same for that purpose, impose upon the corporation the obligation of a common carrier. *Wilson* v. *G. T. R. R. Co.*, 138.
2. A common carrier of passengers is responsible for the willful misconduct of his servant toward a passenger. *Goddard* v. *G. T. R. R. Co.*, 202.
3. A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train, has a remedy therefor against the company. *Ib.*

CASE.

CASES OVERRULED, DOUBTED, OR DENIED.

CHARITABLE BEQUEST.

CHOSE IN ACTION.

See FRAUDULENT CONVEYANCE, 2.

CIRCUS.

See WAY, 8, 9.

CLERK OF COURTS.

See PRACTICE, 9.

COLLATERAL SECURITY.

See ATTACHMENT, 4.

COLLECTOR.

CONSTITUTIONAL LAW.

CONSTRUCTION.

CONTEMPT.

CONTINGENT CLAIM.

CONTRACT.

See COLLECTOR, 1, 2. POOR DEBTOR, 1.

DECEIT.

See DAMAGES, 6.

DEDICATION.

See WAY, 5.

DEED.

1. In 1854, a saw-mill, owned in common by the defendants, Atwood and one Moor, having been destroyed by fire, Atwood rebuilt the same under R. S. of 1841, c. 86, and in October, 1857, in consideration of the full value thereof, conveyed to the plaintiffs "one-half of the saw-mill privilege and all the mill, subject to the claims of Moor in said mill," and at the same time gave an obligation to procure a release from Moor or fully indemnify the plaintiffs for his claim. In April, 1859, not being able to obtain the release, Atwood gave the plaintiffs the bond in suit, referring to the conveyance conditioned to procure a release from Moor and save the obligees harmless from all claims by Moor or his assignees, and closing as follows: "and it is hereby agreed that the said obligees shall keep a full and correct account of the amount of lumber sawed in the mill, and the expense of all repairs on the mill, and at all times secure and afford to the said Atwood free access to the books of account . . . to enable him to settle his accounts and claims with said Moor, and procure his release." *Held*, that the last clause is not a condition precedent.

Conner v. *Atwood*, 100.

2. Two deeds, executed and delivered at the same time by the same grantor to different grantees, one conveying one parcel of real estate with an easement in another parcel, and the other deed conveying the latter parcel but reserving the easement, are to be construed together. *Knight* v. *Dyer*, 174.

3. Though a deed of land with an unrecorded bond of defeasance constitutes a mortgage as between the parties, yet as to the public without notice, the grantor is as of record, the owner of the fee. *Ib.*

4. When such owner conveys an easement in the premises, even without consideration, and his grantee conveys it to a third person for a valuable consideration, the grantees having no knowledge of the bond of defeasance, the last grantor acquires such title as the record gives him. *Ib.*

5. To constitute an indirect conveyance of real estate to a married woman by her husband, within the meaning of R. S., c. 61, § 1, the deed from him must be made as one step in the conveyance to her, for her benefit, and for the purpose of getting the estate into her hands. *Bean* v. *Boothby*, 295.

6. Winslow Hall conveyed to Ephraim Gammon and Ira Bartlett each, "one undivided half of certain land . . . being the 'mill privilege,' so called, . . . the same on which Hall's saw-mill now stands, being a part of lot nine, range five," and described by metes and bounds. Gammon & Bartlett erected a grist-mill on the same dam, whereupon Gammon conveyed to the plaintiff "one undivided half of a saw-mill and grist-mill, and one undivided half of the privilege on

ELECTION.

See ESTOPPEL, 2.

EQUITY.

FRAUDULENT CONVEYANCE.

See JUDGMENT. TRUSTEE PROCESS, 2.

GIFT.

See EVIDENCE, 19.

HAY.

See ASSUMPSIT, 3. LEASE.

HUSBAND AND WIFE.

See MARRIED WOMAN.

ILLEGAL VOTING.

See INDICTMENT, 2.

INDICTMENT.

INDIRECT CONVEYANCE.

See DEED, 5. FRAUDULENT CONVEYANCE, 4.

INSANITY.

INSOLVENT ESTATES.

LANDLORD AND TENANT.

LAW AND FACT.

See REFEREE.

LEAKAGE.

See INSURANCE, 3.

LEASE.

MECHANICS' LIEN.

MESNE PROFITS.

See ATTORNEY, &c. EVIDENCE, 7.

MILL.

NEW ENGLAND EXPRESS COMPANY.

See RAILROAD, 7.

NEW TRIAL.

See PRACTICE, 13.

NOTICE.

1. A notice, duly published, reciting a petition, praying that a "survey be made of the westerly portion of Congress street, with reference to straightening and otherwise improving said street," and designating the time and place, when and where the committee will meet the parties interested, and "will adjudge and determine whether the public convenience requires said street to be laid out," is sufficient. *Jones* v. *Portland*, 42.
2. There is no rule of law prescribing for what length of time the continuance of an open visible defect in a highway shall constitute notice of its existence. *Colley* v. *Westbrook*, 181.
3. Under the statute, the fact that a note is overdue is not notice express or implied, that it was given for intoxicating liquors. *Field* v. *Tibbetts*, 358.

See BILLS, &c., 6. INSURANCE, 5. LANDLORD, &c., 3.

NUISANCE.

1. Under R. S., c. 17, § 8, the temporary location of a traveling circus in its vicinity, cannot convert a reservoir in process of construction in a vacant lot into a nuisance either public or private. *Morgan* v. *Hallowell*, 375.
2. Under R. S., c. 14, § 16, the "owner" of land is liable for the expenses of removing a nuisance therefrom, although a tenant for a term of years caused the nuisance, and continued to be the "occupant" of the premises under his lease when the nuisance was removed. [WALTON, BARROWS, and DANFORTH, JJ., dissenting.] *Bangor* v. *Rowe*, 436.

ODD FELLOWS' LODGE.

1. Neither an odd fellows' lodge nor its trustee acting for it will be allowed to convey its property, receive and retain the consideration, and then repudiate the conveyance upon the sole ground, that, in making it, they acted in violation of their own constitution and by-laws. *Sawyer* v. *Skowhegan*, 500.

PARTNERSHIP.

A contract between the owner and master of a vessel, whereby the latter is to sail her at the halves, man and victual her, and the former to have half the earnings, constitutes the master owner *pro hac vice*, and creates no partnership between them. *Bridges* v. *Sprague*, 543.

PRACTICE.

RAILROAD.

REAL ACTION.

RECEIVERS.

See BANK. FORCIBLE ENTRY, &c., 1.

REFEREE.

In a rule of court, the clause—"The rights of parties under offer to be defaulted,

SALE.

STATUTES.

The latter clause of § 5, c. 37, of the Public Laws of 1858, was not repealed by c. 116 of the Public Laws of 1859, or c. 182 of 1860, or c. 57 of 1861. *Jay* v. *Gray*, 345.

STATUTES CITED EXPOUNDED, &c.

English Statutes.

STATUTES OF THE UNITED STATES.

PROVINCIAL STATUTES.

STATUTE OF MASSACHUSETTS.

SPECIAL LAWS OF MAINE.

PUBLIC LAWS OF MAINE.

REVISED STATUTES.

SUFFRAGE.

See DESERTER.

SUPERIOR COURT.

See PRACTICE, 2, 7.

SURETYSHIP.

See MARRIED WOMAN, 2.

TAX.

1. By virtue of the Public Laws of 1865, c. 319, assessors are not concluded by lists made and returned in conformity with R. S. of 1857, c. 6, § 53, as amended by c. 318 of the Public Laws of 1862. *Gilpatrick* v. *Saco*, 277.

2. When a citizen of a town has been overrated by the assessors, either on an over-valuation, or property not owned by him, his only remedy is by an application for abatement in accordance with R. S. of 1857, c. 6, §§ 54 and 55. *Ib.*

3. Neither § 11, nor § 22, of article 1, of the constitution of this State, limits or restricts the power of the legislature to repeal any statute by which taxes have been imposed, or to prohibit the collection of taxes after they have been duly assessed and committed to the collector. *Augusta* v. *North* 392.

See COLLECTOR, 5. REAL ACTION, 5, 6, 7.

TENANT AT WILL.

See LANDLORD, &c.

TENANT IN COMMON.

1. One tenant in common is liable to an action by his co-tenant for an injury to the common property. *Hines* v. *Robinson*, 324.

TRUST.

See REAL ACTION, 3.

TRUSTEE PROCESS.

USE AND OCCUPATION.

VERDICT.

VOTE.

An article "to see if the town will vote to pay the same bounty to those who may enlist after" a specified time, "as is now paid by the town to those who enlisted before that time," does not authorize the vote to pay a larger bounty. (BARROWS, J., *dissentiente.*) *Austin* v. *York*, 304.
Blaisdell v. *York*, 304.

WAIVER.

1. A disclosure commenced on the last day of the six months, and lasting until three o'clock of the succeeding morning when it was concluded, and the poor debtor's oath administered, will not save a forfeiture of the bond, unless the delay was had at the request of the creditor, or the forfeiture was waived by him. *Guilford* v. *Delaney*, 589.

2. A creditor's participation in the examination of the debtor after the expiration of the six months, does not constitute a waiver of such forfeiture. *Ib.*

See INSURANCE, 1, 5.

WARRANTY.

See CONTRACT, 1.

WATER-POWER.

A construction of a grant of a water-power which will restrict the grantee to the specific use to which the water was applied when the grant was made, will never be adopted unless the language of the grant unmistakably indicate such to have been the intention of the parties. *Hines* v. *Robinson*, 324.

See TENANT IN COMMON, 2, 3. MILL, 1.

WATERING-TROUGH.

See WAY, 12.

WAY.

1. By § 9 of the charter of the city of Portland, the city council have exclusive authority, through a committee therein mentioned, to lay out, alter, or discontinue any and all streets in the city, without petition therefor.
Jones v. *Portland*, 42.

2. A notice, duly published, reciting a petition, praying that a "survey be made of the westerly portion of Congress street, with reference to straightening and otherwise improving said street," and designating the time and place, when and where the committee will meet the parties interested, and "will adjudge and determine whether the public convenience requires said street to be laid out," is sufficient. *Ib.*